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# THE ATLANTIC REPORTER

WITH KEY-NUMBER ANNOTATIONS

## VOLUME 91

PERMANENT EDITION

CONTAINING ALL THE REPORTED DECISIONS OF THE

Supreme Courts of MAINE, NEW HAMPSHIRE, VERMONT, RHODE ISLAND  
CONNECTICUT, and PENNSYLVANIA; Court of Errors and Appeals  
Court of Chancery, and Supreme and Prerogative Courts  
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\* Died June 1, 1914.

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\* Died.

\* Appointed to succeed Joseph W. Congdon.

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# THE ATLANTIC REPORTER

## VOLUME 91

(37 R. I. 96)

**FREY v. RHODE ISLAND CO.** (No. 4742.)  
(Supreme Court of Rhode Island. July 10, 1914.)

**1. TIME (§ 9\*)—COMPUTATION.**

When a period of time is to be reckoned from a certain day, the day from which the time is to be reckoned is excluded from the computation.

[Ed. Note.—For other cases, see Time, Cent. Dig. §§ 11-32; Dec. Dig. § 9.\*]

**2. COURTS (§ 65\*)—TERMS OF COURT—TIME OF HOLDING—"TO"—"FROM."**

Gen. Laws 1909, c. 275, § 3, provides there shall be a vacation of the superior court from the second Monday in July to the third Monday in September of each year, and section 11 provides that in vacation the superior court shall not hear jury trials. Chapter 32, § 12, provides that whenever time is to be reckoned from any day such day shall not be included in the computation. *Held*, that as the word "to," like the word "from," is generally a word of exclusion, and as chapter 275, § 2, requires the superior court to hold sessions at certain points on the third Monday in September, the superior court may hear jury trials on the second Monday in July.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 230, 246; Dec. Dig. § 65.\*]

**3. STREET RAILROADS (§ 99\*)—INJURIES TO PERSONS AT CROSSINGS—DUTY TO LOOK AND LISTEN.**

A motorist about to cross street railway tracks is bound to look along the track immediately before driving upon it.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 209-216; Dec. Dig. § 99.\*]

**4. STREET RAILROADS (§ 114\*) — COLLISION WITH AUTOMOBILE — EVIDENCE — SUFFICIENCY.**

In an action for personal injuries received by a motorist and for injuries to his automobile in a collision with a street car, evidence *held* insufficient to sustain a verdict against the street railway company not showing the motorist's want of contributory negligence.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 239-250; Dec. Dig. § 114.\*]

**5. APPEAL AND ERROR (§ 1005\*)—REVIEW—VERDICTS.**

A verdict approved by the trial court will be accorded great deference on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3876, 3948-3950; Dec. Dig. § 1005.\*]

Vincent, J., dissenting in part.

Exceptions from Superior Court, Kent County; John W. Sweeney, Judge.

Action by Charles T. Frey against the Rhode Island Company. After a verdict for plaintiff a new trial was granted unless plaintiff would enter a remittitur, and both plaintiff and defendant excepted. Plaintiff's exceptions overruled, and defendant's sustained and cause remanded.

William R. Champlin, of Providence, for plaintiff. Joseph C. Sweeney and Alonzo R. Williams, both of Providence, for defendant.

**SWEETLAND, J.** This is an action of trespass on the case to recover damage for injuries to the plaintiff's person and to his automobile alleged to have been received through the negligence of the defendant. The case was tried before a justice of the superior court sitting with a jury and resulted in a verdict for the plaintiff for \$8,000. The defendant duly filed its motion for a new trial. Said justice in his decision on the motion ordered that a new trial should be granted, on the ground that the damages awarded by the jury were excessive, unless within five days after said decision the plaintiff should remit all of said verdict in excess of \$6,000. The plaintiff did not file his remittitur. The plaintiff and the defendant each filed an exception to said decision. The case is before us upon the plaintiff's exception to the decision of said justice granting a new trial, and upon the defendant's exceptions to certain rulings of said justice made during the progress of the trial and to the decision of said justice on said motion for a new trial.

[1, 2] Said trial was commenced during a session of the superior court holden at East Greenwich within and for the county of Kent on the 8th day of July, 1913, and continued through the 8th, 9th, 10th, 11th, 12th, and 14th days of July, 1913. In the year 1913 the 14th day of July was the second Monday of July in that year. On said 14th day of July, 1913, the counsel made their arguments to the jury, the justice delivered his charge, and the jury thereupon considered the case and rendered their verdict. On said day the defendant moved that the case be taken from the jury and passed on the ground that the justice and the jury could not legally sit

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the trial of said case on that day, because it is provided by statute that there shall be a vacation of the superior court from the second Monday in July to the third Monday in September in each year. The justice denied said motion and the defendant duly excepted to said ruling. This exception is now before us. Chapter 275, § 3, Gen. Laws 1909, provides as follows:

"There shall be a vacation of the superior court from the second Monday in July to the third Monday in September in each year."

And section 11 of the same chapter provides as follows:

"In vacation the superior court shall not hear jury trials (except in special statutory cases), petitions for divorce, or motions to default recognizances."

Although it might be desirable that the superior court should have authority to complete in the early days of vacation a jury trial commenced during a session and not finished before the close of the session, thus preventing a loss to the state and to the parties, yet in view of the prohibitive language of the statute we are of the opinion that said court does not have such power. The question involved in this exception is whether the second Monday of July in each year is or is not a part of the vacation of the superior court; whether the word "from" in said section 3 shall be interpreted as a word exclusive or inclusive of said second Monday of July.

It is the well-settled rule that when a period of time is to be reckoned from a certain day, unless there is something in the context or the circumstances to indicate a different intention, the day from which the time is to be reckoned shall be excluded from the computation and from the period. In *Ordway v. Remington*, 12 R. I. 319, 34 Am. Rep. 646, this court construed a lease which demised the tenement let "from the first day of September now next ensuing, for and during the full end and term of one year and nine months thence next ensuing," and held that:

"If the demise is from a given day and there is nothing else to indicate the intention, then, unless there is some particular reason for holding otherwise, according to the weight of authority we think the given day must be excluded."

In *Millard v. Willard*, 3 R. I. 42, the court treated this subject without reference to the statute dealing with construction, which we shall consider later, and said:

"In all cases when a point of time or the doing of an act is referred to merely as a terminus from which to measure time, the day of the date or of the act should be excluded."

We have, moreover, in this state the following rule for the reckoning of time from any day when such provision occurs in a statute. Sections 1 and 12, c. 32, Gen. Laws 1909, provide that unless such construction is inconsistent with the manifest intent of the General Assembly, or is repugnant to some other part of the same statute, "whenver time is to be reckoned from any day,

date, or act done, or the time of any act done, such day, date, or the day when such act is done, shall not be included in such computation." This is conclusive of the question before us, for such an interpretation of the word "from," in the section establishing a vacation in the superior court, is not inconsistent with the manifest intent of the General Assembly, nor is it repugnant to some other part of the statute. It is urged that such an interpretation will carry said vacation into the third Monday of September and interfere with the beginning of the sessions of the superior court on such date. There is no force in that contention. We have no rule for the interpretation of statutes which requires the day to which a period of time extends to be included in such period. The word "to," like the word "from," is generally a word of exclusion. In a sense both the second Monday of July and the third Monday of September are days from which the period of vacation is to be reckoned, and hence both are to be excluded. Furthermore, there is a specific provision of law contained in chapter 275, § 2, Gen. Laws 1909, that the superior court shall hold sessions in South Kingstown and Providence on the third Monday of September in each year, thus clearly placing that day within the period of the session of the court and not that of vacation.

It is urged that this interpretation is inconsistent with the settled practice of the superior court, which each year has not carried the business of its sessions into the second Monday of July. This interpretation does not require the superior court to hold jury trials on said second Monday of July. The justices of that court can so arrange the business of the court, just previous to the close of the sessions before vacation, that jury trials and other matters which may not be heard in vacation will surely not extend beyond the period of the sessions. If to accomplish that they have as a general rule taken up none of the regular business of the different sessions on the second Monday of July, that is plainly a matter within their power and discretion. It is further urged that this interpretation is inconsistent with the practice of this court with regard to its own sessions. Our attention is called to chapter 275, § 1, Gen. Laws 1909, which provides that:

"The Supreme Court shall be in session at Providence from the first Monday in October to the second Monday in July in every year."

And it is argued that if the word "from," in the section concerning the vacation of the superior court, shall be interpreted to exclude the second Monday of July from such vacation, a like interpretation should exclude the first Monday in October from our session. This contention disregards the further language of said section 1, which also provides that this court shall be in session "at such other times as said court shall deem proper."

We have permitted motions to be made returnable before us on the first Monday of October, and it has been the practice of the court to hear other matters which have been assigned to that day. The court has done this without formal determination as to whether said first day of October was or was not the first day of the session named in the statute. It is clearly in accordance with the authority given to us by law, and is not a practice inconsistent with the interpretation which we are now making.

The superior court is held by the various justices of that court in the several counties of the state at different times in each year, in accordance with the provisions of section 2, c. 275, Gen. Laws 1909, as follows:

"The superior court shall hold its sessions every year at the times and places following, to wit, at South Kingstown, within and for the county of Washington, on the third Monday of September, November, February, and April; at Newport, within and for the county of Newport, on the first Monday of October, December, March, and June; at East Greenwich, within and for the county of Kent, on the fourth Monday of October, January, March, and June; and at Providence, for the counties of Providence and Bristol, on the third Monday in September, and thence continuously to the second Monday in July of the following year: Provided, that there shall be no jury trials in Providence between the first Monday of July, inclusive, and the first Monday of October in each year, except by agreement of parties with the consent of the court."

It may be observed that with the exception of the session at Providence in each year there is no specific provision as to the time of termination of the various sessions of the court. Each session of necessity is closed on the day before the opening of a new session in the same county and also on the day before the beginning of vacation. It may be urged that the construction which we have placed upon the provision regarding vacation is repugnant to the provision contained in section 2, which continues the session at Providence "to the second Monday in July," thus excluding the second Monday in July from the session; and that this indicates the intent of the General Assembly to make the second Monday of July a part of vacation. We do not find such repugnance. This provision relates solely to the session in the counties of Providence and Bristol and has no reference to the sessions in the other counties of the state. The sessions in each county open and close without reference to the sessions in any other county; but the provision for vacation is a general one; and in accordance with the rule for construction prescribed in chapter 32, § 12, Gen. Laws 1909, we are forced to hold that said vacation begins on the day after the second Monday in July in each year. There was no error in the ruling of said justice denying the defendant's motion to take the case from the jury on July 14, 1913.

The defendant excepted to the ruling of said justice denying defendant's motion for

the direction of a verdict in its favor. We do not find error in this ruling.

Both the plaintiff and the defendant excepted to the decision of the justice upon the defendant's motion for a new trial. We will consider these exceptions together. We agree with said justice that the amount of the verdict is excessive. After a consideration of all the testimony, we think the amount of damage fixed by said justice is also much too large. We shall not order a remittitur, however, as in our opinion there should be a new trial on the question of liability as well as of damages.

[3-5] It appears in the transcript of the evidence that on September 2, 1912, the plaintiff was operating an automobile, owned by him, on Bay View avenue in the town of Warwick; that Bay View avenue runs from the west on a steep downgrade into the Old Post Road at right angles with said road; that the plaintiff proceeded easterly down said grade into the Old Post Road, and when his automobile was crossing the electric street railway track of the defendant, which lies on the westerly side of the Old Post Road, his automobile was struck by an electric car of the defendant, which was proceeding in a southerly direction, and the plaintiff and his automobile were each injured; that to a person coming down Bay View avenue towards the Old Post Road the view to the north onto said road is obstructed for about 21 feet west of said road by a bank along the northerly side of Bay View avenue with a fence and a growth of bushes and shrubs on top of said bank; that said bank at the corner of the Old Post Road and Bay View avenue is about  $3\frac{1}{2}$  or 4 feet high; that on top of said bank along the westerly side of the Old Post Road is a stone wall which meets said picket fence at the corner; that from said corner to the westerly rail of the defendant's track is 15 feet; that between said corner and the defendant's track is a large tree and a small one; that there was a top or hood over the defendant's automobile, which top was up and in place over the machine, and the side curtains of said top were in position, thus obstructing the plaintiff's view on either side while he was sitting upright on the seat. The plaintiff testified that when he was coming down Bay View avenue he looked along the defendant's track to the north at the last point from which he was able to do so, before his view was obstructed by said bank and bushes, and saw no car of the defendant approaching from the north; that he then proceeded down the grade, and did not again look along said track until the front wheels of his automobile were on the track; that, as the hind wheels of his automobile were just passing onto the first or west rail of the track, he was struck by a car of the defendant proceeding from the north.

It was the duty of the plaintiff to look

along the defendant's track immediately before driving upon it. He did not do so. A finding that his failure thus to look did not contribute to the accident cannot be upheld in view of the other circumstances of the case. There is some testimony tending to support the contention that the defendant's motorman might have stopped his car and prevented the accident after it should have been plain to him, in the exercise of reasonable care, that the plaintiff was about to drive upon the track and place himself in a position of danger; and that the failure of the motorman to do so constituted negligence in the defendant. On the other hand, there is much testimony to the effect that, after the actions of the plaintiff made it apparent that he was about to drive on the track regardless of the danger, there was no opportunity for said motorman to stop his car and prevent the collision; and that in the circumstances of the case the motorman acted with reasonable care and due regard for the plaintiff's safety. We are not unmindful of the fact that, so far as it relates to the liability of the defendant, the justice presiding in the superior court has refused to disapprove of the jury's verdict. In view of the rule in *Wilcox v. R. I. Co.*, 29 R. I. 292, 70 Atl. 913, it is with hesitation that we disturb that finding. However, the approval which said justice gives of the verdict is not positively expressed, if properly it can be called an approval at all. The language of his re-script is, "I cannot say that their verdict is against the fair preponderance of the evidence." For a plaintiff to recover, his cause must be supported by a fair preponderance of the evidence. It is hardly enough that it is not against the fair preponderance of the evidence. In view of the nature of this decision of the judge, and the strong opinion which we have, after an examination of the evidence, that the preponderance of the evidence both as to the defendant's liability and as to the due care of the plaintiff is against the finding of the jury, we think the case in justice to the defendant should be submitted to the consideration of another jury.

The plaintiff's exception is overruled. The defendant's exception to the decision upon the motion for a new trial is sustained. The other exceptions of the defendant are overruled, and the case is remitted to the superior court for a new trial.

VINCENT, J. (dissenting). I am obliged to dissent from that portion of the majority opinion which sustains the action of the superior court in continuing and completing the trial of a jury case on the second Monday in July. Our statute provides (Gen. Laws, 1909, c. 275, § 3) that:

"There shall be a vacation of the superior court from the second Monday in July to the third Monday in September in each year."

The question is: Is the second Monday in July to be included in the vacation, or is it a

part of the period within which the superior court may try jury cases? This leads to the consideration of the meaning of the words "from the second Monday." In many well-considered opinions the word "from" is construed to include the first-named day.

In *Swift v. Tousey*, 5 Ind. 196, the court held that, where a computation of time is to be made from any particular act or time, the word "from" means that the day on which the act was done or the day of the date is to be included.

In *Evans v. Sander*, 8 Port. (Ala.) 497, 33 Am. Dec. 297, it was held that a note for a certain sum, with interest "from 1835," means from the beginning of the year 1835, and not from or after its expiration.

Numerous other authorities to the same effect could be cited if necessary.

The majority opinion seems to be based on section 12 of chapter 32 of our statute and upon the case of *Ordway Brothers & Co. v. Remington & Perkins*, 12 R. I. 319, 34 Am. Rep. 646. The section of the statute referred to is as follows:

"Sec. 12. Whenever time is to be reckoned from any day, date, or act done, or the time of any act done, such day, date, or the day when such act is done, shall not be included in such computation."

In my view of the case this statute has nothing to do with the question as to whether the second Monday in July is or is not a part of the court vacation and was not designed or intended to apply thereto. In section 3 of chapter 275, before referred to, the beginning and end of the vacation of the superior court is definitely fixed. To ascertain when such vacation begins, or when it ends, no reckoning or computation is required, necessary, or even useful. This statute undoubtedly was intended to provide a method for ascertaining when a certain number of days would expire as, for instance, where a party is allowed by the court a period, expressed in days, for the performance of some act. A computation would then be necessary to ascertain the termination of the period and in such computation it is provided by section 12 of chapter 32 that the first day shall be excluded.

In the case of *Ordway Brothers & Co. v. Remington & Perkins*, supra, the court considered the language used in a lease with a view to determining the day when it began to run. The words of the lease were "from the first day of September now next ensuing," and the court in considering this language said, referring to the 1st day of September, that:

"The day is to be included or excluded according to the apparent intention of the parties to the lease; but if the demise is 'from' a given day, and there is nothing else to indicate the intention, then unless there is some particular reason for holding otherwise, according to the weight of authority, we think the given day must be excluded."

This case does not seem to me to support the position taken in the majority opinion. The substance of the opinion is that the



given day should be excluded only when there is no apparent intention of the parties otherwise, and there is no particular reason for holding the other way.

In none of our statutes fixing the sessions of our court is there any provision effecting the division of a week, but, on the contrary, it is evident from such provisions that it was the intention of the General Assembly that courts in this state should begin and end their sessions with the week. With this plain intent of the General Assembly it seems to me clear that the second Monday in July should be included in the vacation. Further than that, the fact that our courts have for a period of more than nine years recognized the second Monday in July as a part of the vacation of the superior court would be, in the language of the Ordway Case, a "particular reason" for holding that the given day should not be excluded.

In the other portions of the majority opinion I concur.

(38 R. I. 558)

**GLENLYON DYE WORKS v. INTERSTATE EXPRESS CO. et al. (No. 4670.)**

(Supreme Court of Rhode Island. July 3, 1914.)

**1. CARRIERS (§ 180\*)—LOSS OR INJURY TO GOODS—LIABILITY OF INITIAL CARRIER.**

Though the operator of electric express cars fixed no through rate to points beyond its line and rendered no bill for through charges, but charged a flat rate per 100 pounds, irrespective of the character of the goods or their value, which was paid upon weekly bills, whether the charges of an express company, to which it delivered shipments, were prepaid or collected from the consignee, it advancing the express charges when they were prepaid and placing the amount in a separate item in its bills under the head of "Advances," where, by its bills of lading, it undertook to carry shipments to their destination on the line of the express company, it was not a mere agent of the shipper but was the initial carrier, within the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [U. S. Comp. St. 1901, p. 3154]), and under the express provisions of the Carmack Amendment (Act June 29, 1906, c. 3591, § 7, pars. 11, 12, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]), it was liable for loss of, or damage to, the goods while in the express company's possession notwithstanding a provision of the bill of lading restricting its liability to loss or damage occurring on its own road.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 815-828; Dec. Dig. § 180.\*]

**2. CARRIERS (§ 180\*)—LOSS OR INJURY TO GOODS—LIMITATION OF LIABILITY WHERE VALUE IS NOT DISCLOSED.**

Where the operator of electric express cars made no through rate to a point on the line of an express company and had no such rate on file with the Interstate Commerce Commission, but charged for transportation to the point of connection with the express company a flat rate per 100 pounds, plus the charges of the express company, which it advanced, and a shipper had dealt with the express company for years, had actual knowledge of its rates which, as filed with and approved by the Interstate Commerce Commission, specified a rate based upon an agreed valuation unless a higher valuation was disclosed, and a higher rate paid, and knew that there were two rates based upon val-

uation, the liability of the operator of such cars for loss or damage occurring while a shipment, which it was directed to ship via such express company, was in possession of the express company, was limited to the valuation upon which the express company's rate was based, though its bill of lading contained no limitation of liability based upon an agreed valuation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 815-828; Dec. Dig. § 180.\*]

**3. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

In an action against an initial carrier for loss or damage to a shipment while in the custody of a connecting carrier, evidence as to the course of dealings between the parties admitted in support of defendant's contention that it was simply an agent of the shipper to transport the goods and deliver them to the connecting carrier, and that it had no further responsibility for them, was not prejudicial to plaintiff, where it was held that defendant was an initial carrier liable for loss occurring while the shipment was in the custody of the connecting carrier.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

**4. CARRIERS (§ 185\*)—LOSS OR INJURY TO GOODS—ACTIONS—EVIDENCE.**

In an action against an initial carrier which made no through rate for the loss of a shipment while in the custody of a connecting carrier, whose rates filed with and approved by the Interstate Commerce Commission specified a rate based upon a stipulated valuation unless a higher valuation was disclosed, evidence as to the course of dealings between plaintiff and defendant, tending to show that defendant's rates were based partly upon the rate of the express company and that plaintiff had a thorough knowledge of the express company's rates with reference to which the parties contracted, was properly admitted.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 835-850; Dec. Dig. § 185.\*]

Exceptions from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Action by the Glenlyon Dye Works against the Interstate Express Company and others. The trial court rendered a decision for plaintiff for an insufficient amount, and it brings exceptions. Exceptions overruled.

Harold W. Thatcher, Seeber Edwards, and Edwards & Angell, all of Providence, for plaintiff. Joseph C. Sweeney, Nathaniel W. Smith, Frank P. Ayer, and Clifford Whipple, all of Providence, for defendants.

**SWEETLAND, J.** This is an action on the case originally brought against the Interstate Express Company, as a common carrier, to recover for the value of three shipments of goods lost in transit between Phillipsdale, in the town of East Providence, and the city of New York. During the travel of the case, by agreement of counsel, the Rhode Island Company was made a party defendant.

The claim of the plaintiff for loss upon said three shipments amounted to \$2,796.72, with interest amounting to \$751.62, in all to the sum of \$3,548.34. The case was tried before a justice of the superior court sitting

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

without a jury, and said justice rendered a decision for the plaintiff for \$50 upon each shipment, in all for the sum of \$150. The case is before us upon the plaintiff's exceptions to certain rulings of said justice upon the admission of evidence and upon its exception to said decision. It appeared in testimony before said justice that the plaintiff's business required it to make frequent shipments of goods; that from 1901 to 1907 it had carried such goods by its own wagons from its works to the depot of the Earl & Prew Express Company in Providence, a distance of about four miles, had there delivered said goods to the express company for shipment, and had received therefor the bills of lading of the express company. Early in 1907 the Interstate Express Company established a line of electric express cars, operated by overhead trolley, between Providence and Phillipsdale; this business later passed into the hands of the Rhode Island Company. From the beginning of said electric express service until the time of the shipments in question, the plaintiff sent its goods to Providence by said electric express, which delivered said goods in Providence to the Earl & Prew Express Company. From January, 1907, until August, 1908, apparently with the acquiescence of the Earl & Prew Express Company if not by its direction, the plaintiff filled out the blank receipts or bills of lading of the Earl & Prew Express Company for its goods, forwarded in this manner to said company. These bills of lading were signed by the electric express car conductors for the Earl & Prew Express Company, and were retained by the plaintiff. About August 1, 1908, the Earl & Prew Express Company refused to permit the electric car conductors any longer to sign its receipts, and directed its servants to receive the shipments of the plaintiff from the electric express and to deliver to the electric express car conductors a receipt or bill of lading which should state that said shipments were received from the Rhode Island Company, thus ending any course of dealing by which it might appear that the electric express company was acting as the agent of the Earl & Prew Express Company. After August 1, 1908, the plaintiff, if it desired to ship goods through the Earl & Prew Express Company, would fill out a blank receipt or bill of lading, furnished by the Rhode Island Company, and on the delivery of said goods to the electric express car conductor would obtain his signature to said bill of lading, which bill was retained by the plaintiff. In said bill the plaintiff would write "Via E. & P. Ex." which indicated that said goods were to be shipped to their destination through the Earl & Prew Express Company. The plaintiff would also indicate by the word "Paid" written in said bill that the charges of the Earl & Prew Express Company were to be prepaid by the electric express company, or by the word "Collect" that said charges were to be col-

lected by said Earl & Prew Express Company from the consignee. The electric express company would then deliver said goods to the Earl & Prew Express Company and receive its bill of lading for the same, stating that the goods were received for shipment from the Rhode Island Company. The three shipments now in question were delivered to the defendant, the Rhode Island Company, in this manner; and the undisputed testimony is that the Rhode Island Company safely delivered said three shipments to the Earl & Prew Express Company; but the goods were never delivered to the consignees.

Save as to the names of the consignees and the descriptions of the goods, the three bills of lading, filled out by the plaintiff and signed by the car conductor of the Rhode Island Company, when said three shipments were delivered by the plaintiff to the Rhode Island Company, were in the same forms, and each was as follows:

"Original. Providence, R. I. 8/6, 1908.  
"Received from Glenlyon Dye Works, by the Interstate Express Company,

"The property described below, in apparent good order except as noted (contents and conditions of contents of packages unknown), marked, consigned and destined as indicated below, which said company agrees to carry to the said destination, if on its road, otherwise to deliver to another carrier on the route to said destination.

"It is mutually agreed in consideration of the rate of freight hereinafter named, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property that every service to be performed hereunder shall be subject to all the conditions, whether printed or written, herein contained, and which are hereby agreed to by the shipper and by him accepted for himself and his assigns as just and reasonable.

"The conditions of the regular bill of lading of the steamship company receiving this shipment are hereby made a portion of this contract and are binding the same as if expressed herein.

Consignee: Victor & Archelis, Dept. P. K.  
Destination: New York City, N. Y.

Description of Articles.	Weight Subject to Correction.
1 Case No. 1873	
Paid	
Via E. & P. Ex.	

"The conditions upon which the above-mentioned property is received for transportation are printed on the back hereof.

"The Interstate Express Company,  
"Per [Signed] Houdr."

The only condition printed upon the back of said receipt, which appears to us to be material, is the following:

"(3) No carrier shall be liable for loss or damage not occurring on its own road or its portion of the through route, nor after said property is ready for delivery to the next carrier or to consignee. The amount of any loss or damage for which any carrier becomes liable shall be computed at the value of the property at the place and time of shipment under the bill of lading, unless a lower value has been agreed upon or is determined by the classification upon which the rate is based, in either of which events such lower value shall be maximum price to govern such computation."

[1] The first question which arises in the consideration of the case is whether, in view of the course of dealing between the parties, and especially by reason of the terms of the condition quoted above, the defendant, the Rhode Island Company, is liable in any amount. The defendant, and by that term, hereafter in this opinion, we shall refer to the Rhode Island Company, claims that it was acting simply as the teamer of the plaintiff, taking the place of the plaintiff's own wagons, in carrying the plaintiff's goods from Phillipsdale to Providence and delivering the same to the Earl & Prew Express Company; that it performed this service safely and was under no further liability; also that no loss or damage to said goods occurred on the road of the Rhode Island Company, and hence it is not liable in accordance with the condition printed on the back of its bills of lading accepted by the plaintiff. In support of this the defendant calls attention to the testimony showing the manner in which its charges and the charges of the Earl & Prew Company were paid by the plaintiff. The defendant fixed no through rate from Phillipsdale to New York, and it did not render to the plaintiff a bill for through charges. The defendant did have an agreement with the plaintiff for a rate from Phillipsdale to Providence of six cents per hundred pounds, irrespective of the character of the goods or their value. This charge of the defendant was paid by the plaintiff upon weekly bills rendered to the plaintiff on all goods carried and delivered to the Earl & Prew Company, whether the charges of the Earl & Prew Company were prepaid or that company was to collect its charges from the consignee. When the charges of the Earl & Prew Company were to be prepaid, the defendant advanced the amount of these charges, and, in its bill rendered to the plaintiff, placed said amount as a separate item under the head of "Advances."

These and other circumstances in the dealings between the plaintiff and the defendant would lead to the conclusion that the defendant was acting merely as the agent of the plaintiff in carrying the plaintiff's goods to the Earl & Prew Company, and that, when it had performed such service, its liability was at an end. The defendant, however, by its bills of lading, in the three shipments now under consideration, has fixed its status in those transactions as an interstate carrier, and hence it is subject to all the restrictive provisions prescribed by Congress in the Interstate Commerce Act and its amendments. It has undertaken to carry said goods from Phillipsdale to their destination in New York City, and by that fact, in accordance with the universally accepted rule, it was engaged in commerce between the states and was subject to the legislation of Congress. It became what is known as the initial carrier, and according to the provisions of section 20 of the Interstate Commerce Act,

which section is known as the Carmack Amendment, it was responsible for any loss or damage to said goods caused by it or any carrier to which said goods were delivered in transit, notwithstanding the condition printed upon the back of the defendant's bills of lading, by which it sought to restrict its liability to any loss or damage occurring on its own road. Said Carmack Amendment (34 St. at Large, 584) provides as follows:

"That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad, or transportation company from the liability hereby imposed."

The question then arises, under the conflicting claims of the parties, whether, in the circumstances of this case, the defendant is liable for the full value of the goods lost or in a less amount. The plaintiff claims that under the Carmack Amendment and the terms of the defendant's bills of lading, especially the terms of condition 3 printed on the back, it is entitled to recover the full value of said goods at the place and time of shipment.

[2] It appeared in evidence that the rates of the Earl & Prew Express Company between Providence and New York were established, duly filed with the Interstate Commerce Commission, and approved by it, and duly published and posted as required by the Interstate Commerce Law. Those schedules stated that the rate was based upon a value of not exceeding \$50 per shipment, and that no further liability is assumed by the company unless the shipper declares, at the time of shipment, a higher value. If a value of more than \$50 upon the goods is declared by the shipper, a higher rate is charged and greater precautions against loss are taken by the Earl & Prew Company. In the defendant's bills of lading, which were filled out by the plaintiff, no rate is named, and no value of the goods shipped is declared, but the defendant is directed to ship the goods to destination through the Earl & Prew Express Company.

The plaintiff claims that, notwithstanding the direction in the bills of lading, the defendant was not obliged to forward the goods through the Earl & Prew Express Company; that, by a specific condition in its bills of lading, it might have limited its liability in accordance with the limitations contained in the rates of the Earl & Prew Company, or it might have forwarded the goods through some other carrier which did not differentiate its rates in accordance with the classification based on values, as was done by the Earl & Prew Company. The plaintiff has cited a number of cases which it claims supports

this contention. Those cases appear to us to hold merely that a carrier is not obliged to undertake to transport goods beyond its own lines; that it is at liberty to do so upon such terms, as to routes, as it may fix or agree upon. The defendant has called to our attention a large number of decisions of the Interstate Commerce Commission to the effect that, if an initial carrier undertakes to forward goods beyond its own lines, it is obliged by law to follow the shipper's directions as to routes, if any are given. In this case, moreover, it was a part of the defendant's undertaking to forward the goods to their destination through the Earl & Prew Company, and by no other carrier. The plaintiff cannot be heard to urge that the rates of the Earl & Prew Company have no bearing on the case because the defendant might have disregarded its contract and sent the goods forward through some other carrier.

The defendant had no through rate from Phillipsdale to New York City on file with the Interstate Commerce Commission and approved by it. It had never quoted to the plaintiff a through rate from Phillipsdale to New York City. Its charge for such service was its own rate of six cents per hundred pounds from Phillipsdale to Providence, which had been agreed upon between the parties, plus the charges of the Earl & Prew Company from Providence to New York, which the defendant had paid under the name of advances for the plaintiff. The rates of the Earl & Prew Company, however, were filed with and had been approved by the Interstate Commerce Commission. To secure equality, rates, when so approved, have been held to have the force of rates imposed by law and cannot be varied. Such a rate becomes binding upon all persons, and all shippers are charged with knowledge of it as constituting the lawful rate.

In *Gerber v. Wabash R. R. Co.*, 63 Mo. App. 145, 147, the court said:

"Considering the evils which the interstate commerce law was intended to remedy, would it, under any circumstances, be good policy to allow contracts made in violation of it to be enforced specifically? We think not. Prior to its enactment, the complaint was almost universal that the common carriers were discriminating in their rates in favor of favored shippers. To remedy this evil as to interstate shipments, Congress enacted the law; and it should be construed and enforced so as not in the least to thwart its purpose. Strictly speaking, the published schedules are not a part of the law itself, but are the results of the acts of the carrier and the interstate commerce commissioners in execution of the law. But every shipper must be presumed to know of the existence of the schedules and that they are open for his inspection, and also of the terms of the act rendering invalid every contract of affreightment not made in accordance therewith. Therefore, where a contract for an interstate shipment has been made defendant thereon, the shipper must be held to have contracted with reference to and in accordance with the rates fixed by the schedules, regardless of the terms of his contract. In other words, the rates of interstate shipments are not the subject of contract, but are in effect

fixed under the law. To hold differently would be subversive of good policy, and it would tend to nullify the law."

In *Louisville & Nashville R. R. Co. v. Dickerson*, 191 Fed. 705, 709, 112 C. C. A. 295, 299, the court said:

"A rate once regularly published is no longer merely the rate imposed by the carrier, but becomes the rate imposed by law; and routes and rates once so established become matter of public right and forbid private contract inconsistent therewith. It results that, under the commerce act, a stipulation in a bill of lading for a rate greater or less than the published tariff is void."

It also appeared in testimony that the plaintiff had dealt with the Earl & Prew Express Company for years, had actual knowledge of the rates of that company, and knew that there were two rates, each based upon the valuation of the merchandise declared by the shipper. The manager of the plaintiff corporation testified as follows:

12 Q. "In any event, you were aware, were you not, Mr. Blanchard, that the charges were higher on goods on which value was declared?" A. "In a general way, yes." 13 Q. "That there was a graduated charge?" A. "Yes." 14 Q. "Based upon value, in force by the Earl & Prew and Adams Express Company?" A. "I was."

It was also in testimony and not contradicted that the manager stated that he did not declare value on his shipments because it would be too expensive.

It thus appears that, when the plaintiff delivered said three shipments to the defendant, it directed that its goods should move by the Earl & Prew Company from Providence, and by that direction the defendant was bound; that the plaintiff knew the rates of the Earl & Prew Company; that those rates were based upon the value of the goods shipped, and that, if no value was declared, the shipments should be considered as of the value of \$50 each, and no further liability would be assumed by the Earl & Prew Company; that the rate which it was to pay to the defendant for the through services to New York City was to be the defendant's own rate to Providence, plus the rate of the Earl & Prew Company, which was based upon a valuation of \$50 on each shipment. Can it fairly be held otherwise than that the plaintiff's position, at least with reference to a loss after delivery of said shipments to the Earl & Prew Company, is the same as if it had specifically declared a value of \$50 on each shipment, by which declaration, made for the purpose of obtaining a lower rate, it would be bound?

In *Wells Fargo & Co. v. Neiman-Marcus Co.*, 227 U. S. 469, 33 Sup. Ct. 267, 57 L. Ed. 600, the court said:

"But the shipper, in accepting the receipt reciting that the company 'is not to be held liable beyond the sum of \$50, at not exceeding which sum said property is hereby valued, unless a different value is hereinabove stated,' did declare and represent that the value did not exceed that sum, and did obtain a rate which he is to be assumed to have known was based upon that as the actual value. There is no substantial distinction between a value stated upon inquiry,

and one agreed upon or declared voluntarily. The rate of freight was based upon the valuation thus fixed, and the liability should not exceed the amount so made the rate basis."

In *Kansas City Southern Ry. Co. v. Carl*, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683, the court said:

"But when a shipper delivers a package for shipment and declares a value, either upon request or voluntarily, and the carrier makes a rate accordingly, the shipper is estopped upon plain principles of justice from recovering, in case of loss or damage, any greater amount. \* \* \* The valuation declared or agreed upon as evidenced by the contract of shipment upon which the published tariff rate is applied must be conclusive in an action to recover for loss or damage a greater sum. \* \* \* To permit such a declared valuation to be overthrown by evidence aliunde the contract, for the purpose of enabling the shipper to obtain a recovery in a suit for loss or damage in excess of the maximum valuation thus fixed, would both encourage and reward undervaluations and bring about preferences and discriminations forbidden by the law."

Moreover, it appears to us that the parties by the terms of the bills of lading have provided as to the amount of loss for which the defendant should be liable. We refer to a portion of the third condition printed on the back of the bills of lading, and quoted above, to the effect that in computing the amount of loss, if a value lower than the actual value "has been agreed upon or is determined by the classification upon which the rate is based, \* \* \* such lower value shall be maximum price to govern such computation."

It must be held that, within the contract of the parties, a part of the defendant's rate, to be paid by the plaintiff, was the rate of the Earl & Prew Express Company. That latter rate, which was well known to the plaintiff, was based upon a classification as to value, and hence a value lower than the actual value of the goods had been agreed upon and was determined by the classification as to value upon which the rate of the defendant was based.

It therefore appears to us as deducible from the course of dealings between the parties, from which their contract as to rates must be found, for the bills of lading are silent on that subject, and from the specific terms of the condition printed on the back of the bills of lading, that the liability of the defendant for the loss of the goods was limited to \$50 on each shipment. The decision of said justice in that regard is without error unless said decision was based upon evidence improperly admitted.

[3] The plaintiff has included in its bill a large number of exceptions to the rulings of said justice admitting evidence during the trial. We find no merit in any of these exceptions. The defendant sought to introduce some of said evidence for the purpose of showing the course of dealings between the parties in support of its contention that it was simply the agent of the plaintiff to transport said goods to Providence, there to de-

liver them to the Earl & Prew Express Company; and that it had no further responsibility for said goods. The plaintiff claimed that this was an attempt to vary and contradict the terms of the written bills of lading, and that such evidence was inadmissible. The justice admitted it *de bene esse*. The plaintiff has not been prejudiced by the admission of such evidence, as the superior court held that the defendant was an initial carrier who undertook the through transportation of said goods and was liable to the plaintiff for loss throughout the transit of said goods.

[4] The other evidence, to the admission of which exceptions were taken, relates to the course of dealing between the parties showing the rates of the defendant for its service to Providence, and for through service. As to this matter, there was no mention in the bills of lading, yet a finding with regard to it was essential to the determination of the controversy between the parties. This evidence tended to show that the rates of the defendant were based partly upon the rate of the Earl & Prew Express Company, and also that the plaintiff had a thorough knowledge of the rates of the Earl & Prew Express Company with reference to which the parties had contracted. This evidence was properly admissible.

Although the evidence disclosed no liability on the part of the defendant, the Interstate Express Company, the decision of said justice appears to have been rendered against both defendants. As the Interstate Express Company had taken no exception to said decision, we shall not disturb the decision in that regard.

All of the plaintiff's exceptions are overruled. The case is remitted to the superior court for the entry of judgment on the decision.

(37 R. I. 89)

# GIBBONS v. RHODE ISLAND CO.

(No. 4717.)

(Supreme Court of Rhode Island. July 10, 1914.)

## 1. WITNESSES (§ 388\*)—IMPEACHMENT—CONTRADICTORY STATEMENTS IN ANOTHER CASE.

It was proper, on cross-examination, to ask a witness whether in a deposition in another case he had not made certain statements which the plaintiff claimed were contradictory of his testimony in the present case.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1233-1242, 1246; Dec. Dig. § 388.\*]

## 2. TRIAL (§ 140\*)—QUESTIONS FOR JURY—CREDIBILITY OF WITNESSES.

Whether statements of an expert medical witness contained in a deposition made by him in another case were inconsistent with his testimony in the present case held a question for the jury.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 334, 335; Dec. Dig. § 140.\*]

### 3. DAMAGES (§ 168\*)—PHYSICAL CONDITION—EVIDENCE—RELEVANCY—SIMILAR FACTS.

Where plaintiff claimed that as the result of her injury she was suffering from hyperthyroidism, that an examination of her blood showed an abnormal condition, indicating an excess of lymphocytes in the blood, and defendant claimed that the count of lymphocytes in plaintiff's blood was not in excess of the number appearing in the blood count of a normally healthy person, the result of certain counts of the blood of defendant's counsel was inadmissible, where there was no showing that he was in a normally healthy condition at the time of taking the sample of which the counts had been made.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 480, 482-486; Dec. Dig. § 168.\*]

### 4. DAMAGES (§ 132\*)—EXCESSIVE DAMAGES—INJURY TO NERVOUS SYSTEM.

A verdict of \$27,500 for injury to plaintiff, 25 years of age, and who, though previously in excellent health, was physically incapacitated from the time of the accident to the time of the trial nearly three years later, and was suffering from a nervous trouble, and who would never be completely restored to health, was excessive, and would not be allowed to stand unless plaintiff filed a remittitur of the amount in excess of \$20,000.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

### 5. APPEAL AND ERROR (§ 1140\*)—DISPOSITION—OPPORTUNITY TO REMIT DAMAGES.

Under Gen. Laws 1909, c. 298, § 12, providing that a verdict shall not be set aside as excessive until the prevailing party has been given an opportunity to remit so much thereof as the court adjudges excessive, the Supreme Court, on overruling defendant's exceptions and plaintiff's exception to an order for a remission of damages in excess of \$20,000, with which order she had never complied, and on agreeing that \$20,000 was a proper verdict, would remit to the lower court for a new trial, unless plaintiff filed a remittitur of the excess over \$20,000, in which case the lower court would be directed to enter judgment for that amount.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4462-4476; Dec. Dig. § 1140.\*]

Exceptions from Superior Court, Providence and Bristol Counties; Chester W. Barrows, Judge.

Action by Flora Gibbons against the Rhode Island Company. Verdict for plaintiff, defendant's motion for new trial denied, and new trial ordered, unless plaintiff within seven days should remit the verdict in excess of \$20,000, and plaintiff and defendant except. Exceptions overruled, and case remitted for new trial unless plaintiff, on or before July 20, 1914, file a remittitur of the verdict in excess of \$20,000, with direction in case plaintiff filed such remittitur to enter judgment for that amount.

John W. Hogan and Philip S. Knauer, both of Providence, for plaintiff. Joseph C. Sweeney and Eugene J. Phillips, both of Providence, for defendant.

SWEETLAND, J. This is an action of trespass on the case to recover damages for personal injuries alleged to have been received by the plaintiff through the negligence of the defendant. The case was tried before

a justice of the superior court sitting with a jury. The jury returned a verdict for the plaintiff in the sum of \$27,500. The defendant duly filed its motion for a new trial on the ground that the damages awarded by the jury were excessive. Said justice in his decision on said motion held that the amount of said verdict was excessive, and ordered that a new trial should be granted unless, within seven days, the plaintiff should remit all of said verdict in excess of \$20,000. The plaintiff did not file her remittitur in accordance with said decision. The case is before us upon the plaintiff's exception to the decision of said justice on the motion for a new trial and upon the defendant's exceptions to certain rulings of said justice, upon the admission of evidence, made during the trial, and to the decision of said justice upon its motion for a new trial.

The defendant excepted to the ruling of said justice permitting the plaintiff, in cross-examination of a medical witness, who had qualified as an expert, to call the attention of said witness to certain testimony given by him in another case between different parties, which former testimony the plaintiff claimed was contradictory of the witness' testimony given in the case at bar. In direct examination this witness testified in regard to the condition of the plaintiff:

"I think she—I am very positively of the opinion that she has one thing and that is this so-called traumatic neurosis which has been testified to, that includes elements of hysteria."

Later, in cross-examination, the witness testified as follows:

"Q. 44. What do I understand you is the cause of this condition that you find, Doctor? A. I understand that the accident was the exciting cause; that the condition has been prolonged largely by litigation. Q. 45. And the condition is what? A. What is known as traumatic—some call it traumatic neurosis, some call it litigation neurosis at this stage, because after three years the effects of the original accident have presumably passed away and that of the litigation is the important one, long-continued study of herself, and so on. It is a mental condition largely."

And later, in cross-examination, the witness testified as follows:

"Q. 52. How long have you been diagnosing neurosis and neurasthenia following an accident, trauma? A. Oh, I suppose for—ever since the diagnosis originated. Ever since it originated. They used to call these cases spinal concussion long ago. When I was in the medical school they called them all spinal concussion. Then about the time I graduated the opinion was changing about them, that they were—that the spinal cord was not affected in these cases and it was a functional condition, and they began to call them traumatic neurosis and traumatic hysteria. That was along perhaps 1886, or something like that, and I have studied these cases ever since that time, as well as before. Q. 53. Traumatic neurasthenia and traumatic neurosis are in the same class? A. Well, in a way. Traumatic neurosis includes traumatic neurasthenia. Neurosis is a general term that includes hypochondria, hysteria, and neurasthenia. Q. 54. Does traumatic neurosis mean a larger field of injury and symptoms than traumatic neurasthenia?"

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

A. Not necessarily. It may be smaller. Q. 55. Now, ever since you began in 1886, as I understand, to examine these cases you have made that diagnosis; that people have traumatic neurosis or neurasthenia from accident, trauma, injury, I want to know the length of time you have been doing it? A. Well, I should like to include also what I have done besides the length of time. I have examined and given opinions on these cases since certainly that time, say 1886. When I have made the diagnosis I have made it as I did here in this case, so-called traumatic neurosis. I carefully used the word 'so-called,' in view of the fact that it is not all due to the accident."

The plaintiff was then permitted to ask the witness, against the defendant's objection, if in a deposition given by the witness in another case he had not made certain general statements with regard to the diagnosis of neurasthenia resulting from accident, to which the witness replied that he had. The answers of the witness, contained in said deposition, in which these statements appeared were the following:

"Well, to tell the honest truth, the diagnosis of neurasthenia resulting from accident is one that I practically never make. I practically never made it. I don't regard accidents as a cause of neurasthenia;" and answer: "I mean I don't think that accidents cause neurasthenia as such. Neurasthenia may be set up by worry, anxiety, overwork, and I have sometimes made the diagnosis litigation neurasthenia in cases in which I thought that the worry and anxiety of litigation was putting the person into a more or less neurasthenic condition, but I don't think that an accident in itself is a legitimate cause of neurasthenia."

[1-3] The grounds of the defendant's objection to this cross-examination is that it was testimony given in another case between different parties; that the answers contained in the deposition are not inconsistent with the testimony of the witness given upon the stand in this case, and that the examination must have created the impression upon the minds of a jury of laymen that there was such an inconsistency, although none existed. We do not find merit in the exception. It is proper cross-examination of an expert witness, who in his testimony has given an opinion upon some matter connected with the art or science of which he has special skill or knowledge, to ask such witness if he has always been of that opinion, or if he has not at some certain time, which is specified, made a statement which is inconsistent with his present testimony. The scope of the cross-examination of an expert witness for the purpose of testing the value of his opinion is largely within the discretion of the judge presiding at a jury trial. It is a proper exercise of such discretion to permit such a witness to be asked if on a former occasion he has not expressed a different opinion. The cross-examiner may call the witness' attention to such former statement of opinion, whether the same was made orally, in some written work, or, as in this instance, in a deposition. Later in his testimony, the witness in this case insisted that his statements on the stand were in harmony with those in the former deposition, and the de-

fendant urges that an examination of the whole of the witness' testimony shows that to be the fact. Sufficient, however, appeared in the testimony of the witness and in his former deposition to furnish a basis for the plaintiff's claims that they were contradictory. Whether or not they were inconsistent was a matter for the jury to determine in passing upon the value of the witness' testimony. If this evidence was otherwise admissible, it should not have been excluded, as the defendant now urges, because the jury might fail to understand it, or to comprehend the distinctions properly to be drawn. It must always be that some members of a jury are liable to become confused in the consideration of testimony relating to scientific and medical subjects, fail to understand some of the language employed by expert witnesses, or fail to draw just conclusions as to the effect of their testimony. But when a party offers such direct testimony, he cannot properly object to cross-examination on the grounds that it may still further confuse the jury and that they may not place a correct interpretation upon the answers, which may be given.

[4] The defendant at the trial excepted to the ruling of said justice excluding testimony offered by the defendant to show the result of certain so-called counts of the blood of defendant's counsel. It was a part of the claim of the plaintiff that, as a result of said injuries, she was suffering from hyperthyroidism, that an examination of her blood showed an abnormal condition indicating a lymphocytosis, or an excess of lymphocytes in the blood stream, and that lymphocytosis is a corroborative symptom in cases of hyperthyroidism. The defendant claimed that the count of lymphocytes in the blood of the plaintiff was not in excess of the number of such cells appearing in the blood count of a normally healthy person, and sought to show the count which had been made of the blood of defendant's counsel. Said justice excluded this on the ground that no evidence had been introduced tending to show that said counsel was in a normally healthy condition at the time of taking the sample of which the count had been made. We think the evidence was rightly excluded.

[5] We shall consider together the plaintiff's and the defendant's exceptions to the decision of said justice upon the motion for a new trial. The only question before the justice on said motion was as to the propriety of the amount of the jury's award. The defendant did not deny its liability. It is plain that the plaintiff was very seriously injured. The accident occurred on August 12, 1910. The plaintiff was then 25 years old, and up to that time had been in excellent health. She was thrown violently to the ground from a wagon in which she was riding, by a collision, in which the defendant's electric street car struck against the rear of said wagon; she had been physical-



ly incapacitated up to the time of the trial in June, 1913. The testimony is conflicting as to the disease from which the plaintiff is suffering. Witnesses for the plaintiff diagnosed her ailment as traumatic hyperthyroid neurosthenia; those for the defendant were of the opinion that she was suffering from traumatic neurosis. The plaintiff's chances of improvement are much greater if the latter diagnosis is the true one. There was testimony from which the jury might reasonably find that, while the plaintiff's present condition will probably be somewhat relieved and, under proper treatment, some of her more distressing symptoms may disappear, she will never be completely restored to health. After a consideration of the whole testimony and the written decision of said justice, we agree with him that the case demands very substantial damages, but that, in view of the probable improvement of the plaintiff's physical condition in the future and upon a reasonable computation of her probable pecuniary loss, the evidence does not warrant the full amount of the jury's verdict. What sum will justly amount to compensation it is very difficult to determine. Said justice has made a thorough review of the testimony, and has carefully computed the items of damage. The amount of \$20,000 fixed upon by him appears to us to be as nearly adequate compensation for the plaintiff's injuries as can be given in money damages in a court of law. Upon this very difficult question we agree with said justice, and find no error in his decision on the motion for a new trial.

The question now arises as to the order which shall be made in remitting the case to the superior court. Both the plaintiff's and the defendant's exceptions are to be overruled. We have agreed with said justice that the verdict is excessive in amount, and that his determination as to a proper amount is just. The plaintiff comes here upon an exception to a decision granting a new trial unless she should remit a part of the verdict before a certain day. That day has passed; she did not remit, and we have overruled her exception to the decision. Shall we send the case back for a new trial in accordance with the decision; or, as we have approved the amount of damages which was fixed by the court, shall we order judgment to be entered in the superior court for that amount, or shall we give to the plaintiff another opportunity to remit the improper excess before the verdict is set aside by our order? Chapter 298, § 12, Gen. Laws, 1909, provides as follows:

"A verdict shall not be set aside as excessive by the supreme or superior court until the prevailing party has been given opportunity to remit so much thereof as the court adjudges excessive."

The exceptions of the plaintiff and the defendant brought before us the question as

to whether the verdict was excessive; we have said that it was, and that it should be set aside. In our opinion a proper construction of the statute, quoted above, requires that, before the verdict shall be set aside by our order, we must determine the amount of illegal excess and give the plaintiff an opportunity to remit. If we had fixed upon an amount of such excess greater than that fixed by the superior court it plainly would have been our duty under the statute to do so. Merely because the amount of improper excess which we have found agrees with the determination of the superior court the plaintiff is not to be deprived of that privilege, for the verdict in fact will be set aside by our order.

The exceptions of the plaintiff and the defendant are overruled. The case is remitted to the superior court for a new trial unless the plaintiff, on or before July 20, 1914, shall file in the superior court her remittitur of all of said verdict in excess of \$20,000. In case the plaintiff shall duly file such remittitur the superior court is directed to enter its judgment for the plaintiff for \$20,000.

(R. I. 21)

#### HOWARD v. McPHAIL. (No. 282.)

(Supreme Court of Rhode Island. July 7, 1914.)

#### 1. CHATTEL MORTGAGES (§ 84\*)—EXECUTION—REQUISITES—VALIDITY—SURRENDER OF POSSESSION—RECORD.

Under the express provisions of Gen. Laws 1909, c. 258, § 10, requiring that chattel mortgages shall be recorded within five days or possession of the property delivered to the mortgagee, such a mortgage is valid as between the parties, though neither of such requirements is complied with.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 152; Dec. Dig. § 84.\*]

#### 2. SALES (§ 219\*)—TITLE—RIGHTS OF PURCHASER.

Otherwise than by estoppel, a buyer of personal property acquires no better title than that of the seller from whom he buys.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 588-603; Dec. Dig. § 219.\*]

#### 3. CHATTEL MORTGAGES (§ 155\*)—LIEN—PURCHASER WITH NOTICE—INVALID MORTGAGE—ESTOPPEL.

A buyer of personal property subject to a mortgage which had not been recorded within the statutory period, with notice of the mortgage, could not acquire title freed from the lien of the mortgage by estoppel.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 264, 270; Dec. Dig. § 155.\*]

#### 4. CHATTEL MORTGAGES (§ 41\*)—SUFFICIENCY OF INSTRUMENT—AGREEMENT TO CREATE LIEN—INVALIDITY.

Under the rule that equity considers that as done which the parties intended to do and which ought to be done as against the parties and purchasers with notice, an agreement intended to effect a mortgage on chattels or create a lien thereon or an equity therein, though lacking in some legal requisite, will be upheld in equity, and the court, as against the party or a purchaser with notice, will raise a trust and decree that the party or purchaser holds the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



property in trust for the lienor to the extent of the lien.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 84; Dec. Dig. § 41.\*]

**5. CHATTEL MORTGAGES (§ 225\*)—TRANSFER OF PROPERTY.**

Where the owner of certain personal property executed a mortgage thereon, but the property was neither delivered to the mortgagee nor the mortgage recorded within five days, as required by Gen. Laws 1909, c. 258, § 10, a buyer of the mortgaged\* property from the mortgagor with notice of the agreement of the seller to create a valid mortgage on the property would be regarded in equity as a trustee for the mortgagee to the extent of the latter's interest under the mortgage.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 468-470; Dec. Dig. § 225.\*]

**6. CHATTEL MORTGAGES (§ 155\*)—STATUTORY INVALIDITY—PURCHASER WITH NOTICE—FRAUD.**

Where a chattel mortgage was unenforceable at law because of the mortgagee's failure to take possession of the property or record his mortgage within five days, as required by Gen. Laws 1909, c. 258, § 10, and the mortgagor sold the property to complainant, who took with notice of the facts and the mortgagee's rights in the premises, complainant was in particeps criminis with the mortgagor in seeking by such sale to defeat the mortgage, and was therefore not entitled to a decree in equity restraining the mortgagee from taking possession of the property and from foreclosing or treating the mortgage as valid.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 264, 270; Dec. Dig. § 155.\*]

Vincent and Parkhurst, JJ., dissenting.

Case Certified from Superior Court, Providence and Bristol Counties.

Suit by Katherine V. Howard against Donald T. McPhail. On certificate from superior court. Bill dismissed.

Elliot G. Parkhurst and Edwards & Angell, all of Providence, for complainant. Irving Champlin and Hammill & Bradford, all of Providence (John C. Knowles, of Providence, of counsel), for respondent.

**SWEETLAND, J.** This is a suit in equity wherein the complainant seeks to restrain the respondent from taking possession of certain personal property and from foreclosing or treating as valid a mortgage thereon. The complainant also prays that said mortgage be ordered to be delivered up for cancellation.

After the pleadings were closed and after hearing in the superior court for final decree upon an agreed statement of facts, the cause was certified to this court for final determination. The essential facts set out in the agreed statement are as follows: On September 28, 1910, one Julia M. Vaill, now deceased, for valuable consideration, executed and delivered to the respondent, McPhail, a chattel mortgage covering certain personal property then owned by, and in the possession of, the mortgagor, located in the town of New Shoreham. The respondent, said mortgagee, did not take possession of the mortgaged

chattels, and did not file said mortgage for record until October 26, 1910. Said mortgage is now held by the respondent, and the debt as security for which said mortgage was given has not been paid. At some time in November, 1910, the complainant had actual notice of the existence of said mortgage and of the record of said mortgage in New Shoreham. On July 18, 1911, said Julia M. Vaill, the mortgagor in said mortgage, executed and delivered to the complainant a bill of sale of the personal property covered by said mortgage. The consideration named in said bill of sale was \$2,000. Thereupon the complainant took possession of said personal property, still retains possession thereof, and has filed this bill to restrain the respondent from interfering with said chattels, and also for the cancellation of said mortgage.

The complainant's prayer is based upon her interpretation of section 10, c. 258, Gen. Laws 1909. The portion of said section, pertinent to the case, is as follows:

"No mortgage of personal property hereafter made shall be valid as to the assignee in insolvency of the mortgagor, or any other person except the parties thereto and their executors and administrators, until possession of the mortgaged property be delivered to and retained by the mortgagee, or the said mortgage be recorded, \* \* \* which said recording or taking and retention of possession as aforesaid shall be made or taken within five days from the date of the signing thereof."

The complainant relies largely upon the authority of *Burdick v. Coates*, 22 R. I. 410, 48 Atl. 389, which was an action at law upon a state of facts unlike that of the case at bar, and did not involve a consideration of the principles of trusts and of fraud which should govern the determination of the case before us.

[1] An important provision in said section is that the mortgage remains valid as to the parties, although possession of the mortgaged property be not delivered to, and retained by, the mortgagee, and the mortgage be not recorded. The situation, then, on July 18, 1911, before Julia M. Vaill made the bill of sale of said chattels to the complainant, was that Miss Vaill had by a valid instrument conveyed the title of said chattels to this respondent defeasible on payment of the mortgage debt. For a personal property mortgage is more than a security; it transfers the legal title subject to defeasance only on performance of the conditions. Although she was permitted by the respondent to retain possession of said chattels, Miss Vaill's possession was that of a bailee; there remained in her only the right to redeem said property on performance of the conditions of the mortgage. The question before us therefore is: Will a court of equity, by reason of the provisions of said section of the statute, decree that Miss Vaill, who was without title herself, nevertheless was able to convey title to this complainant, who had actual notice

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

and full knowledge of the respondent's rights under the mortgage and of the impropriety of Miss Vaill's act? For whatever may be determined as to the position of the complainant, Miss Vaill was guilty of actual fraud in selling said chattels in disregard of the rights of the respondent, unless her bill of sale shall be considered in equity merely as a disposition of her right to redeem, and not as an attempt to convey title to said property; in which case the complainant clearly would not be entitled to the relief which she seeks.

[2] This court, in *Goodell v. Fairbrother*, 12 R. I. 233, 34 Am. Rep. 631, and *Woods v. Nichols*, 21 R. I. 537, 45 Atl. 548, 48 L. R. A. 773, has stated the generally recognized principle that otherwise than by estoppel the purchaser acquires no better title than the vendor from whom he buys.

[3] The complainant cannot claim that any doctrine of estoppel works in her favor against the respondent; because, although he allowed the mortgaged property to remain in the mortgagor's possession, nevertheless before the complainant took said bill of sale she had knowledge of the mortgage and that it had been recorded. She must claim that in some way, by reason of the statute, despite the absence of circumstances creating an estoppel, and, in spite of her knowledge of the facts, she has acquired from Miss Vaill a title that Miss Vaill herself did not have, and that equity will confirm that title to her. The purpose of statutes requiring the registry of mortgages or other conveyances is to prevent fraud and deception, by protecting bona fide purchasers and creditors from the effect of secret incumbrances. Their purpose is to prevent, not to assist, fraudulent transactions. This court said with reference to the absolute language of a recording act under consideration in *Wilson v. Esten*, 14 R. I. 621: "The statute, however, must receive a reasonable construction." In well-considered cases in this court registry statutes have received a reasonable construction. This court has not lost sight of the purpose of such statutes and the fundamental principles of equity; and has recognized that, even where the language of the statute, taken literally, is absolute, it may still be the subject of exception. *Wilson v. Esten*, 14 R. I. 621; *Miller v. Coffin*, 19 R. I., at page 168, 36 Atl. 6; *Westerly Savings Bank v. Stillman*, 16 R. I. 497, 17 Atl. 918. The last case will be considered more fully later.

The complainant has invoked the aid of a court of equity, and her suit must be considered in accordance with equitable principles. Before taking up the important question of the effect upon the complainant's rights of her vendor's fraud, of which she had full notice and in which she participated, I will consider how far the knowledge by the complainant of the respondent's rights in the mortgaged property, at the time of her purchase, raises a trust as to said property in

favor of the respondent against the complainant.

[4] Equity looks upon that as done which the parties intended to do and which ought to be done. As against the parties themselves and those who purchase with notice, an agreement, intended to effect a transfer of property or to create a lien upon it or an equity in it, though lacking in some legal requisite, will be upheld in equity which binds the conscience; and in such circumstances a court of equity, as against the party himself and as against a purchaser with notice, will raise a trust. *Legad v. Hodges*, 1 Ves. Jr. page 477.

*Coble v. Nonemaker*, 78 Pa. 506, was a suit by a mortgagee of an unrecorded chattel mortgage against a subsequent purchaser of the chattels covered by said unrecorded mortgage, of which the purchaser had notice at the time of his purchase. The court said:

"Considered in another aspect, the case seems equally plain. While the title remained in Eves [the mortgagor], he held it bound by the trust for the benefit of the plaintiff which the mortgage had created. When the title was passed to the defendant, he, having notice of the plaintiff's equities, became, by operation of law, invested with the character of trustee with precisely the same obligations that the contract expressly imposed on Eves [the mortgagor]. A trust already in existence, and annexed to the present subject-matter, is created de novo as against a person who takes by a title derivative from the original trustee. *Lewin on Trusts*, 206. If an estate be passed by trustee to a stranger by conveyance, then the grantee, if he be a volunteer, will be bound by the trust, whether he had notice of it or not; for, though he had no actual notice of the equity, yet the court will presume it against him where he paid no consideration. *Id.* 206; *Mansell v. Mansell*, 2 P. Wms. 678, 681. But if the grantee be a purchaser of the estate at its full value, then, if he take with notice of the trust, he is bound to the same extent and in the same manner as the person of whom he purchased (*Dunbar v. Tredennick*, 2 B. & B. 319); for, knowing another's right to the property, he throws away his money voluntarily and of his own free will (*Mead v. Lord Orrery*, 3 Atk. 328 [236]). And the rule applies not only to the case of a trust properly so called, but to purchasers with notice of any equitable incumbrance, as of a covenant or agreement affecting the estate (*Daniels v. Davison*, 16 Vesey, 249), or a lien for purchase money (*Mackreth v. Symmons*, 15 Vesey, 329). The defendant [the subsequent purchaser] then held these goods subject to the equities of the plaintiff [the mortgagor] under the mortgage."

In the early and leading case in this country of *Mitchell v. Winslow*, 2 Story, 644, Fed. Cas. No. 9,673, Judge Story said:

"It seems to me a clear result of all the authorities that wherever the parties, by their contract, intended to create a positive lien or charge, either upon real or upon personal property, whether then owned by the assignor or contractor or not, or, if personal property, whether it is then in esse or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto, under him, either voluntarily, or with notice, or in bankruptcy."

In accordance with this principle it was held in *Williams v. Winsor*, 12 R. I. 9, that

a mortgage of personal property to be subsequently acquired, though invalid at law, will be upheld in equity.

In *Westerly Savings Bank v. Stillman*, 16 R. I. 497, 17 Atl. 918, this court considered the validity of the mortgage of a corporation to which the treasurer had affixed a seal and as to which act of the treasurer there was no allegation of authorization, which mortgage was not acknowledged and recorded as required by statute. The court said:

"The statute, however, only applies to deeds, and it is not clear that the mortgage in question is a deed; for, though the treasurer of the corporation affixed a seal to it, it is not alleged that he was authorized to do it. If the mortgage be not a deed, it is inoperative at law as a conveyance, and would bind the estate only in equity, where it would undoubtedly be enforced between the parties according to its intent. Would it likewise bind the estate as against a subsequent mortgagee or purchaser for value with notice? We think so. The general rule is, that a purchaser with notice of the right of another is in equity liable to the same extent and in the same manner as the person from whom he purchases."

In *Mayo v. Newhoff*, 47 N. J. Eq. 31, 38, 19 Atl. 837, the Court of Chancery of New Jersey recognized the general rule laid down by Lord Cottenham in *Folk v. Moxhay*, 2 Phill. 772, that if an equity is attached to property by its owner, no one purchasing with notice of that equity can stand in a different situation from the owner, and that this rule is applicable to personalty.

In *Porter v. Parks*, 49 N. Y. 566, the court said:

"While, therefore, the law is well settled, as claimed on behalf of the respondents, that where a party, by his own act and consent, has given to another the evidence of ownership and the apparent *jus disponendi* of property, a bona fide purchase from the apparent owner, or one who advances money or incurs responsibilities on the faith of the title, will be protected, it is equally well settled that, if the party dealing with the apparent owner has actual notice of the rights of the true owner, he acquires no better title than the transferor or apparent owner can lawfully convey. In other words, the purchaser or pledgee is not a bona fide purchaser as against the rightful owner, and is not within the protection of the rule invoked by the defendants, and must rely upon the actual, rather than the apparent, authority of the individual with whom he deals for his protection."

In *Bernheimer v. Verdon*, 63 N. J. Eq. 312, the court affirmed a decree of the Vice Chancellor, whose opinion is reported in 49 Atl. 732. The Vice Chancellor held that, where the purchaser of personalty located in a certain place has notice of another's claim to a mortgage thereon, before taking the bill of sale, equity will direct the execution of a mortgage by the purchaser on such personalty as was in such place at the time of purchase, and still remaining in the purchaser's hands.

In 2 Story's Equity Jurisprudence, at page 577, the author says:

"Indeed, there is generally no difficulty in equity in establishing a lien not only on real estate but on personal property, or on money in the hands of a third person, wherever that is a

matter of agreement at least against the party himself, and third persons who are volunteers or have notice. For it is a general principle in equity that as against the party himself, and any claiming under him voluntarily or with notice, such an agreement raises a trust."

Mr. Pomeroy in his work on Equity Jurisdiction (2d Ed.) § 591, says:

"When a person is acquiring rights with respect to any subject-matter, the fact whether he is so acting with or without notice of the interests or claims of others in or upon the same subject-matter is regarded throughout the whole range of equity jurisprudence as a most material circumstance in determining the extent and even the existence of the rights which he actually acquires. In conformity with this view, the general rule has been most clearly established that a purchaser with notice of the right of another is in equity liable to the same extent and in the same manner as the person from whom he made the purchase. The same rule may be thus expressed in somewhat different language: A person who acquires a legal title or an equitable title or interest in a given subject-matter, even for a valuable consideration, but with notice that the subject-matter is already affected by an equity or equitable claim in favor of another, takes it subject to that equity or equitable claim."

[5] It therefore appears clear from the authorities that, in equity, this complainant, having knowledge of the agreement between Miss Vaill and the respondent to create a lien upon the chattels in question, would take the same bound by the trust as Miss Vaill was bound and subject to the equities of the respondent, although the instrument which evidenced the agreement be defective in legal form and in execution, and be lacking in the requisites of acknowledgment and registry necessary to make a mortgage valid in law. It is a well-recognized, equitable principle that an attempt to make a legal mortgage which fails for want of some solemnity, may yet create a lien valid in equity. Therefore, if we should grant the prayer of the complainant's bill, we should effect this result: That a decree shall be entered in this cause in equity which will permit the complainant to hold said mortgaged property freed from the trust by which, in good conscience and according to established principles of equity, she should be bound.

I will now consider the question of fraud which is involved in the cause. As we have said above, Miss Vaill, in selling said chattels in disregard of the title and ownership of the respondent, was guilty of actual fraud. What was the position of the complainant in the transaction as it relates to another equitable consideration important in the case? Story says (1 Story Eq. Juris. § 395):

"Another class of constructive frauds consists of those where a person purchases with full notice of the legal or equitable title of other persons to the same property. In such cases he will not be permitted to protect himself against such claims, but his own title will be postponed, and made subservient to theirs. It would be gross injustice to allow him to defeat the just rights of others by his own iniquitous bargain. He becomes by such conduct particeps criminis with the fraudulent grantor; and the rule of equity as well as of law is: *Dolus et fraus nemini patrocinari debent.*' And in all such cases of pur-

chases with notice courts of equity will hold the purchaser a trustee for the benefit of the persons whose rights he has thus sought to defraud or defeat."

In the case of *Dunbar v. Tredennick*, 2 Ball & B. p. 319, the court said:

"Why, then, what is the situation of a purchaser with notice of a fraudulent title? It certainly may be stated as a general proposition, that a purchaser with notice is, in equity, bound to the same extent, and in the same manner, as the person from whom he purchased; or, as Lord Rosslyn states it in *Taylor v. Stibbert*: 'If he is a purchaser with notice, he is liable to the same equity, stands in his place, and is bound to do that which the person he represents would be bound to do by the decree.' What would Weir [the purchaser] be bound to do? Why to deliver up these deeds to be canceled, or to reconvey and to restore the possession; for notice operates by affecting the conscience of the party. He is a purchaser, it is true, for a valuable consideration, but he is not a bona fide purchaser; he takes a legal title, knowing the right in equity to belong to another; this is the reasoning of Lord Hardwicke in *Le Neve v. Le Neve*. He is not a party to the original fraud, but, if I may apply the reasoning to a civil right, he is an accessory after the fact."

Mr. Justice Brewer, then a member of the Supreme Court of Kansas, said, in *Phillips v. Reitz*, 16 Kan. 397:

"If the vendee knew of the fraudulent intent of the vendor, and bought with that knowledge, he can scarcely claim to be a bona fide purchaser, for he was knowingly helping the vendor to accomplish the fraud and do the wrong."

Among many authorities on the point are the following:

"He who takes title to property with knowledge or notice that that title is tainted with fraud takes it with no better right than he had who was guilty of the fraud; that is, the fraud of the actual wrongdoer may, on the question of title, be alleged against his successor on taking the property." Bigelow on the Law of Fraud, vol. 1, § 12.

"The meaning of 'good faith' is synonymous with 'conscience.' It embraces those obligations, which are imposed upon one, in dealing with property, by the circumstances surrounding it at the time. The taking of a legal estate after notice of a prior right makes a person a mala fide purchaser. Undoubtedly it is an act savoring of fraud for a person who has received actual direct notice of another's right to go on, and knowingly acquire the property in violation of that other's right." Jones, Ch. Mort. (5th Ed.) p. 699, § 484.

"In its results, 'good faith' is synonymous with 'conscience.' It embraces those obligations which are imposed upon one, in dealing with property, by the circumstances surrounding it at the time. It is not questioned but that, at the time defendants' mortgages were taken, the property was subject to complainant's lien; that Pfaff [the mortgagor] held it subject to complainant's right. That right continues until cut off by a superior right—by a right which, in conscience, is entitled to preference. It is fundamental that such preference cannot be acquired by any one having notice of the existing right. Lord Hardwicke laid it down that the taking of a legal estate after notice of a prior right makes a person a mala fide purchaser. *Le Neve v. Le Neve*, 2 White & T. Lead. Cas. Eq. (4th Am. Ed.) 109. Undoubtedly it is an act savoring of fraud for a person who has received actual, direct notice of another's right to go on and knowingly acquire the property, in violation of that other's right." *Riederer v. Pfaff* (C. C.) 61 Fed. 873.

*Riederer v. Pfaff* was a suit for the foreclosure of a chattel mortgage. The question considered by the court was whether the complainant, who had failed to comply with a statutory requirement as to filing affidavit of the renewal of his mortgage, lost the priority of his mortgage against the claim of a subsequent mortgagee with notice.

"It will therefore be assumed, as a settled principle, that a person claiming property under a deed or conveyance which has been duly executed and recorded must take it subject to all other claims of which he has had actual notice before the execution of his deed. Because, after such notice, the accepting and recording of a conveyance must be considered in equity as fraudulent, since the party actually had that notice which it was intended by the act of assembly he might have had by the recording of the conveyance of the prior claimant." *Hudson v. Warner*, 2 Har. & G. (Md.) 422.

"It is an undoubted principle of equity that the owner of property may follow and reclaim it wherever he can find and identify it, until arrested in the pursuit by the countervailing equity of a bona fide purchaser, for a valuable consideration paid. A purchaser with notice that the sale is a breach of trust, or a fraud upon the rights of the real owner, is particeps criminis with the fraudulent vendor, and his purchase cannot protect him against the owner, because such a purchase is not bona fide." *Garrard v. Pittsburgh & Connelville R. R. Co.*, 29 Pa. 158.

Does this complainant escape the effect of the equitable doctrine which we are now considering by reason of the language of the statute in question? According to the best authority, she does not. In the early and celebrated case of *Le Neve v. Le Neve*, 2 W. & T. Leading Cases in Equity, 187, 2 Atk. 646, decided in 1747, Lord Hardwicke considered the effect in equity of the absolute language of an early registry act:

"That every such deed shall be void against any subsequent purchaser or mortgagee unless the memorial thereof be registered."

The Chancellor said:

"What appears, by the preamble, to be the intention of the act? Plainly to secure subsequent purchasers and mortgagees against prior secret conveyances and fraudulent incumbrances. Where a person had no notice of a prior conveyance, there the registering his subsequent conveyance shall prevail against the prior; but, if he had notice of a prior conveyance, then that was not a secret conveyance by which he could be prejudiced. The enacting clause says that every such deed shall be void against any subsequent purchaser or mortgagee, unless the memorial thereof be registered, etc.; that is, it gives him the legal estate, but it does not say that such subsequent purchaser is not left open to any equity which a prior purchaser or incumbrancer may have; for he can be in no danger when he knows of another incumbrance, because he might then have stopped his hand from proceeding. \* \* \* The operation of both acts of parliament and the construction of them is the same; and it would be a most mischievous thing if a person, taking that advantage of the legal form appointed by an act of parliament, might under that protect himself against a person who had a prior equity, of which he had notice. \* \* \* The ground of it is plainly this: That the taking of a legal estate after notice of a prior right makes a person a mala fide purchaser; and not that he is not a purchaser for a valuable consideration in every other respect. This is a species of fraud and dolus

malus itself; for he knew the first purchaser had the clear right of the estate, and, after knowing that, he takes away the right of another person by getting the legal estate. \* \* \* Now, if a person does not stop his hand, but gets the legal estate when he knew the right was in another machinatur ad circumvenendum. It is a maxim, too, in our law, that 'Fraus et dolus nemini patrocinari debent.' Fraud, or mala fides, therefore, is the true ground on which the court is governed in the cases of notice." *Le Neve v. Le Neve*, White & T. L. Cas. (8th Ed.) vol. 2, pp. 192, 193, 196.

The principle announced in *Le Neve v. Le Neve* as applicable to the rights of a subsequent purchaser or mortgagee, having actual notice of a prior unrecorded mortgage, notwithstanding the unqualified language of a registry act, has been generally accepted by courts of equity and text-writers upon the subject from 1747 to the present. It has been followed by this court as a proper interpretation of a registry statute and as stating an exception to be understood as modifying the absolute language of such statutes when the language, upon a literal reading, appears to be in conflict with the purpose of such acts and with the equitable doctrine of constructive fraud arising from notice. The principle was recognized in *Harris v. Arnold*, 1 R. I. 125, at pages 136 and 137. It was fully considered and approved in *Westerly Savings Bank v. Stillman*, 16 R. I. 497, 17 Atl. 918, in an opinion written by Chief Justice Durfee, and has never been questioned by this court since that time.

*Westerly Savings Bank v. Stillman* was a suit in equity to establish the lien of a mortgage which had not been acknowledged and recorded in conformity with a statutory provision. The language of the statute then under consideration was that of section 4, c. 173, Pub. Stat. R. I., as follows:

"Sec. 4. All bargains, sales, and other conveyances whatsoever of any lands, tenements or hereditaments, whether they be made for passing any estate of freehold or inheritance, or for term of years exceeding the term of one year, and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed, shall be void, unless they shall be acknowledged and recorded as aforesaid: Provided, that the same, between the parties and their heirs, shall nevertheless be valid and binding."

The court said:

"The section referred to declares that all conveyances of real estate for more than a year, and all deeds of trust and mortgages, shall be void unless they shall be acknowledged and recorded, provided that between the parties and their heirs they shall be valid. The language, taken literally, is absolute, and, under it so taken, A. might stand by and see B. convey a lot of land to C. by deed, and then take a deed from B. of the same lot in due form, and if the deed to C. should happen not to have been acknowledged, or, if acknowledged, should happen not to have been forthwith recorded, could acquire the better title by lodging his deed for record. We do not understand, however, that the section has even been construed so as to permit this; on the contrary we understand that it has always, notwithstanding the absoluteness of its language, been construed to be subject to an exception, implied from its pur-

pose as a provision for the protection of bona fide purchasers and creditors, to the effect that any deed, valid between the parties and their heirs, though neither acknowledged nor recorded, shall likewise be valid as to other persons having actual notice of it; so that, if any other person having such notice take a conveyance of the land covered by the prior deed, he will take it subject to any right, title, or interest therein created by the prior deed as fully as if the prior deed had been duly acknowledged and recorded. It is true that we do not find this construction given to the section by actual decision in any reported case, but there are reported cases in which the construction is recognized. *Taylor et ux. v. Luther*, 2 Sumn. 228 [Fed. Cas. No. 13,796]; *Nichols v. Reynolds*, 1 R. I. 30, 36 [36 Am. Dec. 238]. The construction is confirmed by numerous decisions under similar statutes in other states, some of which follow: *Norcross v. Widgery*, 2 Mass. 506; *State of Connecticut v. Bradish*, 14 Mass. 296; *Trull v. Bigelow*, 16 Mass. 406 [8 Am. Dec. 144]; *Jackson dem. Gilbert v. Burgott*, 10 Johns. [N. Y.] 457 [6 Am. Dec. 349]; *Van Rensselaer v. Clark*, 17 Wend. [N. Y.] 25 [31 Am. Dec. 280]; *Rogers v. Jones*, 8 N. H. 264; *Emmons v. Murray*, 16 N. H. 412; *Hart et al. v. Farmers' & Mechanics' Bank et al.*, 33 Vt. 252; *Ohio Life Insurance Co. v. Ledyard*, 8 Ala. 866; *Rupert et al. v. Mark*, 15 Ill. 540. *Correy's Lessee v. Caxton & Rees*, 4 Bin. [Pa.] 140. The Massachusetts statute provided that the conveyance should not 'be good and effectual against any other person than the grantor and his heirs, unless acknowledged and recorded.' 'But,' said Parsons, C. J., in *Norcross v. Widgery*, supra, 'if the second purchaser has notice of the first conveyance, the intent of the statute is answered, and his purchase afterwards is a fraudulent act.' This construction finds countenance in the wording of the statutes of some of the states; but the construction is the same, generally, even where the statutes declare unqualifiedly that unregistered conveyances shall be void as against purchasers, or as against all persons who are not parties to the conveyance. *Le Neve v. Le Neve*, Ambler, 436; 2 White & Tudor Lead. Cas. Eq. (4th Amer. Ed.) 109, and cases cited in American notes on pages 213, 214. We think our statute always has been, and should continue to be, construed in the same manner."

It should be observed that the language of the section then under consideration is as absolute and unqualified as that of the section now before us.

The provision of said section of the Public Statutes was that the conveyances named therein should be void unless acknowledged and recorded. The provision of section 10 of the General Laws 1909 is that no mortgage of personal property shall be valid as to any person until possession of the mortgaged property be taken and retained by the mortgagee or the mortgage be recorded. In each of these sections there is a similar provision making the respective conveyances valid as to the parties thereto, although the respective statute be not complied with. Is there any other provision in section 10 of the General Laws which renders the rule of construction adopted in *Westerly Savings Bank v. Stillman* inapplicable to that section? In said section 10 there is the further provision that the recording or the taking and retaining of possession shall be made or taken within five days from the date of

the signing of the mortgage. Does this clause render said section 10 essentially different from said section of the Public Statutes and relieve it from the application of the rule laid down in *Westerly Savings Bank v. Stillman*? It is clear that to hold thus would be to attempt to draw a distinction between the two sections, in regard to the point now under consideration which is altogether unreasonable and illogical. It would be to magnify a verbal variance into a vital and legal distinction, where none could have been intended. By the provisions of said section of the Public Statutes the conveyances therein named were to be invalid as to all persons save the parties thereto, unless said conveyances were acknowledged and recorded; the strongest interpretation that can be placed upon the later act, regarding personal property mortgages, is that they are to be invalid as to all persons except the parties thereto, unless possession of the chattels be taken and retained, or unless said mortgages be recorded in five days. According to the strict language of each section a condition of invalidity is provided for if the requirement of the respective statute is disregarded; in one case, if the conveyance is not acknowledged and recorded; in the other if the mortgagee fails to do one or the other of the things therein prescribed within five days. It would be a perversion of reasoning to hold that the Legislature intended to provide for a higher or a different degree of invalidity in the latter section than in the former, or to create in the latter section a condition of invalidity which would be unaffected by any equitable principle which should be applied to the former. I take it there are no degrees of invalidity. Under the former section the holder of certain conveyances, unacknowledged and unrecorded, according to the absolute language of that section, was the holder of an invalid conveyance save as to the parties. Under the latter section the holder of a chattel mortgage who had not taken and retained possession of the chattels or had not recorded said mortgage within five days, by the absolute language of that section, was the holder of an invalid personal property mortgage save as to the parties. Each holder under the conditions named was in exactly the same category as to the validity of his conveyance or his mortgage and a rule of construction applicable to one statute, which declared the invalidity of the conveyance, is equally applicable to the other statute, which declared the invalidity of the chattel mortgage. In one case the invalidity was based upon the absence of acknowledgment or record; in the other it was based upon the absence of possession or record within five days. The test of validity or invalidity provided in the two cases differed, but the condition of invalidity was the same. In *Westerly Savings Bank v. Stillman* the court was

dealing with an instrument which was claimed to be invalid by one test; we are dealing with an instrument which is claimed to be invalid according to the other test. But in each case the invalidity claimed is based upon like unlimited statutory language. I have sought to emphasize the consideration that the language employed in each of these two sections, taken literally, is equally absolute and without exception; that for the same purpose which is behind all registry statutes, with no stronger or different purpose in one act than in the other the Legislature, by language equally positive, has provided for the invalidity of certain instruments in the circumstances respectively set out in the two acts; and that in the construction of both acts any equitable principle which would read an exception into the absolute language of one with equal force would require an exception to be understood as to the operation of the other.

Nor can it with reason be said that there is any expression which indicates a desire on the part of the Legislature to limit the rule of construction as to registry statutes adopted by this court in *Westerly Savings Bank v. Stillman*. Rather must it be inferred from the absence of such provision that the Legislature was satisfied with that construction, and did not desire to interfere with its continuance. *Westerly Savings Bank v. Stillman* was decided in 1889. The section relating to personal property mortgages now under consideration was first adopted in 1899. This court had said explicitly that, in equity at least, the construction of all registry statutes should be the same whether such statutes in terms provided that an unrecorded mortgage was valid as against a purchaser with notice or was silent on that subject. That had remained the settled rule of construction in our courts for ten years, and yet this statute was passed without an attempt on the part of the Legislature, by any language in the act, to neutralize or limit this established rule of construction. The case of *Westerly Savings Bank v. Stillman* must be regarded as the ruling authority in this state upon the question now under consideration, and is decisive of the case at bar.

The view taken by the English Court of Chancery and by this court in *Westerly Savings Bank v. Stillman* is in agreement with the great weight of English and American authority.

In 1 *Story's Equity Jurisprudence*, the author, in the course of his treatment of the subject of constructive fraud, says, at section 397:

"It is upon the same ground that in countries where the registration of conveyances is required in order to make them perfect titles against subsequent purchasers, if a subsequent purchaser has notice at the time of his purchase of any prior unregistered conveyance, he shall not be permitted to avail himself of his title against that prior conveyance. This has been long the settled doctrine in courts of equity; and it is

often applied in America, although not in England, in courts of law as a just exposition of the registry acts. The object of all acts of this sort is to secure subsequent purchasers and mortgagees against prior secret conveyances and incumbrances. But, where such purchasers and mortgagees have notice of any prior conveyance, it is impossible to hold that it is a secret conveyance by which they are prejudiced. On the other hand, the neglect to register a prior conveyance is often a matter of mistake or of overweening confidence in the grantor; and it would be a manifest fraud to allow him to avail himself of the power by any connivance with others to defeat such prior conveyance."

In *Patten v. Moore*, 82 N. H. 382, two partners, being the owners of certain standing timber, executed a mortgage on the same to the complainant, but all the formalities required by law were not completed and the mortgage recorded until November 3, 1851. On October 23, 1851, one of the partners, who had purchased his copartner's interest, conveyed said timber to the respondent, who had knowledge of the complainant's mortgage. The respondent claimed the timber as a bona fide purchaser, alleging that the complainant's mortgage was invalid against him; it never having been completed and recorded till November 3, 1851. The court said:

"The principle of equity is unquestioned that one who buys property with notice of an existing right of a third person, either legal or equitable, shall be deemed to have made his purchase in bad faith, and to be guilty of a fraud, so that he will not be permitted to set up his purchase against such right. \* \* \* It is no answer to this to say that the mortgage was at that time invalid. As between the parties, a mortgage is sufficient without any oath, and without either possession or recording. Rev. Stat. 248, c. 132, § 7. And in that case, if before, or at the time of his purchase, William Moore [the respondent] had notice that there was even a defective and voidable mortgage, as to a bona fide purchaser, he was chargeable with notice of all the facts at that time existing relative to that mortgage, and at best would stand in no better position than Moore and Gage [said partners]."

In *Gooding v. Riley*, 50 N. H. 400, at page, 411, the court said:

"The English registry acts provided that conveyances of land should be deemed fraudulent and void as against subsequent purchasers and mortgagees, unless a memorial of such conveyances was registered; but it was very soon the established doctrine in equity that such prior deed or incumbrance, though not registered, created an equitable title in the grantee, and that, as the object of these statute provisions was to protect subsequent purchasers and incumbrancers against secret conveyances, notice to them would be equivalent to registry. *Le Neve v. Le Neve*, 3 Atk. 646; and see *Dickerson v. Tillinghast*, 4 Paige [N. Y.] 221 [25 Am. Dec. 528]. In such cases courts of equity lend their aid to protect the holders of such equitable titles against subsequent purchasers and others, with notices of such equity, as in all other cases where there is a prior equitable title which courts of equity would enforce. Whenever a party, who has purchased and paid for the property of another, has taken a promise to convey it, or has taken a conveyance which is good as between the parties, but not as to others for want of registration or the like, he will in equity be regarded as having the equitable title, which will prevail against a subsequent grantee having notice of it. A purchase with knowl-

edge of such equity is everywhere regarded as made in bad faith; and this is a doctrine of equity, of universal application, holding that a purchaser cannot in conscience hold a legal estate so acquired; there being no equity united with it. In the case before us as made by the bill, Lawrence [the first mortgagee] parted with his money and received this mortgage in good faith. As between him and Haskill [the mortgagor], the title, both legal and equitable, passed. As to subsequent purchasers and mortgagees, he was clothed with the equitable title, and the attempt to sell the property afterwards to another, and thus defeat the equitable title before created, would on the part of Haskill be the grossest bad faith; and, if the second mortgagee had notice of the prior equity, he would be justly charged with participating in the fraud. Indeed, there is no doctrine of equity more generally recognized than that which denounces such a purchase as made in bad faith; and we are wholly unable to perceive any good reason why it should not be applied in its full force in a case like the one stated in the bill; and this, we think, accords with the adjudged cases in our own courts."

[8] Under the authorities the complainant must be held guilty of fraud in knowingly entering into the transaction with the mortgagor, Miss Vaill, to defeat the legal and equitable rights of the respondent. The respondent in good faith had parted with his money, and had received therefor the mortgage in question. In the sale of the chattels by Miss Vaill to the complainant, these two women, Miss Vaill as principal and the complainant as particeps criminis, were guilty of fraud involving moral turpitude in thus combining in the attempt to deprive this respondent of his security and to cheat him of his money justly due. It would be a most unheard of and monstrous exercise of the equity jurisdiction of this court to grant this complainant the relief which she seeks upon a claim based on her own moral delinquency and fraud. Such action by the court would be in disregard of the maxim that "He that hath committed iniquity shall not have equity."

The complainant's bill must be dismissed. On July 10, 1914, at 10 o'clock a. m., the respondent may present to this court a form of decree to be entered in the superior court dismissing the complainant's bill and awarding costs to the respondent.

VINCENT, J. (dissenting.) This is a suit in equity whereby the complainant seeks to restrain the respondent from taking possession of certain personal property and from foreclosing or treating as valid a certain mortgage upon the same and to have said mortgage delivered up and canceled.

A restraining order was issued which was continued after a hearing upon the motion for a preliminary injunction and is still in force. Subsequently, after the pleadings were closed, and after a hearing in the superior court upon the entry of a final decree, the case was certified to this court under section 85, c. 289, Gen. Laws of R. I., upon an agreed statement of facts.



From the facts, as stated, it appears that on or before September 28, 1910, Julia M. Vaill, now deceased, executed and delivered to the respondent the mortgage under consideration, covering personal property then owned by Miss Vaill and located in New Shoreham, R. I. The respondent never took possession of the mortgaged chattels, nor did he have the said mortgage recorded within five days from the date of the signing thereof, but the same was placed on record in New Shoreham on October 26, 1910. Later, on July 18, 1911, Miss Vaill, by a bill of sale, sold and conveyed the chattels described in the said mortgage to the complainant, who thereupon took, and has since retained, possession of the same.

The complainant at the time when she purchased the property—July 18, 1911—knew of the existence of the said mortgage to the respondent, and that the same then appeared of record. The indebtedness for which the said mortgage was given has not been paid, the interest thereon is in default, and therefore the respondent claims the right to take possession of and sell the property covered by said mortgage under the provisions thereof. The respondent also claims that the mortgage is valid as to the complainant because the complainant knew of its existence and record prior to her alleged purchase of the property which the mortgage describes.

On the other hand, the complainant claims that said mortgage has no validity whatever; it not having been recorded within five days from the date of the signing thereof as required by section 10, c. 258, of the Gen. Laws of 1909.

The case presents but a single issue, and that is whether or not a mortgagee, who has neither taken possession of the mortgaged property nor recorded his mortgage within the time required by statute, can still maintain his mortgage as against the mortgagor's vendee who purchases the property with full knowledge of the existence of the mortgage. The statute which fixes the time within which mortgages of personal property shall be recorded is section 10, c. 258, Gen. Laws of R. I., and is as follows:

"Sec. 10. No mortgage of personal property hereafter made shall be valid as to the assignee in insolvency of the mortgagor, or any other person except the parties thereto and their executors and administrators, until possession of the mortgaged property be delivered to and retained by the mortgagee, or the said mortgage be recorded in the records of mortgages or personal property in the town or city where the mortgagor shall reside, if in this state; and if not in this state, then in the town where the property is at the time of making said mortgage; which said recording or taking and retention of possession as aforesaid shall be made or taken within five days from the date of the signing thereof: Provided, that nothing herein contained shall be so construed as to affect any transfer of property under bottomry or respondentia bonds, or of any ship or goods at sea or abroad, if the mortgagee shall take possession thereof as soon as may be after the arrival of the same in this state."

The respondent claims that, notwithstanding the specific terms of the statute, the recording of a personal property mortgage after the expiration of more than five days from the date of the signing thereof acts as a constructive notice to those who may take a conveyance subsequent to such recording, and that as against them such a mortgage would be valid.

Our statute, before quoted, contains the imperative provision that no mortgage of personal property shall be valid until the mortgagee shall take possession of the mortgaged property or until he shall record his mortgage, and that such possession or recording shall take place within five days from the date upon which the mortgage is signed. As the court said in *Haythorn v. Van Keuren & Son*, 79 N. J. Law, 101, 74 Atl. 502:

"The presumption is that the word 'shall' in a statute is used in an imperative, and not in a directory, sense. If a different interpretation is sought, it must rest upon something in the character of the legislation or in the context which will justify a different meaning."

In thus making the record of the mortgage imperative within a specified time, the Legislature must have had some object in view, and must have intended that the failure to record should have some bearing and some effect on the validity of the instrument. It seems to me that the Legislature, in using the language which we find in the statute, intended that a mortgage which remained unrecorded for a period of five days should have no further legal existence, except as between the parties. The fixing of a definite period within which a mortgage must be recorded places the mortgage upon a different footing from mortgages made under statutes where no special time for recording is fixed. This difference has been recognized by this court in the case of *Burdick v. Coates*, 22 R. I. 410, 48 Atl. 389, in which the court, referring to the case of *Commercial Bank v. Colton*, 17 R. I. 226, 21 Atl. 349, used the following language:

"The mortgage was recorded prior to the assignment, and there was no provision in the statute as to the time when it should be recorded. The present statute is quite different; and, under a similar statute in Massachusetts it was held, in *Drew v. Streeter*, 137 Mass. 460, that an attachment made before the mortgage was recorded, even though the record was within the statutory period, took precedence of the mortgage."

In the later case of *Ziegler v. Thayer*, 34 R. I. 288, 83 Atl. 266, the court said, in quoting from *In re Ronk* (D. C.) 111 Fed. 154:

"It is apparent that it was the purpose of the Legislature to allow no valid claim, lien, or secret equity to be created on goods, unless public disclosure was made either by delivery of the goods to the assignee or mortgagee and the retention thereof by him, or by recording the assignment or mortgage within 10 days. To hold otherwise would be to defeat the beneficial effect of the recording statute."

There are, however, some authorities which support the respondent's contention that recording, however long delayed, acts as con-



structive notice to those who take a conveyance subsequent to such recording. In support of this contention the respondent cites cases from Ohio, Kansas, Michigan, Texas, and New York. In only three of these states—Kansas, Texas, and Ohio—does the statute fix any time for recording. In Kansas and Texas the statute provides for recording "forthwith," and in Ohio within six months. The courts in those states hold that the later record of the mortgage is a notice to parties who may subsequently deal with the property in question.

In *Burdick v. Coates*, supra, this court held that a chattel mortgage could have no validity whatever if the mortgagee failed to take possession of the property or to record his mortgage within five days from the date of the signing thereof, quoting *Drew v. Streeter*, 137 Mass. 460.

The conclusions reached by this court in *Burdick v. Coates*, supra, are in accord with the decisions of the courts of many other states. See *Sheldon, Adm'r. v. Conner*, 48 Me. 584; *Kennedy v. Shaw et al.*, 38 Ind. 474; *Simpson v. Harris et al.*, 21 Nev. 353, 31 Pac. 1009; *Gassner v. Patterson et al.*, 23 Cal. 299; *Sage v. Browning*, 51 Ill. 217; *People v. Hamilton et al.*, 17 Ill. App. 599; *Lockwood v. Slevin et al.*, 26 Ind. 124; *Parroski v. Goldberg*, 80 Wis. 339, 50 N. W. 191; *Bevans v. Bolton*, 31 Mo. 437; *Rawlings v. Bean et al.*, 80 Mo. 614; *Garland v. Plummer*, 72 Me. 397; *Sidener v. Bible*, 43 Ind. 230; *McDowell et al. v. Stewart*, 83 Ill. 538.

These authorities are equally applicable to another contention of the respondent that an unrecorded chattel mortgage is valid against a subsequent purchaser with actual knowledge of the mortgage.

The respondent also cites cases to the effect that an unrecorded conveyance of real estate is valid against a subsequent purchaser with notice of the prior conveyance. It does not however, appear that the questions submitted in the cases cited by the respondent upon this point arose under any statute peremptorily fixing a time within which conveyances of real estate shall be recorded, but that they were determined by the well-settled and well-understood equitable principles governing such matters.

While, as before stated, there is authority supporting the respondent's contention regarding both constructive and actual notice, the weight of authority seems to support the law as laid down by this court in *Burdick v. Coates*, supra, and I see no reason for changing the views therein expressed regarding the interpretation of the statute in question.

I think that the complainant is entitled to a decree as prayed for in her bill of complaint.

PARKHURST, J., concurs in opinion of VINCENT, J.

(37 R. I. 163)

## STATE v. MARIANO. (No. 4634.)

(Supreme Court of Rhode Island. July 10, 1914.)

## 1. HOMICIDE (§ 163\*)—EVIDENCE—ADMISSIBILITY.

In a prosecution for manslaughter, the fact that the dead boy's anus was found open, which in the opinion of the doctors was due to its having been penetrated by some instrument just before or after death, and which one doctor stated might have been caused by the commission of the crime of sodomy, was insufficient basis for showing accused's sexual capacity to commit that crime.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 310-317; Dec. Dig. § 163.\*]

## 2. WITNESSES (§ 236\*)—EXAMINATION—QUESTIONS.

The allowance of a question which was simply preliminary was not error.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 817-826; Dec. Dig. § 236.\*]

## 3. HOMICIDE (§ 338\*)—APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The erroneous admission of evidence of the sexual capacity of one accused of manslaughter to commit the crime of sodomy, merely because the boy's anus was found open, which might have been caused by the commission of the crime of sodomy just before or after death, was prejudicial to accused, as that crime is disgusting and repulsive and the slayer would be regarded as a foul degenerate and a wicked and criminal pervert.

[Ed. Note.—For other cases, see *Homicide*, Cent. Dig. §§ 709-713; Dec. Dig. 338.\*]

## 4. CRIMINAL LAW (§ 404\*)—EVIDENCE—DEMONSTRATIVE EVIDENCE.

Demonstrative evidence, such as the skull, etc., of accused's victim, is relevant and admissible when it shows the commission of a crime or throws light on the way it was committed; but, if it explains no fact and is relevant to no disputed issue, it is excluded on account of its tendency to create prejudice.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.\*]

## 5. CRIMINAL LAW (§ 404\*)—EVIDENCE—ADMISSIBILITY—DEMONSTRATIVE EVIDENCE.

In a prosecution for killing another by blows upon the head with a stone or other blunt instrument, the fractured portion of the victim's skull was admissible, as demonstrating the destructive force and effect of the blows inflicted, though accused announced that he would deny all knowledge of the homicide and would not dispute the evidence as to the homicide itself, as that simply left upon the state the burden of proving its case and did not bar it from offering any demonstrative evidence which might tend to throw light not only on the fact but on the mode of killing.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 873, 891-893, 1457; Dec. Dig. § 404.\*]

## 6. CRIMINAL LAW (§ 1169\*)—APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.

In a prosecution for manslaughter, where a boy witness had been asked upon cross-examination who told him not to take the watch offered by accused because it belonged to deceased, an exception to the admission on redirect examination of evidence that it was his sister who told him was without merit.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**7. CRIMINAL LAW (§ 1169\*)—APPEAL AND ERROR—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

An exception to the admission of evidence which could not have prejudiced accused will be overruled.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

**8. CRIMINAL LAW (§ 516\*)—EVIDENCE—"CONFESSION."**

Statements of accused that he unintentionally caused deceased's death by striking with his foot a stone which hit deceased in the head were not strictly a "confession," which is a person's declaration of his agency or participation in a crime, and is restricted to acknowledgments of guilt; such statements being of an explanatory or exculpatory character.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1139-1145; Dec. Dig. § 518.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1417-1419; vol. 8, p. 7611.]

**9. CRIMINAL LAW (§ 406\*)—EVIDENCE—ADMISSIONS.**

Statements of an accused person not amounting to a confession, but from which in connection with other evidence and the surrounding circumstances an inference of guilt can be drawn, are admissible as admissions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.\*]

**10. CRIMINAL LAW (§ 406\*) — ADMISSIONS—VOLUNTARY CHARACTER.**

A boy's admissions not amounting to a confession were not inadmissible because, after admonishing him that whatever he said would be used for or against him, the officer added, "but, whatever you tell me, I want you to tell the truth"; such words not constituting an inducement rendering the statements involuntary.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.\*]

**11. CRIMINAL LAW (§ 406\*) — ADMISSION — VOLUNTARY CHARACTER.**

A boy's admissions not amounting to a confession were not inadmissible because the officer said, "If you did it, say so, and I will do all I can for you," where he added, "If you didn't do it, don't say you did," to which the boy replied, "I didn't kill him, so I can't say I did," as the added words naturally refuted any suggestion in the preceding words of a recommendation to confess, and the reply showed no indication of having been influenced by what the officer had said.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.\*]

**12. CRIMINAL LAW (§ 406\*)—EVIDENCE—ADMISSIONS—VOLUNTARY CHARACTER.**

That while the admissibility of an officer's testimony concerning accused's admissions was being discussed, accused's counsel asked the state to call certain other officers that he might cross-examine them upon the voluntary character of the admissions, no ruling being requested or made, nor did counsel himself offer to call such officers, who were afterwards called and cross-examined, was not ground for excluding such admissions.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.\*]

**13. CRIMINAL LAW (§ 406\*)—ADMISSIONS—ON ARRAIGNMENT.**

Accused's admission when arraigned that he killed deceased, but unintentionally, was admis-

sible in the absence of anything happening at the arraignment to render it inadmissible.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 785, 894-917, 920-927; Dec. Dig. § 406.\*]

**14. CRIMINAL LAW (§ 1169\*)—ADMISSIONS—VOLUNTARY CHARACTER.**

There was no error in refusing to strike out accused's admissions, as to the voluntary character of which the evidence was conflicting, where the court instructed the jury that they might consider all the evidence, but to exclude the admissions if they were not voluntary, to which no exception was taken.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 754, 3088, 3130, 3137-3143; Dec. Dig. § 1169.\*]

**15. HOMICIDE (§ 268\*)—TRIAL—QUESTIONS FOR JURY.**

Evidence in a prosecution for homicide held to make a case for the jury, and to leave no reasonable doubt of accused's guilt if believed to be true.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. § 562; Dec. Dig. § 268.\*]

**16. CRIMINAL LAW (§ 655\*)—TRIAL—CONDUCT OF TRIAL.**

It is always incumbent upon the court, and especially so in the heat of the trial when it may be annoyed by the persistence of zealous counsel in the face of rulings already made, to avoid any utterance which would prejudice the accused with the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1520-1523, 1527, 1535; Dec. Dig. § 655.\*]

**17. INFANTS (§ 66\*)—CAPACITY TO COMMIT CRIME—QUESTIONS FOR JURY.**

Whether a boy lacking 3 months of being 14 years of age, who was accused of manslaughter, had sufficient capacity to commit a crime, held, under the evidence, for the jury.

[Ed. Note.—For other cases, see Infants, Cent. Dig. § 172; Dec. Dig. § 66.\*]

Exceptions from Superior Court, Providence and Bristol Counties; Elmer J. Rathbun, Judge.

Antonio Mariano was found guilty of manslaughter, and case transferred from the superior court on his exceptions. Part of exceptions sustained and part overruled, and case remitted for a new trial.

Livingston Ham, Asst. Atty. Gen., for the State. Anthony V. Pettine, of Providence, for defendant.

**BAKER, J.** This is an indictment against the defendant, Antonio Mariano, for manslaughter in killing William A. Mather on February 29, 1912, in North Providence in this state. There are four counts in the indictment, the first two charging the killing by means of blows upon the head with a stone; the other two by blows upon the head "in some way and manner and by some means, instruments, and weapons to the grand jurors unknown." The case was heard on the 11th, 12th, 13th, 14th, 15th, 18th, and 19th days of March, 1913. At the trial the following statements showing the commission of a crime and its circumstances were in evidence and not disputed:

On February 29, 1912, Mather was 12

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

years and 8 months old. He was a pupil in the fourth grade in the public schools at Marleville, a village in said North Providence. He attended both school sessions that day. He left his house at 10 minutes before 1 o'clock in the afternoon and reached the school after the session had begun and was marked tardy. In consequence of being late, he was detained 10 minutes after the close of the school for the day. He then went away, and there is no direct evidence that he was ever afterwards seen alive. His dead body was found on the side of Moses Angell Hill, near Mineral Spring avenue, on the evening of March 27, 1912, at a place more or less covered with trees and rocks and which was to all appearances little used or frequented in winter. The skull was crushed in from about an inch back of the right ear to the middle of the occipital bone. There was a scalp wound and another fracture of the skull about the size of a half dollar on the top of the occipital bone. In addition there were four other scalp wounds and a contused wound with a slight abrasion on the right elbow. The anus of the body was open and distended, by measurement from  $1\frac{1}{4}$  inches to  $1\frac{3}{4}$  inches. When found, the body was lying prone with the head turned so that the left side of the face was resting on the ground, leaving the right cheek exposed, with the left arm under the body and the right arm over the back. The body was frozen and in a good state of preservation, excepting that there were indications that the right side of the face had been disturbed by some animal. The body was clothed with a shirt or waist, a "singlet" or undershirt, a pair of trousers, stockings, and shoes. The shirt or waist was torn and the suspenders were down off the shoulders. His coat and sweater were found behind a V-shaped rock higher up the hill and about 125 feet from where the body was found, and his cap still further up the hill about 25 feet away from said rock. There was blood on the sweater. At a distance of two feet from the head of the body when found lay a stone about 8 inches long, 5 inches wide and  $1\frac{1}{2}$  inches thick, tapering in nearly all directions to a sharp edge, and weighing 4 pounds and 6 ounces. A microscopical examination, verified by chemical analysis, revealed traces of human blood, several human hairs, and a small piece of scalp tissue on portions of said stone.

The medical examiner, who made the autopsy, testified that the wounds upon the head might have been caused by "almost any blunt instrument" used with different degrees of force; that said stone could have been such instrument; and that the blow which crushed the skull would cause "almost instant death." The distention of the anus was explained by the medical witnesses as being due to its having been dilated either just before or just after the boy Mather's death; that the dilation was caused

by penetration of the anus by some instrument or body; that it was impossible to state what actually caused the dilation; and that it possibly might have resulted from the commission of the crime of sodomy.

The defendant on February 29, 1912, lacked a few months of being 14 years of age; that is, he did not become 14 until June 4, 1912. He had attended the public school in Marleville for a short time during the fall of 1911, but with his relatives moved into Providence for a few months, where he was a pupil in the school on Branch avenue. Later they returned to Marleville, where, on February 29, 1912, he re-entered the public school but in a different room and in a lower grade than the one attended by the Mather boy.

What follows sets forth in substance the material portions of the testimony connecting the defendant with the crime:

Suspicion was cast upon Mariano shortly after the finding of the dead boy's body. It appears that there had been some talk about his having bats. In answer to the request of other boys for bats, he promised to give them some. These boys were Pasco Busserio, James Amond, and Antonio Amond. They were at the time about 11 years old each. After school at noontime he told these boys to go up the hill (where the body was afterwards found), and said that they would find some bats behind a rock. Mariano went a little way with them and then started to go home. Not finding any bats, they got up on the rocks and called to him. In reply he told them to go higher up. They went higher up, but could find no bats; they did find, however, behind a rock, a coat, a sweater, and a rubber shoe. They left the clothes, but James Amond took the rubber away. After school that day Mariano gave to James Amond two bats and to two other boys three bats, or five in all, which he had properly obtained from a neighbor living across the street, a Mrs. Hayden by name. The date of these occurrences is not entirely clear, but it was apparently March 27th or thereabouts. At any rate, as Walter A. Lefebvre was returning from his work on that day, he heard that boys had found some clothes up in the woods, and he started off the team, when it stopped at the bottom of the hill, and went up the hill, and after some search found the clothes. Later in the evening he with two other men and William M. Mather, father of the dead boy, went to the place, found and identified the clothes, and after further search found the dead body lying diagonally across an old cart path, in the condition already described. Afterwards it was learned that the defendant had tried to sell a watch to one Ricci Petrocelli, a boy of 10, who attended the same school, which watch was supposed from its description to belong to the dead boy, who had a cheap open-face watch. Thereupon, between 5 and 6 o'clock of March 30,

1912, the defendant was taken into custody by George P. Willis, chief of police of North Providence, and placed in one of the cells in the basement of the town hall at Centredale, after having been questioned several times by Mr. Willis and Domenico Conca, a special police officer, at which times the prisoner emphatically and repeatedly denied having caused the death. At about 10 o'clock in the evening, however, after first protesting, "Honest to God, Mister, I didn't kill him," he told Mr. Sanford E. Kinnecom, a deputy sheriff assigned to duty in the Attorney General's office, that on the day of the boy Mather's death he met him playing in the road with the boys near the spring; that Mather refused to play with him because he (Mariano) had given the other boys bats but none to him; that he then said to Mather, "If you want some bats, you come up the hill, and I will give you bats;" that they went up on the hill, and upon finding no bats Mather got mad and they fought, and he put his foot on Mather's neck, but afterwards let him up, and proposed that they climb up on the rocks; that they started to climb up on the rocks, himself leading the way and Mather following; that as they were doing this his foot knocked off a piece of the rock, which hit Mather on the head, who fell and lay on the ground; that Mather said nothing but breathed hard; that he kissed him and said a prayer over him and went home and cried all night; that he went back next day and found the body "just the same, his clothes all right. I knelt down side of him I say another prayer and I go home. I go back again, him all right." In answer to an inquiry as to why he sent the little boys up on the hill to look for bats, when he knew there were no bats there, he said:

"I want them to find him. I feel awful bad, I think of it all the time. But they no go where I tell them. I send them up there. Then tell them to go up further. Then I go home. They no find him. They no go where I tell them."

This conversation was downstairs in the cellroom, but the prisoner was not at the time in a cell. The same evening, at about 11 o'clock, upon being taken upstairs, Mariano repeated this statement in its essential features in the presence of Mr. Willis, Mr. Conca, Inspectors Wolf and Ahearn of the police department of Providence, and Mr. Kinnecom, but with some additional details. Some one asked, "What did you do with the watch?" He replied that he went back the third day and took the watch from the boy's clothes. Further asked what he had done with the watch, he said, "I hid the watch back of a stone over there on the foot of the hill." To the inquiry as to whether he could show where he hid it, he said:

"Yes, side of big rock, some bushes right up side of the rock. I put it between the bushes and the rock," and said he would show where it was.

The entire party thereupon went in an automobile to the hill where the body had been found. Mariano went to a rock and reached down between the bushes and the rock. He felt all around without finding any watch, and then said:

"I showed that stone to my brother. He see me there one day. He knew the watch was here. I bet he came and took it. If he did, I know where he put it."

As they were going back to the automobile, some one asked him if he could show where the stone fell off and hit the boy. He said he could. They went up the hill. After looking around at other rocks, he came to the one behind which the clothes were found, and said, "That is the stone there." This was the V-shaped rock. He also said that he tried to carry the boy home and did carry him a distance, but he was too heavy and so he left him. Said he thought he could show where he left him. He went up the hill and came back and said "kind of path." He came back down the hill till he struck the path, followed it, looking around carefully, and finally said: "Yes, it was right here; he lay right this way." The place indicated was just about where the body was found. Then the party returned to the automobile and went to where Mariano lived. He had said that if his brother had taken the watch he would hide it down under the stairs in the cellar of the barn, as he hid everything there. They went to the barn and made search, but found no watch. The brother was awakened and brought out, but denied any knowledge of the watch. The defendant then said it was at his sister's house on Hassan street; that he had stayed there the night before, and it was under the couch; that the couch lining was torn, and he had put it in there. The party then went to the sister's house, but no one was at home. After some delay she was found, brought there, and an entrance effected. The prisoner walked right over to the sofa, reached under it, and the lining was torn as he had described, but no watch was found there, and no watch was ever found. He was then taken at 3 or 4 o'clock of the morning of March 31st to the police station on Fountain street, Providence. On April 1st he was arraigned before Judge Reuckert, of the Sixth district court, in his office. He read the charge to the boy and asked him whether he was guilty or not guilty, and, as the boy hesitated somewhat, then said to him: "These people, the police, say that you killed William Mather; now what do you say?" To this inquiry the boy replied, "I did, but I didn't mean to."

The defendant in his testimony at the trial says that on February 29th, after the close of school, at half past 3 o'clock in the afternoon, he went directly to George Frazza's house, broke some wood for him in his yard, played piggy for a while, and then went straight home over the fields, cleaned up the yard at the direction of his mother, and did

not go out after he went home. He denies killing young Mather, and says that he did not see him February 29th, and did not know him; he sent the boys for bats, but explains that he had placed some bats, given him by Mrs. Hayden, in the field on his way to school, thinking the teacher would take them from him, if he brought them to school; admits trying to sell a watch to Petrocelli, but says it was a watch given him by one Frank Zabillo; admits making to Mr. Kinnecom and the other officers and to Judge Reuckert the statements related by them, but says the statements were untrue and that he made them by the direction of Domenico Conca and Anthony Capuano, who suggested the story he told as to Mather's death, and told him that by telling it he would get out and be permitted to go home; that he was frightened when in the cell and wanted to go home. He also says that Domenico Conca put him up to telling the story about William Mather's watch, and it was in consequence of what Conca said that he told Judge Reuckert what he did and that Conca told him all this when he was in the cell at the town hall. He also says that Conca told him that the rock he pointed out was where William Mather was killed. George Frazza, a small school boy, says that the defendant went home with him at close of school on February 29th, and played piggy with him for half an hour, and Frank Zabillo testifies that he gave defendant a cheap watch in January, 1912. Defendant's younger brother Michael also says that he saw him with Frank's watch. The mother of Mariano says he came home February 29th "about 4:30 or five, but I do not remember well," and that when he came home he worked around the yard, and his appearance and conduct after February 29th was the same as at other times. He is described by one of his teachers as a very dull boy. In rebuttal Conca and Capuano denied defendant's charges that they induced the defendant to make the statements he did or were in any way the author of them. The jury found the defendant guilty with a recommendation of mercy. Exceptions were taken to various rulings of the justice presiding at the trial in the course thereof, and the case has been heard by this court on defendant's bill of exceptions as allowed by the court below.

The bill of exceptions as filed contains 35 exceptions. Three of these, respectively numbered 18, 21, and 31, were disallowed by the justice presiding at the trial and no attempt has been made to establish their correctness before this court. Those numbered 1, 2, 9, 24, 26, 27, and 30 have not been pressed before this court, thus leaving 25 for consideration.

[1] As several of these exceptions relate to the same subject-matter, it will be convenient to group them in considering them. The fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and

sixteenth exceptions all refer to the admission of testimony offered by the state tending to show that defendant had reached the age of puberty and had the sexual capacity to commit the crime of sodomy. It was shown by the testimony that, while the defendant was detained at the Sockanosset School awaiting his preliminary examination before the Sixth district court, he was subjected to a physical examination on April 5 and 6, 1912 by Dr. Henry A. Jones, the resident physician at the State Institution, and Dr. Clifford H. Griffin, a medical examiner for the county of Providence, and the police surgeon of the city of Providence. The examination was made apparently for the express purpose of ascertaining his sexual development and capacity. While the prisoner was entirely nude, four photographs were taken of him in a standing position, one a front view, one a back view, and two side views, one of each side.

[2] The third, fifteenth, and twenty-second exceptions relate to objections to the introduction of testimony respecting the physical examination and to the introduction in evidence of said photographs. The question to which the third exception lies was simply preliminary, and the allowance of the question and answer was not error and the exception is overruled.

[3] The other 13 exceptions just enumerated, except the fifteenth, are all based upon the offers of testimony tending to show the sexual ability of the defendant to commit the crime of sodomy. The testimony of Drs. Barnard and Griffin and of the undertaker is that the anus of the dead boy was widely open. The two doctors express the opinion that this condition was due to its having been penetrated by some instrument either just before or just after the death of the Mather boy. This opinion as to the time of penetration is based upon said open condition of the anus, which these witnesses believe did not close after its dilation because death had destroyed the contractile power of the sphincter muscle. If these inferences as to the cause and time of said dilation are to be relied upon, it would not be unreasonable to conclude that the person who killed the boy was also the cause in some way of the dilation. Such a conclusion is doubtless the attempted justification of the offer of the evidence now being considered. The only suggestion in the evidence that the dilation was due to the commission of the crime of sodomy is found in the testimony of Dr. Griffin. On page 117 of the transcript this appears:

Cross Q. 89. "Now, doctor, you didn't find—you couldn't say whether that penetration was caused by any particular instrument, could you?" Answer: "No sir."

On page 125 of the transcript we find:

C. Q. 136. "You are not willing to go on record as stating that the crime of sodomy was committed on William Mather, are you?" Answer: "No, sir; I am not. I say the condition

found indicated that it might have been done. That is as far as I can go," O. Q. 137. "Indications only show ——" Answer: "That it could have been done."

There was no testimony showing such a disarrangement of the dead boy's clothes, as for example that the top of the trousers were below the hips, as to give added weight to this suggestion of Dr. Griffin. It therefore derives its whole significance from the dilated condition of the anus. Upon this slender foundation is erected a structure of testimony, which includes the narrative as to the defendant's physical examination, the description of his physical appearance and development, and the four photographs all adduced in order to show to the jury his physical capacity to commit a crime, the actual commission of which is only suggested as a mere possibility. We think the testimony was not sufficiently relevant to the issues in the case. Sodomy is a crime against nature, and as such is a disgusting and repulsive offense. So that, if the person who killed William Mather did it in the endeavor to commit the crime of sodomy, or if the killing was the result, accidental or otherwise, of a personal quarrel, and then, perhaps under a sudden impulse, while the stricken body of the victim was yet warm—whether before or after his death—the slayer availed himself of the opportunity to gratify his lustful passion, for this vile act he would naturally be regarded by most men as a foul degenerate and a wicked and criminal pervert. We think therefore that all of this evidence relative to the defendant's ability to commit the crime of sodomy could not have failed to prejudice his case with the jury. *State v. Ellwood*, 17 R. I. 763, 769, 24 Atl. 782. It should have been excluded. The fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, sixteenth, and twenty-second exceptions are sustained.

With the sustaining of these exceptions the fifteenth exception becomes unimportant, and it is overruled.

Defendant, under exception 22, also urges that the taking of the photographs and their admission in evidence was in effect compelling the defendant to testify against himself in derogation of his constitutional rights in this particular, making specific reference to certain sections of the federal Constitution. In view of the fact that we have found that this evidence should have been excluded, it is not necessary to consider this claim of constitutional privilege beyond calling attention to the case of *Twining v. New Jersey*, 211 U. S. 78, 29 Sup. Ct. 14, 53 L. Ed. 97. A part of the syllabus is:

"Exemption from compulsory self-incrimination in the state courts is not secured by any part of the federal Constitution," and this is upheld by the text of the opinion.

Although a new trial is to be granted for the reason stated, nevertheless a somewhat

full consideration of some of the other exceptions will be of service for guidance in a future trial of the case.

[4,5] The fourteenth exception was taken to the admission in evidence of a certain box and its contents, which said box was marked "State's Exhibit 3." It is somewhat difficult to determine from the record whether the box was so admitted or not. This exception is noted on page 75 of the transcript, but there is no express ruling of the court to that effect. The uncertainty on this point appears to have been such that the state offered it in evidence near the close of its case, as appears on page 452 of the transcript. There was then a prolonged discussion on the point of its admissibility, but no ruling by the court is shown. As, however, the exception on page 75 is allowed and the box is marked "State's Exhibit 3," it is to be treated as having been duly admitted in evidence. The objections to its admissibility are: First, that no dispute was made by the defendant as to the nature and extent of the wounds on the skull of William Mather; and, second, that such evidence only tended to prejudice the jury against the defendant. Inspection shows the exhibit to contain the crown or upper and back portion of the skull with some fragments of bones. Demonstrative evidence of this character is relevant and admissible when it serves either to show the commission of a crime or throws light on the way it was committed. On the other hand, if it explains no fact and is relevant to no disputed issue, then it is excluded on account of its tendency to create prejudice. See *Wharton*, *Crim. Ev.* vol. 2, §§ 518, 518c, 941; 2 *Wigmore on Evidence*, § 1157; *Cole v. State*, 45 Tex. Cr. R. 225, 232, 75 S. W. 527. In this case the manner of the killing was a matter of inference. The fractured bones served to demonstrate the destructive force and effect of the blows inflicted better than a technical verbal description and gave the jury opportunity as practical men to judge for themselves whether the injuries were likely to follow from a stone or similar weapon as described by the medical witnesses. The mere fact that the defendant announced that he would deny all knowledge of the death of Mather, and therefore would not dispute any of the evidence as to the homicide itself, simply left upon the state the burden of properly proving its case and did not bar it from offering any demonstrative evidence which might tend to throw light not only on the fact but on the mode of killing. The necessity of its admission is perhaps a debatable question; but, taking into consideration the character and appearance of the exhibit itself, we do not, under the circumstances of this case, think it was clearly an error to admit the box and contents in evidence. Exception 14 is overruled.

[6] The seventeenth exception to the tes-

timony of Ricci Petrochelli, in answer to question 129 in redirect examination, is not of importance. In the cross-examination of this witness, in question 114, defendant's counsel had asked him who it was that told the witness "to say that you did not want to take the watch that Mariano wanted to give you because it was William Mather's watch." The answer to question 129 and the questions immediately preceding show that it was the sister of the witness who so told him. The exception is overruled.

[7] Exception 20, to the overruling of defendant's objection to question 154 by the last witness, is overruled, as the answers of this witness to this and the following question could not have prejudiced the defendant.

The twenty-third exception is taken to the overruling of defendant's objection to question 48 in the direct examination of Sanford E. Kinnecom, as follows: "And what was the commencement of your conversation with him?" This refers specifically to the admission in evidence of the conversation the defendant had with Mr. Kinnecom in the cell room of the town hall on the evening of March 30, 1912; but it goes also to the admission of his statements during the night in the presence of Mr. Kinnecom. The objection to the admission of this evidence was on the ground that these statements were not voluntary.

In the examination of Mr. Kinnecom before the court in the absence of the jury for the purpose of determining the admissibility of his evidence, he said that on the evening of March 30, 1912, he chanced to be in the vicinity of the town hall of North Providence and went in there and saw Mr. Willis, who informed him that he had a boy in custody who "gets right on the verge of telling us something and then stops. I wish you would talk with him." Thereupon Mr. Kinnecom went downstairs with Officer Brown. He found there Antonio Capuano, an Italian police officer, who was talking in Italian to the defendant through the door of his cell. Mr. Kinnecom did not understand it, and what this conversation was was not at that time in evidence. Capuano finally wound up in English, saying to Mariano:

"If you did it, say so, and I will do all I can for you. If you did not do it, don't say you did. I've got four kids myself."

The reply of the boy was, "I didn't kill him, so I can't say I did." Capuano then went out of the station. Mr. Kinnecom testifies that then:

"I walked up to the cell door and said, 'Well, little fellow, what have they got you in here for?' He made no reply. Officer Brown was going toward the door to go out, and I said, 'Here, have you got a key to this cell?' He said, 'Yea.' I said, 'Come back and let this boy out.' He came back and let the boy out, and I looked around and found a box and a chair, and I took the box and set it down side of the furnace and set the chair in front of it and said, 'Little fellow, sit down here.' He sat

down on the box. I said, 'You don't know who I am, do you?' 'No, Ma'am.' 'Well,' I said, 'I am an officer, I work in the courthouse in the city. You know where that is?' He says, 'Providence?' I says, 'Yea.' 'Now,' I says, 'I am going to ask you about the Mather boy. Whatever you tell me will be used either for you or against you. Now remember, Tony, whatever you tell me, it may tell for you or it may tell against you. Be sure and understand it, it may hurt you, or it may help you; but whatever you tell me, I want you to tell the truth.'"

The boy said, "Honest to God, Mister, I didn't kill him," but afterwards told the stories and made the statements hereinbefore repeated. Mr. Kinnecom also states that the boy did not appear to be frightened during the talk, but was cool and calm. He seemed to be somewhat worried about something, but after making his statement acted as if relieved of a burden.

[8, 9] The statements made to Mr. Kinnecom by the defendant were not in strictness a "confession."

"A confession is a person's declaration of his agency or participation in a crime. The term is restricted to acknowledgments of guilt." *People v. Ammerman*, 118 Cal. 23, 32, 50 Pac. 15, 18.

See, also, *Greenleaf on Evidence*, § 170; 6 *Am. & Eng. Encyc. of Law*, 521; 12 *Cyc.* 459.

These statements by the defendant were of an explanatory and exculpatory character, admitting that he caused Mather's death by accident, but denying criminal intent or liability. Statements and declarations by an accused person, although not amounting to a confession, but from which in connection with other evidence and the surrounding circumstances an inference of guilt may be drawn, are admissible against him as admissions. 12 *Cyc.* 418.

The state claims that it is not necessary to show that these statements were voluntarily made. One of the best modern writers on evidence holds that exculpatory statements denying guilt cannot be treated as confessions, and that in order to admit them in evidence it is not necessary to show them to be voluntary in character. 1 *Wigmore on Evidence*, § 821(2 and 3), and cases cited in notes. In the author's discussion of the subject this view is impressively stated. In practice, however, there is a great lack of uniformity in the decisions on the point; but in the greater number of jurisdictions it is held that the voluntary character of such admissions must be shown. 12 *Cyc.* 419. In *State v. Nagle*, 25 R. I. 105, 54 Atl. 1063, 105 Am. St. Rep. 864, this court treated similar statements or admissions having "a vital bearing upon a highly important link in the chain of circumstantial evidence relied on by the prosecution" as in the nature of confessions and subject to the same rules of admissibility in evidence; that is, that they must be voluntary. From this standpoint we will consider this and the next two exceptions.

[10] The defendant makes little real objection to the preliminary conversation and admonition given by Mr. Kinnecom. The

words "but whatever you tell me, I want you to tell the truth," do not constitute an inducement rendering the statements thereupon made involuntary and inadmissible. 2 Whart. Crim. Ev. § 654. This court, in *State v. Nagle*, supra, said:

"We do not wish to be understood in what we have thus said, however, as deciding that a mere request, advice, or admonition to tell the truth will render a confession induced thereby inadmissible in evidence, for the strong current of authorities, as well as the better reason, is to the contrary. Am. & Eng. Encyc. L. (2d Ed.) vol. 6, p. 531, and cases cited; *State v. Habib*, 18 R. I. 558 [30 Atl. 462]."

The remarks of Mr. Kinnecom to the defendant did not render the defendant's statements made to him inadmissible under this rule.

[11, 12] Was the statement in English of Capuano to the defendant an inducement to make a false confession? If he had simply said, "If you did it, say so, and I will do all I can for you," the promise of assistance might raise a question as to the following statements being voluntary; but the added words, "If you didn't do it, don't say you did," naturally refute any suggestion in the preceding words of a recommendation to confess. The effect of similar expressions has been passed on by other courts. In *Dutton v. State*, 88 Ala. 208, 7 South. 259, an officer told a prisoner he would help him all he could, adding:

"If you did do it, it might be best for you to say so; but, if you did not, stick to it that you did not."

In *Rafe v. State*, 20 Ga. 62, 68, a sheriff told a prisoner if he did do it he had better acknowledge it; but, if he did not do it, not to acknowledge it. In *State v. Kirby*, 1 Strob. (S. C.) 155, the prisoner was told that if he was really guilty and confessed who were the right persons he might be pardoned, but was admonished not to confess if he was innocent. In none of these cases were the statements quoted held to make the confession which followed involuntary.

"Mere advice to confess if guilty, and, if not, to stand firm, does not render the confession involuntary." 2 Whart. Crim. Ev. § 654.

See, also, cases in note 3 to section 832, 1 Wigmore on Evidence.

The answer of the defendant to Mr. Capuano, "I didn't kill him, so I can't say I did," shows no indication of his being influenced to confess by what Capuano had said to him. We think there is nothing in these statements to the defendant to make his subsequent statements to Mr. Kinnecom involuntary. In the discussion before the court as to the admissibility of the testimony of Mr. Kinnecom as to his conversation with the defendant, the defendant's counsel expressed a desire to have the state then call Chief of Police Willis, Domenico Conca, and Antonio Capuano for examination as to what was done and said to the defendant the evening of March 30th before Mr. Kinnecom arrived in order that he might have the privi-

lege of cross-examining them. No ruling was requested and none made. The counsel did not himself offer to call the persons named or any others for examination. These witnesses were all afterwards called by the state in the progress of the trial, and they were cross-examined. There is obviously nothing in this occurrence to lead to the exclusion of the testimony of defendant's statements. *State v. Jacques*, 30 R. I. 578, 585, 76 Atl. 652. The twenty-third exception is overruled.

[13] The twenty-fifth exception is to the admission in evidence of defendant's statement to Judge Reuckert when arraigned. It is not necessary to consider this at length.

"Where the accused is taken before a magistrate, \* \* \* unless otherwise provided by statute, and whether cautioned or not, his confession is admissible in evidence against him unless \* \* \* such confession was brought about by some inducement that renders the confession untrustworthy or has induced a false confession." 2 Whart. Crim. Ev. p. 1279.

There is no suggestion of the happening of anything at the time of arraignment to render defendant's statement inadmissible. *Wolfe v. Commonwealth*, 30 Grat. (Va.) 833, 840; *State v. Washing*, 36 Wash. 485, 78 Pac. 1019. The previous consideration of the objection to the admission of the defendant's statements to Mr. Kinnecom the night of his arrest made on similar grounds renders it unnecessary to say more as to this particular exception, which is overruled.

The twenty-third exception relates to the testimony of Mr. Kinnecom only, and the twenty-fifth to the testimony of Judge Reuckert.

The twenty-eighth exception was taken to the refusal of the court to strike from the record all the testimony of all the witnesses for the state in so far as such testimony purported to give statements of the defendant of the nature of confessions or admissions on the same ground, namely, that these alleged confessions or admissions were not voluntary. This exception covers not only the testimony of Judge Reuckert and Mr. Kinnecom, but also that of Inspectors Ahearn and Wolf, and large portions of the testimony of Chief of Police Willis and of Domenico Conca, although to this testimony, apart from that of Mr. Kinnecom and that of Judge Reuckert, no objection was made when it was offered. The motion to strike out was made after practically all of the evidence in the case was in. The additional testimony pertinent to this exception relates to the happenings to the defendant, after his arrest and before the arrival of Mr. Kinnecom at the town hall, including in such happenings what was said to him or in his hearing by other persons, his surroundings when locked in the cell, and how these conditions affected or influenced him. The undisputed testimony shows: That he was questioned somewhat about Mather's watch while being taken to the town hall. Questioned more at



length as to the whole affair after his arrival there before being taken downstairs to the cell. That on being taken down he said, "Going to leave me here?" On being told, "Yes," he said, "Take me upstairs, I will tell you all about it." That on being taken upstairs he said, "I don't know anything about it." Whereupon, after a brief questioning, he was locked in the cell. That he said several times in the course of these interviews that, if he could go home, he would tell all about it. That he cried at times, the testimony being conflicting as to extent of this and as to whether the cellroom was lighted while he was in the cell. Defendant himself tells of occurrences and remarks, which, if true, might tend to frighten him, and of his being persuaded by promises of assistance from some of the state's witnesses to make the statements he did relative to the manner of Mather's death. Upon these points the testimony was conflicting.

[14] Upon consideration of all the testimony then in, pertinent to the question raised, the justice presiding was apparently of the opinion that on the facts found by him to exist the statements of the defendant testified to were of a voluntary character. Upon the evidence relative to this question, as to which there was no dispute, we find that the testimony objected to was properly admissible. If, and in so far, as he considered the conflicting testimony in the formation of his opinion, we find no sufficient reason for differing with his conclusion. He had the opportunity of seeing and hearing the witnesses, as we have not. Relative to the question of a confession being voluntary or not as affected by a conflict of testimony, in *Com. v. Preece*, 140 Mass. 276, 5 N. E. 494, the court says:

"When there is conflicting testimony, the humane practice in this commonwealth is for the judge, if he decides that it is admissible, to instruct the jury that they may consider all the evidence, and that they should exclude the confession, if, upon the whole evidence in the case, they are satisfied that it was not the voluntary act of the defendant."

See, also, *Com. v. Cuffee*, 108 Mass. 285; *Com. v. Bond*, 170 Mass. 41, 48 N. E. 756; *Burton v. State*, 107 Ala. 108, 18 South. 284; *Stallings v. Johnson*, 27 Ga. 572, 581, 583. The record shows that the court instructed the jury in this manner, and that no exception was taken thereto. There was no error in denying the motion to strike out, and the twenty-eighth exception is overruled.

[15] The twenty-ninth and thirty-second exceptions were taken to the denial of separate motions for the direction of a verdict in favor of the defendant. In our opinion the court's action on these motions was correct. We think a suitable case had been presented for determination by jury, and that the evidence, if believed to be true, might properly leave no doubt of the defendant's guilt. These exceptions are overruled. See *Com. v. Williams*, 171 Mass. 461,

50 N. E. 1035; 7 Am. & Eng. Encyc. of Law, 863, 864.

[16] Exception 31 was taken to certain remarks of the court made while discussion was in progress as to a question calling for testimony concerning "the character or reputation of the defendant." While, of course, it is always incumbent upon a court, and most of all in the heat of a trial when it may be annoyed by the persistence of zealous counsel in the face of its rulings already made, to avoid any utterance which would prejudice a defendant with the jury, the words objected to in this case are not such as to require comment, inasmuch as the defendant obtains a new trial on other grounds, and as there is small probability of the precise situation occurring again. The exception is overruled.

[17] The thirty-third exception was taken to the refusal of the court to charge the jury as follows:

"The state having produced no evidence that the defendant possessed the discretion to judge between right and wrong, and the evidence being clear that the defendant was dull and backward under the age of 14, you are hereby directed to bring in a verdict of not guilty."

The defendant lacked three months of being 14 years of age when the crime was committed. At 14 the presumption of criminal incapacity would cease. Obviously with a boy of average intelligence at his age on February 29th slight evidence might rebut that presumption. The defendant was undoubtedly a backward boy, but he said in his cross-examination that he knew it was wrong to kill another boy. We think that the evidence in this case was sufficient to make the question of his capability to commit crime one for the jury. *State v. McDonald*, 14 R. I. 270. See, also, *State v. Learnard*, 41 Vt. 585, 589; *State v. Guild*, 10 N. J. Law, 163, 18 Am. Dec. 404, 416. This exception is overruled.

Exception 34 lies to the additional instructions given to the jury in response to their request after they had been out a considerable time. We have carefully read and considered these instructions. Some members of the jury seemed confused as to how they should treat the so-called confessions. Several specific questions were asked the court by different jurors. The additional instructions were given in reply. We are not prepared to say that these instructions were obnoxious to the charge of an unfair reference to and use of the testimony. They were not a complete charge in themselves, but were obviously intended to be considered together with the original instructions. This exception is overruled.

The fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, sixteenth, and twenty-second exceptions are sustained. All the others are overruled and the case is remitted to the superior court for a new trial.

(37 R. I. 107)

**BULLARD et al. v. REDWOOD LIBRARY et al. (No. 4747.)**

(Supreme Court of Rhode Island. July 10, 1914.)

**1. TAXATION (§ 891\*) — INHERITANCE TAX — PERSONS LIABLE — INTENTION OF TESTATOR.**

In the construction of a will giving legacies of personal property situated in and subject to the inheritance tax laws of another state the question whether such tax shall be charged against the legacies given or not is one of the testator's intent, in view of all the circumstances.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1712; Dec. Dig. § 891.\*]

**2. PROPERTY (§ 6\*)—SITUS OF PERSONAL PROPERTY.**

Personal property has no locality, but is sold, transmitted, bequeathed by will, and descendible by inheritance according to the law of the owner's domicile, and not according to the law of the situs.

[Ed. Note.—For other cases, see *Property*, Cent. Dig. § 3; Dec. Dig. § 6.\*]

**3. WILLS (§ 436\*)—PROBATE—PRESUMPTIONS.**

A testator, domiciled in the state of Rhode Island, is presumed to have made his will in accordance with the existing laws of such state.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 947-950; Dec. Dig. § 436.\*]

**4. TAXATION (§ 889\*)—INHERITANCE TAX — PERSONS LIABLE—EXECUTORS OR LEGATEES.**

Testatrix died domiciled in this state, and her will was probated and her executors appointed by a probate court of this state. She left personal property in Massachusetts, to get possession of which her executors were obliged to take out ancillary letters testamentary in Massachusetts and to pay inheritance taxes assessed against certain legacies. *Held*, that as the taxes were merely a charge on the particular property because of the jurisdiction of Massachusetts over it by reason of its situs therein, and not on the legacies given by the will, and as such foreign tax law could not regulate the exercise of testamentary power by a domiciled resident of this state, the amount of the tax was not a charge against the pecuniary legacies, but a part of the expenses of administration chargeable against the general estate.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 1710; Dec. Dig. § 889.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 84\*)—COLLECTION OF ASSETS.**

It is the ordinary duty of an executor or administrator to collect and get in the assets of the estate.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 323; Dec. Dig. § 84.\*]

**6. WILLS (§ 587\*)—"RESIDUE"—EXTENT.**

A gift of a "residue" is subject to the precedent claims upon the estate; it is a gift of what remains after the debts and legacies are paid.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1279, 1281-1291; Dec. Dig. § 587.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6169-6171; vol. 8, p. 7789.]

Case Certified from Superior Court, Newport County.

Proceeding by George E. Bullard and others, executors of the will of Mary E. W. Perry, deceased, against Redwood Library and others, for construction of the will. From a decree of the probate court in favor of defendants, Bullard and others appeal to

the superior court, from which the case was certified under Gen. Laws 1909, c. 298, § 10, upon an agreed statement of facts. Papers in the cause, with decision certified thereon, remitted with direction to enter a decree dismissing the appeal and affirming the decree of the probate court.

William MacLeod, of Newport, for appellants. Sheffield & Harvey, of Newport, for appellees.

**JOHNSON, C. J.** This is an appeal from a decree of the probate court of the town of Middletown to the superior court of Newport county, certified to this court upon an agreed statement of facts.

The appellants are the executors of the will of Mary E. W. Perry, a domiciled resident of Middletown in this state, who died December 10, 1910, and, the will having been duly proved, are qualified to act as such by the decree of the probate court of Middletown.

The agreed statement of facts is as follows:

"The parties hereto, having adversary interests in the construction of the will of Mary E. W. Perry in the within cause, concur in stating a special case for the opinion of the Supreme Court upon the following agreed statement of facts:

"(1) That Mary E. W. Perry, late of the town of Middletown, deceased, died on the 10th day of December, A. D. 1910, leaving a last will and testament duly admitted to probate by the probate court of said town of Middletown (a copy of which said will is hereto attached and marked 'Exhibit A').

"(2) That in and by said will testatrix left certain legacies as follows:

Redwood Library, Newport, books, clock, and.....	\$50,000
St. Mary's Church, So. Portsmouth, share in Redwood Library, and....	2,000
St. Mary's Church, rector's fund....	1,000
Trinity Church, Newport, rector's fund, and sundry articles of furniture	5,000
Bowdoin College, Brunswick, Me....	10,000
Home for Aged Women, Bangor, Me...	5,000
Eastern Maine General Hospital, Bangor .....	4,000
First Congregational Church, Groveland, Mass., seven-tenths of Perry Mansion property, to be used as a parsonage, and.....	3,000
Town of Groveland, land for public park	
Mary Bamfield Davies.....	1,000
Mary Wilkinson Richardson.....	1,000
Helen Robinson Woodbury.....	1,000
Lisa Carroll.....	1,000
Alice Bullard Ide.....	1,000
Eleanor May Barker.....	2,000
Mary Adams Willard.....	2,000
Edward F. Fitzgerald, gardner.....	1,100
Marie Bernier.....	500
George E. Bullard.....	10,000
Louis Curtis.....	10,000
Clark Burdick.....	10,000
August Carlson.....	500
Jeremiah Lawton.....	100

—the pecuniary legacies in all amounting to \$121,200.

"(3) That the estate of said Mary E. W. Perry was invested in stocks, bonds, notes, and other property amounting to \$2,315,964.48, of which \$17,330.32 was within the state of Rhode Is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

land, and the balance was within the commonwealth of Massachusetts, but that of said balance, \$135,000 was represented by notes secured by mortgages upon Rhode Island property, and \$22,000 was represented by bonds of the cities of Providence and Woonsocket in the state of Rhode Island, though said notes and bonds were physically in Massachusetts.

"(4) That in order to get possession of the assets of the estate within the commonwealth of Massachusetts the executors were obliged to take out ancillary letters testamentary in the probate court of Suffolk county, Mass., and in accordance with the requirements of the inheritance tax laws of Massachusetts then in force, to wit, St. 1909, c. 490, pt. IV, paid the following taxes assessed against the following legacies by the commonwealth of Massachusetts, and required to be paid before the said executors could gain control of the assets within that state:

Redwood Library.....	\$2,500
St. Mary's Church, So. Portsmouth....	100
Trinity Church, Newport, rector's fund	250
Bowdoin College.....	500
Home for Aged Women, Bangor.....	250
Eastern Maine General Hospital.....	200
Eleanor May Barker.....	100
Mary Adams Willard.....	100
George E. Bullard.....	500
Clark Burdick.....	500
Louis Curtis.....	500

Total tax on pecuniary legacies.. \$5,500

"(5) That the executors under the provisions of chapter 318, § 13, of the General Laws filed in the office of the probate clerk of the said town a statement setting out the names of the legatees and the amounts to be paid to each legatee, and in computing the amounts to be paid to each legatee the executors deducted in each case an amount equal to the inheritance tax paid to the commonwealth of Massachusetts (a copy of which said statement is hereto attached and marked 'Exhibit B').

"(6) That by a decree of said court entered May 19, 1913, said statement was amended by not allowing the deduction of the amount in each case of the Massachusetts inheritance tax, and said executors were ordered to pay said legacies in full as appears by the decree herein, from which decree the executors, the appellants, appealed to the superior court for the reasons stated in their reasons of appeal filed in this cause.

"(7) That the said Mary E. W. Perry was at the time of her death a resident of the town of Middletown and state of Rhode Island.

"Upon the foregoing agreed statement of facts the parties hereto concur in stating the following question in issue:

"Inasmuch as the will of Mary E. W. Perry gave the pecuniary legacies to the legatees as hereinbefore stated without specifically exempting the legatees from any deductions, which of the two following contentions is correct?

"I. The executors contend that the statement as originally filed should be allowed, and that the inheritance tax assessed by the commonwealth of Massachusetts against the legacies given to the respective legatees should be a charge against the legatees, and deducted from their legacies before payment to reimburse the estate for the amount advanced for their taxes.

"II. The appellees contend that the statement allowed by the probate court of Middletown should be confirmed, and that the inheritance taxes paid to Massachusetts are part of the expenses of administration incurred in obtaining the assets of the estate, and that inasmuch as the distribution of the estate should be made by the laws of the state of Rhode Island of which the testatrix was a domiciled resident at the time of her death, the executors have no right to deduct any amounts paid for

foreign inheritance taxes from the legacies payable to the respective legatees."

[1] In the construction of this, as in any other will, the primary question is, in view of all the circumstances, one of intent. The general principle of law is, if possible, to ascertain and give effect to that intent. Boardman Pet., 16 R. I. 131, 13 Atl. 94.

[2] The testatrix, at the time of her death, was a resident of this state. As is said in *Eidman v. Martinez*, 184 U. S. 578, 581, 22 Sup. Ct. 515, 516 (46 L. Ed. 697), in discussing the rights of a foreign state to tax the personal property of nonresidents:

"It is still the law that personal property is sold, transmitted, bequeathed by will, and is descendible by inheritance according to the law of the domicile, and not by that of its situs."

In *Cross v. United States Trust Co.*, 131 N. Y. 330, 30 N. E. 125, 15 L. R. A. 606, 27 Am. St. Rep. 597, the court said:

"It is a general and universal rule that personal property has no locality. It is subject to the law of the owner's domicile, as well in respect to a disposition of it by act inter vivos as to its transmission by last will and testament, and by succession upon the owner dying intestate."

In *Fellows v. Miner*, 119 Mass. 541, 544, Gray, C. J., says:

"But, the testator's domicile being in this commonwealth, the question of the validity of his disposition of his personal property, though to be executed elsewhere, is to be determined by the law of Massachusetts."

[3] The testatrix is presumed to have made her will in accordance with the existing laws of this state. *Missionary Society v. Pell*, 14 R. I. 456.

[4-6] In *Kingsbury v. Bazeley*, 75 N. H. 13, 70 Atl. 916, 139 Am. St. Rep. 664, 20 Ann. Cas. 1355, the court said:

"In a gift of a pecuniary legacy of a certain amount, the apparent intention is to benefit the legatee to the full amount named. If such will is to be administered by the law of a jurisdiction imposing no inheritance tax, or none upon the class to which the legatee belongs, the purpose to transmit the full amount to such legatee would seem clear when the will is read in the light of the law by which it is to be given effect. The conclusion that a less sum was intended, because at the time of the testator's death some portion of his property happened to be within a jurisdiction imposing a tax upon such a transfer, seems strange and illogical."

In *Re Hartmann's Estate*, 70 N. J. Eq. 664, 667, 62 Atl. 560, 562, the court, in discussing the right both of the state of the domicile and the state where the property is located, says:

"The great weight of authority favors the principle \* \* \* that as to personal property its situs, for the purpose of a succession tax, is the domicile of the decedent, and the right to its imposition is not affected by the statute of a foreign state, which subjects to similar taxation such portion of the personal estate of any nonresident testator as he may take and leave there for safekeeping, or until it should suit his convenience to carry it away."

If it be true that such taxation by a foreign state is immaterial when the law of the state of the domicile also imposes such a tax, it must be equally true when the state

of the domicile has no statute imposing such a tax.

In *Callahan v. Woodbridge*, 171 Mass. 595, 597, 51 N. E. 176, 177, the court says:

"The legal right of the Legislature to make such a provision in regard to the property of a nonresident owner rests upon the fact that the property is within the state, and subject to its jurisdiction. \* \* \* It covers the property within the jurisdiction. A ground for its exercise is that the property has the protection of our laws, and that our laws are invoked for the administration of it when a change of ownership is to be effected."

As is stated in *Kingsbury v. Bazeley*, supra:

"As the foreign tax depends upon the jurisdiction over the property, and is not sustainable as a regulation of the exercise of testamentary power by a citizen of another state, it follows that the tax is merely a charge upon the particular property, and not upon pecuniary legacies given by the will."

The only reason therefore for the executors paying the tax was the necessity of getting control of the property. Under the common law such a charge was proper as an expense of administration.

In *Perry v. Meadowcroft*, 4 Beav. 204, the executors had incurred costs, charges, and expenses in getting in some costs due to the testator, and which had been specifically bequeathed. The executors presented a petition for reference to inquire whether they had properly incurred any costs, charges, and expenses in respect of these matters; and the question was whether these expenses ought to be borne by the general estate, or by the specific legatee out of his legacy. The Master of the Rolls said:

"I consider it part of the duty of the executors to get in all the testator's estate, whether specifically bequeathed or otherwise; and I know of no instance in which the expenses have not been paid out of the general estate, as part of the expenses of administration."

It is the ordinary duty of an executor or administrator to collect and get in the assets of the estate. *Grinnell v. Baker*, 17 R. I. 41, 49, 20 Atl. 8, 23 Atl. 911; *Hendrick v. Probate Court*, 25 R. I. 361, 368, 55 Atl. 881. The gift of a residue is subject to the precedent claims upon the estate. It is a gift of what remains after the debts and legacies are paid. *Petition of Mathewson*, 12 R. I. 145; *Nickerson v. Bragg*, 21 R. I. 296, 298, 43 Atl. 539.

The only case directly in point upon the question presented that has come to our attention is *Kingsbury v. Bazeley*, 75 N. H. 13, 70 Atl. 916, 139 Am. St. Rep. 664, 20 Ann. Cas. 1355, supra. That case covers practically the same question as here. There the testatrix was a domiciled resident of New Hampshire, which had a 5 per cent. collateral inheritance tax. The will provided:

"And I further direct that my executors pay from my estate any and all inheritance and succession taxes that may become due upon any legacies given by this will to individuals, so that said legatees may be benefited to the full amount of their respective legacies."

Part of the estate was money or personal property in Massachusetts which it was nec-

essary to get in order to pay the legacies, and upon which there was a tax of 5 per cent. The question arose as to whether this tax was to be deducted from a pecuniary legacy (which was not given to an individual and did not come within the provisions of the will as to payment of inheritance taxes), or whether it was a proper charge against the estate. The court, on the ground that this matter was regulated purely on the basis of the domicile of the testator, held that the amount could not be deducted from the legacies. At page 17 of 75 N. H., at page 918 of 70 Atl. (139 Am. St. Rep. 664, 20 Ann. Cas. 1355), the court, Parsons, C. J., says:

"In a gift of a pecuniary legacy of a certain amount, the apparent intention is to benefit the legatee to the full amount named. If such will is to be administered by the law of a jurisdiction imposing no inheritance tax, or none upon the class to which the legatee belongs, the purpose to transmit the full amount to such legatee would seem clear, when the will is read in the light of the law by which it is to be given effect. The conclusion that a less sum was intended, because at the time of the testator's death some portion of his property happened to be within a jurisdiction imposing a tax upon such a transfer, seems strained and illogical. The sole ground upon which the collection of such tax by the state of the locus of the property, when different from that of the testator's domicile, can be sustained is the jurisdiction over the property which is given by its situs. *Gardiner v. Carter*, 74 N. H. 507, 66 Atl. 939; *Callahan v. Woodbridge*, 171 Mass. 595, 597, 51 N. E. 176. To hold that the effect of the foreign law is to reduce the legacy given by the will construed in accordance with the law of the testator's domicile is to permit the foreign law to regulate the testamentary capacity of a citizen of this state. But the foreign law cannot extend beyond the jurisdiction which created it. If the rights in controversy depend upon the foreign law, those rights are determined in accordance with that law. *MacDonald v. Railway*, 71 N. H. 448, 52 Atl. 982, 59 L. R. A. 448, 93 Am. St. Rep. 550. But when the right involved depends, not upon the foreign law, but upon that of the forum, the foreign law is immaterial and incompetent upon the question at issue. 'It is obvious that the state has no jurisdiction over a right of succession which accrues under the law of the foreign state. That is something in which this state has no interest, and with which it is not concerned.' In *re Bronson*, 150 N. Y. 1, 8, 44 N. E. 707, 34 L. R. A. 238, 55 Am. St. Rep. 632.

"As the foreign tax depends upon the jurisdiction over the property, and is not sustainable as a regulation of the exercise of testamentary power by the citizen of another state, it follows that the tax is merely a charge upon the particular property, and not upon pecuniary legacies given by the will. That the foreign state may regulate the amount of the imposition made by it, or determine whether it will make any at all, by the character of the legacies given by the will, is immaterial. Having jurisdiction over the property, it is for such state alone to determine upon what basis it will exact payment. While in giving effect to a foreign will courts are governed by the law of the testator's domicile, it has never been held that in the administration of an estate the courts of the testator's domicile would be governed by the law of the situs of personal property. The estate within the control of the court is to be administered according to the law of the state. The property to be administered embraces all that was originally within the state, or that the executor has been able to find elsewhere and bring here. Whatever sums the executor may be

obliged to pay to bring the property within the state merely reduce the amount within the control of the court."

The reasoning of this case commends itself to us as sound, convincing, and applicable to the case at bar.

*Williams v. Herrick*, 18 R. I. 120, 25 Atl. 1099, cited by appellants, is not in point. In that case a testator gave all his estate, after the payment of debts and funeral expenses, to his widow for life with remainder over. Upon the question of the settlement of the account of the administrator, the court said:

"Although the taxes are payable out of the income, yet inasmuch as the property of the estate is assessable by statute to the administrator (Pub. Stat. R. I. chap. 42, §§ 12, 13), we think that the taxes are properly charged in the administrator's account. When the income is paid to Mrs. Olney it will devolve upon the administrator to see that the taxes and any other expense payable out of income are properly deducted from the income so paid to her."

Appellants also cite *Fitzgerald v. R. I. Hospital Trust Co., Trustee, et al.*, 24 R. I. 59, 52 Atl. 814. In this case a fund was bequeathed in trust to pay over the income less charges to Fitzgerald, and upon his decease the principal of the trust fund was to be disposed of as part of the residue of the estate. War Revenue Act, June 13, 1898, c. 448, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2307) in section 29, made subject to a tax any person having in charge or trust any legacy "where the whole amount of such personal property \* \* \* shall exceed the sum of ten thousand dollars \* \* \* passing after the passage of this act." The court said:

"The main question raised by the pleadings in the case at bar, as we understand them, is, who, for the purpose of the payment of said tax, assessed, as it confessedly was, upon and in respect of the life estate only, is to be regarded as the legatee, the complainant, the life tenant, or the respondents, who are the present living representatives of the contingent remaindermen? We think it is clear that but one answer can properly be given to this question, namely, the life tenant of said fund, who is the complainant in this case."

The court also cites Act of Congress March 2, 1901, c. 806, § 10, 31 Stat. 946 (U. S. Comp. St. 1901, p. 2307), which amends said act of June 13, 1898, and which contains the provision that:

"Any tax paid under the provisions of sections twenty-nine and thirty, shall be deducted from the particular legacy or distributive share on account of which the same is charged."

Counsel for the appellants also cite *Goddard v. Goddard*, 9 R. I. 293. In this case it appeared from the agreed statement of facts that Thomas P. Ives deceased leaving a last will and testament, duly admitted to probate, whereby he devised all his shares in the capital stock of the Lonsdale Company, a corporation, to three cousins, of whom the defendant was one, and to the survivor of them, share and share alike. His executors paid taxes upon these shares to the United States, and this suit was brought to determine the question whether said legacy taxes were properly chargeable to the shares in

the capital stock of the Lonsdale Company, or to the defendant. The statute, approved July 1, 1862 (12 U. S. Stat. at Large, 486, c. 119, § 112), provided for receipts to be given by the collector or deputy collector, upon payment of the duty or tax, which shall be sufficient evidence to entitle the person who paid such duty or tax, as having taken the burden or trust of administering the estate, "to be allowed for such payment by the person or persons entitled to the beneficial interest in respect of which such tax or duty was paid." The statute of 1862 was superseded by a statute approved June 30, 1864, c. 173, 13 Stat. 223 (being the statute under which the duty in question is claimed to have been paid), in which the provision above quoted is omitted. An amendatory statute, approved July 13, 1866, c. 184, 14 Stat. 98, provides that any tax paid under the provisions of the statute of 1864, relating to this subject, "shall be deducted from the particular legacy or distributive share in account of which the same is charged." The court said (page 297 of 9 R. I.):

"The defendant finds in the omission from the statute of 1864 of the words above quoted from the statute of 1862, and in the amendment of 1866, grounds for an argument, that under the statute of 1864, as it existed prior to the amendment of 1866, the legacy duties were a charge upon the estate at large, and payable out of the residue. But we think the omission and the amendment permit no sufficient warrant for such a construction. The omitted provision relates to the credit to be given to the receipt of the collector or deputy collector as evidence in the settlement of the estate, and only incidentally, as it were, indicates that the duties are chargeable to the persons entitled to the beneficial interest in respect of which they were paid, significantly differing, in this respect, from the amendatory provision of the statute of 1866. We see no reason for supposing that the language referred to was omitted from the statute of 1864, in any other view than because it was supposed to be superfluous or undesirable for the purpose for which it was originally introduced. We think that under the statute of 1864, notwithstanding the omission, the duties paid in respect of any particular legacies are, as between the executor and the legatees, in the settlement of the estate, to be deducted from the legacies in respect of which they have been paid, or charged to the legatees, respectively, who are entitled to such legacies, and that the amendment of 1866 was simply declaratory, being designed to obviate any doubt or question in regard to the construction."

In this case the tax was imposed by a statute of the United States. It is not to be doubted that the United States has power to impose a tax upon legacies, given by a domiciled inhabitant in any state or territory, and to provide that the tax shall be deducted from the particular legacy or distributive share on account of which the same is charged. This is a very different matter from the imposition by the statute of one state of a tax upon a legacy given under the laws of a sister state, by the will of a domiciled inhabitant of said sister state. In such case the statute has effect only because certain property of the testator happens, at the time of his death, to be, not within the state of his

domicile, but within the state whose statute imposes the tax.

The tax imposed by the Massachusetts statute depends entirely upon the jurisdiction over the property by reason of its situs within that state. Said statute cannot regulate the exercise of testamentary power by a domiciled inhabitant of another state. The tax, therefore, is simply a charge upon the particular property within the jurisdiction of the state whose statute imposes the tax. That the state where the property is situated can regulate the amount of the tax to be imposed by the character of the gifts made by the will is immaterial. Its statute has no extraterritorial power, and cannot regulate the administration of the estate and the distribution of the property in the state of the testator's domicile.

Our decision is that the amount paid by the executors on account of the inheritance tax imposed by the Massachusetts law, in order to get possession of the assets of the estate, cannot be deducted by the executors from the amount of the pecuniary legacies bequeathed by the testatrix, but that the same is a proper expense of administration, necessarily incurred by the executors in the performance of their duty in collecting and getting in the property belonging to the estate.

The papers in the cause, with our decision certified thereon, are sent back to the superior court for Newport county, with direction to enter a decree dismissing the appeal and confirming the decree of the probate court.

(37 R. L. 227)

CALLAN v. PECK, Town Treasurer.  
(No. 4732.)

(Supreme Court of Rhode Island. July 10, 1914.)

**1. MUNICIPAL CORPORATIONS (§ 374\*)—PUBLIC IMPROVEMENTS—CONTRACTS—REMEDIES OF CONTRACTOR—EVIDENCE.**

In an action against a town treasurer for work and damages caused by the underdrain, with which plaintiff contracted to make a connection, being stopped up and letting out large quantities of water when tapped, a question as to what course plaintiff recommended with reference to the drain he was installing was properly excluded, and his evidence confined to showing that the town's plans were improper.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. § 374.\*]

**2. TRIAL (§ 45\*)—EXCLUSION OF EVIDENCE—OFFER OF PROOF.**

An exception to the exclusion of a question will not avail because the answer would have shown a certain fact, where no offer of proof thereof was made.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 110-114; Dec. Dig. § 45.\*]

**3. MUNICIPAL CORPORATIONS (§ 360\*)—PUBLIC IMPROVEMENTS—CONTRACTS—EXTRA WORK.**

Under a contract with a town to lay sewers in accordance with the plans and directions made and "to be made," and that "new work shall be added when necessary, to leave all in

good working order," and be paid for as extra work if so decided by the engineer, where 240 additional feet of underdrain was found necessary to join the new work to the old and ordered constructed at the same rate, additional work and damage caused by the stoppage of the old drain and its overflowing the new work when tapped were extras within the contract, and had to be allowed by the engineer to be recoverable.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

**4. MUNICIPAL CORPORATIONS (§ 360\*)—PUBLIC IMPROVEMENTS—CONTRACTS—EXTRA WORK.**

Where one who contracted with a town to lay sewers and add new work to existing work when necessary was ordered to construct an additional underdrain necessary to connect with the old work, the construction of the additional drain amounted merely to a modification of the original contract or a new contract on the same terms, and work performed thereon had to be allowed for by the engineer as extra work, as provided by the original contract; the payments for the additional drain having been made at the same rate and in accordance with the same routine as under the original contract, and the parties having treated the additional work the same as that performed under the original contract by deferring to the engineer's supervision, etc.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

**5. MUNICIPAL CORPORATIONS (§ 360\*)—PUBLIC IMPROVEMENTS—CONTRACTS—EXTRA WORK.**

One who agreed to lay an underdrain for a town for a certain price was entitled to no further compensation for work incident thereto, even if such work was much more than he anticipated.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

**6. MUNICIPAL CORPORATIONS (§ 360\*)—PUBLIC IMPROVEMENTS—CONTRACTS—EXTRA WORK.**

One who laid sewers and underdrains for a town, under a contract clearly providing for what and how he should be paid, was strictly limited thereby, and could not recover for pumping, etc., caused by overflow, where the contract provided that he should do all pumping, etc., and that for all work and materials and all loss or damage he should receive only a stated sum.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

**7. MUNICIPAL CORPORATIONS (§ 360\*)—PUBLIC IMPROVEMENTS—CONTRACTS—EXTRA WORK.**

One who contracted to lay sewers for a town could not recover for overflow from an old underdrain to which connection was being made, because of representations that it was a working drain, whereas it was stopped up, where the contract required him to do all pumping, and to accept a certain sum for all work and material, and all loss or damage.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

**8. MUNICIPAL CORPORATIONS (§ 360\*)—PUBLIC IMPROVEMENTS—CONTRACTS—EXTRA WORK.**

No recovery could be had for extra work under a contract with a town for the construc-

tion of sewers, without a written order from the engineer as required by the contract, which provision the engineer could no more waive than any other provision of the contract.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

**9. MUNICIPAL CORPORATIONS (§ 360\*)—PUBLIC IMPROVEMENTS — CONTRACTS — EXTRA WORK.**

Knowledge that unlooked for work was being done by one who contracted to lay sewers for a town did not create a promise to pay therefor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

**10. MUNICIPAL CORPORATIONS (§ 360\*)—PUBLIC IMPROVEMENTS — CONTRACTS — EXTRA WORK.**

A claim for extra work under a contract to lay sewers for a town, even if proper and the engineer's written allowance thereof had been waived, was subject to the conditions of the contract, which provided that the contractor should not be entitled to payment except in the manner therein set forth.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

**11. MUNICIPAL CORPORATIONS (§ 354\*)—PUBLIC IMPROVEMENTS—CONTRACTS—MODIFICATION.**

The laying of an additional underdrain to connect that being laid for a town with the existing drains, by order of the commissioners fixing the price, was a modification or extension of the contract, which provided that additional work should be done when necessary to put the system in working order, though it provided that the engineer should order the same and fix the price, as it was ordered by the commissioners who may have consulted the engineer in fixing the price, and anyhow they could waive such provisions.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 886, 887; Dec. Dig. § 354.\*]

**12. MUNICIPAL CORPORATIONS (§ 360\*)—PUBLIC IMPROVEMENTS — CONTRACTS — EXTRA WORK.**

The construction of an additional underdrain to connect that being laid for a town with the old drains was not outside of the contract, which provided that additional work should be done when necessary, to be paid for as extra work, because it was not an incidental change made necessary during the progress of the work; it having been supposed that such drain was already in the ground, and its absence only being discovered after the work was begun.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

**13. MUNICIPAL CORPORATIONS (§ 360\*)—PUBLIC IMPROVEMENTS — CONTRACTS — EXTRA WORK.**

A provision in a contract with a town for the construction of sewers that the engineer could correct any errors or omissions when necessary to the proper fulfillment of the plans, authorized the ordering of an additional underdrain where it was supposed a connection could be made with the existing drains at a certain point, but it was found necessary to go 240 feet farther.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

**14. MUNICIPAL CORPORATIONS (§ 354\*)—PUBLIC IMPROVEMENTS—CONTRACTS—MISREPRESENTATION—RESCISSION.**

While one could rescind his contract to construct sewers for a town and sue on a quantum meruit or ratify the contract and sue in deceit for damages, if there had been a fraudulent representation that the old underdrain which overflowed the new work when it was tapped was a working underdrain, whereas it was stopped up, he could not rescind, where misrepresentations made were innocent.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 886, 887; Dec. Dig. § 354.\*]

**15. ASSUMPSIT, ACTION OF (§ 5\*) — MUNICIPAL CORPORATION — DEFECTS IN DRAINS — DAMAGES — NATURE OF REMEDY — COMMON COUNTS.**

The wrongful act of a town in opening up a clogged underdrain and pouring water in upon new work which was being constructed to connect with such drain would not render the town liable on the common counts in assumpsit on an implied contract to pay for pumping the water out and the damages resulting from letting it in; the remedy, if any, being in tort.

[Ed. Note.—For other cases, see *Assumpsit, Action of*, Cent. Dig. §§ 14-26; Dec. Dig. § 5.\*]

Exceptions from Superior Court, Providence and Bristol Counties; Chester W. Barrows, Judge.

Action by Luke H. Callan against George H. Peck, as Town Treasurer of the town of Bristol. Nonsuit granted, and case transferred from the superior court on plaintiff's exceptions. Exceptions overruled, and case remitted for entry of judgment.

A. B. Crafts and William H. McSoley, both of Providence, for plaintiff. William T. O'Donnell, of Bristol, and Waterman & Greenlaw, of Providence, for defendant.

JOHNSON, C. J. This is an action of the case in assumpsit brought by Luke H. Callan, of Bristol, against the defendant, as town treasurer of the town of Bristol. The declaration contains a count on book account and certain common counts. No book account was introduced in evidence, but there was introduced in evidence a certain contract made by and between the plaintiff and the town of Bristol, and a notice to the town council relating to the claim that the plaintiff then made. The case was tried before his honor, Mr. Justice Barrows, and a jury on the 3d, 4th, and 5th days of December, 1913, and, the justice presiding having ruled out certain testimony, the plaintiff rested his case, and a nonsuit was thereupon granted. Thereafterwards he took the usual procedure to bring before this court certain exceptions, and he is now before this court upon his bill of exceptions as allowed by the trial justice.

From an examination of the bill of exceptions we think that most of the exceptions can be eliminated for the purposes of this hearing, as they do not affect the question as to whether or not the nonsuit was properly granted.

[1] The first exception, shown on page 126 of the transcript, related to the ruling out of the following question: "Q. Did you recommend any course?" The plaintiff had testified that the purpose of the verbal contract for the putting in of 240 feet of pipe on Woodlawn avenue, to connect with the underdrain on Wood street, was "so as to take the water away from my trench and drain the soil, the land, as the new work was constructed." Asked if that method was recommended by him or by somebody else, he answered: "Not by me." He was then asked the question to the exclusion of which the exception was taken. It seems to us that the question was properly ruled out for the reason stated by the trial judge:

"The Court: It seems to me his evidence should be confined to showing the plans they adopted were not proper, then, Mr. Crafts. That does not involve saying he had some other plans which were better. His testimony must be limited to showing these plans were not proper."

Moreover, the plaintiff later testified that he wanted to wait until he had completed his system before putting in the underdrain, but they decided that it would better be done then.

[2] The plaintiff claims that the answer to this question would have shown that the plaintiff had another method in view as a substitute for the underdrain, viz., the digging of a trench southerly from Woodlawn avenue onto private property by permission and then pumping accumulating water into the brook. He, however, made no such offer of proof, and hence this will not avail him.

In *O'Malley v. Commonwealth*, 182 Mass. 196, 65 N. E. 30, the court held that:

"In order to sustain an exception to the exclusion of a question to a witness, it must appear what the excepting party expected to prove by the answer, and that he was harmed by the exclusion."

See, also, *Farnum v. Pitcher*, 151 Mass. 470, at page 475, 24 N. E. 590; *Carpenter v. Willey*, 65 Vt. 168, 26 Atl. 488; *Gage v. Trawick*, 94 Mo. App. 307, 68 S. W. 88; *Loker v. S. Mo. Elec. Ry. Co.*, 94 Mo. App. 481, 68 S. W. 373; *Greever v. Bank*, 99 Va. 547, 39 S. E. 159.

As to the second exception, if the nonsuit was properly granted, the question that was ruled out, to which the exception was taken, would be immaterial. The question refers to the extra time taken doing the work, and could only be material on the question of damages.

The offer of proof which is the subject-matter of the third exception relates to the same matter as the question which is the subject-matter of the second exception.

The fourth exception relates to conversations with the commissioners, or members of the commission, or the assistant engineers representing Mr. Gray. If the nonsuit was properly granted, this would have no bearing upon the case.

The offer of proof that is the subject-matter of the fifth exception relates to the question of damages and to like conversations as are referred to in the question that is the subject-matter of the fourth exception.

The offer of proof that is the subject-matter of the sixth exception is that the defendant's representatives, the sewer commission and the engineer, were at fault and responsible for turning this water onto them; that they turned the water onto them, and that necessitated a lot of extra work for which they claim compensation, and that they knew that they were doing this work, and that they should claim extra compensation, but that they never agreed to pay compensation. If the nonsuit was proper, this offer of proof was properly rejected.

[3] The seventh exception is the real basis of this proceeding, and that relates to the granting of the defendant's motion for a nonsuit.

The facts of the case are, in brief, as follows: The plaintiff entered into a written contract with the town of Bristol to do certain construction work in connection with building sewers and their appurtenances. Prior to submitting his bid, he was shown a certain plan, showing an existing and proposed sewerage system in the town of Bristol, and upon that plan there appeared to be an underdrain upon Woodlawn avenue which communicated with an underdrain on Wood street. An underdrain is a drain underneath the sewer proper. It is a sort of an open or porous drain. The pipes are left open and porous at the joints, so that water can get in from the surrounding soil. Sometimes they are of tile drain, so that water can get in all the way. It is simply a drain to assist in caring for the water that is in the ground through and along which the underdrain runs.

The sewer and underdrain appurtenant thereto that Mr. Callan was to construct was to have started at Woodlawn avenue about 240 feet from Wood street, and the underdrain was to have been connected with an underdrain that was supposed to be there, running to and connecting with an underdrain on Wood street, and the sewer was to have run in a general northerly direction, with branches leading into different cross streets. When the plaintiff dug down to start the sewer and the underdrain connected therewith, he did not find any underdrain on Woodlawn avenue. The matter was then taken up with the commission, and the commission decided, in order to complete that part of the sewerage system, to have the plaintiff put in an extra 240 feet of underdrain on Woodlawn avenue, which was the only additional amount that was required to connect with Wood street, the price to be paid being the same as the price paid for the rest of the work. The underdrain on Woodlawn avenue was to be connected with the main underdrain on Wood street.



The claim on behalf of the plaintiff, in the beginning, was that he was misled by a material, though innocent, misrepresentation as to the existence of this underdrain on Woodlawn avenue. This claim was later abandoned, and it was admitted that, while there was a misrepresentation as to the existence of an underdrain on Woodlawn avenue, it was not a material one, and had no effect whatsoever upon his work, except to cause the construction of an extra 240 feet, and did not give rise to his present claim. It simply resulted in his having to build an extra section of sewer for which he received compensation.

When the plaintiff opened up the underdrain on Wood street to make a connection with the new underdrain that he had constructed on Woodlawn avenue, a stream of water gushed out. He claims that he was told that the underdrain on Wood street was a working underdrain, and that the fact that this stream of water gushed out and continued to come from that underdrain for a considerable period of time showed that it was clogged up, and hence it was not a working underdrain. It is for the work done in pumping out the water which came from this Wood street underdrain and for incidental damages due to the water coming into the trench that he was digging and had dug on Woodlawn avenue and that he was digging and had dug on the rest of the system included in the original contract that he seeks to recover in this proceeding, claiming that, to entitle him to recover, he is not obliged to have the same allowed by the engineer as extras.

The defendant, on the other hand, claims that, to entitle the plaintiff to recover, he is obliged to have the same allowed by the engineer as extras, and this is the real specific question raised in this case, and a subordinate question is as to whether, if this is not included in the term "extras," as provided in the contract, and the plaintiff merely claims, as he does, that he was damaged by the town dumping a lot of water upon him, he can recover against the town in an action of assumpsit, or whether he must seek to recover against the town for a tort.

The plaintiff, in order to maintain his contention that the pumping referred to in his bill was not included in the contract, and was not to be considered under the head of extras in the contract, maintains that the underdrain on Woodlawn avenue had nothing whatsoever to do with the contract, and hence that the pumping was not required in connection with anything that he was doing under the contract.

One of the main items of damages for which the plaintiff seeks to recover on account of this water coming in upon him is for delay to the work that he was required to do under the contract itself. The defendant claims that, while the underdrain on Woodlawn avenue was not originally expressly re-

ferred to in the contract, yet it was such work as was impliedly required by the contract, as, under the contract, Mr. Callan agreed to "do and perform all the work, and furnish all tools, implements, and materials, which may be required for the construction of sewer and appurtenances, in accordance with the specifications herein contained, and in accordance with the plans and directions made and to be made from time to time as the work proceeds."

If there was no underdrain along this short stretch of 240 feet, there would not be a complete sewer system. To provide for the changes or alterations or extensions that might have to be made, this provision with reference to the work being done, not only "in accordance with the plans and directions made," but also in accordance with the plans and directions "to be made," was put in. Further, under the head of "Additional Work," etc., there is the following provision:

"If so directed by the engineer, the location of any existing work shall be changed to meet the requirements of the sewers or appurtenances, and new work shall be added when necessary, to leave all in good working order. Any changes or new work above indicated are to be paid for as extra work, solely on the valuation of the engineer, but depending on his decision whether the work done is, or is not, included in the work required of the contractor under this contract."

The plaintiff claims that this provision as to new work refers to new work added to existing work that has to be changed to meet the requirements of the sewers or appurtenances. The provision, however, says: "And new work shall be added when necessary, to leave all in good working order."

Further, this underdrain on Woodlawn avenue could be considered as added to existing work, whether it is considered that the new underdrain was extended down Woodlawn avenue to Wood street, or from the old underdrain on Wood street to the new underdrain that was to commence at the point originally designated on Woodlawn avenue. That would be adding new work to existing work where it was "necessary, to leave all in good working order," and such new work was "to be paid for as extra work, solely on the valuation of the engineer, but depending upon his decision as to whether the work done is or is not included in the work required by the contractor under this contract."

It seems that the underdrain on Woodlawn avenue was reasonably necessary and incidental to the original contract, and this seems to have been the idea of the plaintiff's attorney at the time of the trial. At that time he said:

"In the first place there was no sewer constructed upon Woodlawn avenue unless it connected with something. He wouldn't construct a sewer there, beginning without any connection and pumping a lot of water into Woodlawn avenue. It presupposes on the very face of it that he connected there at Woodlawn avenue with some other drain. \* \* \*"

[4] It seems, therefore, that, under this agreement, the additional work required to be done on Woodlawn avenue, was included in the contract, which, as we have seen, provided that "new work shall be added when necessary, to leave all in good working order." But, even if it was not comprehended in the original contract and was later ordered to be added, we think, as was ruled by the presiding justice, that the doing of this work amounted merely to a modification of the original contract in this respect, and that, in all other respects, the contract remained in full force. The witness received for this work 65 cents a foot, the same price that he had bid for eight-inch pipe sewer. He got his pay for this work in the regular routine; that is, from the town treasurer. It came along with the payments on the rest of the job, in the regular routine of payments on the contract. This work on Woodlawn avenue he apparently did under the supervision of the engineer or his assistant. He himself says that when the water came out upon him at Wood street he complained to Mr. Craig, the representative on the work. Mr. Craig was the assistant of Mr. Gray. His offer to show that the assistant engineers representing Mr. Gray knew about the water coming in upon him and its effect upon the work, and his conversations with them about it, appear to indicate that this Woodlawn avenue job came within the purview of the original contract, and was so understood and treated by Mr. Callan. That it was not necessary as a temporary device during the work, but was necessary as a permanent structure to complete the system, is shown by the testimony on page 127 of the transcript, where the plaintiff said he wanted to wait until he had finished his job and completed his system before he put in that connection. Clearly, therefore, this connection was necessary in order, in the words of the contract, "to leave all in good working order." The contract as made must, we think, be considered a modification of the original contract, to the extent of adding 240 feet of construction, or, if considered a new contract, it was a new contract under the same terms and conditions as the original contract. That it was so understood by the parties appears from their procedure thereunder.

The claim presented to the town of Bristol and attached to the declaration, and which must have been presented to have permitted the plaintiff to have brought this suit, was introduced in evidence. The claim states that the plaintiff "by contract with the sewer commissioners, and by contract with said town of Bristol," had done certain extra work and been put to extra expense outside of the plans and specifications, and that he presents the following therefor. The bill refers to "extra work done in connection with the construction of the East Side sewer system," and starts off as follows:

"Work done on Woodlawn avenue where an underdrain was on top of pipe so that connection could not be made."

The items of the first 3 days of the bill refer to that work. On the third day, the 9th of November, he dug the outlet on Wood street. This corresponds with his testimony that it took 2½ or 3 days to dig the trench on Woodlawn avenue.

Plaintiff argues, however, that he did not mean to use the words "extra work" in their ordinary, technical significance. The contract provided:

"Any changes or new work above indicated are to be paid for as extra work."

The plaintiff used exactly the same words, "extra work," although in his bill a number of extra materials are included. He includes in his bill a large number of items which relate clearly to "extra work" within the meaning of the contract, and these items were allowed by the engineer and paid.

The contract provides:

"All disputes in relation to execution, construction, or completion of the work, or the quality or quantity of work or materials, or to the interpretation of the plans or specifications bearing on the work, shall be submitted to the engineer, whose decision on all points of dispute will be final, and not subject to review; and he shall have the right to correct any errors or omissions therein, when such corrections are necessary to the proper fulfillment of the intention of said specifications or plans, the action of such correction to date from the time that the engineer gives due notice thereof."

Again it is provided:

"And the contractor hereby further agrees that no claims for extra work shall be made unless the same shall be done in pursuance of a written order from the engineer."

There is some question as to whether this work on Woodlawn avenue had to be ordered by the engineer in writing, if such writing had not been waived by the commission. Such new work was to be paid for as extra work, but whether it had to be ordered in writing as other extra work is not clear. But whether it had to be ordered in writing, or was new work under the contract, or extra or additional work under a modified contract, is immaterial, as the work has been done and paid for and the determination of this question does not affect the right to recover in this case.

There is also the following provision:

"It is hereby mutually agreed by the parties to this contract that the value of any such extra work so claimed (that is, extra work done pursuant to a written order of the engineer) is to be determined by the engineer, and that his decision thereon shall be final and binding upon both parties."

And again the contract sets forth fully when and how and under what circumstances the final payments should be made, and then provides as follows:

"And the said contractor hereby further agrees that he shall not be entitled to demand or receive payment for any portion of the aforesaid work, except in the manner set forth in this agreement."

[5, 6] The evidence shows that Mr. Gray allowed Mr. Callan all the extras that he thought he was entitled to, and that everything that he allowed has been paid. Even if this was entirely outside of, and independent of, the contract, this would not permit the plaintiff to recover in this case. He agreed to lay the underdrain on Woodlawn avenue for a certain price, and, unless this was made subject to the written contract, he was entitled to no further compensation for work incident thereto, even if such work was much more than he had anticipated. 30 Am. & Eng. Encyc. of Law (2d Ed.) 1279, 1280. If the work on Woodlawn avenue was within the contract, or within the contract as modified, or extra work under the contract, he could not recover in this proceeding; for not only does the contract not provide for such recovery, but it expressly forbids it. Under the contract the contractor is "to do all pumping," etc.

There is also in the contract the following provision:

"And the contractor hereby further agrees to receive the following prices in full for furnishing all materials, whether enumerated or not, and all labor required in the aforesaid work; also for all loss or damage arising out of the nature of the work aforesaid, or from the action of the elements, or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the same. \* \* \* and for well and faithfully completing the same and the whole thereof in the manner and according to the plans and specifications and requirements of the engineer under them."

There is also a provision for monthly estimates. The contract clearly provides for what and how the contractor should be paid and he is limited strictly to such recovery. In *Lee v. Brayton*, 18 R. I. 233, 26 Atl. 256, the court said:

"The respondent concedes that the petitioner is entitled to a lien for the \$325, the last installment of the contract price, but contends that the blasting of rock and the other items charged in the account for labor and materials were extra work, and therefore that the petitioner is not entitled to a lien therefor, because clause 13 of the contract provides that no claim shall be made for extra work, unless the same shall have been done in fulfillment of a written order from the architect, and also such claims shall be made in writing to the architect, and, if allowed by him, shall be approved and indorsed on the contract after the next ensuing payment, and that no such indorsement appears on the contract. We are of the opinion that the blasting of rock, being particularly mentioned in the specifications accompanying the contract, is to be regarded as work done under the contract, and not as extra work, within the meaning of clause 13. It was work provided for in the contract and necessary for the completion of the house in accordance with it, since the drains mentioned in the specifications could not be excavated without the blasting and removal of the rock. It is true that the amount to be paid for it was extra, outside of or in addition to the price to be paid for the other work; doubtless because it could not be known until the excavation had been made how much blasting was necessary, or how expensive it would be; and therefore no estimate of its cost could be made beforehand; but the fact that the cost of it was thus left indeterminate, and was to be paid in addition to the price for

the other work, did not render it extra work, for, as we have said, the written contract provided by necessary implication that it should be done."

The fact that it was stated that the underdrain on Wood street was a working underdrain would not authorize recovery.

As to the existence of an underdrain on Woodlawn avenue, the plaintiff admits that the only way he was misled was by seeing a representation of such an underdrain on a plan that was shown him and that he was not misled in anything that was material; in other words, whatever misrepresentation there was was not a material misrepresentation. It is not claimed that there was any fraud in this respect. It is merely claimed that the exhibition of this plan constituted an innocent misrepresentation of a fact which turned out not to have been material. This plan was not one of the plans referred to in, and made a part of, the contract, but was merely a plan of the whole Bristol sewer system. It was not one of the plans referred to in the "Notice to Contractors" as being able to be seen "at office of the commission, or at the office of the consulting engineer."

In this connection it is to be noted that:

The "estimated quantities are approximate only, and the said commission therefore expressly reserves the right of increasing or diminishing the same, as may be necessary in the judgment of the engineer."

So far as this contract is concerned, the plan does not enter into it, and has nothing to do with it.

[7] As to the statement alleged to have been made that there was a working underdrain on Wood street, it is not claimed that that was fraudulently made, but it is claimed that it was a misrepresentation, because when the underdrain was opened some time afterwards it is claimed that it was in some way clogged up. It is not clear that there was even a misrepresentation in this connection. Assuming that it was stated that this was a working underdrain, there was certainly no guaranty that it should not be filled with water at any particular point on account of the large amount of moisture in the ground and the large flow of water rendering it impossible to take care of the water fast enough. Such a drain, which is more or less open and porous, is merely to assist in caring for the moisture in the ground, and, on account of its porous nature, is very apt to have dirt or sand washed into it. It might well have been "working" when the statement was made, and thereafterwards become clogged up or filled up. There is no evidence as to what stopped it up, if it was stopped up, nor as to how long it had been stopped up. Even if there was a misrepresentation of an underdrain, this would not permit the plaintiff to recover. In *Cunningham v. City of New York*, 39 Misc. Rep. 197, 79 N. Y. Supp. 401, the plan of a sewer which the plaintiff was to construct had on

it lines which showed an existing sewer which would have furnished drainage during the progress of the plaintiff's work, and with which sewer the sewer that was to be constructed by the plaintiff was to connect, and both plaintiff and defendant entered into the contract in contemplation of that fact. There was an intervening building which the city was to remove, but had not removed; and hence the plaintiff was required to commence at another point than the connection with that sewer. He completed his contract and received his pay therefor, and then brought suit to recover damages for extra work in pumping and other respects, but recovery was denied him, the court saying:

"The contract is in writing. Its terms are clear and unambiguous, and, so far as I have been able to discover, it contains no reference to any existing sewer, and makes no provision for any outlet for water in the excavation during the progress of the work, excepting the marks or lines upon the plan which are said to show the existence of a sewer in Lafontaine avenue; but I doubt very much whether the designation of such a sewer upon a plan could overcome the plain language of the contract. *Dean v. City of New York*, 167 N. Y. 13, 60 N. E. 236."

In *Stuart v. Cambridge*, 125 Mass. 109, the plaintiff was to dig to any depth necessary to secure a solid foundation. It developed that they had to drive piles to secure such foundation. The court said:

"The evidence offered by the plaintiffs, that they made their estimate according to a plan made by the defendant's architect, showing a section of the wall which required only a depth of 14 inches, and did not require any piles, and that it was customary for other persons \* \* \* to make estimates in similar cases in the same manner, was incompetent, because it tended to control and vary the written contract."

Evidence that the architect told plaintiff to go ahead was held to be inadmissible because:

"The written contract carefully provides that any additions to or deviations from the plans and specifications shall be directed in writing by the committee or architect, and that 'it is expressly agreed that no alterations or additions are to be paid for unless so directed in writing.' \* \* \* This clause was intended to protect the defendant against claims for extra work under alleged oral directions or contracts."

In *Thileman v. City of New York*, 82 App. Div. 136, 81 N. Y. Supp. 773, there was no sewer at the place indicated on the map. It was provided that the contractor should, at his own expense, keep all the trenches free from water. Had there been a sewer available, expensive pumping would have been avoided. The plaintiff sought to recover for this pumping. The court said that "the city entered into no contract, express or implied, that it would supply a sewer that would drain off the water, but, on the contrary, the contractor agreed to supply the necessary pumps and facilities for that purpose," and denied recovery.

[8] The plaintiff is not entitled to recover

for the pumping as the pumping out of water from whatever source it came was a part and parcel of his original contract, or, if there was an entirely new and independent contract, then it was a contract to do certain work for certain compensation, and there was no provision for extra compensation if the work turned out to be greater than anticipated. If more work was involved for any reason than he expected, and that was properly chargeable against the town, he would have to recover for it as "extra work" after it had been allowed by the engineer. But the contract provides:

"That no claims for extra work shall be made unless the same shall be done in pursuance of a written order from the engineer."

Under these circumstances, without such written order no recovery can be had. *Stuart v. City of Cambridge*, 125 Mass. 102; *City of Hutchinson v. White*, 80 Kan. 37, 101 Pac. 458, at page 459. Nor can the engineer waive any of the provisions of the contract. *Stuart v. City of Cambridge*, supra; *Cashman v. City of Boston*, 190 Mass. 215, 76 N. E. 671.

In *Molloy v. Village of Briarcliff Manor*, 145 App. Div. 483, 491, 129 N. Y. Supp. 929, at page 936, the court said with reference to a similar provision as to extra work:

"Concededly no written orders were given for this particular work, and there is no proof of any waiver by the defendant. A provision of this kind cannot be waived by the engineer."

[9, 10] The plaintiff offered to show that the inspector or assistant engineers knew about the extra work he was doing, and he notified them that he should demand extra compensation. The duties of the assistant engineers were limited to the particular duties intrusted to them, and not even the engineer himself could waive any of the provisions of the contract. See cases cited supra. Knowledge that the work was being done will not create a promise to pay. *Beattie et al. v. McMullen et al.*, 82 Conn. 484, 74 Atl. 767, at page 773; *Harrison Granite Co. v. Stephens*, 160 Mich. 51, 125 N. W. 36; *James Reilly Co. v. Smith*, 177 Fed. 168, 100 C. C. A. 630. But even if he was entitled to recover for pumping as extra work, and there was a waiver of the order in writing, his claim for extra work was, as the court said, subject to all the conditions of the original contract. *Beattie et al. v. McMullen et al.*, 82 Conn. 484, 74 Atl. 767, at page 773. In this case the plaintiff "agrees that he shall not be entitled to demand or receive payment for any portion of the aforesaid work, except in the manner set forth in this agreement."

[11] The plaintiff in his brief claims that:

"The parties saw fit to treat it [the work on Woodlawn avenue] as entirely outside of the written contract, as shown by the fact that it was not ordered in writing or otherwise by the engineer, was not submitted to him by either the commissioners or the plaintiff for his allowance, that it was paid in violation of all the provisions of said contract as to ordering, al-

lowing and paying. No percentage of this contract was withheld for a certain time, as required by the main contract," etc.

That the Woodlawn avenue extension was not ordered by the engineer in writing is true, but it was ordered by the commission, and was new work necessary to put the system in working order, and hence was to be treated as an extra or as a modification or extension of the existing contract.

It is true there is testimony that the plaintiff agreed upon a certain price with the commission, but there is no testimony that the commission did not consult Mr. Gray, and that Mr. Gray did not fix the price. But, if he didn't, the commission could waive that provision. But in every other detail the original contract was followed literally. Mr. Callan never rendered any bill for it, but received his pay in the regular routine; i. e., it came along with the payments on the rest of the job, on the contract. As the trial justice said:

"The evidence has shown on Mr. Callan's testimony that he got his payments along in regular course, including payments for some of these items which now appear in his declaration under what counsel have referred to as a bill of particulars."

[12] The plaintiff claims in his brief that the construction of this 240 feet of underdrain was not an incidental change made necessary in the progress of the work; that it was necessary before the work commenced and at the place of beginning.

We do not think it has to be an incidental change made necessary during the progress of the work. As a matter of fact, it appears that the necessity for it was discovered after the work was begun. The plaintiff was required to make a sewer in accordance with plans and directions made and to be made from time to time. The contract also provided that new work should be added, when necessary, to leave all in good working order. This work was added to the work originally specified, and the plaintiff was bound, under his contract, to do that work. It is not necessary to bring this within the clause that the engineer might make any changes in the forms, dimensions, grades, alignments, or materials of the work, provided such changes do not materially affect the amount or value of the work to be done, but, if it was necessary to do this, that clause is broad enough to cover this work. The failure to get the engineer's written order, unless waived by the commission, would merely prevent the plaintiff's recovery.

We think, however, that the other portions of the contract are the portions that authorize this change, and, even if it did not come within any provision of the contract, that the contract was so modified as to include the additional work.

[13] Plaintiff further says that it was not a dispute in relation to execution, construction, or completion of the work, or a dispute as to the quality or quantity of work or ma-

terials, or to the interpretation of the plans or specifications bearing on the work, to be submitted under the contract to the engineer, but he fails to note in that paragraph the provision:

"And he [the engineer] shall have the right to correct any errors or omissions therein when such corrections are necessary to the proper fulfillment of the intention of said specifications or plans, the action of such corrections to date from the time the engineer gives due notice thereof."

He claims, as the contract merely covers a sewer running northerly from Woodlawn avenue, that the plans cannot be corrected so as to include a sewer or underdrain on Woodlawn avenue to Wood street. If the purpose of the contract was merely to have a disconnected portion of a sewer, there might possibly be some foundation for his argument, but to have a piece of a sewer, without any outlet, or to have several disconnected underdrains, cannot be conceived of as being within the understanding of the parties. The purpose of the contract was to have a sewerage system for the town of Bristol, not to have several disconnected sewers or several disconnected underdrains, and consequently, when it was found that there was no connection at the point where it was supposed there was a connection, a short amount of extra pipe had to be added to make that connection. It is not like adding a dozen or more side streets. While Woodlawn avenue is a side street, it furnished the only connection that there was between that portion of the sewer that Mr. Callan was building and Wood street. That section of the sewer needed an outlet onto Wood street, and so that was a part of the work that was necessary. If there was any dispute as to the necessity for that, that was for the engineer to pass upon.

The provision as to the order for extra work being in writing, may, of course, be waived by the commission. Furthermore, it is provided that new work was to be added, when necessary, to leave all in good working order, and therefore such new work is not required to be in writing, but the new work is to be paid for as extra work. The commission ordered the new work, and it would have to be paid for in that way, unless that provision of the contract was waived. He says that the price agreed upon for the laying of the pipe was the same as for laying other similar pipe. If that was so, there would not have to be a special valuation by the engineer, but the contract would be modified to that extent. That it was treated as in the nature of extra work is shown by the bill rendered, which includes work done on Woodlawn avenue, three days' digging of the trench, and other things of that nature.

It is clear that that agreement simply affected changes that were made in the contract, and nothing else. For eight-inch underdrains, he was to get 30 cents per linear foot, but he was authorized to put in an

eight-inch sewer pipe to be used as an underdrain, and for this he was to get the price of that; namely, 65 cents a foot. All the other charges and provisions were to be the same as in the old contract, and consequently no changes had to be made. Assuming that it was a new contract, and was made such by the parties, instead of its being ordered as extra work by the engineer, that would not prevent it from being merely a modification of the original contract and being subject to all the terms and provisions of the original contract, and to make that change would not require any authorization in the contract, although such authorization is contained therein. But any contract can be modified by mutual agreement of the parties.

The plaintiff says that the provision that the engineer shall have the right to correct any errors or omissions therein when such corrections are necessary to the proper fulfillment of the intention of said specifications or plans does not apply, because here the intention was to build a sewer northerly.

But it was also the intention to have that sewer and the underdrain connected with the main sewer on Wood street, running from north to south, but flowing southerly. It was supposed that this connection could be made where this sewer, running northerly, struck Woodlawn avenue. It was found out that this was an error, and that the sewer and its underdrain would have to be continued 240 feet to the corner of Wood street and Woodlawn avenue to make this connection.

Plaintiff attempts to make the situation as if the commission had employed a third person to dig the underdrain to Wood street, and, as a result, the water had been turned upon the plaintiff. If such a thing as that had occurred, and there was a provision in the contract for the payment of any extra work that was necessitated in the doing of the work, and that payments should only be made in one way, that would be the limit of the plaintiff's right to recover, and, if it was not the limit of his right to recover, then he would have to recover as for a tort rather than upon an implied contract.

In this case plaintiff seeks to recover the entire amount authorized by the contract and its amendment or modification, besides all extras that the engineer will allow, and then bring suit for such work as the engineer refuses to allow. The plaintiff admits that he went on with the work under the immediate supervision of the engineer and his assistants and of the commission. If he did not consider that this work was included in some way under the written contract, why did he go on with the work under the supervision of the engineer and his assistants?

The authority of the engineer and his assistants was fixed and limited by the contract.

The court did not grant a nonsuit because the plaintiff failed to submit his extra charges to the engineer, but because, in the court's opinion, he was at all times acting under the original contract, as modified, and his claim for extra work was subject to all the conditions of that original contract; namely, approval by the engineer of the doing of the work, fixing of the price by the engineer, and all those elements of the original contract. This approval the plaintiff did not have.

The court furthermore decided that if the plaintiff had any right at all to recover on the last theory advanced by him, that there was no implied assumpsit; that the plaintiff's remedy would be in case for tort.

The plaintiff further says that the town did not agree that the work done was extra work. There is no support for this in the testimony. The town admits that the work, so far as covered by the contract, was extra work, and such allowance therefor was made as it was thought should be made.

[14] If there had been a fraudulent misrepresentation as to the underdrain in Wood street, and this had been a material misrepresentation, and had induced the contract, the plaintiff could rescind the contract after the discovery thereof, and sue on a quantum meruit, or he could ratify the contract and sue in deceit for damages. In this case, however, whatever misrepresentation, if any there was, was an innocent one, and not of such a character as to permit a rescission of the contract. 9 Cyc. 408. Even if rescission could have been had, the plaintiff did not rescind, but elected to affirm, the contract.

[15] The plaintiff finally abandoned his claim as to a mistake in the inducement of either contract, and rested his claim solely on the wrongful act of the town in opening up a drain on Wood street and pouring water in upon him. There is no testimony that the town did this. Further, this would not render the town liable on the common counts in assumpsit on an implied contract to pay for pumping the water out and the damages resulting from letting the water in. The plaintiff's remedy, if any, would be for a tort. *Webster v. Drinkwater*, 5 Greenl. (Me.) 319, 17 Am. Dec. 238; *Tightmeyer v. Mongold*, 20 Kan. 90; *Fanson v. Linsley*, 20 Kan. 285; *Carson River Lumbering Co. v. Bassett*, 2 Nev. 249.

The cases cited by plaintiff's counsel in their brief are all distinguishable from the case at bar.

The nonsuit was properly granted.

The plaintiff's exceptions are overruled, and the case is remitted to the superior court for the entry of judgment upon the nonsuit.

(37 R. I. 1)

## SPRAGUE v. STEVENS et al. (No. 279.)

(Supreme Court of Rhode Island. July 6, 1914.)

## 1. LIS PENDENS (§ 24\*) — PURCHASERS PENDENTE LITE—COMMON-LAW RIGHTS.

In the absence of statute, a purchaser of real property pending suit in which the title is involved takes subject to the judgment or decree that may be passed therein against his vendor.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 38-40, 42-46; Dec. Dig. § 24.\*]

## 2. QUIETING TITLE (§ 30\*) — PARTIES — PURCHASERS PENDENTE LITE.

In a suit involving the title to real property, it is proper to make parties all incumbrancers whose claims arose before the commencement of the suit; but purchasers pendente lite cannot be parties without complainant's consent.

[Ed. Note.—For other cases, see *Quieting Title*, Cent. Dig. §§ 64-66; Dec. Dig. § 30.\*]

## 3. LIS PENDENS (§ 24\*) — PURCHASERS PENDENTE LITE—RIGHTS—STATUTES.

Gen. Laws 1909, c. 294, § 13, provides that no decree concerning the title to real property shall affect such title, excepting as to parties thereto, their heirs and devisees, and those having actual notice thereof, as to any rights acquired before notice of the filing or entry of the same shall be recorded in the records of land evidence in the town or city where the real estate is situated. *Held* that, under such statute, purchasers pendente lite with actual notice take cum onere, and are therefore not necessary parties to the suit, and purchasers pendente lite prior to the recording of the requisite notice, and not having actual notice, cannot be affected thereby; and hence making them parties would serve no useful purpose.

[Ed. Note.—For other cases, see *Lis Pendens*, Cent. Dig. §§ 38-40, 42-46; Dec. Dig. § 24.\*]

## 4. DOWER (§ 76\*) — RECOVERY — DOWER IN SEVERAL PARCELS — JOINDER IN SINGLE ACTION — EFFECT.

The statute providing for the recovery of dower (Gen. Laws 1909, c. 329, § 15) declares that, whenever a widow shall be entitled to dower in several parcels of land, she may sue in equity against all the persons owning the lands, and the court may cause her dower to be assigned in one parcel or in contiguous parcels out of the lands of the heirs at law or devisees of the deceased husband, or otherwise according to equity, and may award the widow damages for the detention of dower. *Held*, that such provision merely authorized a suit to recover dower against the different holders of several parcels, which otherwise would have been multifarious, and that her right to recover dower from the owners of the several parcels was not affected by the bringing of suit against all so as to merge the right to have dower out of each parcel into one right, recoverable against all or none, and require the widow, after having begun such suit, to keep all persons who might have acquired an interest in any of the several parcels as heir, devisee, or alienee of any defendant before the court until the suit was finally terminated.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 267-276; Dec. Dig. § 76.\*]

## 5. DOWER (§ 76\*) — PARTIES — DEATH OF DEFENDANT — JOINDER OF HEIRS.

Gen. Laws 1909, c. 285, § 5, provides that, where there are two or more plaintiffs or defendants, and one dies, and the cause of action survives, the writ shall not abate, but, the death being suggested on the record, the action

shall proceed by or against the survivors. Chapter 329, § 14, provides that no action for dower shall abate by the death of the defendant, where he is a tenant of the freehold, if the property passes by devise or descent from him, but, such death being suggested, the heir or devisee shall be summoned, and the suit shall proceed against him. Chapter 289, § 11, provides for entering on the record the decease of any party, and for bringing in by order the heirs and others interested. *Held* that, where a suit to recover dower is brought against the several owners of separate parcels of land, and the death of one of the defendants is suggested, the fact that chapter 329, § 15, provides that in such suit the court may cause dower in all the parcels to be assigned in one parcel or in contiguous parcels out of the lands of all the defendants does not make the other defendants "parties interested" in having the heirs or devisees of the deceased defendant made parties to the suit, nor is complainant required to join them, and, being entitled to proceed against the remainder, the effect of a failure to join is only to eliminate the parcel owned by the deceased defendant from further consideration in the suit.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 267-276; Dec. Dig. § 76.\*]

## 6. EQUITY (§ 94\*) — PARTIES — JOINDER.

The rule that all persons legally or beneficially interested in the subject-matter of a suit in equity must be made parties is subject to the exception that, if the object of the suit can be accomplished and justice done, as between the parties to the suit, without injustice to others, the suit may proceed without joinder of omitted parties; but, if complete justice between the parties before the court cannot be done without others being made parties, whose rights or interests will be prejudiced by a decree, then proceedings will be stayed, even though such other parties cannot be brought in.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 246, 252; Dec. Dig. § 94.\*]

## 7. DOWER (§ 76\*) — PARTIES — EQUITY RULES — APPLICATION.

Equity rule 14 provides that, in all cases where it shall appear that parties who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction, or by reason of other incapacity, the court, in its discretion, may proceed without making them parties, in which case the decree shall be without prejudice to their rights. Rule 15 declares that, when persons in interest are very numerous, and, without manifest inconvenience and oppressive delays, some of them cannot be brought in, the court, in its discretion, may proceed without making all of them parties, if it shall have sufficient parties before it to represent the adverse interests of plaintiff and defendant in the suit. *Held*, that such rules did not apply, in a suit by a widow to recover dower out of several parcels of land conveyed to various persons, in determining whether, on the death of parties defendant or the alienation of their lands during suit, the heirs, or devisees and the alienees should be made parties, the determination of which question depended, not on the number of such persons or the difficulty of joining them, but on whether they were necessary parties without whose presence the court could not proceed to a decree.

[Ed. Note.—For other cases, see *Dower*, Cent. Dig. §§ 267-276; Dec. Dig. § 76.\*]

Case Certified from Superior Court, Providence and Bristol Counties.

Action by Harriet B. Sprague against Charles W. Stevens and others. On certifi-



ed questions from the superior court under General Laws 1909, c. 289, § 36.

See, also, 32 R. I. 361, 79 Atl. 972.

Nathan W. Littlefield, Walter R. Stiness, John H. Slaterry, and Waterman & Greenlaw, all of Providence (Charles E. Tilley, of Providence, of counsel), for complainant. Mumford, Huddy & Emerson, Tillinghast & Collins, and Gardner, Pirce & Thornley, all of Providence (William W. Moss, of Providence, of counsel), for respondents.

JOHNSON, C. J. This is an action in equity by Harriet B. Sprague to recover of some 800 respondents dower alleged to be due her in certain lands alleged to have been owned by her husband during her marriage. Since the matter was last before this court, the bill has been amended, the different parties in interest have answered, and the bill has been referred to a master in chancery to decide certain questions in the case.

At one of the hearings before said master the death of one of the respondents was suggested upon the record, and thereupon the question arose whether or not the heirs at law or devisees of the said deceased respondent should be made parties to the bill before the matter proceeded. Thereupon the master filed a request to the superior court for instructions upon certain questions. Upon hearing, the presiding justice, considering that the questions submitted are of such doubt and importance and so affect the merits of the controversy that they ought to be determined by the Supreme Court before further proceedings, certified said questions to this court.

The questions are:

"(1) In case the death of any party respondent is suggested on the record, is it necessary for the complainant to make the heirs at law or devisees of said deceased person respondents, before the case can proceed?

"(2) In case the death of any party respondent occurs which is not suggested on the record, is it necessary for the complainant to see that such death is suggested on the record, and to make the heirs at law or devisees of said deceased person respondents before the case can proceed?

"(3) In a case where the parties in interest are very numerous, and without manifest inconvenience and oppressive delays the heirs at law or devisees of deceased parties cannot be brought before the court, is it necessary for the complainant to make the heirs at law or devisees of such deceased person whose death has been suggested on the record respondents, before the case can proceed, if said deceased person was the owner of a part of one of the tracts of land described in the complainant's bill, other owners of which tract are parties to the suit and represented before the court?

"(4) In this case, where the parties in interest are very numerous, if it shall appear that without manifest inconvenience and oppressive delays the heirs at law or devisees of deceased parties cannot be brought before the court, and if any such deceased person was the owner of a part of one of the tracts of land described in the complainant's bill, other owners of which tract are parties to the suit and represented before the court, is it necessary for the complainant to make the heirs at law or devisees

of such deceased person whose death has been suggested on the record respondents, before the case can proceed?

"(5) In this case, where the parties in interest are very numerous, if it shall appear that without manifest inconvenience and oppressive delays the heirs at law or devisees of deceased parties cannot be brought before the court, and if any such deceased person was the owner of a tract of land which is a part of a larger tract of land described in the complainant's bill, which larger tract has been divided into parcels and conveyed to divers parties, and owners of certain of said parcels are parties to the suit and represented before the court, is it necessary for the complainant to make the heirs at law or devisees of such deceased person whose death has been suggested on the record respondents, before the case can proceed?

"(6) In a case where the parties in interest are very numerous, and without manifest inconvenience and oppressive delays the heirs at law or devisees of deceased parties cannot be brought before the court, is it necessary for the complainant to make the heirs at law or devisees of a deceased person whose death has not been suggested on the record respondents, before the case can proceed, if said deceased person was the owner of a part of one of the tracts described in the complainant's bill, other owners of which tract are parties to the suit represented before the court?

"(7) In this case, where the parties in interest are very numerous, if it shall appear that without manifest inconvenience and oppressive delays the heirs at law or devisees of deceased parties cannot be brought before the court, and if any such deceased person was the owner of a part of one of the tracts of land described in the complainant's bill, other owners of which tract are parties to the suit represented before the court, is it necessary for the complainant to make the heirs at law or devisees of such deceased person whose death has not been suggested on the record respondents, before the case can proceed?

"(8) In this case, where the parties in interest are very numerous, if it shall appear that without manifest inconvenience and oppressive delays the heirs at law or devisees of deceased parties cannot be brought before the court, and if any such deceased person was the owner of a tract of land which is a part of a larger tract of land described in the complainant's bill, which larger tract has been divided into parcels and conveyed to divers parties, and owners of certain of said parcels are parties to the suit and represented before the court, is it necessary for the complainant to make the heirs at law or devisees of such deceased person whose death has not been suggested on the records respondents, before the case can proceed?

"(9) In case of the alienation by any of the parties respondent hereto of any part of a tract of land in which dower is claimed, is it necessary to make the alienees of said land parties respondent, no notice of pending suit having been placed upon record on the records of land evidence in the towns where such land lies respectively, in a case where the parties in interest are very numerous, and without manifest inconvenience and oppressive delays such transferees cannot be brought before the court, and if the party respondent alienating his land was before its alienation the owner of a part of one of the tracts of land described in complainant's bill, other owners of which said tract are represented before the court?

"(10) In case of the alienation by any of the parties respondent hereto of any part of a tract of land in which dower is claimed, is it necessary to make the alienees of said land parties respondent, no notice of pending suit having been placed upon record on the records of land evidence in the towns where such land lies respectively, in this case, where the parties



in interest are very numerous, if it shall appear that without manifest inconvenience and oppressive delays such transferees cannot be brought before the court, and if the party respondent alienating his land was before its alienation the owner of a part of one of the tracts of land described in complainant's bill, other owners of which said tract are represented before the court?

"(11) In case of the alienation by any of the parties respondent hereto of any part of the tract of land in which dower is claimed, is it necessary to make the alienees of said land parties respondent, no notice of pending suit having been placed upon record on the records of land evidence in the towns where such land lies respectively, in this case, where the parties in interest are very numerous, if it shall appear that without manifest inconvenience and oppressive delays such transferees cannot be brought before the court, and if the party respondent alienating his land was before its alienation the owner of a tract of land which is a part of a larger tract of land described in the complainant's bill, which larger tract has been divided into parcels and conveyed to divers parties, and owners of certain of said parcels are parties to the suit and represented before the court?

"(12) Under questions 4, 5, 7, 8, 10, and 11, is the master authorized to decide in each instance whether such manifest inconvenience and oppressive delays exist?

"(13) Does rule 15 of the rules in equity of the superior court apply in any or all of the above cases?

"(14) Does rule 14 of the rules in equity of the superior court apply in any or all of the above cases?

"(15) If so, can the master appointed to decide the question of dower in this suit apply said rules in any particular case without specific instructions from the court?"

For consideration the questions may, we think, be grouped as follows:

First. In case of the death of a party respondent, is it necessary for the complainant to make the heirs at law or devisees of said deceased respondent parties to the suit, before the case can proceed, (a) where the death is suggested upon the record, (b) where the death has not been so suggested?

Second. In case of the alienation by any of the parties respondent of any part of a tract of land in which dower is claimed, is it necessary to make the alienee a party respondent, no notice of pending suit having been placed upon record in the records of land evidence of the town where such land lies?

Third. How are the questions affected by the great number of parties and the possible inconvenience and delay resulting therefrom?

Fourth. Instructions are also sought as to the duty and authority of the master to decide questions of inconvenience and delay, and of the applicability of equity rules 14 and 15 of the superior court to this case, and the duties of the master under those rules. The rules are as follows:

"(14) In all cases where it shall appear to the court that persons who might otherwise be deemed necessary or proper parties to the suit cannot be made parties by reason of their being out of the jurisdiction of the court, or are incapable otherwise of being made parties, the court may, in its discretion, proceed in the cause without making such persons parties;

and in such cases the decree shall be without prejudice to the rights of the absent parties.

"(15) When the persons in interest are very numerous, and without manifest inconvenience and oppressive delays in the suit some of them cannot be brought before the court, the court, in its discretion, may proceed without making all of said persons parties, if it shall have sufficient parties before it to represent the adverse interests of the plaintiffs and the defendants in the suit. But in such cases the decree shall be without prejudice to the rights and claims of all persons not parties to the suit."

Counsel for respondents contend that it is necessary that all the owners of the land out of which dower is sought should be parties to the suit at all stages of the proceeding; that such requirement necessarily follows from the statute which provides that:

"Whenever a widow shall be entitled to dower in several parcels of land, whether the fee to the same be in the heir at law, devisee, grantee, or a subsequent holder, she may bring a suit in equity against all of the persons owning the said land."

Counsel argue that:

"It would seem to make no difference whether the death was suggested upon the record or not. If the death is suggested upon the record, of course the heirs at law or devisees can be at once summoned in, and it would seem to be the duty of the complainant to see that when any parties die their heirs at law or devisees were summoned in.

"It would appear to be the plain intent of the statute that this procedure should be followed even where the separate tracts are each described separately, and the owners of each tract brought in as such. But in a case like that at bar, where the land is described simply by ancient deeds which describe the land as it was long ago, and where the lands thus described have been subdivided and again subdivided, and it is sought to join the owners of all such lands, the cause cannot proceed without having the owners of all the land continuously before the court."

[1] So far as the questions pertain to the necessity of making the alienees of parties respondent parties to the suit, before the suit can proceed, the rule as to the relation of such alienees to the suit, in the absence of statute, is well stated in *Brightman v. Brightman*, 1 R. I. 112. At page 119, the court, Staples, J., says:

"We apprehend it is well settled that he who purchases property pending a suit in which the title to it is involved takes it subject to the judgment or decree that may be passed in such suit against the person from whom he purchases. That he purchased bona fide, and paid a full consideration for it, will not avail against such judgment or decree. Nor will he be permitted to prove that he had no notice of the pendency of the suit. The law infers that all persons have notice of the proceedings of courts of record. This rule has been adopted from motives of public policy. Without it, the effect of every judgment and decree of this nature might be avoided by a mere transfer of the defendant's title, as a decree of judgment was about to be pronounced against him. 11 Ves. R. 197. A party might always be in pursuit of his rights without being able to overtake them."

See, also, *Bishop of Winchester v. Paine*, 11 Ves. Jr. 194, 197; *Sorrell v. Carpenter*, 2 Peere Williams, 482; *Metcalfe v. Pulvertoft*, 2 Ves. & Beames, 200; *Murray v. Lylburn*, 2

Johns. Ch. (N. Y.) 441, where, at page 443, Chancellor Kent says:

"There is no principle better established, nor one founded on more indispensable necessity, than that the purchase of the subject-matter in controversy, pendente lite, does not vary the rights of the parties in that suit, who are not to receive any prejudice from the alienation." Story, Eq. Pl. § 156; 1 Dan. Ch. Pl. & Pr. 280.

An assignee under a voluntary assignment may be made a party, when desirable, at the election of the plaintiff. Story, Eq. Pl. § 156.

[2] Purchasers pendente lite cannot be made parties without the complainant's consent. *Steele v. Taylor*, 1 Minn. 274 (Gil. 210).

"The rule is that it is proper to make parties all incumbrancers whose claims arose before the commencement of the suit, but not those who purchased pendente lite." *Miller v. Kershaw, Bailey*, Eq. (S. C.) 469, 471, 23 Am. Dec. 183.

In this state the law as to purchasers pendente lite has, however, been modified by chapter 315, P. L. § 2, passed April 21, 1882. The provision has remained the same in the revisions since its passage, and is now section 13 of chapter 294, Gen. Laws 1909, which reads as follows:

"Sec. 13. No proceeding in court, hereafter taken, whether by filing bill, petition, declaration, or other complaint, or rule of court, or otherwise, and no final order, decree, or judgment, concerning the title to any real estate, in this state, or to any interest or easement therein, shall affect such title (excepting as to parties thereto and their heirs and devisees, and those having actual notice thereof) as to any rights acquired before notice of the filing, or entry, of the same shall be recorded in the records of land evidence in the town or city where such real estate is situated; such notice to be copied in a book duly indexed and kept for that purpose. The notice shall briefly state the names of all the parties, the court wherein filed, the date of filing, and the substance of the bill, petition, declaration, or other complaint, rule, order, decree, or judgment, and a description of the real estate thereby affected, so far as may be necessary to warn any person subsequently dealing with the title to the land."

[3] Therefore, by the terms of the statute, the title of purchasers pendente lite of the lands prior to the recording of the notice provided in the statute, and not having actual notice, cannot be affected by any proceeding in the suit. No reason appears, therefore, for making them parties to the suit, as such a proceeding would avail nothing. They would not be affected by the decree. Those having actual notice are excepted by the statute, and are therefore left in the same position as though the statute had not been passed. They are not necessary parties. They take cum onere, and would be bound by the decree.

The necessity of making heirs or devisees of a deceased respondent parties to the suit, before the suit can proceed, is argued by respondents' counsel, as follows:

"It may be contended that all that the statute requires is that all of the owners of the lands out of which dower is sought should be joined when the bill is brought, but that it is not

necessary for the complainant to follow all the changes in ownership that may occur while the bill is pending. Clearly this contention would be untenable. The same necessity which requires that all of the owners should be joined to begin with requires that all the owners should be kept continually before the court. Otherwise it might be possible for the widow to bring her bill against all of the owners at the time of filing of the bill, and then subsequently to discontinue as to some of them. Such discontinuance would, of course, relieve those as to whom the bill is discontinued of any liability for dower, and thus the widow might maintain a bill for dower against certain ones while at the same time relieving others who were just as liable. She would thus be able to accomplish by indirection the result which the statute plainly prohibits, that is, the choice of certain persons out of whom dower is to be collected and the release of others.

"This court has already decided that all of the owners of all the land out of which dower is sought must be joined. To allow the owners of a part of the land out of which dower is sought to be unrepresented because of alienation of the land, or because of the death of the parties against whom the bill is brought, would obviously leave matters in the same position as if the bill were brought against all to begin with and then were discontinued as to some. We have already seen that that would enable the widow to accomplish by indirection what the statute forbids. Since the allowing of aliens or heirs at law and devisees to be unrepresented accomplishes the same result as would a discontinuance as to certain of the parties, and that course must be held to be forbidden because it would work a circumvention of the statute, it must follow that the cause cannot proceed while aliens or heirs at law and devisees are not represented before the court."

It does not seem clear that a discontinuance as to any respondent or the failure to make the alien or heir at law or devisee of a respondent a party would enable the complainant, as counsel says:

"To accomplish by indirection the result which the statute plainly prohibits, that is, the choice of certain persons out of whom dower is to be collected and the release of others."

The statute makes no such prohibition. It provides that the widow may bring a suit in equity against all of the persons owning the said lands. She could have brought separate suits against all the several owners or against any of them, leaving out any that she saw fit to leave out. She could thus have accomplished exactly what respondents' counsel say is prohibited by the statute permitting her to bring a suit against all the persons owning the said lands.

The right of the complainant to bring a separate suit against each of the owners of the several parcels into which the lands of her husband have been divided, and to obtain her dower from each, if she shows that she is dowable out of the land held by such owner, is not disputed. In the absence of a statute permitting her to bring a suit against all the owners, she would have been confined to such separate suits against the several owners, as a suit against all would have been open to the objection of being multifarious. To relieve this situation, the statute was passed providing that:

"Whenever a widow shall be entitled to dower in several parcels of land, whether the fee of the same be in the heir at law, devisee, grantee or a subsequent holder, she may bring a suit in equity against all the persons owning the said lands."

Having brought suit under the statute against all the owners, how is the right which she before had to recover her dower from the owner of each of said parcels affected? When this case was formerly before this court, 32 R. I. 361, 79 Atl. 972, in answer to the sixteenth question then submitted, the court held, that suit being brought under said statute, it "must be brought against all persons owning the land out of which dower is sought." The court, however, said:

"We do not mean by this that it is necessary to include in the suit all the land out of which the widow was originally entitled to be endowed. It may well have happened that before this suit was brought some of the owners of the land did set off the widow's dower therein, or agreed with her upon some substantial equivalent in lieu thereof. In such a case there would be no necessity for the widow to include those with whom settlements had been made as parties respondent in her bill."

Would this right of the widow to effect a settlement with any of the respondents and thus obtain her dower or a satisfactory equivalent therefor cease upon her bringing a suit against all? Her dower in each of said parcels is still the object of her suit, although it is brought under the statute, against all the owners of the several parcels out of which she is seeking dower.

[4] Is her right to the recovery of dower from the owners of the several parcels affected by the bringing of the suit against all? In effect, does the statute do anything more than enable her to bring suit, upon her several rights to have dower out of the several parcels against the several owners of said parcels together, in form, one suit, but in reality, so far as her right to recover dower from the owners of the several parcels is concerned, an aggregation of the several suits against the several owners? Are the rights of dower which she had before suit against each owner so tied together upon her bringing one suit against all, under the permission given by the statute, that thereafter she cannot recover her dower against any owner, unless all persons who may have acquired an interest in any of the several parcels of land as heir, devisee, or alienee of any respondent are brought in and kept before the court? Have the rights to have dower out of each parcel been fused by the suit brought against all the owners into one right recoverable against all or none? That appears to be the effect of the contention of counsel for respondents. Is this a necessary conclusion? Such a conclusion would render it necessary to decide that the right which she had before suit to recover her dower from the owners severally of each of the parcels of land was destroyed the moment that she brought suit against all under a statute which it would seem must

have been passed for the purpose of facilitating the recovery of dower rather than of impeding it.

In 5 Ency. Pl. & Pr. 840, h. Suits in Equity—(1) Generally, it is said:

"The death of one of several defendants to a suit in equity abates the suit as to him; but the suit may proceed without revivor against the surviving defendants when there are such persons before the court as make it possible to render a final decree in the cause. But where the deceased defendant was a necessary party to the determination of the controversy, his death abates the suit."

[5] In this state Gen. Laws 1909, c. 285, § 5, provides:

"In any case where there are two or more plaintiffs or defendants, if one or more of them shall die, and the cause of action shall survive to the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants, the writ or action shall not be thereby abated, but the death being suggested upon the record, the action shall proceed at the suit of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants."

Gen. Laws 1909, c. 289, § 11, provides:

"No supplemental bill, or bill of revivor, shall be necessary in equity, but the superior court, by general rule or by special order, may provide for the introduction of any supplemental matter into the suit by way of addition to or amendment of the bill, and for entering upon the record the decease of any party, and for bringing in the heirs, personal representatives, and others interested."

And Gen. Laws 1909, c. 329, § 14, provides:

"No action of dower shall abate by the death of the defendant named therein, where the defendant is tenant of the freehold, if the property passes by devise or descent from him; but such death being suggested, the heir or devisee shall be summoned to appear within a certain time, to be prescribed in the discretion of the court in which the action is pending, and take upon him the defense of the suit, and the suit shall proceed against him in the same manner as if he had been the original defendant."

The provision in chapter 289, § 11, "for entering upon the record the decease of any party, and for bringing in the heirs, personal representatives, and others interested," applies of necessity to the bringing in of persons *interested*, as well in the case of "heirs, devisees or personal representatives," as in the case of "*others interested*." Heirs or devisees would ordinarily be interested, but in the case at bar it would not be to their interest to be brought in and made subject to the decree, but quite the reverse. If the complainant wanted to subject them to the decree, her interest would be to have them brought in; but, if she was not willing to take the trouble to do so, none of the other parties to the suit would be interested to have them brought in, unless their not being so brought in would injuriously affect such other parties. Outside of that consideration, it would not seem to be necessary to make them parties, and that the suit could proceed against the other parties respondent who are before the court. The provision in chapter 329, § 14, providing that upon the suggestion of the death of a party "the heir

or devisee shall be ~~summoned~~ to appear within a certain time, to be prescribed in the ~~direction~~ of the court in which the action is pending, and take upon him the defense of the suit, and the suit shall proceed against him in the same manner as if he had been the original defendant," clearly applies to the prosecution of the suit against such heir or devisee in seeking the object of the suit, in the same manner as if he had been the original defendant. The section immediately precedes the section under which this action is brought. Prior to that chapter 329 had dealt only with cases brought against the individual owner of the land. In the case of one defendant, manifestly it would be necessary to have his heir or devisee made a party upon the death of the defendant being suggested, and the complainant would plainly be interested in suggesting the death and having him made a party in order to proceed effectually to a decree against him. The section, however, in our opinion does not affect the question of the prosecution of the suit against the other defendants, if any before the court. Such other defendants would be interested only where the failure to bring such heir or devisee before the court and subject him to the decree would injuriously affect them. In order to show that such other respondents would be injuriously affected by the failure to make the alienee of a respondent or the heir or devisee of a deceased respondent a party, counsel for respondents cite the provision in said chapter 329, § 15, that in any such suit:

"The court, according to the course of equity in marshaling incumbrances, may cause the dower of such widow in all of the said parcels to be assigned in one parcel or in contiguous parcels out of the lands of the heirs at law or devisee of such deceased husband, or otherwise according to equity."

And they argue as follows:

"Under this statute the court or master to whom the case might be assigned might proceed, if it be found that the widow is dowerable, to set off her dower by having transferred to her some one or more of the parcels of land, \* \* \* and charge the owners of other parcels so as to cause them to bear their proportion of the burden. But, if all of the owners were not represented before the court, the decree could not be binding upon them, and thus it might and inevitably would follow that at the conclusion of the action numerous claims would still remain unadjusted."

In this case, all the owners of the several parcels of land were joined as parties under the statute. This having been done, and all having been brought before the court the right of the complainant to dower out of the parcel of each owner, we think, must be concluded by this suit. If a party respondent conveys the parcel owned by him, then if such conveyance is made before the record of notice of his pendens required by Gen. Laws 1909, c. 204, § 13, the title of the alienee is not affected by any proceeding in this suit, unless the alienee had actual notice. If he had actual notice, he takes the land cum

onere, and need not be made a party. Consequently no necessity exists, so far as his rights are concerned, of making him a party. If he acquired the land with actual notice, he will be bound by the decree, and, if he acquired it without actual notice, he will not be affected by the decree. In case of the death of a party respondent, if the complainant causes the heir or devisee to be made a party, then the cause proceeds against such heir or devisee. If the complainant does not cause the heir or devisee to be made a party, then she can have no decree affecting him. The decree, therefore, can cause no injustice to him.

It is true that upon the entry of decree there might be some parcels of the land held by alienees of respondents not having actual notice, and by heirs or devisees of deceased respondents who had not been brought in and made parties. Such alienees, heirs, or devisees would not be affected by the decree. The complainant, however, would be concluded by the decree, and such alienees, heirs at law, or devisees would not be injured.

Would the other respondents, those who remained parties to the suit at the entry of decree, be prejudiced by the decree?

The court, in proceeding to "cause the dower of the complainant in all of the said parcels to be assigned in one parcel or in contiguous parcels out of the lands," could not well include in such parcel or parcels, so assigned, the lands out of which dower or a satisfactory equivalent had been secured by the complainant before suit, as the owners of such lands were not required to be made parties. *Sprague v. Stevens*, 32 R. I. 361, 376, 79 Atl. 972. If any respondent has, after suit brought, conveyed his parcel to one not having actual notice, or if the heir or devisee of any deceased respondent has not been brought in and made a party to the suit, no dower can be recovered by the complainant from the parcels so conveyed, descended to the heir, or devised. Therefore no dower from such parcels could be charged upon the owners of the other parcels. If dower should be assigned by the court in one parcel or in contiguous parcels, it could be so assigned out of the parcels of the parties respondent at the time of the decree. The statute, after providing that the dower may be assigned in a contiguous parcel or parcels, out of the lands of the heirs at law or devisee of such deceased husband, adds the words "or otherwise according to equity," indicating clearly that the court is to be free to assign the dower in such way as under the circumstances will do equity. Is it to be supposed that under such circumstances a court of equity would proceed to cause the dower of the widow to be assigned in one parcel or in contiguous parcels out of those lands from which, by failure to make such alienees, heirs, or devisees parties, she had failed to secure her dower, or, on the other hand, that the court would in such assignment charge upon

the respondents remaining and subject to the decree any burden for the dower which the complainant had thus failed to recover? Such assignment could only be made out of the lands of the respondents remaining parties at the time of the decree, and would work no hardship, as such lands would only be subjected to the burden of the dower recovered from such lands.

[6] We therefore do not think that, because the statute permits the complainant to join all the owners of the lands, it therefore follows that it is necessary that every alienee pendente lite of a respondent and every heir or devisee of a deceased respondent should be brought before the court before the suit can proceed. We think the provisions, as to parties, of the statutes we have cited, *supra*, apply to this proceeding as to other suits in equity. The subject of parties in suits in equity is too broad and the exceptions are too numerous for extended comment; but, as illustrative of some of the principles upon the subject under consideration, we quote from Story's Eq. Pl. § 77, as follows:

"Let us, therefore, before entering upon the more particular considerations applicable to this subject, examine into and consider the general nature of the exceptions which have been admitted to the general rule in equity that all persons legally or beneficially interested in the subject-matter of a suit should be made parties, or, if the expression be deemed more exact and satisfactory, that all persons who are interested in the object of the bill are necessary and proper parties. All these exceptions will be found to be governed by one and the same principle, which is that, as the object of the general rule is to accomplish the purposes of justice between all the parties in interest, and it is a rule founded, in some sort, upon public convenience and policy, rather than upon positive principles of municipal or general jurisprudence, courts of equity will not suffer it to be so applied as to defeat the very purposes of justice, if they can dispose of the merits of the case before them without prejudice to the rights or interests of other persons who are not parties, or if the circumstances of the case render the application of the rule wholly impracticable. On the other hand, if complete justice between the parties before the court cannot be done without others being made parties whose rights or interests will be prejudiced by a decree, then the court will altogether stay its proceedings, even though those other parties cannot be brought before the court, for in such cases the court will not, by its endeavors to do justice between the parties before it, risk the doing of positive injustice to other parties not before it whose claims are or may be equally meritorious."

And also the remark in section 76, c. Id.:

"And here it may be proper to state the remark of a learned chancellor, speaking upon

this very subject of parties, as containing a salutary admonition and instructive lesson, that it is the duty of every court of equity to adapt its practice and course of proceeding, as far as possible, to the existing state of society, and to apply its jurisdiction to all new cases which, from the progress daily making in the affairs of men, must continually arise, and not, from too strict an adherence to forms and rules established under very different circumstances, to decline to administer justice, and to enforce rights, for which there is no other remedy"—citing Lord Cottenham in *Mare v. Malachy*, 1 Myl. & Cr. 550.

[7] As to the questions relative to the applicability of rules 14 and 15 of the superior court in the cases cited in the questions certified, we do not think that said rules are applicable. These rules do not refer to or provide for the procedure in case of the death of parties or the alienation by parties of lands in suit. Both rules embody exceptions to the rule as to parties which have been long acted upon by courts of equity.

The exception embodied in rule 14 is founded upon the utter impracticability of making the new proper or necessary parties, as when such new parties are not within the jurisdiction.

The exception embodied in rule 15 is founded upon the case of exceedingly numerous parties, where it would be impracticable to join them without manifest inconvenience and oppressive delays. Both, however, refer to and provide for the exception of parties, proper and *necessary*, who would have to be made parties but for the exception. In this case the persons who were necessary and proper parties have been made parties to the suit. When parties respondents convey their lands, or die, then the decision of the question whether the alienees in the one case and the heirs or devisees in the other must be made parties depends, not upon the number of said persons or the difficulty of making them parties, but upon the question whether they are necessary parties without the presence of whom the court will not proceed to a decree; and upon that question said rules 14 and 15 afford no assistance, and are not applicable.

In accordance with the reasons above expressed, said questions 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 are answered in the negative.

Having thus answered the questions certified, the papers in the cause, with our decision certified thereon, are sent back to the superior court for further proceedings.

(37 R. I. 141)

**RHODE ISLAND HOSPITAL TRUST CO.**  
v. RHODES et al., City Assessors.  
(No. 4722.)

(Supreme Court of Rhode Island. June 30,  
1914.)

**TAXATION (§ 164\*)—CORPORATIONS.**

A New Jersey holding company, organized to carry on business without the state and authorized to purchase, hold, and dispose of the securities of any government railroad or public service corporation, acquired the stock of street railway and railroad corporations in Rhode Island. Most of its directors resided in Rhode Island and notices of directors' meetings were sent out from its Rhode Island office. The only business it carried on was the collection of rent from its Rhode Island property. *Held*, that the holding company was carrying on business within the state, under Tax Act (Laws 1912, c. 769), providing that every corporation carrying on business for profit in the state shall be subject to taxation upon its corporate assets, liable for such taxes, and stockholders, under the direct provisions of section 20, held their shares free from taxes.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 286; Dec. Dig. § 164.\*]

Exceptions from Superior Court, Providence and Bristol Counties; Charles F. Stearns, Judge.

Petition by the Rhode Island Hospital Trust Company against Elisha H. Rhodes and others, as assessors of taxes of the city of Providence, for relief from an assessment. Petition was denied, and petitioner excepted. Exceptions sustained.

Claude B. Branch, Edward P. Jastram, and Edwards & Angell, all of Providence (Tillinghast & Collins, of Providence, of counsel), for petitioner. Albert A. Baker, City Sol., and Elmer S. Chace, Asst. City Sol., both of Providence, for respondents.

**BAKER, J.** This is a petition for relief from an assessment made by the assessors of taxes of the city of Providence. Jury trial was waived, and the case was tried October 15, 1913, before a justice of the superior court, who denied the prayer of the petition. The petitioner excepted to said decision and afterwards duly took the steps necessary to bring the matter before this court on its bill of exceptions.

The petitioner asks for relief from a tax which it, as trustee under the will of Walter A. Peck, paid under protest October 18, 1912, on 350 shares of the capital stock of the United Traction & Electric Company. The assessors assessed the petitioner on account of these shares of stock on a valuation of \$37,012 at the rate of \$4 a thousand. The United Traction & Electric Company in 1912 made the return required of corporations liable to a tax upon their corporate excess. The petitioner claims that it is entitled to exemption from taxation on these shares of stock under the provisions of the Tax Act of 1912. Section 20 of said act (chapter 769, Pub. Laws 1912) provides that:

"The owner of shares of stock or of bonds or of debentures of any corporation liable to a tax upon its corporate excess under the foregoing provisions shall be exempt from taxation in this state thereon."

And section 39 of said chapter, paragraph 8, provides that:

"No person, copartnership or corporation shall be taxed for shares of stock held in, or for bonds or debentures of, any corporation liable under the laws of this state to a tax upon the corporate excess of such corporation."

Corporations liable to a tax upon its corporate excess are pointed out in section 9 of said tax act, which section is preceded by the caption as part of the act: "Taxation of Manufacturing, Mercantile and Miscellaneous Corporations." So much of said section 9 as shows the basis for the claim of exemption from taxation is as follows:

"Sec. 9. Every corporation and joint stock company or association, wherever incorporated, carrying on business for profit in this state, all hereinafter referred to under the term 'corporation,' \* \* \* in addition to taxes on its real estate and tangible personal property locally or otherwise assessed, shall pay an annual tax to the state upon the value of that portion of its intangible property hereinafter called its corporate excess."

The meaning of the expression "corporate excess" and the method of determining its value are set forth in said tax act, but their consideration is not involved in the present inquiry.

The parties agree that the sole issue or question in this case is whether or not the United Traction & Electric Company was during the year 1912 a corporation "carrying on business for profit in this state" within the meaning of said Tax Act of 1912. It is also agreed that the United Traction & Electric Company is a corporation, and that it was incorporated in New Jersey in May, 1893.

Article 2 of its certificate of incorporation provides that:

"A part of the business of said company is to be conducted and carried on beyond the limits of the state of New Jersey and the places where such part of its business is to be conducted and carried on are the District of Columbia, and states of New York, Connecticut, Rhode Island and Massachusetts, and the principal office or place of business of said company out of this state is to be situated in the city of Providence in the state of Rhode Island."

Article 3 specifies and enumerates the objects for which the company was formed. These objects are numerous, and the company's powers are broad and comprehensive.

Among the enumerated objects for which it is authorized to carry on business are these:

"To purchase, hold, use, dispose of and sell the securities of any government or of any railway or other corporation, private, public or municipal, whether such securities shall be bonds, mortgages, debentures, notes or shares of capital stock and to exercise all the rights of stockholders as to such capital stock. \* \* \* to borrow money with or without security and to pledge or mortgage, if necessary, its franchises and property of every kind whatsoever;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

by and with the authority of the board of directors to endorse or guarantee the payment of the principal or interest or both, of and upon bonds, notes or other obligations of any person or persons, firm or firms, corporation or corporations."

The capital stock of the United Traction & Electric Company is \$8,000,000; its bonded indebtedness is \$9,000,000. It owns all the capital stock of the Union Railroad Company, the par value of which is \$9,000,000, of the Pawtucket Street Railway Company, the par value of which is \$500,000, and the Rhode Island Suburban Railway Company, the par value of which is \$5,000,000. This ownership has existed for several years. The traction company neither bought nor sold any stock in 1912.

These three railway companies are local corporations owning street railway franchises and properties within this state which are leased to the Rhode Island Company as an operating company, which in addition to other specified charges pays as rent 8 per cent. on the capital stock of the Union Railroad Company, or \$720,000; 6 per cent. on the capital stock of the Pawtucket Street Railway Company, or \$30,000; and 2 per cent. on the capital stock of the Rhode Island Suburban Railway Company, or \$100,000—making \$850,000 in the aggregate. These sums are paid directly to the United Traction & Electric Company. It received annually in addition from the Rhode Island Company, as part of said rent, about \$11,000 to cover the New Jersey corporation tax against the traction company, the salary of the treasurer of the latter company and certain other irregular and incidental expenses for clerical services, directors' fees, and the like, so that the amount of money annually received and handled by the traction company is practically \$861,000, \$850,000 of which is income. This company has never owned any property except in Rhode Island or in any corporation owning property outside of this state. The company has a board of seven directors. In the early part of 1912, five of the seven directors resided in Rhode Island, including the president, vice president, secretary and treasurer, the last two offices being filled by Mr. Cornelius S. Sweetland; of the other two directors, one resided in New Jersey, the law of that state requiring it; the other resided in New York. During the year 1912, one of the directors residing in this state resigned, and the vacancy was filled by a resident of Connecticut. The stockholders' meeting was held in New Jersey, as required by the law of that state. The company had a corporate agent in Jersey City, namely, the Corporation Trust Company. Records of transfer of stock were kept, both in Providence and Jersey City. The Corporation Trust Company attended to this in Jersey City and kept the traction company posted on legislation, for which services the Corporation Trust Company was paid a general fee each year. The directors' meetings were

held some in the city of New York, the others in Providence.

The foregoing statement includes all of the acts and activities of the traction company performed outside of Rhode Island. The dividends and said additional sum of \$11,000, paid as rent as aforesaid, are paid to the traction company in Rhode Island and are deposited in Rhode Island banking institutions. The checks for the payment of dividends on the capital stock of the traction company are drawn by the treasurer in Providence against these deposits and sent from there to its 1,100 or 1,200 stockholders. The books of the company are kept in Providence, and notices of stockholders' meetings are sent from there. The company had no office in Providence for 1912 for which it paid any rent. Its office was in practice where the secretary and treasurer had his office. The company had no office in any other state. The treasurer is the only salaried official. It also appears that the signing and issuance of stock certificates take place in Providence, as also did the act of signing as guarantor of the registered bonds of the Rhode Island Suburban Company which are guaranteed by the traction company, although it does not appear that any acts of that nature were performed in 1912. There also is evidence that the stock of the Union Railroad Company and of the Pawtucket Street Railway Company was pledged or mortgaged to the Central Trust Company of New York as trustee as security for the holders of the bonds of the traction company, and that the Union Railroad Company, prior to its leasing of its property to the Rhode Island Company, had issued bonds and given a mortgage on its property to a local trust company to secure their payment. It is stated that Mr. Sweetland, as treasurer of the traction company, in 1912, in order to protect the bondholders of the traction company, was compelled to have interviews with various persons and to exercise supervision of certain proceedings for the extension of the bonds of the Union Railroad Company. At any rate, the foregoing statement includes in substance all the acts and activities of the traction company. There is no controversy, however, as to the facts in the case. The question therefore, restated, is whether or not the traction company, admitting its acts and activities to be as above stated, was a corporation "carrying on business for profit in this state" within the meaning of the Tax Act of 1912.

It is obvious that the question may be narrowed. As already stated, it is conceded that the traction company is a corporation. It is plain, also, that whatever the company did in 1912, whether much or little, was almost entirely done in this state; and it is certainly idle to suggest that the activities of the company, by whatever name they may be characterized, were not carried on "for profit." The stockholders received \$850,000

a year on its invested capital, and the only reasonable inference is that they were maintaining the corporation and carrying on its work for the "profit" or gain afforded thereby and not for pleasure or charity. By the terms of the articles of agreement on which the certificate of incorporation was issued, "the objects for which the company is formed and the nature of business to be transacted by it" expressly include the purchase and holding of shares of capital stock; that is, the incorporators at the beginning of their enterprise described what the traction company has since done, as the transacting of business and such business as one of the purposes for which the corporation was formed. But of course their definition of the term "business" is not decisive of the issue now raised. The question for consideration therefore, as narrowed, is: Do the acts and activities of the traction company carried on by it in 1912 in this state constitute the "carrying on business" within the meaning of the Tax Act of 1912?

And first, what is meant by the term "business"?

In *Re Alabama & Chattanooga R. R. Co.*, 9 Blatchf. 390, 397, Fed. Cas. No. 124, Woodruff, J., says:

"In its broadest sense, the term 'business' includes nearly all the affairs in which either an individual or a corporation can be actors. Indulgence in pleasure, participation in domestic enjoyment, and engagement in the offices of merely personal religion, may be exceptions, in the case of an individual. But the employment of means to secure or provide for these would, to him, be business; and, to a corporation, these exceptions can have no application. The conduct of any and all of the affairs of a corporation is business."

In this broad sense it would not seem to accord with the facts to say that the said traction company is not "carrying on business." But the expression is, no doubt, frequently employed with a somewhat restricted meaning, varying in this particular under differing conditions.

In *People v. Commissioners of Taxes*, 23 N. Y. 242, 244, after defining business thus "The word 'business' embraces everything about which a person can be employed," the court goes on to say:

"No conclusion can be arrived at in this case, by following out the precise lexicographical meaning of these terms. The statute is to be interpreted, therefore, by the light to be obtained from its general scope and tenor, from other statutes in pari materia, and from a consideration of the evils and abuses at which it was aimed."

It is generally understood that the Tax Act of 1912 was the result of a somewhat prolonged investigation and study of the subject of taxation by a commission appointed for that purpose and of a consideration of its recommendations by the General Assembly. Its aim is to effect a more scientific, complete, and equitable system of taxation in this state than hitherto prevailed. The portion of the act now considered is new

legislation. It singles out corporations and joint-stock companies and selects that part of their intangible property named and defined in the act as "corporate excess" and imposes a special tax thereon at a flat rate established by statute, which tax is paid directly to the State Treasurer. This expression "corporate excess" is in our law a new designation and classification of property, but it is in express terms "property," and as its name implies, a kind of property peculiar to and belonging only to corporations and joint-stock companies or associations. The general classification of corporations liable to this tax is effected by the use of the language "every corporation \* \* \* carrying on business for profit in this state." From this general classification trust companies, banks, banking associations, and public service corporations are excepted for various reasons, chiefly because they are taxed by other methods, some of them by taxes on their business receipts rather than on their property. But these exceptions do not affect the purpose of the general classification. The classification points out and includes all the corporations, not especially excepted, liable to taxation in this way: If a corporation belongs to the class, it is not material if it shall appear that it has no "corporate excess," as it is the liability to a tax upon "corporate excess" which exempts the owner of shares of its corporate stock from taxation thereon.

By implication, in addition to the special exceptions referred to, all corporations not "carrying on business for profit in the state" escape liability for taxation for "corporate excess." This expression "carrying on business," and the similar one "doing business," have been frequently considered by the courts, and especially in relation to corporate business. It is said that about the time of the adoption of the federal Constitution there were only six corporations doing business in the United States, and that in 1910 nearly 262,500 corporations made returns under the corporation tax law of 1909. Their enormous growth in recent years, not only in number but in magnitude with their widely-extended and far-reaching business interests, with their large parent plants in one state, with their subsidiary plants and branch offices and numerous agents in other states, has been productive of many very important and difficult legal questions. Many of these cases have arisen in the attempt to enforce tax acts, particularly questions as to whether a foreign corporation is taxable and to what extent when the "carrying on business" or the "doing business" is made the test of taxability. These cases have often involved the question of double taxation when the business activities of a corporation were maintained in more than one state. In many such cases the courts in defining "carrying on business" or "doing business" have made a clear distinction between those things which constitute the real



design and purpose of a corporation and the transactions which are only collateral thereto or incidental, and have held that:

"To constitute doing business within the meaning of such statutes there must be a doing of some of the works, or an exercise of some of the functions for which the corporation was created." 5 Thomp. Corp. § 6670, p. 1459.

This distinction is discussed in an interesting and instructive manner in *Re Alabama & Chattanooga R. R. Co.*, supra. This case arose under the bankruptcy law of 1867 (Act March 2, 1867, c. 176, 14 Stat. 517). A railroad corporation created by the laws of the state of Alabama and operating a railroad in that state and maintaining an office in the city of New York was sought to be adjudged an involuntary bankrupt in the District Court for the Southern District of New York. The law gave jurisdiction when the debtor had "resided or carried on business for six months" in the judicial district. On page 397 of 9 Blatchf., Fed. Cas. No. 124, after defining business as above quoted, the court says:

"Does, then, the doing of any acts whatever pertaining to the affairs of a railroad corporation constitute 'carrying on business,' in the sense of the act? Has the term 'carrying on business' the same meaning as 'transacting any of its business'? If the necessities or interests of a railroad company require that an agent should be sent to a timber region to purchase or otherwise procure (e. g., by cutting, sawing, etc.) materials for its superstructure, is that carrying on business there? If it send an agent or agents to a city, the center of capital, to negotiate its bonds and raise money in aid of the construction of its road, and such agency be continued for that purpose, and for receiving subsequent remittances and making payments of interest or other indebtedness, at an office provided therefor, is that carrying on business in such city, within the meaning of the act? I am constrained, not only by considerations already suggested, but by what, upon the words themselves, should be deemed their proper interpretation, to answer these questions in the negative. There are, in the carrying on of a business, many affairs which are merely incidental, and which may be, and often are, transacted elsewhere than at the place where the business—that which is the real design and purpose or object in view—is located; and such transactions may be of such frequent, or even daily, occurrence as to require an agency of considerable duration. It would seem to me greatly unjust and unreasonable to regard such transactions as a carrying on of business, in the sense of the law. 'Carrying on business' looks to the scheme and purpose to which such transactions tend, and not to the incidental transactions themselves. Thus, the business of a railroad corporation is, by its charter, the construction, maintenance, and operation of a railroad. That is its business. In aid thereof, it may be necessary or expedient to employ agents and agencies—since it can only act by agents—in other places than those in which its business of constructing, maintaining, and operating the road can be done. But the transactions of such agents are only collateral or incidental. They do not, in a just sense, constitute the business of the railroad company."

See, also, *Honeyman v. Colorado Fuel & Iron Co. (C. C.)* 133 Fed. 96; *People v. Feltner*, 77 App. Div. 189, 78 N. Y. Supp. 1017; *Pavilion Co. v. Hamilton*, 15 Pa. Super. Ct.

389; *Berger v. Pennsylvania R. Co.*, 27 R. I. 583, 65 Atl. 261, 9 L. R. A. (N. S.) 1214, 8 Ann. Cas. 941.

It may be accepted, therefore, that a corporation is "carrying on business" in a particular locality if it is doing some of the work or is exercising some of the functions for which it was created; but transactions collateral thereto and incidental only, although they may be business, are not the business referred to in the expression now the subject of interpretation.

In *People v. Roberts*, 154 N. Y. 1, 47 N. E. 974, the facts were very similar to those in the case at bar. In that case the Chicago Junction Railways & Union Stockyards Company, a foreign corporation, as relator, sought relief from taxation under the laws of the state of New York. The court states the facts and the law as follows:

"The jurisdiction to tax foreign corporations under chapter 542 of the Laws of 1880, as amended by chapter 501 of the Laws of 1885, and the subsequent amendments, depends upon the existence of two concurring conditions, namely, that the corporation sought to be taxed shall be 'doing business' in this state, and, second, that its capital or some portion thereof shall have been 'employed within this state.' \* \* \* The relator is a corporation organized under the laws of New Jersey as an investment company with a capital of \$13,000,000, and is managed by a board of ten directors, two of whom only are residents of the state of New York. It has an office in Jersey City where meetings for the election of directors are annually held, and an office in the city of New York. \* \* \* The company seems to have been organized for the purpose of investing its capital in the purchase of the stock and bonds of the Union Stockyard & Transit Company, an Illinois corporation, and its whole capital has been invested in the stock and bonds of that corporation. \* \* \* The relator's whole income is derived from its investment in the Chicago company. The entire business of that company is done at Chicago, and its dividends are declared and paid in that city. The dividends and income of the relator, arising from the investment in the Illinois corporation, are applied by it to the payment of the interest and principal of its obligations, the disbursements of the New York office, and in paying dividends to its own stockholders, declared from time to time by the directors at meetings in New York. These dividend checks are drawn upon banks in the city of New York and are there mailed to its stockholders, 1,500 in number. The relator keeps its bank account in that city, composed of a portion of its dividends and income, and has an average balance of \$25,000 or \$30,000 to its credit, and it has constituted the Bank of Commerce its transfer agent there."

The entire court held that the relator was "doing business" in New York, although on the point of employing capital there the majority held that such was not the fact.

Andrews, C. J., for the majority of the court, said:

"It may be conceded that the relator in keeping an office in the city of New York, where it received and disbursed its income derived from its investment in the Illinois corporation, depositing it in bank and drawing upon the deposit for the payment of its obligations, dividends to its shareholders and disbursements in maintaining its office, was doing a part of its appropriate function as an investment company, and that this was 'doing business within this

state,' which satisfied that condition of the statute."

And Vann, J., in his dissenting opinion, said on the question of the corporation's "doing business":

"It was not engaged in business in the state of New Jersey, where it was organized, for the election of directors and officers is not doing business within the meaning of the statute, but simply appointing agents to do business. \* \* \* Some confusion has arisen from the peculiar nature of its business, which was not that of making, buying, or selling tangible things, or lending money, or rendering services to others, but was the investment of its own capital, caring for the investment, collecting, and dividing the proceeds. Thus it was, so to speak, an incorporated gentleman of leisure. While an individual who simply invests his money and collects the profits is not regarded as a business man, there is no escape from the fact that the relator was a business corporation, engaged in business in some state, and as nearly every business act that it is shown to have ever done, aside from some of the purchases of stock, was done in the state of New York, I think it was doing business in this state within the meaning of the statute."

A material question in *Colonial Trust Co. v. Montello Brick Works*, 172 Fed. 310, 97 C. C. A. 144, was whether the United States Brick Company was "doing business" in Pennsylvania. The case first appeared in the District Court, E. D. Pennsylvania, under the title "In re Montello Brick Works," 163 Fed. 621. The certificate of the referee in the last-named case states the material facts as follows:

"The United States Brick Company was incorporated in Delaware. \* \* \* The United States Brick Company was composed almost entirely of residents of Berks and surrounding counties in Pennsylvania, and the greater part of its stock was held by these persons. It has an office in Wilmington, Del., which it used, together with a large number of other Delaware corporations, only for the purpose of holding annual meetings of stockholders. Under its charter it purchased nearly all of the stock of the Montello Brick Works, bankrupt, and a controlling interest in the stock of several other corporations in Pennsylvania and New York. This was practically all of its corporate purposes that it exercised either in this state or in any other, unless loans of money, to be referred to later, were an exercise of its corporate objects and purposes. \* \* \* Its meetings of directors were held in Philadelphia and Reading at the offices of the Montello Brick Works, the offices of the bankrupt. Its books were in the custody of its executive officers and clerks at said offices in Reading, Pa., and all the clerical work on these books was done there. It deposited its moneys in the First National and Penn National Banks and the Colonial Trust Company, all Reading banks. \* \* \* I find, in short, that, excepting the incorporation of the United States Brick Company, and the signing of the deed of trust by the company at Wilmington, Del., nearly all the things that the United States Brick Company did were done in Pennsylvania, and these things no more than have been hereinbefore found. I do not find that the United States Brick Company did anything in Pennsylvania, excepting to obtain and exercise control of certain Pennsylvania corporations, including the bankrupt, and to lend money to the corporation whose stock it owned largely or in part."

McPherson, J., in deciding the case said:

"\* \* \* The brick company has an omnibus charter, under which it can do many things;

but for present purposes it is enough to note that it was undoubtedly organized for the principal object of doing just what it proceeded to do, namely, to acquire the stock of the bankrupt, and to lend it money to carry on the operation of brickmaking under certain patents. This, in a few words, is the essential fact of the present controversy, and to state it is equivalent to drawing the conclusion. The Supreme Court of Pennsylvania and the Court of Appeals of the Third Circuit unite in deciding that, when a foreign corporation exercises its charter powers in the state, it is 'doing business' therein, and that it cannot recover upon contracts made in the exercise of such powers, unless it has complied with the provisions of the Pennsylvania statutes concerning registration and other matters."

On appeal to the Circuit Court of Appeals, the court said (172 Fed. 310-313, 97 C. C. A. 144, 147):

"\* \* \* The proofs show the office of the company was in Reading, Pa. All of its directors, with the exception of a formal Delaware man, were residents of Pennsylvania. Its officers all resided at Reading, and did their official acts there; its books and bank accounts were kept there; its bonds were registered at Reading, and were payable there; the money in question was paid at Reading, and the notes executed there. Out of \$300,000 of available funds the Delaware Company had, about \$287,000 were thus advanced by it in Pennsylvania to the Montello Brick Works and by that company used in Pennsylvania in accordance with the wishes of the Delaware Company. It will thus appear this company was called into being to do local Pennsylvania work. It had no purpose to exercise its charter power elsewhere than in that state, and it made no effort or pretense so to do. Everything it did was a local act and in fulfillment of the local purpose for which it was created. \* \* \* It is clear that all its operations were, as they were at all times intended they should be, a doing of business in Pennsylvania. Judged from the intent of all parties concerned and finding such intent emphasized by every proven act, we are clear that the undoubted purpose of every one concerned was to have this company do business in Pennsylvania."

These cases throw light on the two points whether a corporation is "carrying on business" or "doing business," and, if so, whether it is doing so in a foreign state.

See, also, the Pennsylvania Co. for Insurance on *Lives v. Bauerle*, 143 Ill. 459, 33 N. E. 166; *Farmers' Loan & Trust Co. v. Lake St. El. R. Co.*, 173 Ill. 439, 456, 51 N. E. 55, and *R. I. Hospital Trust Co. v. Tax Assessors*, 25 R. I. 355, 359, 55 Atl. 877.

Under the caption *Flint v. Stone Tracy Co.*, 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312, known as the Corporation Tax Cases, because 15 such cases were heard together and decided by one opinion, the court very fully considered the question of what constitutes "carrying on business" or "doing of business" under the "corporation tax" law of the United States, approved August 5, 1909 (Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 [U. S. Comp. St. Supp. 1911, p. 946]). As is well known, this act imposes an excise tax. The purpose of the act is thus referred to on page 145 of 220 U. S., on page 347 of 31 Sup. Ct. (55 L. Ed. 389, Ann. Cas. 1912B, 1312):

"It is therefore apparent, giving all the words of the statute effect, that the tax is imposed, not upon the franchises of the corporations irrespective of their use in business, nor upon the property of the corporation, but upon the doing of corporate or insurance business."

And on page 150 of 220 U. S., on page 348 of 31 Sup. Ct. (55 L. Ed. 389; Ann. Cas. 1912B, 1312):

"Within the category of indirect taxation, as we shall have further occasion to show, is embraced a tax upon business done in a corporate capacity, which is the subject-matter of the tax imposed in the act under consideration. The Pollock Case construed the tax there levied as direct, because it was imposed upon property simply because of its ownership. In the present case the tax is not payable unless there be a carrying on or doing of business in the designated capacity, and this is made the occasion for the tax, measured by the standard prescribed. The difference between the acts is not merely nominal, but rests upon substantial differences between the mere ownership of property and the actual doing of business in a certain way."

And on page 151 of 220 U. S., on page 349 of 31 Sup. Ct. (55 L. Ed. 389, Ann. Cas. 1912B, 1312), it says:

"The tax under consideration, as we have construed the statute, may be described as an excise upon the particular privilege of doing business in a corporate capacity, i. e., with the advantages which arise from corporate or quasi corporate organization; or, when applied to insurance companies, for doing the business of such companies. \* \* \* If business is not done in the manner described in the statute, no tax is payable."

Several real estate corporations claimed exemption from the tax. As to them, this is said:

"It is especially objected that certain of the corporations whose stockholders challenge the validity of the tax, are so-called real estate companies, whose business is principally the holding and management of real estate. These cases are No. 415, Cedar Street Company v. Park Realty Company; No. 431, Percy H. Brundage v. Broadway Realty Company; No. 443, Phillips v. Fifty Associates; No. 446, Mitchell v. Clark Iron Company; No. 412, William H. Miner v. Corn Exchange Bank; and No. 457, Cook v. Boston Wharf Company. In No. 412, Miner v. Corn Exchange Bank, the bank occupies a building in part and rents a large part to tenants. Of the realty companies, the Park Realty Company was organized to 'work, develop, sell, convey, mortgage or otherwise dispose of real estate; to lease, exchange, hire or otherwise acquire property; to erect, alter or improve buildings; to conduct, operate, manage or lease hotels, apartment houses, etc.; to make and carry out contracts in the manner specified concerning buildings; \* \* \* and generally to deal in, sell, lease, exchange or otherwise deal with lands, buildings and other property, real or personal,' etc. At the time the bill was filed the business of the company related to the Hotel Leonori, and the bill averred that it was engaged in no other business except the management and leasing of that hotel. The Broadway Realty Company was formed for the purpose of owning, holding, and managing real estate. It owns an office building and certain securities. The office building is let to tenants, to whom light and heat are furnished, and for whom janitor and similar service are performed. The Fifty Associates are operating under a charter to own real estate with power to build, improve, alter, pull down, and rebuild, and to manage, exchange,

and dispose of the same. The Clark Iron Company was organized under the laws of Minnesota, owns and leases ore lands for the purpose of carrying on mining operations, and receives a royalty depending upon the quantity of ore mined. The Boston Wharf Company is operating under a charter authorizing it to acquire lands and flats, with their privileges and appurtenances, and to lease, manage, and improve its property in whatever manner shall be deemed expedient by it, and to receive dockage and wharfage for vessels laid at its wharves. What we have said as to the character of the corporation tax as an excise disposes of the contention that it is direct, and therefore requiring apportionment by the Constitution. It remains to consider whether these corporations are engaged in business. 'Business' is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dict. 158, citing People v. Commissioners of Taxes, 23 N. Y. 242, 244. 'That which occupies the time, attention and labor of men for the purpose of a livelihood or profit.' Bouvier's Law Dictionary, vol. 1, p. 273. We think it is clear that corporations organized for the purpose of doing business, and actually engaged in such activities as leasing property, collecting rents, managing office buildings, making investments of profits, or leasing ore lands and collecting royalties, managing wharves, dividing profits, and in some cases investing the surplus, are engaged in business within the meaning of this statute, and in the capacity necessary to make such organizations subject to the law."

We believe that these cases sufficiently indicate the proper construction of the words "carrying on business" which should be followed in the case at bar. As already stated, the traction company's acts and activities in 1912 were practically all performed in Rhode Island and they were done for profit. Do these acts and activities constitute "carrying on business"? We think they do. They constitute the exercise of one of the functions which the corporation was expressly created to perform. That, as we have found, is the test of "doing business." These activities were not collateral and incidental to a business conducted elsewhere. On the contrary, what the corporation has done in this state is the only business it has undertaken anywhere. It is not important that its business activities are small so long as the business is what the corporation was created for and what it is expressly authorized to conduct. To find otherwise would be equivalent to saying that an investment or holding company, expressly created as such, when exercising that function, is not doing business. That would be contrary to the authority of the foregoing decisions. It would also be contrary to the provision of the tax act itself which in paragraph 2 of section 11 provides the method of ascertaining the "corporate excess of corporations deriving their profits principally from the holding or sale of intangible property," clearly indicating that corporations of this character were to be included as "carrying on business for profit."

But certain cases have been cited by the defendants as being contrary to the view above announced, and we will consider them

and indicate wherein they in our judgment are distinguishable from the case at bar.

*Zonne v. Minneapolis Syndicate Co.*, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428, was heard with the above-mentioned corporation cases and decided the same day. Mr. Justice Day wrote the opinion in both the *Flint* and the *Zonne* Cases. The court says:

"The case presents a peculiarity of corporate organization and purpose not involved in the case just decided. The Minneapolis Syndicate, as the allegations of the bill, admitted by the demurrer, show, was originally organized for and engaged in the business of letting stores and offices in a building owned by it, and collecting and receiving rents therefor. On the 27th of December, 1906, the corporation demised and let all of the tracts, lots, and parcels of land belonging to it, \* \* \* for the term of 130 years from January 1, 1907, at an annual rental of \$61,000, to be paid by said lessees to said corporation. At that time the corporation caused its articles of incorporation, which had theretofore been those of a corporation organized for profit, to be so amended as to read: 'The sole purpose of the corporation shall be to hold the title to the westerly one-half of block 87 of the town of Minneapolis, now vested in the corporation, subject to a lease thereof for a term of 130 years from January 1, 1907, and, for the convenience of its stockholders, to receive, and to distribute among them, from time to time, the rentals that accrue under said lease, and the proceeds of any disposition of said land.' \* \* \*

The corporation involved in the present case, as originally organized and owning and renting an office building, was doing business within the meaning of the statute as we have construed it. Upon the record now presented we are of opinion that the Minneapolis Syndicate, after the demise of the property and reorganization of the corporation, was not engaged in doing business within the meaning of the act. It had wholly parted with control and management of the property; its sole authority was to hold the title subject to the lease for 130 years, to receive and distribute the rentals which might accrue under the terms of the lease, or the proceeds of any sale of the land if it should be sold. The corporation had practically gone out of business in connection with the property and had disqualified itself by the terms of reorganization from any activity in respect to it. We are of opinion that the corporation was not doing business in such wise as to make it subject to the tax imposed by the act of 1909."

The wholly parting with the control and management of the property and disqualification of itself by the terms of reorganization from any activity in respect to it are stated as the significant facts and reasons for finding that the corporation had practically gone out of business in connection with the property. Such facts do not exist in the case at bar. The traction company has in no particular parted with the control and management of its property, nor has it in any respect disqualified itself from exercising any of its powers or activities relative thereto, or any of its other powers. The *Zonne* Case does clearly imply that the mere holding of the title to the real estate and receiving and distributing the rentals under the lease are not doing business within the meaning of the corporation tax act, although the court is apparently careful to refrain from

declaring without qualification that the Syndicate Company was not doing business. In this case, as reported, it appears that counsel for the defendant urged that the debates in Congress as well as the affirmative action of that body show that holding companies were entitled to be excluded from the operation of the corporation tax law. The court does not expressly find that holding companies are not taxable. But if the decision were to be so interpreted, it clearly would not be a precedent in the present case inasmuch as our statute, as already shown, clearly indicates a legislative intent to tax such companies. The case cited, for these reasons, is distinguishable from the present one.

In *McCoach v. Minehill Railway Co.*, 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842, the facts are substantially these: The Minehill Company was incorporated in 1828 for the purpose of conducting and operating a railroad. It built a railroad and operated it for many years. In 1896 it leased its entire railroad and all of its property of every description in use or adapted for use in, upon, or about the railroad, and also "all the rights, powers, franchises (other than the franchise of being a corporation), and privileges which may now, or at any time hereafter during the time hereby demised, be lawfully exercised or enjoyed in or about the use, management, maintenance, renewal, extension, alteration, or improvement of the demised premises or any of them" to the Philadelphia & Reading Railway Company, for a term of 999 years from January 1, 1897, at a yearly rental of \$252,612; that being equivalent to 6 per cent. upon the capital stock of the Minehill Company. Thereupon the railroad and its property were turned over to the Reading Company, which has since operated it, and the Minehill Company has not carried on any business in connection with its operation. The Minehill Company maintains its corporate existence and organization by electing officers annually. It receives said yearly rental and interest on its bank deposits and maintains a contingent fund from which it receives annual sums as interest or dividends. It pays the necessary expenses incident to maintaining its offices and corporate existence including salaries of officers and clerks. It keeps stock books for the transfer of its stock, which is bought and sold upon the market. The annual income from the contingent fund is about \$24,000, and the annual payments for state tax about as much, and its expenditures for corporate maintenance about \$5,000. On page 303 of 228 U. S., on page 422 of 33 Sup. Ct. (57 L. Ed. 842), the court says:

"The precise question presented by the present record is whether the Minehill Company is 'doing business' in the sense in which the realty companies concerned in *Flint v. Stone Tracy Co.*, 220 U. S. 107, 170, 31 Sup. Ct. 342 (55 L. Ed. 389, Ann. Cas. 1912B, 1312), were doing business, or had gone out of business in sub-

stantially the same sense that the Minneapolis Syndicate had done so. From the facts as stated above it is entirely clear that the Minehill Company was not, during the years of 1909 and 1910, engaged at all in the business of maintaining or operating a railroad, which was the prime object of its incorporation. This business, by the lease of 1896, it had turned over to the Reading Company. If that lease had been made without authorization of law, it may be that for some purposes, and possibly for the present purpose, the lessee might be deemed in law the agent of the lessor; or at least the lessor held estopped to deny such agency. But the lease was made by the express authority of the state that created the Minehill Company, conferred upon it its franchise, and imposed upon it the correlative public duties. The effect of this legislation and of the lease made thereunder was to constitute the Reading Company the public agent for the operation of the railroad and to prevent the Minehill Company from carrying on business in respect of the maintenance and operation of the railroad so long as the lease shall continue. And it is the Reading Company, and not the Minehill Company, that is 'doing business' as a railroad company upon the lines covered by the lease and is taxable because of it. The Corporation Tax Law does not contemplate double taxation in respect of the same business. \* \* \* We conclude that the Minehill Company was not taxable with respect to the railroad business."

And the court further says:

"In our opinion the mere receipt of income from the property leased (the property being used in business by the lessee and not by the lessor) and the receipt of interest and dividends from invested funds, bank balances, and the like, and the distribution thereof among the stockholders of the Minehill Company, amount to no more than receiving the ordinary fruits that arise from the ownership of property. The ground of the decision in the Pollock Case was that a tax upon income received from real estate and invested personal property (as distinguished from income received from the transaction of business) was in effect a direct tax upon the property itself, and therefore invalid unless apportioned according to the population."

And on page 308 of 228 U. S., on page 424 of 33 Sup. Ct. (57 L. Ed. 842), after discussing the section of the Corporation Tax Act providing for the including of income from nontaxable property in order to ascertain the measure of the tax, the court says:

"The distinction is between (a) the receipt of income from outside property or investments by a company that is otherwise engaged in business, in which event the investment income may be added to the business income in order to arrive at the measure of the tax; and (b) the receipt of income from property or investments by a company that is not engaged in business except the business of owning the property, maintaining the investments, collecting the income, and dividing it among its stockholders. In the former case the tax is payable; in the latter not. And so, upon the whole, we think the court below correctly held that the present case is governed by *Zonne v. Minneapolis Syndicate*, 220 U. S. 187 [31 Sup. Ct. 361, 55 L. Ed. 428], and that the taxes under consideration were unlawfully imposed."

If we interpret this opinion aright, it amounts (speaking broadly) to this: First, that the Minehill Company was not taxable with respect to the railroad business for which it was incorporated, inasmuch as it had transacted no such business; second, that a tax upon its income of \$24,000, arising

from its investments, on the authority of the Pollock Case, 157 U. S. 429, 15 Sup. Ct. 673, 39 L. Ed. 759 (the Income Tax Case), would in effect be a direct tax upon property imposed thereon solely by reason of its ownership and therefore invalid because not apportioned according to population; and, third, that the collection and distribution of rentals and income to stockholders, and the other activities of the Minehill Company as described, were not carrying on business within the meaning of the Corporation Tax Act, such activities being incidental to the ownership of property merely.

The principal point in this decision is based on the fact that the Minehill Company was not transacting the business for which it was incorporated, although that it was doing business is not denied, but expressly conceded. As to this point the decision does not apply to the case at bar, as the traction company is doing what it was incorporated to do. Neither is the distinction between a tax on business and property of importance here, as the tax under the state Tax Act is expressly a tax on property. If the reference to the collection and distribution of income arising from investments and from the rental of the Minehill property, etc., as not constituting carrying on business under the act, contains the implication that the Minehill Company had become in effect a holding company and as such not taxable, what we have already said as to the scope of our own act in this particular distinguishes the case at bar from the Minehill Case. But in view of the decision as to the realty companies in the Flint Case it is at least questionable if such implication was intended in the Minehill Case. The Supreme Court up to the present time has apparently carefully refrained from declaring a holding company not taxable.

Three of the court dissented in the Minehill Case on the ground that it was carrying on business and Mr. Justice Day wrote the dissenting opinion. We make extracts therefrom because they are suggestive and pertinent in some particulars in giving interpretation to our own tax act and are in general harmony with the views we have already expressed. Among other things, he says:

"The amount of business done is utterly immaterial. The doing of any business with the advantages which inhere in corporate organization brings the corporation within the terms of the act. Such was the ruling in the Flint Case after full consideration by this court of the terms and scope of the law. It is said, however, that this case is controlled by the ruling in the *Zonne* Case. \* \* \* It seems to me that the present case is quite unlike that one. \* \* \* In the present case the corporation has not disqualified itself from business activity. It maintains a considerable force in active employment and, entirely apart from the receipts from the railroad lease, so deposits and invests its funds as to create, in these days of low interest upon good investments, an annual income of over \$24,000, as appears by its return. The amount derived from investments depends upon the exercise of judgment and the efficiency of management. If business includes every-

"(14) To the reading to the jury by said justice at said trial during his charge to said jury of certain portions of the decision of the Supreme Court of the state of Rhode Island in the case of Angell v. Lewis, the exception thereto being set forth on page 520 of the transcript of testimony, etc., filed herewith, lines 24-26, inclusive, said portions appearing on pages 508 and 509 of the transcript of testimony, etc., filed herewith.

"(15) To the giving of certain instructions to the jury by said justice at said trial at the request of the plaintiff, namely, the plaintiff's second request to charge as modified by said justice, the exception thereto appearing on page 520, said plaintiff's request to charge No. 2 on page 522, and said plaintiff's request to charge No. 2 as modified by said justice and given to the jury on page 517 of the transcript of testimony, etc., filed herewith.

"(16) To the giving of certain instructions to the jury by said justice at said trial at the request of the plaintiff, namely, the plaintiff's third request to charge, the exception thereto appearing on page 520, said plaintiff's request to charge No. 3 on page 522, and said plaintiff's request to charge No. 3, as given to the jury by said justice on page 517 of the transcript of testimony, etc., filed herewith.

"(17) To the giving of certain instructions to the jury by said justice at said trial at the request of the plaintiff, namely, the plaintiff's fifth request to charge as modified by said justice, the exception thereto appearing on page 520, said plaintiff's request to charge No. 5 on page 523 and said plaintiff's request to charge No. 5 as modified by said justice and given to the jury on page 518 of the transcript of testimony, etc., filed herewith.

"(18) To the giving of a certain portion of the charge to the jury by said justice at said trial, which part and the exception thereto are set forth on page 521 of the transcript of testimony, etc., filed herewith, line 3, said part also in the charge of said justice, being paragraph 'First' at line 8 on page 515 of the transcript of testimony, etc., filed herewith.

"(19) To the giving of a certain portion of the charge to the jury by said justice at said trial, which part and the exception thereto are set forth on page 521 of the transcript of testimony, etc., filed herewith, line 3, said part also in the charge of said justice, being paragraph 'Third' at line 21 on pages 515 and 516 of the transcript of testimony, etc., filed herewith.

"(20) To the giving of a certain portion of the charge to the jury of said justice at said trial, which part and the exception thereto are set forth on page 521 of the transcript of testimony, etc., filed herewith, lines 4 to 8, inclusive, said portion also appearing in the charge of the said justice on pages 514 and 515 of said transcript of testimony, etc., filed herewith.

"(21) To the decision of said justice denying defendant's motion for a new trial, which motion was based upon the following grounds."

The several questions which the defendant argues under its bill of exceptions are more particularly set forth in its brief as follows:

(1) That the hospital record, showing clearly the misconduct of the plaintiff at the hospital, which, to some extent precluded a satisfactory recovery from his injuries, should have been admitted in evidence.

(2) That the trial justice charged the jury improperly as to the plaintiff's misconduct at the hospital.

(3) That the trial justice instructed the jury improperly as to the law of the road as applied to the facts of this case:

"A. It was error for the court to charge that the statutory rule of the road in case of one vehicle overtaking another does not affect

the rights and duties toward vehicles approaching from the opposite direction.

"B. It was error for the court to charge that, if the defendant was at the time of the accident traveling on the left of the road, he assumed the risk of so doing, and was required to use greater care than if he had been traveling on the right side.

"C. It was error for the trial justice to charge that, if at the time of the accident the defendant was on the left of the road, he would be liable for all injury flowing exclusively therefrom.

"D. It was error for the court to include in its charge the quotations from the opinion in the case of Angell v. Lewis, 20 R. I. 391 [39 Atl. 521, 78 Am. St. Rep. 881].

"E. It was error for the trial justice to refuse to grant the defendant's first, second, third, and fourth requests to charge.

"F. It was error for the trial justice to grant the plaintiff's fifth request to charge."

(4) The trial justice erred in denying the defendant's motion for a new trial.

And (5) the damages were excessive.

The plaintiff's declaration consists of one count. He alleges that on June 14, 1912, he was riding a bicycle easterly along Point street in the city of Providence when an auto truck near the boundary of Point Street Bridge, traveling westerly, was driven so carelessly by the defendant's chauffeur that it ran into him, throwing him to the ground, as a result of which he sustained a fracture of the left leg between the hip and the knee.

It appears from the evidence that about 6 o'clock, on the afternoon of June 14, 1912, the defendant's auto truck, used for carrying merchandise, was being driven in a westerly direction over the Point Street Bridge, and was being operated by one Alexander J. Lodge, one of the defendant's employes. Another employe of the defendant, Arthur Berry, was upon the truck with Lodge at the time. In proceeding across the bridge the truck traveled at a low rate of speed along the northerly side thereof, and behind a two-horse wagon, the horses being driven at a walk. When the wagon in front reached a point near the west end of the bridge, having already passed the gates at the west end of the draw and also the joist set in the middle of the bridge to separate the driveways, Lodge sounded his horn, shifted his speed from first to second, and started to pass on the left of the wagon in front of him. While thus attempting to pass the team in front, a collision took place between the truck and the plaintiff, who was riding a bicycle in an opposite direction. The collision resulted in throwing the plaintiff to the ground and inflicting upon him injuries for which he now seeks to recover damages. At the westerly end of the bridge, where the asphalt pavement and the granite block pavement meet, the roadway for vehicles is 24' 10" in width, and this width continues across the bridge to the east. In a westerly direction from the bridge, the roadway widens gradually on the north side until it reaches a width of 32' 4". It then commences to widen on the south side, and finally reaches a width of 40' that being the full width of Point street.

The distance from the westerly boundary of the asphalt to the point where the street obtains its full width is 38' 4". The accident occurred near the boundary between the granite blocks and the asphalt pavement. The defendant's truck was about 6' wide, and probably somewhat wider in the upper body. The two-horse wagon which was first ahead and later north of the defendant's truck was 12' long and about 6' wide.

There is a conflict of testimony as to the movements of the plaintiff in approaching the place of the accident. The plaintiff claims that he was proceeding along Point street on his way to the bridge on his own right side of that street, and that both before and after the defendant's truck was turning out for the purpose of passing the team ahead of it his approach could have been easily observed by Lodge, who was operating the truck. The defendant claims that the plaintiff was not upon his right side of the street, as he claims, but that, so far as Lodge could observe, the street presented a clear passage for his truck upon the left of the team in front of him; that the plaintiff must have been traveling on his left-hand side of Point street, and his approach, therefore, obscured by the team ahead, and that the plaintiff, evidently intending to bear to his left, in passing the team and truck, suddenly found that a passage upon that side was impracticable, and so quickly turned to the other side, passing close to the heads of the horses of the team ahead of the truck, and unexpectedly appearing in front of the truck too late for Lodge, the driver, to avoid a collision. The truck did not run over the plaintiff, but the left front mud guard came in contact with his left leg, and he sustained a fracture of the left thigh.

We shall not undertake to deal with the questions of fact which were presented to and were particularly within the province of the jury, but the foregoing brief statement will serve to assist the understanding in the discussion of the questions of law.

The defendant claims that the court erred in excluding the record of the Rhode Island Hospital. It appears from the evidence that it is a rule of the Rhode Island Hospital that a record shall be kept showing, among other things, the condition of the patient when received, his treatment while there, his condition from time to time, denoting his progress toward recovery or otherwise, as the case may be, and of such other matters as may have a bearing upon or furnish needed information. Such a record relating to the plaintiff was kept by Dr. Peet, who was an interne or assistant surgeon at the hospital. This record embraces some matters which came under the personal knowledge of Dr. Peet while other matters of record were communicated to him through doctors and nurses connected with the case. Dr. Peet, who made the record, was at the

time of the trial without the jurisdiction of the court, and was not available as a witness. The record of Dr. Peet covered the case from June 14 to August 15, 1912. It appears to have been his business, as the recording official, to place upon record such facts relating to the patient as were communicated to him by his associates and subordinates, as well as those which came under his personal observation. It also appeared that the record in question was written up by Dr. Peet every third day. These facts, explanatory of the record, having all appeared in testimony, and it having also appeared that Dr. Peet was without the state, and that the record was in his handwriting, it was offered in evidence by the defendant. The court excluded the record and noted the defendant's exception, stating that it had been excluded with the understanding that it was objected to, whereupon counsel for the plaintiff observed:

"I don't understand that it is legal evidence, that it is hearsay, and we have no opportunity to cross-examine the people who made up that record."

So far as appears, both sides proceeded upon the assumption and understanding that the plaintiff had regularly objected to the introduction of the record, and we, therefore, may consider it in the same way.

The purpose for which this record was offered in evidence was to show the unruly behavior of the plaintiff and his disobedience of the positive orders of the surgeons and nurses as to keeping quiet and refraining from movements which would be likely to seriously interfere with the proper adjustment and knitting together of the fractured bone. It also appears in evidence that some, if not all, of those who reported the plaintiff's condition and actions from time to time were called as witnesses at the trial, and that therefore, as the plaintiff claims, the exclusion of the record did not in effect deprive the defendant of any useful or important testimony. We do not think that the plaintiff's claim in this regard is well founded. The exclusion of the record deprived the defendant of its force as corroborative of the testimony of the other witnesses, the record having been made long prior to the suit and without any reference to the plaintiff's claim.

The general rule that hearsay is not competent testimony is well understood. To this general rule, however, there are various exceptions. It is not necessary that there should be any express statute or regulation creating the authority or duty to make such a record. If the duty of making it devolved upon Dr. Peet, under the rules and regulations of the Rhode Island Hospital, that would be sufficient in that regard, and the source from which that duty originated would not be material. Such duties may arise from the casual direction of a superior, or from functions necessarily inherent to the position



which the recorder occupies. 3 Wigmore on Evidence, § 1633; Kyburg v. Perkins, 6 Cal. 676; Evanston v. Gunn, 99 U. S. 660, 25 L. Ed. 308.

We do not understand that the plaintiff controverts the general rule of law as contained and stated by the court in its opinion in *State v. Mace*, 6 R. I. 85, which is as follows:

"The general principle, as established by the leading English and American cases, is that entries made in the regular and usual course of business are admissible in evidence after the death of the person who made them, on proof of his handwriting. In some of the states of this country absence from the state, as far as it affects the admissibility of secondary evidence, has the same effect as the death of the witness. In Massachusetts insanity has been held equivalent to death. In New York and Alabama the strict rule is adhered to that the person who made the entry must be dead to render the entry admissible. The principle as established by the American decisions, on which an entry is admitted as evidence, seems to be that the acts of men performed in the usual course of business and committed to writing, being under obligation to do the act, and where there is no inducement to misstate facts, may be relied on as evidence of things done as they occur. On this principle entries made in the regular and usual course of business are admitted as proof, although the person who made them may recollect nothing of the facts, upon his testifying to the authenticity of the entry. It would seem, therefore, if this evidence may be admitted when the person who made the entry is present to verify the book, the entry being all that constitutes the evidence, if he be dead or absent secondary proof that it was kept by him is admissible, on the same ground that, a subscribing witness to an instrument being absent, his handwriting may be proved, or a copy of an instrument, when the original is lost, may be offered in proof. All that is necessary to render the entry admissible as evidence, if the witness is living, is that he shall testify that the entry was made in the regular course of business in his handwriting; and if he be absent or dead, other witnesses may be competent to testify to that."

The objections of the plaintiff to the admission of the hospital record, as set forth in his brief, are: (1) That there is nothing in the case to show that such record is required by law or ordinance; (2) that there is nothing to show that it was the duty of any particular person to keep such record; (3) that it was not a public record, but something that was kept simply for the convenience and assistance of attending doctors and nurses; (4) that the recording was not contemporaneous with the happening of the events recorded; (5) that some of the events recorded were not within the personal knowledge of the person recording them; and (6) that facts reported by others to Dr. Peet and by him recorded were capable of proof by those who reported them, and who were, or might have been, called as witnesses on behalf of the defendant.

[1] The admissibility of a record does not depend upon its requirement by law. In fact, a great variety of records unquestionably admissible in evidence, as, for instance, the books of mercantile houses, the records

of societies and associations, including church records of baptism and marriage, are not kept through any requirement of law or ordinance. It is sufficient if such record be kept by some person in the regular course of his occupation or business, that is, in the course of transactions performed in one's habitual relations with others and as a natural part of one's mode of obtaining a livelihood, including any regular record that would be helpful, though not essential or usual in the same occupation as followed by others. It is only necessary that the keeping of such record should be a natural concomitant of the transaction to which it relates. 2 Wigmore on Evidence, § 1523; *Fisher v. Mayor*, 67 N. Y. 77; *Kennedy v. Doyle*, 10 Allen (Mass.) 161.

[2] The claim of the plaintiff that there is nothing to show that it was the duty of any one to keep such a record is erroneous. The uncontradicted testimony of Dr. R. G. McAllay is that it was the duty of Dr. Peet to make such record from June 14th to August 15th, that being a part of the period during which the defendant claims that the unruly and disobedient conduct of the plaintiff was responsible for his incomplete recovery from the fractured bone, and, further, that such records were in the handwriting of Dr. Peet.

[3, 4] In making a record of this character which shall be admissible in evidence it is necessary that the entries therein be made contemporaneously with the facts to which such entries relate. *Chaffee & Co. v. U. S.*, 18 Wall. 516, 21 L. Ed. 908. The plaintiff claims that the entries made by Dr. Peet were not contemporaneous, and that his failure in that regard would be sufficient to exclude the record. The testimony is that the record was made up every three days, and that that method was the one employed at the hospital. The term "contemporaneous" is not construed to mean that a record must be made at the moment of the occurrence, but within such time thereafter as would reasonably make it a part of the transaction. *Jones on Evidence* (2d Ed.) § 319; *Ingraham v. Bockius*, 9 Serg. & R. (Pa.) 285, 11 Am. Dec. 730; *Jones v. Long*, 3 Watts (Pa.) 326; *Barker v. Haskell*, 9 Cush. (Mass.) 221.

We think that, taking into consideration the regular method in which these records were made and the apparent impracticability, in a hospital, of recording each event as it occurred, the facts relating to the plaintiff were recorded within such reasonable time as would make them a part of the transaction, and therefore contemporaneous within the meaning of that term. They were entries made in the regular course of business at the hospital and at the times and in the manner there in vogue. They were made by a person, now without the jurisdiction, who had at the time no interest to misrepresent facts. In *Jones v. Long*, supra, the court said:

"The entry need not be made exactly at the time of the occurrence; it suffices if it be with-



in a reasonable time, so that it may appear to have taken place while the memory of the fact was recent, or the source from which knowledge of it was derived, unimpaired. The law fixes no precise instant when the entry should be made."

[5] The plaintiff further claims the record to be inadmissible because some of the facts therein recorded by Dr. Peet were not within his personal knowledge, and that, it being impossible to separate the facts therein due to such personal knowledge from those received by reports from others, the record as a whole must be excluded. We cannot agree with this contention of the plaintiff. The law upon this subject is ably discussed in 2 Wigmore on Evidence, § 1530, reaching the conclusion that:

"Where an entry is made by one person in the regular course of business, recording an oral or written report, made to him by one or more other persons in the regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry."

And further on (section 1555) the author says:

"Where, then, the party has made the record, but has not personal knowledge of the delivery of the goods or the rendering of the services charged, he may call the person having knowledge and use the latter's supplemental testimony. If the salesman or teamster is deceased, or otherwise unavailable, \* \* \* this need not prevent the use of the entry book."

In *Anchor Milling Co. v. Walsh*, 108 Mo. 264, 18 S. W. 904, 32 Am. St. Rep. 600, plaintiff's manager kept a shipping book in which most of the entries or deliveries were made on the knowledge of a shipping clerk; the clerk had left the plaintiff's employment and was not called. The book was admitted in evidence. In *Morris v. Briggs*, 8 Cush. (Mass.) 343, workmen made memoranda from which the plaintiff made entries in his books. It was held that the testimony of the workmen was not necessary. In *Fireman's Ins. Co. v. Seaboard Air Line Ry.*, 138 N. C. 42, 50 S. E. 452, 107 Am. St. Rep. 517, the court held that where, in an action against a railroad for burning cotton, it became material to show at what time defendant's wrecking train reached a certain station on the day in question, the dispatcher's train sheet for that day, kept in the usual course of business, on which the dispatcher testified that he marked the time of the arrival and departure of the train as telegraphed to him by the operator at the station, was not objectionable as hearsay. See, also, *Louisville & N. R. Co. v. Daniel*, 122 Ky. 256, 91 S. W. 691, 3 L. R. A. (N. S.) 1190, to the same effect.

[6] The final objection of the defendant to the admission of the hospital record is that the facts reported to Dr. Peet and by him recorded were capable of proof by those making such reports, and that they were or might have been called to testify at the trial on behalf of the defendant. We do not think that this is a well-founded objection. As be-

fore stated, it deprives the defendant of the corroborative effect of the record upon the testimony of the witnesses in the event that they were called and testified. The written record should not be excluded upon the ground that the witnesses who made reports to Dr. Peet had also testified at the trial of the case. They are two distinct sources of testimony each having a value independent of the other. 2 Wigmore on Evidence, § 1544; *Peck v. Abbe*, 11 Conn. 210.

[7] Our conclusion is, after full and careful consideration of the plaintiff's several points of objection, that the hospital record should have been admitted.

[8] The defendant contends that the trial judge erred in charging the jury in reference to the plaintiff's misconduct while in the hospital. There was testimony on the part of the doctors, surgeons, and nurses that the plaintiff, during the time he remained at the hospital, was unusually restless, that he was sometimes ugly and disobedient and interfered with the apparatus placed upon his leg and body for the purpose of restraining his movements during the period when the ends of the fractured bone would be expected to knit together, and that these several acts on the part of the plaintiff were contrary to the express instructions and orders of the attending surgeons and nurses. The surgeons testified that the plaintiff's recovery was not as satisfactory as would reasonably have been anticipated, and that the shortening of the leg was probably due to the plaintiff's disobedient and unruly conduct in unfastening straps and in the movements of his body in various ways.

The defendant requested the court to charge the jury upon this point as follows:

"If defendant is liable in this case it is only for the natural consequences resulting from the collision. If the plaintiff unreasonably disobeyed the orders of the physicians or nurses in the hospital with regard to keeping quiet, and this failure produced more serious injury than would otherwise have resulted from the accident, the defendant is not responsible to the plaintiff for this aggravation of his injuries."

This request was refused, the court charging the jury as follows:

"Now the first thing in that connection, and to my mind one of the most important things for you to decide is, is it established as an affirmative fact that the plaintiff's acts have caused an aggravation of the injury? I instruct you that unless you find on the evidence as an affirmative fact that the plaintiff by his acts has caused such aggravation of the injury, then you are to dismiss this claim from your consideration. It is not enough to decide that the plaintiff may have aggravated his condition; that would be pretty nearly the same as saying that the plaintiff's acts may not have aggravated his condition. It has got to be more than that; you have got to find as an affirmative fact before you make this allowance that he did aggravate his condition by his own act. The subject is one that I have not found easy to find definite authority on to satisfy my own mind in the time allowed during this trial, but I am going to give my construction of the law on it. I will put it in three paragraphs, so that if you wish to ex-

cept to the reading of any, just note your exception.

"First. The plaintiff's acts, to have the effect of striking from your consideration any consequences of the injury, must have been voluntarily and knowingly performed and performed with the knowledge or means of knowledge that such acts would necessarily or probably do him material harm.

"Second. If the plaintiff did voluntarily and knowingly, and with the knowledge that such acts would necessarily or probably do him material harm, commit acts which materially aggravated the effects of his injury, he cannot recover for the aggravation to his injuries so caused by his own act; but this does not affect defendant's liability for damages caused by its wrongful act and for the necessary and proximate consequences of that act of the defendant.

"Third. If the plaintiff's injury was aggravated by restlessness or acts done by him which were merely the necessary or proximate consequences of the original injury, you will not, because of such aggravation, lessen the damages required to compensate for the injury done him, but will consider the results of such aggravation as a part of the results of the original injury. If it is involuntary, if it is due to restlessness, or any other act beyond the control of the plaintiff, or done without consciousness that it must or probably would hurt him, then it is to be disregarded."

The court first says:

"Now the first thing in that connection, and to my mind one of the most important things for you to decide, is, is it established as an affirmative fact that the plaintiff's acts have caused an aggravation of the injury? I instruct you that unless you find on the evidence as an affirmative fact that the plaintiff by his acts has caused such aggravation of the injury, then you are to dismiss this claim from your consideration."

And later, in the same portion of the charge, the court said:

"You have got to find as an affirmative fact before you make this allowance that he did aggravate his condition by his own act."

We think that the use of this language was unfortunate for the reason that the jury might naturally, and would be likely, to understand therefrom that without some positive proof that the rebellious acts of the plaintiff caused the failure to obtain the best result, they were to dismiss that subject from their consideration. The word "affirmative," as used in that portion of the charge before referred to, describes something positive, something declaratory of what actually exists, something that is a fact. The testimony of the physicians and surgeons is simply an expression of their opinion. This opinion is based: First, upon the absence of other conditions which would militate against a good recovery; and, second, upon the probable effect of the movements and behavior of the plaintiff. From the very nature of things it could not be a matter of positive proof, but only a matter of opinion. It was something, however, which was proper for the jury to consider. It was proper for them to consider it in determining whether or not the failure to obtain the best result was to some extent due to the unwarranted behavior of the plaintiff himself. We think that the

instructions in this respect amounted to error.

[9] The defendant further claims that the trial court erred in charging, in substance, that if the defendant was, at the time of the accident, traveling on the left of the road, he assumed the risk of so doing and was required to use greater care than if he had been traveling on the right side. The portion of the judge's charge to which the defendant's exception refers is as follows:

"The case that I want to cite from is *Angell v. Lewis*, and there the plaintiff's wife was driving a buggy between Fruit Hill and Centerdale. The findings of the court and jury showed that she kept to her right, did not get beyond the middle; that two wagons came to meet her, came towards her; the first one continued to keep to its right and went by safely. The defendant was in the second, and as he came near the plaintiff's buggy he swung to the left to pass the wagon in front of him, and in so doing smashed into the plaintiff's buggy, and it was found and declared that Mrs. Angell, who was driving, could not reasonably do anything to prevent the accident. On that state of affairs the court used expressions that would be applicable to this case if this case happened on the supposition that I have named. And the case, I think, is pertinent in other respects. The evidence shows that the plaintiff's wife complied with this requirement on meeting the two teams, and that she was in the act of passing them safely when the defendant suddenly pulled his team to the left and collided with hers. In thus taking the wrong side of the road the defendant took the risk of the consequences which might arise from his inability to get out of the way of another team approaching on the right side of the road, and is responsible for injuries sustained by the latter while exercising ordinary care. In other words, one who violates the law of the road by driving on the wrong side assumes the risk of such an experiment, and is required to use greater care than if he had kept on the right side of the road, and if a collision took place in such circumstances, the presumption is against the party who is on the wrong side—and this: In another case cited by the Rhode Island court these words are used: 'It is legal negligence in any one to occupy the half of the way appropriated by law to others having occasion to use it in traveling with teams and carriages, and he is chargeable for any injury flowing exclusively from that cause. The plaintiff's wife had the right to presume that the driver of any team coming in the opposite direction would duly observe the law of the road as she herself was doing, and hence she was not called upon to exercise that degree of care which devolved upon the defendant when taking the wrong side of the road.'

"Now you will remember the circumstances of the case in which that language was used. That was used with reference to the facts, then before the court, that the plaintiff's wife, Mrs. Angell, was on and had kept on her side of the road and the collision was caused because the defendant left his right, drove over on his left, and smashed into the plaintiff's buggy; and it is to be remembered, in considering the opinion there, the words of the opinion, that the opinion was used with reference to that state of facts."

It appears from this portion of the charge that the court read to the jury certain portions of the opinion in the case of *Angell v. Lewis*, 20 R. I. 391, 39 Atl. 521, 78 Am. St. Rep. 881, as applicable to the case on trial. That case was decided prior to the passage

of section 1, c. 87, Gen. Laws 1909, now sometimes referred to as the "law of the road." In the case of *Angell v. Lewis*, supra, the court in its opinion made use of the following language:

"In thus taking the wrong side of the road the defendant took the risk of the consequences which might arise from his inability to get out of the way of another team approaching on the right side of the road, and is responsible for injuries sustained by the latter while exercising ordinary care. In other words, one who violates the 'law of the road' by driving on the wrong side assumes the risk of such an experiment, and is required to use greater care than if he had kept on the right side of the road; and if a collision takes place in such circumstances, the presumption is against the party who is on the wrong side. And this is especially true where the collision takes place in the dark."

We think that this language of the court in *Angell v. Lewis* must be considered in connection with the facts of that case in order to get at its intended meaning. That case differs in some important particulars from the case at bar. The accident occurred in the darkness of night. The defendant admitted that when he pulled out to pass the teams ahead of him he was not thinking that some one might be coming towards him on the other side of the road. In other words, the defendant in that case confessedly, without exercising any care whatever, drove upon the left-hand side of the road under circumstances which made it impossible for him to ascertain or observe the approach of another team. We think that the opinion in that case must be limited by the facts therein, and that, under the circumstances, the court may have been justified in characterizing the action of the defendant as an experiment, the risk of which he assumed.

The law regarding the movement of vehicles upon the highway is contained in section 1, c. 87, Gen. Laws of Rhode Island 1909, and is as follows:

"Section 1. Every person traveling with any carriage or other vehicle, who shall meet any other person so traveling on any highway or bridge, shall seasonably drive his carriage or vehicle to the right of the center of the traveled part of the road, so as to enable such person to pass with his carriage or vehicle without interference or interruption. Every person traveling with any carriage or other vehicle who shall overtake any other person so traveling on any highway or bridge shall pass on the left side thereof, and the person so overtaken shall as soon as practicable drive to the right so as to allow free passage on the left."

Under this section the rights and duties of parties moving in opposite directions upon the highway, as well as the duty of parties moving in the same direction, are defined. It is, under this statute, the privilege of a person who may be traveling in the rear of another vehicle to pass such vehicle upon the left side; it being the duty of the one in advance to bear to the right for the purpose of facilitating such passage. In passing a vehicle ahead, it would be necessary in many highways to enter upon and occupy, for the time being, some portion of the traveled way

beyond the central line thereof, and it cannot be reasonably said that in the passage of the statute, above quoted, it was the intention of the Legislature to confine the passing vehicle to such portion of the highway as might lie upon the right side of the center line thereof. Where two vehicles are moving in the same direction, the one in the rear has the right to pass the one in front, and such passing is not of and in itself negligence, although some portion of the road to the left of the central line may be encroached upon. The person passing would not be required to exercise a greater degree of care; he would be required to exercise such care as the conditions and circumstances demanded, and if he did exercise such care as the conditions and circumstances demanded, he would be in the exercise of due care.

In the case of *Marsh v. Boyden*, 33 R. I. 519, 82 Atl. 393, 40 L. R. A. (N. S.) 582, the court said:

"They would not be held to a greater degree of care as being upon the wrong side of the road; in fact the degree of care required was exactly the same on the one side of the car as upon the other, and that was due care, care proportionate to the conditions existing at that time and place. \* \* \* If a duty was violated, it is the duty of using due care under all the circumstances of the case."

We think that in the case at bar the trial court, to some extent, misconceived the case of *Angell v. Lewis*, and gave to the opinion therein a greater force or a different construction than it was entitled to.

We think that the jury, from that portion of the charge relating to the law of the road, would naturally understand that the presence of the defendant's truck upon the left side of the road was negligence in itself, and that the defendant was therefore responsible for the results of the collision, whereas, on the contrary, the jury should have been instructed that the defendant had a right to pass to the left of the team in front of him, and would not be responsible for the collision if, in doing so, he acted with such care as the time, place, and circumstances demanded of him, or, in other words, if in his attempt to pass by he exercised due care.

The defendant's exceptions numbered 1, 2, 4, and 5 relate to rulings of the trial court admitting testimony. These exceptions do not seem to us to be important for the reason that we cannot see that the admission of the testimony was prejudicial to the defendant's case. The defendant's sixth exception is apparently abandoned. The defendant's exceptions numbered 7, 8, and 9 are to the refusal of the court to charge as therein requested, such refusal being upon the ground that the matters referred to in the requests had already been covered, and we cannot see from an examination of the whole charge that the court was in error.

[10] The defendant's tenth exception relates to the refusal of the court to charge the

jury in accordance with defendant's fourth request, which reads as follows:

"You are instructed that in arriving at a verdict in this case you are to act just as if the case had been brought against the defendant's employé, Alexander J. Lodge, instead of the defendant company, and you should not find a verdict against the defendant, the Revere Rubber Company, unless you would have found a verdict against Alexander J. Lodge if the case had been brought against him."

While this language might have been used with propriety in the course of argument, it does not seem to us that it was of any particular importance as an instruction to the jury.

The defendant's twelfth exception is to a portion of the charge to the effect that the last half of section 1, c. 87, Gen. Laws 1909, in no respect changes the rights or duties of the automobile about to pass a team in regard to vehicles going the other way. It is not altogether clear as to what the trial court had in mind in giving this instruction. The section of the statute referred to deals with two situations: (1) When parties proceeding in different directions approach each other; and (2) when one vehicle desires to pass another going in the same direction. As we have before substantially said, a person attempting to pass a vehicle ahead of him and going in the same direction must exercise proper care in so doing. If a vehicle is approaching from the opposite direction at the moment when he desires to pass the vehicle in front, and the highway is not wide enough to safely accommodate all three teams abreast, then it would be the duty of the person in charge of the rear vehicle, in the exercise of proper care under the circumstances, to wait until the vehicle coming in the opposite direction had passed by before he attempted to turn out. It is not necessary to involve the question as to the duty of the vehicle in the rear, in passing, towards another vehicle that may be approaching in an opposite direction. The approach of the vehicle in the opposite direction is simply one of the circumstances which must be considered by the rear man when he attempts to pass. It is simply one of the things which demands the exercise of care upon his part under all circumstances, and in some circumstances he would be required to refrain from attempting to pass until the approaching vehicle had gone by.

[11] The defendant's seventeenth exception is based upon the charge of the court as requested by the plaintiff in his fifth request. This request is as follows:

"If you find that at the time of the accident the plaintiff was riding upon Point street on his right side of the highway, and was in the exercise of ordinary care, and the driver of the auto truck of the defendant company suddenly drove his truck to the left side of the highway in an effort to pass a team in front of him, and the plaintiff was unable to get out of the way of the auto truck owing to the suddenness of defendant's approach in front of him, by the exercise of ordinary care, then the defendant com-

pany is liable for the injuries received by the plaintiff."

We do not see any error in charging the jury in accordance with this request, nor do we see any error in the refusal of the trial court to grant a new trial; the latter being covered by the defendant's exception numbered 21.

The defendant's exceptions 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 17, and 21 are overruled. The defendant's exceptions 3, 11, 13, 14, 15, 16, 18, 19, and 20 are sustained, and the case is remitted to the superior court for a new trial.

JOHNSON, C. J. (dissenting). I am unable to agree entirely with the opinion of the majority of the court. By said opinion all the defendant's exceptions are overruled except its exceptions numbered 3, 11, 13, 14, 15, 16, 18, 19, and 20, which are thereby sustained. I dissent only as to the exceptions sustained.

The third exception is to the exclusion of the record of the Rhode Island Hospital. Upon the subject of said record prior to the offer thereof in evidence, Dr. McAllay testified that in June, 1912, Dr. Johnson was house surgeon. Dr. Peet was the second, and the witness the third, man in the service. He said:

"Well, the last six weeks of every service, that is of every houseman's term, which is three months, his junior writes the continued notes; the first six weeks of his own service the house surgeon writes them himself."

He testified that this was Dr. Peet's duty during the early part of the period when the plaintiff was at the hospital; that Dr. Peet was then the junior house surgeon; that the records were in Dr. Peet's handwriting from June 15th to August 15th; that Dr. Peet was at Philadelphia, at the time of the trial. The question was then asked:

"How are these records made up; what is the custom and rule of the hospital with reference to the making up of the records, Doctor?" A. "The man who has charge of writing the names on the case is supposed to make notes on that case every three days, that is, the important things that have happened in the case, every three days and oftener if necessary."

The question is then asked:

"And then those notes are incorporated into the hospital record?" A. "Yes, sir." Q. "Are those notes which he makes every three days in the usual course of his duty based upon his own observation or upon the observation of himself and others?"

The witness: "I served three months as senior man on the nose and throat service, and I had to make records every three days. I served nearly three months as house physician, and I had to make notes every three days on every patient."

The Court: "Is your answer complete?"

Witness: "No. I said that you made the notes from your own observation and the observation of your visiting man on the rounds, and I said that was my experience, and my experience is the custom of the hospital; that is, it is the custom there for every man to do the same thing."

The record was then offered. It was ruled out, and defendant's exception noted.

This record was offered for the purpose of showing unruly behavior on the part of the plaintiff and his disobedience of the orders of the surgeons and nurses as to keeping quiet and refraining from movements which would be likely to interfere with the proper adjustment and knitting together of the fractured bone. It also appears in evidence that some, if not all, of those who reported the plaintiff's condition and actions from time to time were called as witnesses at the trial, and that therefore, as the plaintiff claims, the exclusion of the record did not in effect deprive the defendant of any useful or important testimony.

The objections of the plaintiff to the admission of the record made by Dr. Peet, as set forth in his brief, are: (1) That there is nothing in the case to show that such record is required by law or ordinance; (2) that there is nothing to show that it was the duty of any particular person to keep such record; (3) that it was not a public record, but something that was kept simply for the convenience and assistance of attending doctors and nurses; (4) that the recording was not contemporaneous with the happening of the events recorded; (5) that some of the events recorded were not within the personal knowledge of the person recording them; and (6) that facts reported by others to Dr. Peet and by him recorded were capable of proof by those who reported them, and who were, or might have been, called as witnesses on behalf of the defendant. It appears from the evidence that some of the facts recorded by Dr. Peet were not within his personal knowledge, and the plaintiff claims that, it being impossible to separate the facts therein due to such personal knowledge from those received by reports from others, the record as a whole must be excluded.

Upon the question of knowledge on the part of the witness, it is said in section 657 of Wigmore on Evidence:

"Knowledge must be founded on personal observation by the senses, not on hearsay. The first corollary from the general principle of knowledge is that what the witness represents as his knowledge must be an impression derived from the exercise of his own senses, not from the reports of others; in other words, must be founded on personal observation. This general rule, to which contrary instances can be only casual exceptions, has long been recognized as fundamental. Upon this principle, the testimony of one claiming to have knowledge has constantly been rejected, when it appeared that he had lacked personal observation."

Among the exceptional cases under this principle when knowledge founded on hearsay may suffice is that of testimony of deceased or absent persons under the hearsay exception. Upon this, Mr. Wigmore says, in section 670:

"Under the exceptions to the hearsay rule the testimony of the witness deceased or absent must equally be based on personal observation."

And in section 1424:

The hearsay rule is merely an additional test or safeguard to be applied to testimonial evidence otherwise admissible. The admission of hearsay statements by way of exception to the rule therefore presupposes that the assertor possessed the qualifications of a witness in regard to knowledge and the like. These qualifications are fundamental as rules of relevancy, and can never be dispensed with. Thus these extrajudicial statements may be inadmissible because of their failure to fulfill the ordinary rules about qualifications, even though they meet the requirements of a hearsay exception."

"Personal knowledge of entrant; entries by bookkeeper, etc., on report of salesman, teamster, etc. (1) There can be no doubt that the general principle of testimonial evidence (ante, section 657) should apply here as elsewhere, namely, that the person whose statement is received as testimony should speak from personal observation or knowledge. This principle has often been invoked in excluding entries made by persons who had no personal knowledge of the supposed facts recorded. \* \* \*

"The use of a party's entries, like that of all the hearsay exceptions, must be subject to the ordinary principles of testimonial qualifications. Ante, section 1424. When the party is the entrant, then he must have the elementary qualification, the personal knowledge of the transaction recorded. Ante, section 657." Id. § 1530.

The admission of such records is discussed in *Delaney v. Framingham Gas, etc., Power Co.*, 202 Mass. 359, at page 366, 88 N. E. 773, at page 776, the court said:

"So far as respects the admissibility of the records of the Carney Hospital under St. 1905, c. 330, the same rule applies because these records also were made before it was passed. The defendant insists, however, that the records of this hospital are admissible under the common law. While it is true that the records were not made in accordance with a requirement of law, and therefore were not legal records within the meaning of the rule that legal records or copies thereof are generally admissible, still it appears that they were made in the usual course of business by a person in the discharge of a duty, who appears not only as the maker of them, but as their custodian. If she had died and her handwriting had been proved, in the absence of any other testimony as to the manner in which they were made up, they would have been admissible. As in the case of *Townsend v. Pepperell*, 99 Mass. 40, it would have been assumed that the records were of facts known to her. The rule applicable to such records ordinarily is that the entries must be made by a person having personal knowledge of the truthfulness of the statements. This test has been applied by this court in the case of shop books offered to prove delivery of goods, and it has been held that where the clerk who made the entries had no knowledge of the facts, the entries are not admissible, although the clerk testified that he correctly put down the information he received from the person by whom the delivery was said to be made. \* \* \*

It is true that this rule has not been applied with the same strictness to other memoranda. But in substance the general principle is the same. In the leading case of *Welsh v. Barrett*, 15 Mass. 380, 386, in which a bank's messenger's memorandum of a demand and notice made by him in the course of his duty was admitted upon proof of his handwriting, he being dead, the principle was stated in these words: 'What a man has said when not under oath may not, in general, be given in evidence when he is dead, because his words may be misconstrued and misrecalled, as well as because it cannot be known that he was under any strong motive to declare the truth. Yet there are well-

known exceptions to this rule, as in questions concerning pedigree. But what a man has actually done and committed to writing, when under obligation to do the act, it being in the course of the business he has undertaken, and he being dead, there seems to be no danger in submitting to the consideration of the jury.' And the rule has been adhered to quite generally except where in the course of the business the clerk making the entry receives his information either orally or in writing from various persons whom he cannot expect to remember, and whom it will be impracticable to call. To apply the rule in such a case, and to require the evidence of every person in the long line of persons who have had anything to do with the transaction recorded, would be practically impossible, and so as a practical necessity the record is admitted upon the oath of the recorder, if alive, or upon proof of handwriting if he be dead. It is probable that this exception has been carried farther elsewhere than in this state. For a general discussion of the subject, see Wigmore on Evidence, § 1530, and cases cited in the notes. In our own state this exception seems to have been recognized in *Briggs v. Rafferty*, 14 Gray (Mass.) 525; *Adams v. Coulliard*, 102 Mass. 167.

"In the present case the records were produced by the witness Gabagan. It appeared that the records were made by her, and that she was the proper custodian of them. But it further appeared that she never had any personal knowledge of the facts stated therein; that she received slips of paper from Dr. Painter, the physician, and copied them into the record; and that was all she knew about them. The record was offered as evidence to show that the statements therein made were true. As handed to the witness by the physician, they were simply statements of the physician as to what the patient had said to him, or as to the diagnosis made by the physician. The records were comparatively recent. It was not shown that the physician was not living and within the jurisdiction of the court. No necessity was shown, therefore, for the introduction of this hearsay testimony. For aught that appeared there was better evidence. Under these circumstances the reason upon which the general rule was based, namely, that the record should be a record of facts of which the writer had personal knowledge, should be applied. The case is not within the above-mentioned exception to the general rule."

The case at bar differs from the case last cited in that here the entrant was shown to be outside the jurisdiction of the court. It appears, however, that the testimony of those from whom the entrant received the information which he wrote down was available, and that many, if not all, of said persons were called and testified. The defendant was therefore able to get the testimony of the original witnesses.

The majority opinion says:

"We do not think that the plaintiff's claim in this regard is well founded. The exclusion of the record deprived the defendant of its force as corroborative of the testimony of the other witnesses, the record having been made long prior to the suit and without any reference to the plaintiff's claim."

The defendant had the testimony of the declarants, which was the best evidence, and it is not entitled to corroborate the testimony of said witnesses by showing that they had, when not under oath, made the same statements as when under oath. After a witness had testified, I do not think that another

witness would be permitted to corroborate his testimony by saying that the witness had previously made the same statement to him. Further, the judge, on the evidence submitted preparatory to the offer of the record kept by the junior house surgeon, may properly have found that the record was imperfect or not properly kept. Upon such a finding it would be properly excluded. In my opinion there was no error in the exclusion of the record offered.

The defendant alleges error in the charge to the jury with reference to the conduct of the plaintiff in the hospital. The defendant requested the court to charge the jury upon this point as follows:

"If defendant is liable in this case it is only for the natural consequences resulting from the collision. If the plaintiff unreasonably disobeyed the orders of the physicians or nurses in the hospital with regard to keeping quiet, and this failure produced more serious injury than would otherwise have resulted from the accident, the defendant is not responsible to the plaintiff for this aggravation of his injuries."

This request was refused, the court charging the jury as follows:

"Now the first thing in that connection, and to my mind one of the most important things for you to decide, is, is it established as an affirmative fact that the plaintiff's acts have caused an aggravation of the injury? I instruct you that, unless you find on the evidence as an affirmative fact that the plaintiff by his acts has caused such aggravation of the injury, then you are to dismiss this claim from your consideration. It is not enough to decide that the plaintiff may have aggravated his condition; that would be pretty nearly the same as saying that the plaintiff's acts may not have aggravated his condition. It has got to be more than that; you have got to find as an affirmative fact, before you make this allowance, that he did aggravate his condition by his own act. The subject is one that I have not found easy to find definite authority on to satisfy my own mind in the time allowed during this trial, but I am going to give my construction of the law on it. I will put it in three paragraphs, so that if you wish to except to the reading of any, just note your exception.

"First. The plaintiff's acts, to have the effect of striking from your consideration any consequences of the injury, must have been voluntarily and knowingly performed, and performed with the knowledge or means of knowledge that such acts would necessarily or probably do him material harm.

"Second. If the plaintiff did voluntarily and knowingly, and with the knowledge that such acts would necessarily or probably do him material harm, commit acts which materially aggravated the effects of his injury, he cannot recover for the aggravation to his injuries so caused by his own act; but this does not affect defendant's liability for damages caused by its wrongful act, and for the necessary and proximate consequences of that act of the defendant.

"Third. If the plaintiff's injury was aggravated by restlessness or acts done by him which were merely the necessary or proximate consequences of the original injury, you will not, because of such aggravation, lessen the damages required to compensate for the injury done him, but will consider the results of such aggravation as a part of the results of the original injury. If it is involuntary, if it is due to restlessness, or any other act beyond the control of the plaintiff, or done without consciousness

that it must or probably would hurt him, then it is to be disregarded."

The only criticism of this instruction by the majority opinion is of the words:

"Now the first thing in that connection, and to my mind one of the most important things for you to decide, is, is it established as an affirmative fact that the plaintiff's acts have caused an aggravation of the injury? I instruct you that, unless you find on the evidence as an affirmative fact that the plaintiff by his acts has caused such injury, then you are to dismiss this claim from your consideration."

And later:

"You have got to find as an affirmative fact before you make this allowance that he did aggravate his condition by his own act."

The majority opinion says:

"We think that the use of this language was unfortunate for the reason that the jury might naturally, and would be likely, to understand therefrom that, without some positive proof that the rebellious acts of the plaintiff caused the failure to obtain the best result, they were to dismiss that subject from their consideration. The word 'affirmative,' as used in that portion of the charge before referred to, describes something positive, something declaratory of what actually exists, something that is a fact."

The word is defined in Webster's New International Dictionary—

"2. That affirms; asserting that the fact is so; declaratory of what exists; answering 'yes' to a question—opposed to negative; as an affirmative answer or vote."

The opinion then says:

"The testimony of the physicians and surgeons is simply an expression of their opinion. This opinion is based: First, upon the absence of other conditions which would militate against a good recovery; and, second, upon the probable effect of the movements and behavior of the plaintiff. From the very nature of things it could not be a matter of positive proof, but only a matter of opinion. It was something, however, which was proper for the jury to consider. It was proper for them to consider it in determining whether or not the failure to obtain the best result was to some extent due to the unwarranted behavior of the plaintiff himself."

While it is true that the testimony of the physicians and surgeons is an expression of their opinion, such testimony must be based upon facts sufficient to justify such opinion, in order to affirmatively establish that which such opinion asserts to be true. "The absence of other conditions which would militate against a good recovery" would be a fact which, taken in connection with movements and behavior of the plaintiff shown by the evidence, would furnish a basis for an opinion by the physicians as to the probable effect of such movements and behavior of the plaintiff. The majority opinion says:

"From the nature of things it could not be a matter of positive proof but only a matter of opinion."

While the testimony of the physician would consist in the statement of his opinion, including the grounds thereof, what is to be established as the result of the proof is not an opinion but a fact. As the majority opinion says:

"The word 'affirmative,' as used in that portion of the charge before referred to, describes

something positive, something declaratory of what actually exists, something that is a fact."

That is an admirable definition of the word as used in the instruction, and its use was entirely proper. The judge did not err in this instruction. The foregoing discussion involves exceptions 11, 18, 19, and 20.

The defendant also excepted to the following portion of the charge of the court:

"The case that I want to cite from is Angell v. Lewis: And there the plaintiff's wife was driving a buggy between Fruit Hill and Centerdale. The findings of the court and jury showed that she kept to her right, did not get beyond the middle; that two wagons came to meet her, came towards her; the first one continued to keep to its right and went by safely. The defendant was in the second, and as he came near the plaintiff's buggy he swung to the left to pass the wagon in front of him, and in so doing smashed into the plaintiff's buggy, and it was found and declared that Mrs. Angell, who was driving, could not reasonably do anything to prevent the accident. On that state of affairs the court used expressions that would be applicable to this case if this case happened on the supposition that I have named. And the case I think is pertinent in other respects. The evidence shows that the plaintiff's wife complied with this requirement on meeting the two teams, and that she was in the act of passing them safely when the defendant suddenly pulled his team to the left and collided with hers. In thus taking the wrong side of the road the defendant took the risk of the consequences which might arise from his inability to get out of the way of another team approaching on the right side of the road, and is responsible for injuries sustained by the latter while exercising ordinary care. In other words, one who violates the law of the road by driving on the wrong side assumes the risk of such an experiment, and is required to use greater care than if he had kept on the right side of the road, and if a collision took place in such circumstances the presumption is against the party who is on the wrong side—and this: In another case cited by the Rhode Island court these words are used: 'It is legal negligence in any one to occupy the half of the way appropriated by law to others having occasion to use it in traveling with teams and carriages, and he is chargeable for any injury flowing exclusively from that cause. The plaintiff's wife had the right to presume that the driver of any team coming in the opposite direction would duly observe the law of the road as she herself was doing, and hence she was not called upon to exercise that degree of care which devolved upon the defendant when taking the wrong side of the road.'

"Now you will remember the circumstances of the case in which that language was used. That was used with reference to the facts, then before the court, that the plaintiff's wife, Mrs. Angell, was on and had kept on her side of the road and the collision was caused because the defendant left his right, drove over on his left and smashed into the plaintiff's buggy; and it is to be remembered in considering the opinion there, the words of the opinion, that the opinion was used with reference to that state of facts."

The case of Angell v. Lewis, 20 R. I. 391, 39 Atl. 521, 78 Am. St. Rep. 881, has never been overruled, doubted, or distinguished in any way to diminish its authority. The doctrine therein laid down that one who violates the law of the road by driving on the wrong side assumes the risk of such experiment, and is required to use greater care than if he had kept on the right side of the road, and if a



collision took place in such circumstances the presumption is against the party who is on the wrong side of the road, and that quoted from the case therein cited, "It is legal negligence in any one to occupy the half of the way appropriated by law to others having occasion to use it in traveling with teams and carriages, and he is chargeable for any injury flowing exclusively from that cause," have been consistently followed in this state.

Angell v. Lewis was cited in *Winter v. Harris*, 23 R. I. 47, 49 Atl. 398, 54 L. R. A. 643, in which case the court says:

"The plaintiff showed no sufficient cause or excuse for being on the wrong side of the road at the time of the accident, and the injuries she complained of were attributable mainly, if not wholly, to her own failure to exercise due care; hence, under the circumstances of this case, we find no error in the charge of the justice, to which exception was taken."

Also in *Pick v. Thurston*, 25 R. I. 86, 54 Atl. 600, where the court said:

"As the plaintiff in the case at bar was violating the 'law of the road,' she must show some sufficient cause or excuse for being on the wrong side to enable her to attribute negligence to the defendant."

Many cases in other jurisdictions are in accord.

In *Brember v. Jones* (1893) 67 N. H. 374, 30 Atl. 411, 26 L. R. A. 408, the court says:

"Ordinarily, if one traveler, in meeting another, be found upon the half of the way appointed to him by the statute, traveling with ordinary care and prudence, and he sustain an injury by a collision with the vehicle of another, who is upon that part of the way to which he has not the statutory right, the individual who has thus sustained the injury may have redress by action against him who was thus on the part of the way to which the statute did not give him the right. The traveler who thus travels prudently and carefully upon the half of the way assigned to him will ordinarily pass at the hazard and risk of him who trenches upon his rights in the manner already stated. \* \* \*

It is legal negligence in any one thus to occupy the half of the way appropriated by law to others having occasion to use it in traveling with teams and carriages, and he is chargeable for any injury flowing exclusively from that cause."

In *Riepe v. Elting* (1893) 89 Iowa, 82, 56 N. W. 285, 26 L. R. A. 769, 48 Am. St. Rep. 356, the court said:

"The general rule seems to be that, where a collision occurs between the horse or vehicle of a person on the wrong side of the road and that of a person coming towards him, the presumption is that it was caused by the negligence of the person who was on the wrong side of the road, but that his presence on that side may be explained and justified. 2 Shearm. & Redf. Neg. § 650; Elliott, Roads and Streets (3d Ed.) § 1082."

In *Foot v. American Product Co.* (1900) 195 Pa. 190, 45 Atl. 934, 49 L. R. A. 764, 78 Am. St. Rep. 806, the court said:

"In passing north along the east side of Seventeenth street, the boy was where he had a right to be and where, if traveling on the street in that direction, the law of the road, as well as the city ordinance, required him to be. When the collision occurred the driver was turning his wagon around the southeast corner of Spruce and Seventeenth streets, and the plaintiffs claim that it was with the intention of going south

on the east side of the street. When no one was approaching with a desire to pass him with a vehicle, the driver had the right to use any part of the street, not occupied by another; yet when he turned abruptly on Seventeenth street in the manner shown by the testimony, he was taking the chance of a collision with other travelers going north on that street, whose rights at that place were superior to his."

In *Louis Perlestein v. American Express Co.*, 177 Mass. 530, 59 N. E. 194, 52 L. R. A. 959, the court, Knowlton, J., said:

"The plaintiff introduced testimony that he himself was driving on the right-hand side of Harrison avenue, close to the sidewalk, and it tended to show that he was in the exercise of due care. The driver of the other team was driving 'very fast' in the opposite direction, and collided with the plaintiff. This was evidence that he was acting in violation of the statute, which requires persons meeting each other as these persons were to drive 'to the right of the middle of the traveled part' of the road, and unexplained it indicated negligence. *Reynolds v. Hanrahan*, 100 Mass. 813; *Young v. South Boston Ice Co.*, 150 Mass. 527 [23 N. E. 326]; *Randolph v. O'Riordon*, 155 Mass. 331 [29 N. E. 583]."

"One who violates the law of the road by driving on the wrong side of the way assumes the risk of all such experiments, and must use greater care than if he keeps upon the right side of the road. If a collision takes place, the presumption is generally against the party on the wrong side." Elliott, Roads and Streets, § 1082.

In the charge it does not clearly appear whether the judge read from *Angell v. Lewis* or not. In his statement of the facts, he does not follow the language literally, while he does so in substance. The instructions in matters of law are given as in the report of said case. I see no reason for criticism in his use of said case in the charge, and in my opinion there was no error in such use. As to the suggestion in the majority opinion that the language of *Angell v. Lewis* must be considered in connection with the facts of that case in order to get at its intended meaning, the case is not peculiar in that regard. No two cases are exactly alike in all their circumstances. The fact, however, that the collision in that case occurred between 5 and 6 o'clock p. m. on January 3, 1897, while that in this case occurred about 6 o'clock in the afternoon on June 14, 1912, or the fact that in that case the defendant admitted that when he pulled out to pass the teams ahead of him he was not thinking that some one might be coming towards him on the other side of the road, while in this case the defendant's servant sounded his horn, shifted his speed from first to second, and started to pass on the left of the wagon in front of him, and while thus attempting to pass the team in front a collision took place between the truck and the plaintiff who was riding a bicycle in the opposite direction, constitute such differences in the facts of the two cases as render the law of the former case inapplicable to the case at bar.

The law of the road is now given in Gen. Laws, 1909, sections 1 and 2, as follows:

"Section 1. Every person traveling with any carriage or other vehicle, who shall meet any other person so traveling on any highway or



bridge, shall seasonably drive his carriage or vehicle to the right of the center of the traveled part of the road, so as to enable such person to pass with his carriage or vehicle without interference or interruption. Every person traveling with any carriage or other vehicle who shall overtake any other person so traveling on any highway or bridge shall pass on the left side thereof, and the person so overtaken shall as soon as practicable drive to the right so as to allow free passage on the left.

"Sec. 2. Every person who shall willfully violate the provisions of the preceding section shall be fined five dollars, and shall be liable for all damages sustained in consequence of any neglect to comply with said provisions."

*Marsh v. Boyden*, 33 R. I. 519, 82 Atl. 393, 40 L. R. A. (N. S.) 582, cited in the majority opinion, is not in point. In that case, at page 523 of 33 R. I., at page 395 of 82 Atl. (40 L. R. A. [N. S.] 582), the court said:

"If the rule of the road had any application at all it must have been with reference to the street car or the people thereon, but the plaintiff at the time of the accident had ceased to be a passenger on the car, and there was no interference with the car or collision in which it and the automobile of the defendant were involved. The plaintiff was not injured in consequence of the neglect of any duty which the defendant owed to the car or its occupants. Of course the defendant was bound to take notice of the fact that a street car had stopped to allow passengers to alight and to so conduct his vehicle as not to run down persons who had so alighted, but that is not a duty imposed by the statutes hereinbefore referred to as prescribing the rule of the road."

This language precedes that quoted in the majority opinion.

The foregoing discussion involves exceptions 13, 14, 15, 16, 17.

All of defendant's exceptions should be overruled, and the case should be remitted to the superior court for the entry of judgment for the plaintiff upon the verdict.

SWEETLAND, J., concurs in opinion of JOHNSON, C. J.

(37 R. I. 66)

QUINN v. HALL et al. (No. 278.)

(Supreme Court of Rhode Island. July 7, 1914.)

#### 1. EQUITY (§ 457\*)—BILL OF REVIEW—RIGHT TO FILE—PARTIES.

A strict bill of review can be filed only by a party to the original cause or by one in privity with such party; other persons aggrieved by the decree sought to be reviewed being required to proceed by original bill in the nature of a bill of review.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 1099; Dec. Dig. § 457.\*]

#### 2. EQUITY (§ 442\*)—BILL IN THE NATURE OF A BILL OF REVIEW—RIGHTS OF THIRD PERSONS—FILING.

Where, after the death of the life beneficiary of a trust, her heirs, without notice to complainant, who was her husband, obtained a decree terminating the trust and directing distribution of the trust fund to them, a subsequent bill brought by complainant to set aside such decree and to recover the property on the ground that it was distributable to him, alleging that he had no knowledge of the existence of the trust and had not been made a party to the prior proceedings because of fraudulent

concealment on the part of the beneficiary's heirs of the fact that she died leaving a living husband, and that, on discovering the facts, he proceeded diligently to take action, was not a bill of review, but a bill in the nature of a bill of review, and was therefore not objectionable because not filed within a year from the entry of the final decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1065-1070; Dec. Dig. § 442.\*]

#### 3. JUDGMENT (§ 460\*)—DECREE—FRAUD.

Since it is incumbent on a trustee, in proceedings to terminate the trust, to fully advise the court as to all material facts affecting the distribution of the estate upon the determination of the trust and to satisfy himself beyond doubt of the persons legally and equitably entitled to the fund, a bill to set aside a decree terminating the trust and distributing the property, alleging that complainant, the husband of the beneficiary for life, was entitled to the trust fund, but that, by fraudulent concealment of the fact that the beneficiary died leaving a husband, he was not made a party to the bill, and it was made to appear to the court that the wife's heirs were the only parties in interest, and for this reason the property was ordered distributed to them, sufficiently charged fraud in procuring the original decree to state a cause of action for equitable relief.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 879, 880, 882-891; Dec. Dig. § 460.\*]

#### 4. EQUITY (§ 442\*)—BILL OF REVIEW—DESIGNATION.

Where a bill by a third person to set aside a decree for alleged fraud in failing to make complainant a party to the suit stated a cause of action appropriate to a bill in the nature of a bill of review and not to a strict bill of review, the use of the word "review" in the prayer of the bill, and the fact that complainant applied to a justice for leave to file the bill, did not require the court to consider the bill a strict bill of review.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1065-1070; Dec. Dig. § 442.\*]

#### 5. JUDGMENT (§ 455\*)—EQUITABLE RELIEF—BILL OF REVIEW—VENUE.

Court & Practice Act 1905, § 4 (Gen. Laws 1909, c. 273, § 1), provides that there shall be a superior court which shall consist of a presiding justice and five associate justices. Other sections require the holding of sessions of the court by a single justice in one or more places at the same time and at stated times in the different counties of the state for convenience of litigants; the various sessions in the several counties being held by the same justices. *Held* that, where complainant, in a suit in the nature of a bill of review to set aside a decree terminating a trust and distributing the property, was a nonresident, and the trustee was a resident of N. county, the bill was properly filed in that county, as provided by Gen. Laws 1909, c. 283, § 2, regardless of the fact that the decree attacked was rendered and of record in P. county; the court having full jurisdiction in the suit in N. county to nullify such decree and to show such nullification by a certified copy of the decree rendered, filed in P. county.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 860-862; Dec. Dig. § 455.\*]

#### 6. WILLS (§ 634\*)—CONSTRUCTION—RIGHTS OF SURVIVING HUSBAND—TRUST ESTATE—PERSONAL PROPERTY—"INHERIT."

Gen. Laws 1909, c. 312, § 10, provides that administration of the estate of a person dying intestate shall be granted, if the deceased is a married woman, to her husband, if competent, who shall not be compelled to distribute the surplus of the personal estate after the payment of her debts, but shall be entitled to retain the

same for his own use. Testator bequeathed \$5,000 and certain real estate to a trustee in trust for the benefit of C. for life, with power to manage the same generally and to sell and reinvest the proceeds if desirable. A subsequent clause of the will declared that in all cases where testator had given property in trust for the benefit of other persons, and had not specially provided for its disposition on their death, the trustee, on such event, should pay and convey the property in fee, discharged of all trusts, to the persons who, by the laws of Rhode Island, would inherit it had the persons, for whose benefit it was so given, died seised and possessed thereof in fee. *Held* that, the real property having been converted into personalty by the trustee during the lifetime of the beneficiary for life, the word "inherit" could not be construed as having been used by testator in its strict legal sense as designating those persons only who would inherit real property from an intestate ancestor, but the word was used in the sense of "take"; and hence, on the death of the beneficiary for life, the remainder of the trust fund so bequeathed to her passed to her husband and not to her heirs.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.\*]

Baker, J., dissenting.

Appeal from Superior Court, Providence and Bristol Counties; Willard B. Tanner, Presiding Justice.

Bill in the nature of a bill of review by William C. Quinn against Benjamin Hall, Jr., trustee, and others. From a decree in favor of defendants, complainant appeals. Reversed and rendered.

Crane, Munro & Barry and Thomas A. Barry, all of Providence (Wm. G. Rowe, of Brockton, Mass., of counsel), for complainant. Irving Champlin, Alfred Wilson, and Claude C. Ball, all of Providence (John C. Knowles, of Providence, of counsel), for defendants Morton and another. Burdick & MacLeod, of Newport, for defendant Hall.

PARKHURST, J. This is an appeal from a final decree entered in the superior court in the above-entitled cause. Said cause was heard in the superior court before the presiding justice September 15, 1913, on the demurrers to the bill of complaint filed by Benjamin Hall, Jr., trustee, George Morton, Helen M. Morton, and Hezekiah A. Cook, and upon hearing thereof said demurrers were sustained upon all points contained therein. On September 27, 1913, a final decree was entered in said superior court sustaining said demurrers upon all points and dismissing said bill as to said respondents, with costs. Within the time prescribed by law, the complainant filed his claim of appeal from said final decree, together with his reasons therefor, and thereupon the papers in said cause were certified to this court for determination of said appeal.

This is a bill in equity praying that the defendant Benjamin Hall, as trustee under the will of Hezekiah Anthony, be required to account as said trustee; that said trust be terminated; and that the balance of said

estate be paid to this complainant, who alleges his right to the surplus of said trust estate as surviving husband of the life beneficiary.

The essential allegations in said bill of complaint are as follows: That Hezekiah Anthony, late of the city of Providence, by his will duly admitted to probate January 22, 1884, provided in section 17 thereof as follows:

"I give, devise and bequeath to Sarah Ann Cook in trust for Helen Cook widow of Enos A. Cook, the sum of five thousand dollars and also the house and land where said Enos A. Cook formerly lived on Almy street in Fall River, commonwealth of Massachusetts, To have and to hold the same to her the said Sarah Ann Cook, her heirs, executors, and administrators for the use and benefit of Helen Cook widow of Enos A. Cook her heirs, executors and administrators with power to manage the same generally and if need be in her opinion to sell the same and reinvest the proceeds thereof and with power to change the investment thereof whenever in her opinion it shall seem best, and with power also to convey said real estate to her, her heirs and assigns at any time when she may think proper and with power to pay over to her said money or any part thereof according to her discretion."

The bill further sets forth that the will also provided in an unnumbered paragraph following section 22, as follows:

"In all cases where I have given property in trust for the use and benefit of other persons, and have not specially provided for its disposition on their decease, my will is that the trustee holding such property shall on such decease pay and convey the same in fee simple discharged of all trusts to the persons who by the laws of the state of Rhode Island would inherit it had the persons for whose benefit it was so given died seised and possessed thereof in fee."

It is further alleged that said Sarah Ann Cook qualified as said trustee and sold the real estate in Fall River, the proceeds from said sale becoming a part of the trust fund; that the original trustee died September 7, 1888, and by a decree of the Appellate Division of the Supreme Court of the state of Rhode Island entered November 22, 1890, Hezekiah Anthony Cook was appointed trustee in her stead; that Hezekiah Anthony Cook died November 8, 1900, and by decree of said court entered October 14, 1901, Benjamin Hall, Jr., defendant in the present case was appointed trustee; that Helen Cook, the beneficiary under said trust, became the wife of the complainant, William C. Quinn, in September, 1905, and died intestate on April 3, 1911, said William C. Quinn being appointed as administrator of her estate.

The bill further alleges that on June 26, 1911, George Morton, Helen M. Morton, Frank Pierce, Sarah Pierce, Robert E. Maher, Hattie E. Maher, Hezekiah Anthony Cook, Jennie E. Cook, Hattie E. Cook, Stanley O. Holden, Nancy A. Holden, and Reuben C. Small brought a bill in equity No. 2348, in the superior court of the state of Rhode Island against Benjamin Hall, Jr., trustee, setting forth that said Joseph A. P. Cook,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Helen M. Morton, Sarah A. Pierce, Hattie E. Maher, Hezekiah Anthony Cook, Jennie E. Cook, and Nancy A. Holden were the sole heirs at law of said Helen Cook; that said trust had been fully completed, and nothing further remained to be done in pursuance thereof, and praying that:

"As there is no reason for the further continuance of said trust, a decree of this honorable court may be entered ordering the termination of said trust and a distribution of the trust funds among the several distributees to each one equal share, and further ordering the trustee discharged from further responsibility in the premises."

This bill further alleges with reference to the bill in equity No. 2348 that said Benjamin Hall, Jr., respondent, therein waived issuance and service of subpoenas, admitted the allegations set forth in the bill of complaint, consented that the trust might be terminated, the trust fund be distributed, and prayed that he be discharged from liability thereunder. Following the above proceedings, a decree was entered in said cause on July 10, 1911, by consent, empowering and directing the trustee to sell certain shares of stock owned by the estate and to pay the trust fund in equal shares to the above-named parties, and declaring the trust terminated and the trustee discharged.

The complainant in this bill further alleges that he had no knowledge of the pendency of the above proceedings and no knowledge of the existence of said trust; that, upon the discovery of the same, he diligently filed a request to file a bill of review in equity, which was granted; and that on July 9, 1912, he filed a bill of review in equity No. 2603, which bill has been discontinued and dismissed. The complainant further states in this bill that at the time of her decease, and at the time of the institution of said suit and the entry of final decree therein, it was well known to the trustee and other parties therein that the said Helen Cook, the life beneficiary, was the wife of William C. Quinn; that none of the parties to said proceeding made known to the court that said Helen Cook left a husband surviving her and living at the time of the said proceedings; that the complainant did not know of the existence of said trust nor of the pendency of said proceedings, and was not made a party thereto; and that the decree entered was a fraud both upon the complainant and upon the court.

The bill concludes with a prayer that said decree be reviewed, reversed, set aside, and declared to be fraudulent and void; that an account be taken, the trust terminated, and that the complainant be declared entitled to the balance of the trust fund.

It appears that the bill, as filed, named fourteen several respondents, of whom eight were not residents of the state of Rhode Island; that those eight nonresidents appeared specially and severally filed their pleas to the jurisdiction of the court on the ground

of nonresidence; that these pleas were sustained by a judge of the superior court, and the bill was dismissed as to them; that, of the remaining respondents, one was not served with process and entered no appearance; that there were consequently 5 respondents left in the case. Three of these, namely, George Morton, Helen M. Morton, and Hezekiah A. Cook, joined in a demurrer to the bill, stating their causes of demurrer as follows:

"First. The complainant does not state a cause of action entitling him to relief.

"Second. It appears by said bill that the matters complained of have been finally adjudicated by a court of competent jurisdiction.

"Third. It appears that the complainant's claims in said bill contained are stale.

"Fourth. It appears that said bill was not brought within the time required by law.

"Fifth. It does not appear in what county said cause in equity No. 2348 was brought.

"Sixth. It appears that the complainant was not a party and was not a privy of a party to said cause in equity No. 2348.

"Seventh. It appears that the complainant was not a necessary party to said cause in equity No. 2348.

"Eighth. It does not appear that the complainant is entitled to any of the proceeds of said trust fund.

"Ninth. It does not appear that the complainant was aggrieved by the decree entered in said cause in equity No. 2348."

The respondent Benjamin Hall, Jr., also demurred to the bill on grounds which were substantially the same as those stated above. Both demurrers were heard before Mr. Justice Tanner on September 15, 1913, and a decision was announced sustaining the same on all points; and thereafter on September 27, 1913, a final decree was entered sustaining these demurrers upon all points and dismissing the bill; from this decree this appeal is taken, the reasons of appeal being set forth as follows: (1) That said decree is against the law; (2) that said decree is against the rights of the complainant as disclosed by the pleadings; (3) that the court erred in sustaining the respondents' several demurrers to the bill of complaint, and thereby deciding that the complainant was not entitled to the whole or any part of the trust fund therein described.

It is contended on behalf of the defendants that this is a bill of review; that therefore it should have been filed within one year after the entry of the final decree sought to be reviewed; that, being filed later, it cannot be sustained (citing *Williams v. Starkweather*, 24 R. I. 512, 53 Atl. 870; *Id.*, 25 R. I. 77, 54 Atl. 931; *Id.*, 28 R. I. 145, 66 Atl. 67); that it is not brought in the same county where the original decree was enrolled, and therefore cannot be sustained; that being a bill of review, and being brought by one who is neither a party nor the privy of a party to the original suit, it cannot be sustained. All these questions are raised under the grounds of demurrer second to sixth, inclusive, above set forth, and must stand or fall together; they all depend upon the ques-

tion whether this is a bill of review. In our opinion, after careful consideration of the briefs and arguments of counsel, this is not a bill of review; it is an original bill in the nature of a bill of review.

[1, 2] It was long since held by this court, in accord with well-settled principles of equity procedure, that a bill of review can be filed only by a party to the original cause or by one in privity with such party; and that "other persons aggrieved must proceed by original bill in the nature of a bill of review" (Doyle, Petitioner, 14 R. I. 55, 56), and it is one of the chief grounds of complaint in this bill that this complainant was not made a party, although it was well known to the parties to said suit that the said Helen Cook, named as a beneficiary in the will of Hezekiah Anthony, had married the complainant, and that he survived her; that by referring to said beneficiary by the name of Helen Cook, instead of by the name of Helen Cook Quinn, although knowing her to have married the complainant, and by neglecting to make this complainant a party to said suit, the parties to said original suit deceived the court. And the bill further alleges that this complainant had no knowledge of the proceedings by the parties claiming as heirs at law of Helen Cook to have the trust terminated and the fund distributed, and had no knowledge of the existence of the trust; and that upon discovery thereof he proceeded diligently to take action. It further appears that he first sought leave to file a bill of review and did attempt to file such a bill, which was afterwards dismissed; evidently the complainant discovered that a bill of review was not the proper remedy for him, and therefore he proceeded to file this original bill in the nature of a bill of review. There is no ground for the claim set up by the defendants that this complainant has been guilty of laches in filing his bill. It appears that he proceeded with diligence as soon as he was informed of what had taken place; and, although his first attempt to file a bill of review was ill advised, it must at least have operated to give prompt notice of his claim to the parties in interest. It further appears by certain pleas on file in the case that the trustee, Benjamin Hall, Jr., distributed the trust fund in said bill mentioned, under the decree entered in said cause on the 10th day of July, 1911, during said month of July, 1911, to the parties named in said decree, so that it was impossible for this complainant, not being informed of said proceedings, to have filed his bill before said fund was distributed. It therefore clearly appears that the delay arising from this complainant's ignorance, and incident to his procedure, could have worked no harm to the parties respondent, and would not be a valid ground of defense to this suit. This bill is based upon allegations of fraudulent concealment of the fact that this complain-

ant was the living husband of the beneficiary Helen Cook named in Hezekiah Anthony's will, whereby it was made to appear to the court that the only parties in interest were the parties named in the original bill, and that the decree for termination of the trust and distribution of the fund was obtained by reason of such fraudulent concealment.

[3] The above facts constitute a complete and sufficient allegation of fraud in procuring the decree in the original suit. It was the duty of the trustee to fully advise the court as to all material facts affecting the distribution of the estate upon the determination of the trust.

"It is incumbent upon the trustee to satisfy himself beyond doubt, before he parts with the possession of the property, who are the parties legally and equitably entitled to it." Lewin on Trusts (12th Ed.) 402.

Likewise, in instances of the distribution of a trust estate through court proceedings, it is stated that:

"Whether the trustee be plaintiff or defendant, he should take care, before an order is made, that all proper parties are before the court, for, if the trustee fail in his duty to point out the proper parties, it might be held that the order of the court under such circumstances did not indemnify him." Lewin on Trusts (12th Ed.) 422. See, also, Perry on Trusts (6th Ed.) § 924; Story, Eq. PL (10th Ed.) § 427.

In Story on Equity Pleading (10th Ed.) § 426, the author says:

"There is no doubt of the jurisdiction of courts of equity to grant relief against a former decree, where the same has been obtained by fraud and imposition, for these will infect judgments at law and decrees of all courts, but they annul the whole in the consideration of courts of equity. \* \* \* Where a decree has been so obtained, the court will restore the parties to their former situation, whatever their rights may be."

See, also, to the same general effect, Kerr on Fraud & Mistake, p. 293; Fletcher, Eq. Pleading, p. 1005.

A bill impeaching a decree for fraud is an original bill in the nature of a bill of review. The nature of the bill necessary to obtain relief in cases of this kind is defined in Story's Equity Pleading (10th Ed.) § 426, as follows:

"Fourthly, bills impeaching decrees for fraud. A bill of this sort is an original bill in the nature of a bill of review. There is no doubt of the jurisdiction of courts of equity to grant relief against a former decree, where the same has been obtained by fraud and imposition, for these will infect judgments at law and decrees of all courts; but they annul the whole in the consideration of courts of equity. This must be done by original bill."

So in 3 Encyc. PL. & Pr. 608, it is stated as follows:

"It is a well-settled rule of equity jurisprudence that, where a decree has been obtained by fraud or collusion between the parties, it may be impeached by an original bill filed for that purpose."

The rule is stated in Daniell's Chancery Pleading & Practice (8th Am. Ed.) vol. 2, p. \*1584, as follows:

"If a decree has been obtained by fraud, it may be impeached by original bill, without the leave of the court; the fraud used in obtaining the decree being the principal point in issue, and necessary to be established by proof, before the propriety of the decree can be investigated."

A bill to impeach a decree for fraud is an original bill in the nature of a bill of review. *Mussel v. Morgan*, 3 Bro. Ch. 74; *Ex parte Smith*, 34 Ala. 455; *Person v. Nevitt*, 32 Miss. 180; *Sequin v. Maverick*, 24 Tex. 526, 78 Am. Dec. 117. So in cases where, as in the case at bar, the decree is obtained without making the persons parties to the suit whose rights are affected, such decree is void as to those parties, and the remedy is an original bill in the nature of a bill of review.

In *Dunklin v. Harvey*, 56 Ala. 177, it was held that a decree in chancery was fraudulent and void as to persons who were not made parties to the suit, and whose rights were known to be involved, and that an original bill in the nature of a bill of review is the proper mode by which to impeach such decree for fraud, at the instance of a stranger to the original suit.

So in *Bailey v. Holden*, 50 Vt. 14, it was held that a person whose rights had been prejudiced by a decree in a suit to which he was not a party, and as to the pendency of which he had no knowledge, might impeach said decree by an original bill for fraud. The real nature of the bill is to be determined by its substance rather than by its mere form.

[4] It has been suggested by the defendants that the use of the word "review" in the prayer of the present bill of complaint and the application to a justice for leave to file the bill renders it a bill of review, and hence subject to the one-year limitation. While the use of the word might equally point to the fact of its being an original bill in the nature of a bill of review, nevertheless under the authorities no doubt can arise.

In *Ex parte Smith*, 34 Ala. 455, the court said:

"The real nature of a bill is to be determined rather by its substance (that is, by its allegations and object) than by the title which the pleader chooses to give it. The bill in this case is called by the complainant a bill of review. It is obvious, however, that it is not a bill of review, for that cannot be filed, except upon the ground of error on the face of the decree, or of new matter which has arisen or been discovered since the publication of testimony in the original suit. Nor is it what is termed a supplemental bill in the nature of a bill of review, for this also is founded upon the occurrence or discovery of new facts. The object of the bill is to impeach a final decree for fraud; and this can only be done by an original bill filed for that purpose. Such a bill is sometimes called an original bill in the nature of a bill of review."

In *Berdanatti v. Sexton*, 2 Tenn. Ch. 704, the essential difference between a bill of review and an original bill in the nature of a bill of review is aptly stated as follows:

"The object and effect of a bill for fraud, even if the fraud consist in the want of notice, are to vacate the former decree in toto, not to retry the cause, whereas the object and effect of a bill of review are to reverse the decree, so far as it is erroneous, and to retry the cause upon the original record, or the original and new proof, according as the bill is for error apparent or newly discovered evidence."

In *Gordon v. Ross*, 63 Ala. 363, 365, the court said:

"The objects and effect of a bill of review, and of a bill impeaching a decree for fraud, are essentially different. \* \* \* If entertained as a bill of review, the former decree, so far as erroneous, would be reversed, and the court would proceed to retry the cause, rendering the decree the evidence would authorize. But, if fraud has infected the decree, it must be vacated entirely; there is no retrial of the cause."

[5] One point raised by defendant's demurrers is that this bill is not brought in the proper county. It appears upon inspection of the papers on file that the original suit, in which the decree was entered ordering distribution of the trust fund, and which said decree is now attacked by this suit and sought to be set aside, was brought in the superior court in the county of Providence; and that the bill in this cause was filed in the superior court in the county of Newport. We think this is quite immaterial. By the Court and Practice Act, under which the superior court was created, chapter 2, § 4, provides:

"There shall be a superior court which shall consist of a presiding justice and five associate justices." Gen. Laws 1909, c. 273, § 1.

Further sections of the same and other chapters provide for the holding of sessions of the superior court by a single justice in one or more places at the same time, and at stated times in the different counties of the state, and this is for the convenience of litigants. But as was said in *Paull v. Paull*, 30 R. I. 253, 256, 74 Atl. 1016, 1017, "In this state the superior court is one court for the entire state." The various sessions in the several counties are held by the same justices; and it is customary for equity causes filed in one county to be heard in another for convenience of the court or parties. In fact it appears that the hearing of this cause, although filed in Newport county, was actually had in Providence, where the original suit was filed. Inasmuch as the complainant in this suit was a nonresident and the principal defendant, Benjamin Hall, Jr., trustee, was a resident of Newport county, this bill was properly filed in Newport county under the provisions of Gen. Laws R. I. 1909, c. 283, § 2. If the decree attacked in this suit is set aside, there is no difficulty in making such an order as shall cause the decree in this suit to appear by way of a certified copy in the records of the county of Providence, so as to effectually nullify the decree entered in said county of Providence.

[6] The sole further question of importance in this case is whether the complainant has by the allegations of his bill shown that he

has an interest in the disposition of the trust fund formerly held by the defendant Benjamin Hall, Jr., as trustee for complainant's deceased wife. At the outset, under the will of Hezekiah Anthony, the trust estate consisted of \$5,000 and of a house and land in Fall River, Mass. Under the will the trustee was authorized to convert the said house and land into money and reinvest the proceeds. It appears that this conversion was made by the original trustee, and that thereafter, and down to the death of the said Helen Cook Quinn, the trust fund consisted solely of money or other personal property and was such at the time when it was finally distributed under the decree of July 10, 1911.

The will of Hezekiah Anthony has been construed in *Cook v. Dyer*, 17 R. I. 90, 20 Atl. 243, wherein it was held that, under the provisions of the seventeenth and twenty-second clauses of the will, Helen Cook took an equitable life estate, and that upon her decease the property would pass under the last portion of the twenty-second clause of the will. The question as to the parties entitled to take upon the termination of the equitable life estate was not before the court nor considered by it, and is now, for the first time, presented for determination. The contention of the complainant is that, as husband of the life beneficiary, he is entitled to take the entire balance of the trust estate.

The last part of the twenty-second clause of the will is as follows:

"In all cases where I have given property in trust for the use and benefit of other persons, and have not specially provided for its disposition on their decease my will is that the trustee holding such property shall on such decease pay and convey the same in fee simple discharged of all trusts to the persons who by the laws of the State of Rhode Island would inherit it had the persons for whose benefit it was so given died seised and possessed thereof in fee."

The substantial question involved is the determination of the testator's intent as to the disposition of the trust estate after the death of Helen Cook. The respondents contend that the word "inherit" should be construed in its technical signification, so that the heirs at law, as such, are entitled to the final distribution of the trust fund, and that the complainant is barred from taking at the death of his wife. An examination of the will, however, shows that the word "inherit" was not used in any such sense, but rather as equivalent to "take"; it being the intent of the testator that the property should pass as the intestate property of Helen Cook. It may be admitted that in its strictest, technical sense the word "inherit" means to take as an heir at law, by descent. While words are to be construed according to their technical meaning whenever possible, nevertheless the courts have not hesitated to adopt a broader interpretation whenever necessary to effectuate the intent of the testator. Es-

pecially is this true in the case of the word "inherit," which is very commonly used to describe some method, aside from descent, by which property is taken on one's death.

In *Dohn's Ex'r v. Dohn*, 110 Ky. 884, 898, 62 S. W. 1033, 1036, it was held that the word "inherit," as used in a clause in the will which, after providing that the estate shall be divided in single parts among children or their heirs, provides that the issue of the children dying shall inherit the share of the parent, is not used as a word of limitation to indicate that the issue of the dead child shall take from and through the parent and not from a testator, but loosely in lieu of "take," the court saying:

"Indeed, it seems probable that the word 'inherit' is loosely used in lieu of 'take', as frequently occurs in wills."

In *Kohl v. Frederick*, 115 Iowa, 517, 88 N. W. 1055, the word "inherit," as used in an antenuptial agreement, evidenced by a writing made after the marriage between the husband and wife, both of whom had children by a former marriage, that neither of the parties should inherit any claim, right, or interest in or to any estate of the other, will not be used in its strict technical sense, but in the sense of "take" or "have," and thus the wife was excluded from taking a dower interest in the husband's estate.

In *Graham v. Knowles*, 140 Pa. 325, 21 Atl. 398, the court construed a will wherein the testatrix devised and bequeathed "all my estate, both real and personal, that I shall inherit as my portion after my father's death." The court held that "the word 'inherit' was not used in a technical sense," but that "it often means 'to become possessed of'; and in that sense it was doubtless employed by the testatrix."

In *Hill v. Giles*, 201 Pa. 215, 50 Atl. 758, it was held that the words "shall be inherited by" were used as the equivalent of "go to" or "be received by."

So in *Harris v. Dyer*, 18 R. I. 540, 28 Atl. 971, this court held that the word "inherit," as there used in a will, would not be used in its strict sense of taking by descent, but merely as equivalent to "take."

It is evident from the will itself that the testator did not use the word "inherit" in its technical legal significance as denoting the passing of title to real property by descent, and that the prima facie presumption as to the meaning of the word is rebutted by the actual intent of the testator, as shown by the internal evidence of the will itself.

The general character of the will does not tend to strengthen any presumption that the words are used in a technical sense. As pointed out by this court in *Cook v. Dyer*, 17 R. I. 90, 20 Atl. 243, this particular will was not drafted in a precise or careful manner, nor with regard to the careful use of words, supposed to be used in a technical sense. Thus the court points out with reference to clauses 17 and 22 of the will that:

"The two clauses, instead of coalescing, exhibit an irreconcilable repugnancy, owing to the words of inheritance and representation that are added to said Helen's name."

And further:

"The clause indicates that the testator used the words 'heirs, executors, and administrators' very indefinitely, and that, at any rate, he did not regard them as words by which the disposition of the trust estates was specially provided for after the decease of the persons for whose benefit they were the more immediately given."

The failure to use words in their strict technical sense is apparent from an examination of the twenty-second clause in connection with the seventeenth clause of the will. The testator uses the word "inherit," which the respondents claim is used to denote the class who would take title to real property by descent from Helen Cook. It is evident that the testator by this twenty-second clause intended to provide a method for complete disposition of the trust property upon the termination of the life estate. Even at the inception of the trust, said estate consisted in part of personal property, and as to this part, and the accumulations of rents and profits from the real estate, the word "inherit" would have no strict application, since no one would "inherit" the personalty; the same passing to the next of kin or to the surviving husband. Furthermore, the testator, by vesting in the trustee an express power to sell the real estate, contemplated the conversion of the realty into personalty during the life of the life tenant, in which case the word "inherit" would have no technical applicability. As a matter of fact, as shown by the allegations of the bill, the power of sale was exercised by the trustee during the lifetime of the life beneficiary, and the trust property at the time of her decease had been actually and entirely converted into personalty in the form of cash and securities.

That the testator contemplated that the trust estate would be personalty either in whole or in part, at the time of the death of Helen Cook is shown by the direction that upon such decease the trustee holding such property shall "pay" and "convey." Obviously the word "pay" can have no application other than to personalty, as to which the word "inherit," in its strictest legal sense, is without significance.

It is an established rule of construction that, where the estate to be divided is in the form of personalty, the words "heirs" or "heirs at law" shall be held to mean those entitled to succeed to personal estate in case of intestacy.

Thus in *Lawrence v. Crane*, 158 Mass. 392, 83 N. E. 605, the will provided:

"When my estate shall finally be disposed of by my said trustees, or the survivor of them, and all collections made that can be made, then my said trustees, or the survivor of them, shall dispose of the net proceeds in their hands by dividing the same among my heirs at law as provided for by the laws of the commonwealth of Massachusetts."

The court said:

"When it is contemplated that real estate shall be changed into money before going to the heirs at law, then those words are held to mean those entitled to succeed to personal estate in case of intestacy."

In *Kendall v. Gleason*, 152 Mass. 457, 25 N. E. 838, 9 L. R. A. 509, the court said:

"On the death of Stillman A. Gleason the trust terminated as to his share, which then immediately became payable 'to his legal heirs.' The will contemplated a change of the real estate to personal property in the hands of the trustees, and that it should go to the heirs in the form of personal property. The words 'legal heirs' must therefore be construed to mean those who would take personal property under the statute of distribution."

So in *Houghton v. Kendall*, 7 Allen (Mass.) 72, it was held that, where the word "heirs" is used in a gift of personalty, it should primarily be held to refer, not to those who would take realty by descent, but to those who would be entitled to take intestate estate of the person whose "heirs" they are called.

The inference as to the intent of the testator in these cases is aptly stated in *White v. Stanfield*, 146 Mass. 424, 436, 15 N. E. 919, 925, as follows:

"Where a testator establishes a fund consisting of personal property for the purpose of providing an income for life for his son, and this is apparently his principal object, and when, after his son's decease, he directs it to be paid over to the son's 'heirs at law,' his intention is not so much to make a bequest of it, or direct further how it shall go, as it is to surrender the disposition of the fund, as if it were actually the son's to those upon whom the law would in such case devolve it."

In regard to these cases last above cited, it is to be noted that in *Lawrence v. Crane*, *Kendall v. Gleason*, and *White v. Stanfield*, supra, where the words "heirs at law" were used, it was nevertheless held that not only the next of kin under the statute of distributions, but also the "widow, as a person entitled under the statute," would be entitled to share in the fund to be distributed.

For other cases where the word "heirs," used in a will relating to the disposition of personal property, has been held to mean those entitled under statutes of distribution as in case of intestacy, and including widows, see *Wright v. Methodist Church*, 1 Hoff. Ch. (N. Y.) 202, 212; *Freemen v. Knight*, 37 N. C. 72; *Hascall v. Cox*, 49 Mich. 435, 13 N. W. 807; *Corbitt v. Corbitt*, 54 N. C. 114; *Kiser v. Kiser*, 55 N. C. 28; *Eddings v. Long*, 10 Ala. 203; *Jacobs v. Prescott*, 102 Me. 63, 65 Atl. 761; *Trenton Trust, etc., Co. v. Donnelly*, 65 N. J. Eq. 119, 55 Atl. 92; *West's Estate*, 214 Pa. 35, 63 Atl. 407.

It has likewise been repeatedly held that, under a settlement in trust or a will disposing of personal property, using the word "heirs," the husband of a beneficiary is entitled to the wife's interest as in case of intestacy, where the statute gives him the right to her intestate property or a portion thereof. *Sweet v. Dutton*, 109 Mass. 589, 12 Am. Rep. 744.



"In cases where the word 'heirs' in a deed or will has been construed to mean distributees of personal property under the statute of distributions, and that statute has given the whole or a part of the personal property of a deceased husband or wife to the wife or the husband, they have taken the property in the same manner as under the statute." *Lavery v. Egan*, 143 Mass. 389, 393, 9 N. E. 747. See, also, *Lincoln v. Perry*, 149 Mass. 368, 374, 21 N. E. 671, 4 L. R. A. 215; *International Trust Co. v. Williams*, 183 Mass. 173, 68 N. E. 798; *Gray v. Whittemore*, 192 Mass. 367, 381-383, 78 N. E. 422, 10 L. R. A. (N. S.) 1143, 116 Am. St. Rep. 246; *Eby's Appeal*, 84 Pa. 241, 246; *Turner v. Burr*, 141 Mich. 106, 110, 104 N. W. 379.

The language used by the testator at the conclusion of the twenty-second clause of the will, and which has already been decided to be applicable to the final disposition of the trust fund held for the benefit of Helen Cook (Quinn) (see *Cook v. Dyer*, *supra*), is as follows:

"In all cases where I have given property in trust for the use and benefit of other persons and have not specially provided for its disposition on their decease my will is that the trustee holding such property shall on such decease pay and convey the same in fee simple discharged of all trusts to the persons who by the laws of the state of Rhode Island would inherit it had the persons for whose benefit it was so given died seized and possessed thereof in fee."

The trust fund, as above shown, was all personal property; the real estate originally included therein having been lawfully converted into personal estate by the first trustee long before the death of the beneficiary and so remaining. The above-quoted language plainly shows the testator's intention that the trust fund should, after the death of Helen Cook Quinn, be paid over to the persons who would take the same had Mrs. Quinn been possessed of the fund in her own right at the time of her decease, had she died intestate.

Gen. Laws of R. I. 1909, c. 812, § 10, provides as follows:

"Sec. 10. Administration of the estate of a person dying intestate shall be granted as follows: \* \* \* Second. If the deceased was a married woman, to her husband, if competent, who shall not be compelled to distribute the surplus of the personal estate, after payment of her debts, but shall be entitled to retain the same for his own use."

Substantially the same statute was in force at the time of the making of testator's will and of the probate thereof, and has continued in force ever since. Pub. Stat. R. I. 1882, c. 184, § 7. This statute was considered in *Kenyon v. Saunders*, 18 R. I. 590, 30 Atl. 470, 26 L. R. A. 232, and was held to be a re-enactment of the Statute of 29 Charles II, and to be declaratory of the common-law rule that "under the common law the personal estate of the wife became the husband's, and on her death he could administer on her estate and retain the surplus after paying her funeral charges, and if another administered he held the surplus as trustee for the husband"; the only changes brought about by subsequent legislation being power in the wife to dispose of her personal estate by

will and the liability of her estate for her debts. See, also, *Caswell v. Robinson*, 21 R. I. 193, 42 Atl. 877.

In view of these authorities, it is beyond question that, if Helen Cook Quinn had been possessed in her own right of this trust fund at the time of her death, it would have gone to her husband, the complainant in this case, under the statute above quoted; and that, under the terms of the will as above set forth, such must be deemed to have been the testator's intention. This statute gives to the husband the exclusive right to the surplus of the personal estate of his deceased intestate wife, and it is immaterial that such provision is not contained in the statute of descent and distribution, so called. Careful examination of the briefs for the several defendants discloses nothing which in any wise tends to affect our opinion as above expressed as to any point discussed. We find that the superior court erred in sustaining the several demurrers to the bill and in dismissing the bill by the decree from which the appeal is taken. The complainant is entitled to the fund formerly held by the trustee, Benjamin Hall, Jr., for the benefit of Helen Cook Quinn, and should have been made a party to the original bill for the termination of the trust and for the disposition of the trust fund.

The decree appealed from is reversed; the complainant is entitled to the relief prayed for in his bill, and may present a decree for the approval of this court in accordance with this opinion.

BAKER, J. (dissenting). I concur in the opinion of the majority of the court with the exception of that part thereof which construes the last part of the twenty-second clause of the will of Hezekiah Anthony in connection with the seventeenth clause thereof as they relate to the disposition of the trust estate created by the last-named clause upon the death of Helen Quinn, formerly Helen Cook. Construction of the clause first named becomes necessary, because no part of the corpus of said trust estate was transferred to the life tenant during her life, as was possible by the terms of the said will. The last part of the twenty-second clause of the will is quoted in the majority opinion and need not be here repeated.

The seventeenth clause is as follows:

"I give, devise, and bequeath to Sarah Ann Cook, in trust for Helen Cook, widow of Enos A. Cook, the sum of five thousand dollars, and also the house and land where said Enos A. Cook formerly lived, on Almy street, in Fall River, commonwealth of Massachusetts; to have and to hold the same to her, the said Sarah Ann Cook, her heirs, executors, and administrators, for the use and benefit of Helen Cook, widow of Enos A. Cook, her heirs, executors, and administrators, with power to manage the same generally, and, if need be in her opinion, to sell the same and reinvest the proceeds thereof, and with power to change the investment thereof whenever in her opinion it shall seem best and with power also to convey said real estate to her, her heirs, and assigns, at any



time when she may think proper, and with power to pay over to her said money or any part thereof, according to her discretion."

In *Cook v. Dyer*, 17 R. I. 90, 20 Atl. 243, this court, in construing clause 17, held that Helen Cook took an equitable life estate thereunder. The simple question of construction now presented is: Who were the persons meant and pointed out as beneficiaries by the following words of the twenty-second clause:

"My will is that the trustee holding such property shall on such decease pay and convey the same in fee simple, discharged of all trusts, to the persons who by the laws of the state of Rhode Island would inherit it had the persons for whose benefit it was so given died seized and possessed thereof in fee."

In construing a will, the words should be given their ordinary and usual significance. But, where technical words are used, they are presumed to be used technically, and they will be so construed unless a clear intention to the contrary is apparent from the context. 40 Cyc. 1396, 1398. The word "inherit" is of course a technical word, and used technically means "to take property by descent as an heir." *Anderson, Law Dict.* The word "heir" is also a technical term, in strictness meaning "one born in lawful matrimony who succeeds by descent and right of blood (*Richards v. Martin*, 55 N. H. 47), or, as stated in *Richard v. Miller*, 62 Ill. 422, "an heir is one who inherits," showing that in the present case "the persons who \* \* \* would inherit it" are identical in meaning with the word "heirs." Strictly speaking, the words "inherit" and "heirs" are words used in respect to real estate only. It is unquestionably true, however, that courts have not hesitated to subordinate the language to the manifest intention of the testator, and in so doing, if necessary, will give a secondary and untechnical meaning to technical terms. The words "inherit" and "heirs" have both been interpreted in a secondary and untechnical sense, the latter the more frequently than the former because the occasions for its construction by courts have been the more numerous.

It is urged in the present case that the word "inherit" should not be interpreted technically but in the sense of "take" or "have." The claim is based upon the fact that, in the inception of the trust, part of the estate was personal property, and as to this the word "inherit" could have no strict application, since no one could inherit personally. Attention is also called to the provision of the will authorizing the trustee to sell the real estate, and that therefore the testator contemplated the conversion of realty into personality during the life of the life tenant, in which case the word "inherit" would have no applicability in a technical sense, and that, as a matter of fact, the real estate had been converted into personality when Helen Quinn, formerly Helen Cook, died. In other words, the complainant claims that the na-

ture of the property disposed of shows that the testator, at the death of said Helen, did not intend to give it to her heirs but to those entitled to take her personal estate upon her dying intestate.

The nature of the property disposed of is well recognized as something to be considered in interpreting wills when, by fair construction, a question has arisen as to what persons were entitled as beneficiaries by the language employed in the will to designate them.

Practically all the reported cases pertinent in the present case relate to the construction to be given to the word "heirs" when applied to real estate and personal estate included in the same gift. Under clause 17 of *Hezekiah Anthony's will*, both real and personal estate were given to the trustee, and the words of clause 22 are applicable to the whole of such estate as might be in the trustee's possession and control at the time of the death of the life tenant. The rule of interpretation applicable in such cases is stated in 1 *Roper on Legacies*, \*p. 93:

"It being always a question of intention as to the meaning of the testator in the use of the word 'heirs,' if it appear that the intent was for the heir, properly and technically such, to take the personal estate, there can be no objection to his title. An instance of that intention may occur when a testator blends his real and personal estates together, and, after giving the fund to a person for life, directs that his next heir at law shall afterwards succeed to it. In this case, the intention that both estates should be enjoyed together is apparent, and to divide them by giving the one to the next of kin would be contrary to the words; consequently a court of equity has no alternative but to adhere to the description in the will and to permit the person answering that description, viz., the heir at law, to enjoy the whole."

So in *Kent's Com.* vol. 4, 537, note (12th Ed. Holmes):

"But if real and personal estate be devised, after a life estate, to the heirs at law, both the next of kin and the heir at law cannot take, if it appears both descriptions of property were to go together; and then the heir will take the whole."

And in 2 *Redfield on Wills*, 63:

"But where real and personal estate is blended in the same bequest, there seems an inconsistency in giving the word 'heir' or 'heirs' a different import with reference to the different subject-matters combined in the same general disposition. This difficulty is referred to in some of the earlier cases. But the question was thoroughly reviewed, and all the cases bearing on this point considered, in the case of *De Beauvoir v. De Beauvoir*, and the rule fully established that in all such cases the word 'heir' or 'heirs' must receive its natural and ordinary import and construction."

There are many decisions in support of this view. The leading English case is *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 524. There a testator gave "all my estate in the funds of England and all my said manors" unto three persons in succession, and their sons successively in tail male, "and for default of such issue I give and devise the

same to my own right heirs forever." The Lord Chancellor on page 550 says:

"That question is: Who is the person to take? Till you ascertain who that person is, the only remaining question is: Did this testator, or not, mean that the same persons who took the real estate should take the personal estate? It does not matter whether he is described as right heir, or whether he belongs to the class of legal right heirs, if he is the person and the only person who can take, supposing the real and personal property are to go together as a blended fund. The moment you ascertain that the heir at law, at the death of the testator, is the person entitled to the real estate, you ascertain at the same moment, assuming the intention, that the same person is to take the personal estate as *persona designata*."

And on page 552 he says:

"It is said that the effect of this construction will be to give to the two words two senses. It does no such thing. It gives to the right heir two descriptions of property, but in one sense. The fact that the testator's right heir is to take both properties involves no difference of sense at all. One class of this property he does not take in the character of right heir, but, being the right heir, he takes it as a gift under this will. It is perfectly clear that, if the personal property is given to him expressly, he will take it. The words are not used in two senses, but they are used in one sense, to carry both properties according to the intention."

See, also, *Haslewood v. Green*, 28 Beav. 1; *Gwynne v. Muddock*, 14 Ves. 448; and *Smith v. Butcher*, 10 Ch. Div. 112.

This rule of interpretation is adopted by the courts of last resort in many states.

In *Allison v. Allison*, 101 Va. 537, 44 S. E. 904, 63 L. R. A. 920, the testator gave all the residue of his estate, real, personal, and mixed, to his executor in trust for a daughter during her natural life and at her death to be divided among her children should any survive her, but if she should die without issue, or if her child or children should die before becoming of age, "then the property bequeathed for the benefit of my daughter is to be divided among my heirs at law according to the laws of the state of Virginia." The estate was a large one and included real and personal estate. After considering the point at length as to the meaning of the words "heirs at law" and discussing authorities, the court says:

"We are content to accept the law as declared by the English Court of Chancery, the Supreme Court of Massachusetts, and the eminent text-writers from whom we have quoted. We are therefore of opinion that, as the residuary clause of the will blends real and personal estate and gives it to the heirs at law of the testator, the persons answering that description should enjoy the whole; there being nothing to indicate a contrary intention on the part of the testator."

In *Mason v. Bally*, 6 Del. Ch. 129, 14 Atl. 309, the testator had divided the rest, residue, and remainder of his estate, real, personal, and mixed, whatsoever and wheresoever the same might be, into six equal parts. He gave one of these equal one-sixth parts to S. "in trust to pay the dividends and rents accruing thereto \* \* \* to her sister, my daughter Ann Elizabeth Grimshaw, for and

during the term of her natural life," and upon her death to convey the same as the said Ann might by her last will direct, and, "on the failure of such last will or testament or instrument, then to convey the same to the right heirs of the said Ann Elizabeth Grimshaw, their heirs and assigns forever." The fourth item of the will was as follows:

"I authorize and empower my executors hereinafter named or the survivor of them, should it be deemed necessary, in making distribution of my estate according to this my will, to sell and convey any or all of my estate, either at public or private sale, for the best price that can be obtained, and deed or deeds in fee simple to the purchaser or purchasers thereof, or other conveyances or transfers to make, execute, and deliver."

There was no proof of the nature, character, and description of the property and estate of the testator at the date of his will. At his death he owned two burial lots and a considerable personal estate. The Chancellor considers the meaning of the words "heir," "right heir," and "heir at law" at great length in an elaborate opinion in which many cases are cited and discussed, and says (6 Del. Ch. 158, 14 Atl. 321):

"There is nothing in the context or any part of the will to show that, by the words 'right heirs' of his daughter, he meant any other person or persons than those who were technically such."

And:

"The question in this, as in every similar case, is this: Is the person described described as *persona designata* or not? The question is: Who is the person to take? It does not matter whether he is described as right heir, or whether he belongs to the class of legal right heirs, if he is the person and the only person who can take, supposing the real and personal property are to go together as a blended fund. \* \* \* In all cases, whether the gift is immediate or in remainder, whether it is of personal estate or of a mixed fund of real and personal estate, the question simply is whether there is such a description on the face of the will as amounts to a designation personæ and enables you to give, to a person not filling the character in which he would be entitled to take it by law, the property which the testator bequeathed to him."

Held, that the entire equal sixth part went to the heirs of said Ann. See, also, *Hackney v. Griffin*, 59 N. C. 381, 383, and *Gordon v. Small*, 53 Md. 550, 561.

The rule of interpretation above set forth has been applied in Massachusetts in numerous cases, as, for example, *Clarke v. Cordis*, 4 Allen (Mass.) 466; *Lombard v. Boyden*, 5 Allen (Mass.) 249; *Fabens v. Fabens*, 141 Mass. 395, 5 N. E. 650; *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 671, 4 L. R. A. 215; *Proctor v. Clark*, 154 Mass. 45, 27 N. E. 673, 12 L. R. A. 721; *Olney v. Lovering*, 167 Mass. 446, 45 N. E. 766; *Heard v. Read*, 161 Mass. 216, 47 N. E. 778; *Rand v. Sanger*, 115 Mass. 124; *Holbrook v. Harrington*, 16 Gray (Mass.) 102; and *Gray v. Whittemore*, 192 Mass. 367, 78 N. E. 422, 10 L. R. A. (N. S.) 1143, 116 Am. St. Rep. 246.

In *Lincoln v. Perry*, supra, the testator, who was born and lived a while in New

Hampshire, but was domiciled in Massachusetts when he executed his will and thenceforth until his death in 1877, gave one-fourth part of the residue of his estate, consisting of personalty in Massachusetts and of land in New Hampshire, to his brother's wife, who was domiciled in New Hampshire with her husband, and there died in 1894, "to have and to hold the same to her during her life and at her decease to her heirs at law and their heirs and assigns forever." The plaintiff was appointed trustee under the will in each state. There was no power to sell given in the will. By proper authority the trustee sold, in 1881, the real estate in New Hampshire for \$3,000; the personal property in Massachusetts, amounting to \$35,000, had never been invested in real estate; and after 1881 the whole property in question had been personal property. The question was as to who was entitled to take the property in Massachusetts under the designation "heirs at law." The court said:

"The testator has appointed a common destination for all of said fourth part of the residue of his property, whether the same is real or personal. The words should not be construed to mean that the real estate should go to one set of persons, and the personal estate to another, but the whole residue must go to the heirs, according to the meaning which that word bears at common law, namely, those who would be entitled to succeed to real estate in case of intestacy."

The rule applicable to these cases is stated in 40 Cyc. p. 1464, as follows:

"Where the gift consists of both real and personal estate, the word 'heirs' will ordinarily be construed as legal heirs or heirs at law as to the real estate, and as next of kin or distributees as to the personal estate; but where the gift is directly to the heirs of a certain person as a substantive gift to them, and there is no indication that more than one class is intended, or that the two kinds of property are to go in different directions, the whole property, both real and personal, will go to the heirs at law."

In the note 7 cases are cited as supportive of the statement that "heirs will ordinarily be construed" technically as to the realty and as next of kin or distributees as to the personalty. A careful examination of the seven cases cited shows that the decisions in four of them do not support the statement of the text. Three of the four, namely, *Fabens v. Fabens*, *Hackney v. Griffin*, and *Allison v. Allison*, are cited above. *Ingram v. Smith*, 1 Head (Tenn.) 411, relates only to personal property. Of the other three cases two are English cases, *Wingfield v. Wingfield*, 9 Ch. Div. 658, and *Keay v. Boulton*, 25 Ch. Div. 212, in the former of which real estate and personal property in trust was to be divided among "brothers and sisters then living or their heirs," and in the latter case among children "as may be then surviving or their heirs," in which the word "heirs" is held to have a twofold meaning, namely, "heir at law" as to real estate and "next of kin" as regards the personalty. The distinction between these cases and the cases of which *De Beauvoir v. De Beauvoir*

is a type is not readily obvious, unless the distinction is based on the fact that in them the gift was substitutional or in succession and in the latter case it was substantive.

In *Howell v. Gifford*, 64 N. J. Eq. 180, 53 Atl. 1074, which is the third case cited, there was a similar ruling where the will provided that, if a child died without living issue him surviving, the share of the deceased child was to be paid "his heirs or legal representatives"; the court plainly basing its decision upon the use of both terms "heirs" and "legal representatives." In the latter case the executors were authorized to sell the realty but were not required to do so. It is possible that other cases of this kind exist, but they are to be regarded as exceptional in face of the authorities already cited.

It is a well-established rule of interpretation of wills, as affected by the nature of the property, that the word "heirs," as applied to personalty primarily, means next of kin or those persons who would take under the statutes of distribution in case of intestacy. And this rule applies when the will directs realty to be sold and the proceeds paid to the heir. 40 Cyc. 1464. The reason of this rule as applicable to the proceeds of real estate sold is that the testator equitably converts the realty and plainly intends that it shall go to the beneficiaries as personalty. But this suggests a question as to what effect a power of sale given to a trustee, but optional with him as to its exercise, has upon the interpretation to be given the word "heirs" when realty and personalty are included in the gift and also as to what effect the exercise of the power converting realty to personalty will have. In the five Massachusetts cases, supra, namely, *Fabens v. Fabens*, *Olney v. Lovering*, *Heard v. Read*, *Proctor v. Clark*, and *Gray v. Whittemore*, the trustee was given power to sell real estate but not directed to do so; and in two of the five cases considered, *Olney v. Lovering* and *Gray v. Whittemore*, the trustee exercised the power to sell and converted the realty into personalty; but in each case it was held that the entire property would go to the heirs and not to the distributees or next of kin.

These matters are very thoroughly considered in *Gray v. Whittemore*, supra, decided in 1906. The testator gave the residue of his property, consisting of real and personal estate, to trustees, who were to pay the income thereof to beneficiaries for life, and at the expiration of the life interests they were to pay and transfer the whole property to the heirs at law of a deceased son or daughter. He also gave his trustees authority as follows:

"And I hereby empower my said trustees and their successors to sell and convey any or all of said trust property: discharged of the trusts, and without obligation upon the purchasers to see to the application of the purchase money: and the proceeds shall be held upon the same trusts."

In determining who were the persons entitled to take under the designation "heirs at law" of said deceased child, the court says:

"It is necessary also to determine who are the persons entitled to take under the designation 'heirs at law' of deceased children. \* \* \* We think it manifest that by these words, in the connection in which they are used, the testator intended to designate those who, under the law of this commonwealth, would inherit the real estate of the person whom they represent. This case comes under the rule of *Clarke v. Cordis*, 4 Allen [Mass.] 466, and *Lombard v. Boyden*, 5 Allen [Mass.] 249, in which it was held that where real and personal estate are included in a single provision, by which the income is to be paid to life tenants, and at the expiration of the life estates the trustees are to pay and transfer the whole property to the legal heirs either of the testator or of one of the life tenants, there being no indication that more than one class is intended or that the two kinds of property are to go in different directions, the whole property will go to those who are technically described as heirs. [Numerous cases are cited.] In the cases in which, under somewhat similar circumstances, the word 'heirs' has been construed to have other than its common-law meaning, so as to include those who would take personal property, either alone or together with heirs strictly so called, it generally will be found either that the fund consisted wholly of personal property, or that any real estate included therein was directed by the testator to be converted into personal property, or that the decision turned upon what was found to be the particular intention of the testator."

Five Massachusetts cases showing this are cited, all of which are also cited in complainant's brief and in the majority opinion. The court further says:

"It remains to be determined whether the proceeds of real estate originally held in the trust fund, but sold and changed into personal property by the trustees before April, 1898, in accordance with the power given to them by the will, should be treated as real estate. It is to be observed that the will does not direct that the real estate be converted into personal, but simply gives the trustees power to sell and convey and to make new investments; and this has been already found to be a circumstance of weight in determining the construction of the words 'heirs at law.' If the conversion had been directed by the testator, or if he had contemplated the making of such a conversion before the taking effect of his final limitations, the proceeds of the real estate would be treated as personal property. \* \* \* But where, as here, there is a mere power to change investments, the fund resulting from a sale of real estate retains its original character until it reaches one who has the right to treat it as his own absolutely and for all purposes. \* \* \* Accordingly we are of opinion that the proceeds of the realty originally forming part of the trust estate are to be treated as realty in making distribution of the trust fund until the final vesting of the right to them in the parties ultimately entitled."

See, also, *Holland v. Cruft*, 3 Gray (Mass.) 162; *Holland v. Adams*, 3 Gray (Mass.) 188; and *Hovey v. Dary*, 154 Mass. 7, 27 N. E. 659.

In *Holland v. Cruft*, 3 Gray (Mass.) 180, supra, Chief Justice Shaw says:

"The principle therefore appears to be fully settled, both upon well-considered reasons of justice and expediency, and upon a series of authorities, that where land is devised as real estate, and either by the direction of the testa-

tor himself, or by operation of law, such real estate is converted into money for the purpose of better investment, or for any other purpose consistent with the design and purpose of the ultimate destination to which the real estate was appropriated, there the money is substituted for, and stands in the place of the devised real estate, and shall go to the same persons and in the same proportions, and vest in possession and enjoyment at the same times and upon the same contingencies, which would have affected the real estate, had it remained specifically in real estate."

In *Holland v. Adams*, supra, 3 Gray (Mass.) 191, he also says:

"As a general rule to be deduced from the cases, we think that in case of such conversion of real into personal estate, to stand in place of the real, as more beneficial to the parties, without changing the beneficial destination, the character thus impressed on the money will attach to it, until it reaches one who, if it had remained real estate, would take it beneficially."

In *Hovey v. Dary*, supra, 154 Mass. 10, 27 N. E. 659, the court says:

"Where executors or trustees are directed to convert real estate into personal, it will more readily be inferred that the proceeds of such realty are to be held as personal property than where power and authority merely are conferred upon the executors thus to change investments. In the former case, the direction shows, or tends to show, that the testator has contemplated and understands the change that may be made in the rights of various parties by the change in the form of the property, while in the latter case it is less easy to suppose that he has confided to another the right and power to determine at his own discretion whether the descent or devolution of the property shall be changed by the new form which the property may assume by reason of the sale."

See, also, *Scholle v. Scholle*, 113 N. Y. 281, 21 N. E. 84.

In *Rhode Island Hospital Trust Co. v. Harris*, 20 R. I. 408, 39 Atl. 750, where trustees were given a general power to sell and dispose of the trust estate at public auction or private sale and exercised the power by selling real estate, the court says:

"We are of the opinion that as the real estate was sold by the trustees subsequently to the death of the widow, not in pursuance of any direction by the testator, but merely for the purposes of the trust, its proceeds are to be treated as real estate and are to be distributed among the persons who would have been interested in the real estate had it not been sold."

See *Id.*, 20 R. I. 160, 37 Atl. 701, for terms of will and decision upholding validity of the sale of such real estate by the trustees.

All of the cases cited by the complainant in his brief as supportive of his claim are cases where the property disposed of was either personalty or realty expressly directed by the testator to be converted into personalty, or where the intention of the testator as to such conversion for the purpose of final distribution was clear, although the conversion was not expressly ordered. No case is cited where the power to sell real estate by the trustee is optional and is simply a power to change investment, whether the power be exercised or not, which upholds the complainant's claim, and after a somewhat diligent search I have discovered none.

I therefore find no good ground in reason

or authority for not following the rule set forth in *Gray v. Whittemore*, supra. In this case there is nothing to indicate that either by giving the trustee "power," \* \* \* if need be, in her opinion, to sell the same and reinvest the proceeds thereof and with power to change the investment thereof whenever in her opinion it shall seem best," or by the exercise of such powers the testator intended to change the ultimate destination of the gift or that he intended to confide in the trustee the right and power to determine, at her discretion, whether the devolution of the property should be changed as a result of changing its form by the sale thereof. On the contrary, it seems the more reasonable to conclude that these powers "to sell and reinvest" and "to change the investment," whenever it might seem best to the trustee, which naturally includes the power to invest wholly in realty or wholly in personalty, or partly in each, were given simply for the purpose of enabling the trustee to manage the trust estate in the most beneficial manner. Under these conditions, the words "persons who, by the laws of the state of Rhode Island, would inherit" should, in my judgment, be given their technical meaning as the equivalent of "heirs." To state it otherwise, the words are used in their strict sense as *persona designata* to point out the beneficiaries of the gift. This interpretation is strengthened by the use of the words "pay and convey the same in fee simple" and the words "and the persons dying seised and possessed thereof in fee." Of course, by "the statutes of Rhode Island," the complainant is not an heir of Helen Quinn and cannot inherit from her. Accordingly he takes nothing under the will of Hezekiah Anthony and has no interest in the property in question.

On this ground, the complainant's appeal from the decree of the superior court in sustaining the respondent's demurrers and in dismissing the bill should be denied and dismissed, and the cause be remanded to the superior court for the entry of a decree in accordance herewith.

(36 N. J. L. 144)

**CLARK v. PUBLIC SERVICE ELECTRIC CO. (No. 47.)**

(Court of Errors and Appeals of New Jersey.  
June 15, 1914.)

**1. WITNESSES (§ 817\*)—IMPEACHMENT.**

Where a witness is impeached as to a material part of his testimony, the jury may disregard his whole testimony.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1080-1083; Dec. Dig. § 817.\*]

**2. WITNESSES (§ 811\*) — IMPEACHMENT — CREDIT.**

A witness is not entitled to credit, whose testimony is inconsistent with the common principles by which the conduct of mankind is governed; hence testimony that the deceased, although seeing that a live wire emitted sparks and flashed when it touched the ground, stated

that he was not afraid of it is impeached by the fact that mankind commonly know the danger of live wires.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 1072-1075; Dec. Dig. § 311.\*]

**3. TRIAL (§ 141\*)—JURY QUESTION—DIRECTED VERDICT.**

The court is justified in directing a verdict only in a case of admitted or uncontroverted facts.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 336; Dec. Dig. § 141.\*]

**4. TRIAL (§ 141\*)—DIRECTED VERDICT.**

A verdict should not be directed where the only person who could contradict the witness is dead.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. § 336; Dec. Dig. § 141.\*]

**5. ELECTRICITY (§ 19\*)—ACTIONS—JURY QUESTION.**

In an action for the wrongful death of plaintiff's intestate, killed by defendant's live wire, the question of the contributory negligence of plaintiff's intestate *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.\*]

**6. ELECTRICITY (§ 19\*) — ACCIDENT — NEGLIGENCE.**

Where a windstorm, which preceded the breaking of defendant's electric wire, was only of a velocity of 70 miles an hour, and it was not unusual for winds to exceed that rate, defendant cannot be held free from negligence, as a matter of law, on the theory that the storm was an unusual occurrence which could not have been anticipated, particularly as it appeared that wires, such as the one broken, would stand winds up to 135 miles an hour.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.\*]

**7. NEGLIGENCE (§ 61\*) — DEFENSES — INEVITABLE ACCIDENT.**

Where an act of God, such as a storm, concurs with defendant's negligence to cause an injury, defendant is liable.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 74, 75; Dec. Dig. § 61.\*]

**8. ELECTRICITY (§ 19\*)—ACTIONS—EVIDENCE—JURY QUESTION..**

In an action for the wrongful death of plaintiff's intestate, killed by a shock from defendant's electric wire, the question of defendant's negligence in stringing the wire or in failing to inspect its insulation *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 11; Dec. Dig. § 19.\*]

**Appeal from Supreme Court.**

Action by William P. Clark, administrator of David T. Clark, against the Public Service Electric Company. From a judgment for defendant, affirmed by the Supreme Court, plaintiff appeals. Reversed and remanded.

Arthur T. Dear and Charles E. S. Simpson, both of Jersey City, for appellant. Edwards & Smith, of Jersey City, for respondent.

**WALKER, C.** This case was tried before a jury in the Hudson circuit. It resulted in a direction of a verdict for the respondent, and appellant appeals from the judgment.

The gravamen of the complaint is that respondent maintained in Jersey City certain

electric wires, and that on June 10, 1911, through its negligence, one of the wires carrying electric current fell, and that decedent came in contact therewith, receiving a shock from which his death resulted. Respondent answered, denying all allegations of negligence on its part, and further alleging that the falling of the wire was caused by inevitable accident, to wit, a storm of great and extraordinary violence. Appellant replied, and issued was joined.

On June 10, 1911, appellant's intestate was found, during a storm, lying dead on Clinton avenue near the southwest corner of Clinton avenue and Sackett street, Jersey City, with a broken electric light wire of respondent's on or near him and a burn on his left hand. The testimony of most importance, and which was given controlling effect on the question of decedent's negligence, was that of the witness, Michael Walsh, a letter carrier, who stated that on June 10, 1911, about 10 o'clock at night, he was going to deliver a letter; that he was on a car when a storm of lightning, thunder, heavy rain, and terrific wind started; that trees were blown down and the car was stopped in order to take trees off the track; that he got off at Monticello avenue and ran up Communipaw avenue to Sackett street, stopped a few minutes in a doorway, and started to run again along Sackett street, crossed Clinton avenue, and discovered a live wire there; that it was hanging from a pole in front of No. 103 Clinton avenue; that it broke from the pole on the southwest corner and was flashing; that he asked some women in No. 107 Clinton avenue if any one had telephoned for the police, but does not remember what was said; that he waited and saw decedent. Witness was examined as follows:

"Q. As he came over to you, did you say anything to him, and, if so, what did you say, and what did he say to you? A. I told him to look out; there was a live wire; so he says, 'That won't hurt; there is insulation on it.' I said, 'Don't touch it; it is dangerous;' and part of it was hanging from the fence on the sidewalk, and he went over and pulled it, and, as he pulled it, it threw him over on his back and killed him. Q. As soon as it threw him on his back, what did you do? A. I asked the ladies in the house to come over to the window, and I said, 'Give me a chair or something so I can knock it out of his hand;' and so they handed me a chair, and I tried to put it out of his hand, and could not, and I took a few pillows and tried to get it out of his hand, and could not. I was afraid I would get electrocuted myself. Q. Did you stay there? A. I stayed around for a few minutes there, and the policeman came up. Q. Then what did you do? A. I went up the street and delivered a letter. Q. Now, when you said to Mr. Clark, 'Look out, it is a live wire,' you say he said to you, 'It won't hurt me; it is insulated.' At the time Mr. Clark came there and you stated to him it was a live wire, was there any indication there showing it was a live wire? A. Why, yes, there was a flashing all over—all over the point that was touching the ground. Q. As I understand you, when you came there, you were there all alone at first? A. I was alone, yes. Q. Clark came along afterwards? A. Afterwards."

On cross-examination he testified that the flashing was at the end of the wire; that there was insulation on the rest; that it was all black except where it was flashing; that when he came from Communipaw avenue to Clinton avenue he was running to escape the rain; that when he came there no one was about, and he saw only the people in the house.

In the next place, Walsh says that he called the attention of two ladies in the corner house to the fact that the wires were down and asked them to telephone, and that it was while he was talking to them that the deceased came up and took hold of the wire. The appellant thereupon produced the occupants of the corner house, Miss Grace C. Baldwin and Miss Frances Baldwin. They each testified that there had been two other ladies in the house with them, one their mother, who was then dead, and the other an aunt, who was then in Washington. The Misses Baldwin each testified that neither of them spoke to any one through the window; that their mother was all of the time in the dining room, and that the windows were in the parlor; that the door between the dining room and the parlor was open; that their aunt was with them in the dining room, and that neither of them heard any one at any time talking at the front window, nor was the front window open at any time, and they were in a position whereby they could see everything that was going on. Neither of them saw the letter carrier at all.

James H. Scarr, weather expert in charge of the local office of the United States Weather Bureau in New York City, was examined and stated that there was a rain and thunder storm from 7:15 to 7:55 p. m., later from 9:55 to 11:45 p. m.; heavy rain and high wind; wind at 10:19 p. m. was 70 miles per hour. This storm was unusually severe, the fall of rain very heavy, and the wind very high, driving rain before it. On cross-examination he stated that there was wind velocity in April, 1911, of 83 miles per hour, and that there had been other winds higher than 70 miles per hour.

At the conclusion of the case a motion was made for the direction of a verdict for the respondent upon the ground that there had been no negligence shown upon its part; that the wire was blown down by an unusual and extraordinary storm, one not to be expected and guarded against by the respondent; that decedent came to his death by the assumption of a risk, and was guilty of contributory negligence, in picking up or touching a wire which he knew to be a live one, having been warned of its dangerous character.

After argument on the motion, the court directed a verdict for the respondent, making the following observations:

"Under the decisions of our highest courts, the verdict of a jury cannot stand unless there is some evidence to support it, and it is the duty of the court, unless there is some evidence

which would support a verdict, to direct the jury to bring in a verdict for the defendant. If the testimony of Walsh given in this case be true, the plaintiff has no case whatever. There is nothing that I can see that would justify you any way in discrediting Walsh's testimony. He was a government official; he was in the performance of his duty that night; and he says he warned this man who was killed not to touch that wire, and that after he received the warning he took hold of it, perhaps innocently; thinking he could do so in safety, but it turned out he was mistaken, and our courts have held, if a man sees fit to take risks of that sort, why he must take the risk, and he cannot charge the effect of his own carelessness upon anybody else. Then, too, there is undisputed evidence that this was an unusual storm that night, and the courts do not hold people responsible for the effect of storms unless they have good reason to anticipate them. You cannot anticipate unusual storms. It appears from the evidence that that was an unusual storm, not only in itself, but in its effect, because it carried down a large number of trees and a large number of wires. Upon both grounds I have no hesitation in saying to you that, if a verdict should pass in favor of the plaintiff, it would not be sustained, and, under the circumstances, I am constrained under the law to say to you that your verdict must be for the defendant."

Appellant's counsel thereupon objected to the direction of a verdict for the respondent, and afterwards appealed to this court from the judgment entered upon the verdict of the jury rendered in conformity with the trial judge's instruction.

[1-5] On behalf of appellant many grounds for reversal were assigned, which were argued under two points: (1) That the learned trial court erred in directing a verdict for the respondent upon the ground that the deceased was guilty of contributory negligence; and, (2) that respondent could be relieved from responsibility for the accident only upon proof that it was caused solely by an act of God, and that, as respondent's negligence contributed to the accident, the trial court erred in directing a verdict. Respondent's counsel argued only the first point raised by the appellant, asserting that, no matter what caused the fall of the wire, that fact was not of importance in the case, because the undisputed evidence demonstrated that decedent's death was caused by his deliberate and intentional act.

Now, if the witnesses, the Misses Baldwin, are to be believed, and the jury would have a right to believe them, the letter carrier was either in error or was falsifying as to what occurred between him and them, and, if he was in error in this respect, the jury would have a right to believe that he was in error in other respects; and, if falsifying in any respect, they would have a right to believe that he was falsifying in all other respects, applying the maxim, "Falsus in uno, falsus in omnibus." *Addis v. Rushmore*, 74 N. J. Law, 649, 65 Atl. 1036.

It will be remembered that the letter carrier Walsh testified that he warned the deceased that the wire was a live one and admonished him not to touch it; that in the

face of this warning and admonition the deceased deliberately took hold of it and was killed. Practically everybody understands the danger lurking in a live electric wire. It is to be presumed that every one warned of the existence of such a wounding and death dealing instrumentality would recoil from it. This wire was flashing fire at the time according to Walsh's statement.

Vice Chancellor Van Fleet in *Earl v. Norfolk & New Brunswick Hosiery Co.*, 36 N. J. Eq. 188, said at page 194, that a witness is not entitled to credit, whose testimony is inconsistent with the common principles by which the conduct of mankind is naturally governed. This judicial observation has pointed application to the testimony to which reference has just been made. Surely it was for the jury to say, in respect to the situation just adverted to, whether the deceased would have been likely to act as Walsh said he did, or whether he would have been likely to shrink from contact with the flashing wire upon the well-known principle of self-preservation, quite appropriately called the first law of nature.

In the recent case of *Dickinson v. Erie R. Co.*, 90 Atl. 305, this court held that a trial judge was only justified in directing a verdict upon a court question arising from the admitted or uncontroverted facts of a case, and that conflicting testimony, and its weight, must always be submitted to the jury for their consideration and determination. See, also, *Fulton v. Grieb Rubber Co.*, 72 N. J. Law, 35, 60 Atl. 37.

The rule seems to be, as stated in 38 Cyc. p. 1570, namely, that a verdict will not be directed where the only person who could have contradicted the witness is dead.

The respondent relies upon *Anderson v. Jersey City Elec. Light Co.*, 64 N. J. Law, 664, 46 Atl. 593, and *Brooks v. Consolidated Gas Co.*, 70 N. J. Law, 211, 57 Atl. 396, as justifying the trial judge in directing a verdict in its favor. In *Anderson v. Jersey City Elec. Light Co.*, 64 N. J. Law, at page 665, 46 Atl. at page 593, there was a nonsuit at the circuit, and this court, in reviewing the judgment entered thereon, said:

"We find nothing in the facts which would justify us in reversing the action of the trial court. Instead of receiving his injuries, as he alleges in his declaration, by unwittingly, but without any fault or lack of care on his part, coming in contact with this wire while engaged at his work (*Anderson v. Jersey City Electric Light Co.*, 63 N. J. Law, 387 [43 Atl. 654]), they are the result of his deliberately touching this wire, not in the performance of the work about which he was employed, but simply for the purpose of demonstrating the correctness of his judgment as to its harmlessness. He knew that the wire might be dangerous if the insulation was not perfect, and, having voluntarily assumed the risk of injury in order to vindicate the soundness of his judgment, he has no one but himself to blame for the consequence which followed."

There is no suggestion of conflicting evidence in this *Anderson Case* as to what took place, nor concerning the plaintiff's neg-



ligence. Had there been, the case would have doubtless been submitted to the jury, and, if not, at least another question would have been involved on the hearing in this court. The Anderson Case upon examination will be found not to be an authority for respondent's contention.

The case at bar is more nearly like that of *Brooks v. Consolidated Gas Co.*, 70 N. J. Law, at page 215, 57 Atl. at page 398, in which this court held:

"There was evidence from which the contributory negligence of deceased might perhaps be inferred, but none so conclusive as would justify an instruction for the defendant. It was shown that deceased had been warned by an employé of the defendant company of the danger in coming in contact with the wires. There was also evidence that a person warned deceased on the morning of his death, and, upon learning that he was going to work on the balcony, that the wires were dangerous, and that deceased replied that he was not afraid of them. When first found, the left hand of deceased was firmly clasped upon the wire. If it may be inferred therefrom that deceased deliberately took hold of the wire, either to show that he was not afraid of it or for some other reason, his conduct was negligent, and, if such was the only inference possible, a direction of a verdict would have been proper. *Anderson v. Jersey City Electric Light Co.*, 64 N. J. Law, 664 [46 Atl. 593]. But that inference was not a necessary one. Considering the warnings he had received, his declaration that he was not afraid of the wires may be intended to indicate that the work he was about to do would not put him in danger. And a reasonable inference from the circumstances may be drawn that when deceased leaned over the balustrade, engaged in painting the gutter, his left hand may have been placed upon the corner of the house, and by an unexpected slip have been caught in the loop of the wire. Whether, upon such an inference, he was guilty of negligence in thus placing his left hand was a fair question for the jury."

[8-8] Now on the other question, that of inevitable accident owing to the storm: There was testimony tending to show that the wire in question was improperly strung, passing through a tree and touching the branches; that it had been insulated, and that the insulation was worn and broken from friction with the tree; that, at the point where the wire was thus worn and bare, it broke on the night of the accident. True, the respondent denied these facts and introduced evidence to show that the wire was properly inspected, and that it did not break in the tree top at the point claimed by the appellant's witnesses, but broke at an entirely different place, namely, at a corner pole some distance away. This raised a question of fact for the jury to decide.

The accident happened in the month of June, when there was no ice or snow to

weigh down the wire and help cause it to break. Its breaking, if due to the storm, could only have been occasioned by the velocity of the wind. The testimony showed that, at about the time of the accident, the wind was blowing 70 miles per hour. Such storms, however, were shown not to be entirely infrequent; there being records in the preceding 10 years of wind velocities of 76, 74, 80, 83, 72, 78, and 96 miles an hour, and that it would take a wind velocity of 135 miles an hour to break the particular wire if it were in good condition. It cannot therefore be said, as matter of law, that the storm in question, happening when it did, was one of such severity and unlikelihood that it could not have been anticipated or guarded against.

There was certainly a question as to whether or not negligence of the respondent in the maintenance of this wire (including inspection of insulation) did not, in combination with the storm, cause the injury resulting in the death of the appellant's intestate. If the injury so resulted, it may be presumed that the damage was caused by a defective wire. *New Brunswick Steamboat Co. v. Tiers*, 24 N. J. Law, 697, 64 Am. Dec. 394. True, that was a suit against a common carrier who is an insurer against loss of goods carried, and is not excused from liability when the loss is occasioned by an act of God, unless that act is the proximate cause of the injury, nor where the negligence of the carrier or any other person concurs with the act of God in producing the loss. In the case at bar the respondent, not being an insurer, would not be liable for damage occasioned exclusively by inevitable accident, but only from its own negligence.

The rule as to damages for injury resulting from negligence concurrent with inevitable accident is thus stated in 29 Cyc. at page 504:

"Nevertheless the rule imposing liability on defendant, although another efficient cause concurs with defendant's negligence, applies where an accident or act of God is the concurring cause. And the same is true where the primary cause was an accident for which defendant was not liable if the injury would not have resulted but for his negligence, or where, by the exercise of ordinary care, the result might have been essentially mitigated."

Upon this whole matter we are of opinion that the respondent's liability or nonliability for the accident resulting in the death of appellant's intestate was a question of fact which should have been submitted to the jury, and therefore the judgment should be reversed, and a venire de novo awarded.



(88 N. J. Eq. 300)

**MUNN & CO. v. AMERICANA CO. et al.**  
(No. 67.)(Court of Errors and Appeals of New Jersey.  
June 15, 1914. Dissenting Opinion  
June 29, 1914.)*(Syllabus by the Court.)***1. TRADE-MARKS AND TRADE-NAMES (§ 78\*)—  
INJUNCTION—GROUNDS.**

The basis of suits to enjoin the use of the complainant's name is the damage or possibility of damage to the complainant, not the damage or probability of damage to the public; fraudulent conduct on the part of the defendant is a necessary element, but fraudulent conduct without damage to the complainant does not suffice.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 88; Dec. Dig. § 78.\*]

**2. EQUITY (§ 65\*)—MAXIMS.**

Since it is the complainant who is to be protected in suits to enjoin the use of his name, he must come into court with clean hands.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. § 65.\*]

**3. TRADE-MARKS AND TRADE-NAMES (§ 87\*)—  
INJUNCTION.**

Where the complainant and defendant agreed that an encyclopedia should be represented to the public as the work of the complainant in order to avail themselves of its reputation to attract subscribers for the book, the complainant cannot be heard to complain of conduct in which it joined and by which it profited.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 96; Dec. Dig. § 87.\*]

**4. TRADE-MARKS AND TRADE-NAMES (§ 87\*)—  
INJUNCTION—DEFENSE—PLEADING.**

Where complainant and defendant agreed that an encyclopedia should be represented to the public as the work of the complainant in order to avail themselves of its reputation to attract subscribers for the book, and subsequently the complainant terminated the agreement and sought to enjoin the use of its name, the court denied relief because the complainant did not come into court with clean hands, although the point was not raised by the defendant in their answer.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 96; Dec. Dig. § 87.\*]

**5. EQUITY (§ 65\*)—RIGHT TO EQUITABLE RE-  
LIEF.**

Where a complainant's conduct has been such that he does not come into court with clean hands, the disqualification applies only to the particular matter or transaction with which the wrongful conduct has to do, and he may have relief in other respects.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 185-187; Dec. Dig. § 65.\*]

White, J., dissenting.

Appeal from Court of Chancery.

Bill by Munn & Company, a corporation, against the Americana Company and others, to restrain defendants from using the words "Scientific American" in connection with the sale of defendants' publication. Injunction granted in part (88 Atl. 330), and defendants appeal. Modified and affirmed.

See, also, 89 Atl. 529.

Robert H. McCarter and Conover English, both of Newark, for appellants. J. Franklin Fort and Franklin W. Fort, both of Newark (Arthur H. Masten and Sinclair Hamilton, both of New York City, on the brief), for respondent.

SWAYZE, J. [1] The basis of suits of this character is the damage or possibility of damage to the complainant, not the damage or probability of damage to the public. The question sometimes discussed is whether relief may be rested on a personal basis alone, or whether damage to property rights is necessary—a question left undecided in this court in *Vanderbilt v. Mitchell*, 72 N. J. Eq. 910, 926, 67 Atl. 97, 14 L. R. A. (N. S.) 304. In an early English case the court refused an injunction to restrain the sale of a quack medicine under the name of the complainant, an eminent physician. *Clark v. Freeman*, 11 Beav. 112. And although the case is not of great authority, the criticism upon it was not due to the fact that the court refused at the suit of an individual to restrain a fraud upon the public, but to the fact that it overlooked the property right of a man in his own name. *Maxwell v. Hogg*, L. R. 2 Ch. 307. The Court of Chancery has held that there is such a right. *Edison v. Edison Polyform & Mfg. Co.*, 73 N. J. Eq. 136, 67 Atl. 392. Although damage is the basis of the suit, the mere fact of damage or possibility of damage is not enough, since damage may result from lawful acts, such as legitimate competition. Fraudulent conduct on the part of the defendant is a necessary element. *International Silver Co. v. Rogers*, 71 N. J. Eq. 560, 563, 63 Atl. 977. But fraudulent conduct without damage to the complainant does not suffice. The case upon which the complainant relied was expressly put upon the ground of the liability of the complainant to loss. *Walter v. Ashton* (1902) 2 Ch. 282.

[2] The very discussion suffices to show that, although fraudulent conduct which may deceive the public is a necessary element, it is the private loss of the complainant that is to be prevented, not the public injury arising to others from the fraudulent use of the complainant's name. This is in consonance with general principles. It is unnecessary to dwell upon the point. Its importance in the present case is due to its bearing upon the standing of the complainant to maintain its bill. If it were the public that is to be protected, the conduct of the complainant ought not to prevent relief. Since it is the complainant that is to be protected, the well-established maxim of equity is applicable; the complainant must come into court with clean hands.

[3] The facts found by the learned Vice Chancellor establish an agreement on the part of the complainant and the Americana Company to make money out of the public

by representing the encyclopedia as the work of the Scientific American, and thereby availing themselves of the reputation of that journal to attract subscribers for the book. The adoption of the name Scientific American Compiling Department cannot be otherwise explained. The word "Department" in that expression can hardly convey to the ordinary mind any other meaning than Department of the Scientific American; and the language of the letter addressed by Munn & Co., to the American People under date of May, 1906, is carefully chosen to convey the same impression without saying so in express words. The encyclopedia is therein said to be issued under the direct editorship and personal supervision of the editor of the Scientific American, although his actual connection with the work was slight; he is said to be assisted by a board of eminent Department Editors; the natural impression conveyed is that they were editors of departments of the Scientific American, since nothing else is mentioned that could have departments; in fact, so far as appears, no editor of the Scientific American except Mr. Beach was connected with the encyclopedia. The book is said to be a great work "published by the Scientific American Compiling Department," with the full co-operation of Munn & Co., who add that they are certain that it will be found standard in its information and fully equal to the reputation of the Scientific American for accuracy and reliability. The gravamen of the complainant's bill is that Munn & Co. will be injured in their good business reputation by the fraud of the defendants in palming off the book upon the public as a work connected with the Scientific American. Yet that is the very scheme in which the parties joined for years prior to 1911. We think the complainant cannot now be heard to complain of conduct in which they formerly joined and by which they profited. It makes no difference whether the encyclopedia is valuable or not, nor whether purchasers thereof have been damaged; it is enough that they have been or may have been beguiled of their money because the complainant's representations and the representations of the defendant, to which the complainant assented, persuaded them that they were buying a work which was made better by the co-operation of the Scientific American. We think that the complainant, when it tires of its bargain and seeks to enjoin the defendant from further profiting by the supposed connection, does not come into court with clean hands. Fraudulent conduct which the law would enjoin but for the agreement of the parties to exploit the public is as inimical to public policy as gambling in cotton, which is condemned by statute, and the rule applied in *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394, 45 Atl. 611, is applicable to the present case. The principle applied in the law courts in *Hope v. Linden Park Ass'n*, 58 N. J. Law,

627, 34 Atl. 1070, 55 Am. St. Rep. 614, and *Wyckoff v. Weaver*, 66 N. J. Law, 648, 52 Atl. 356, is in effect the same.

[4] The failure of the defendants to question in their answer the standing of the complainants is not material. This very point was made and overruled by this court in *Minzesheimer v. Doolittle*, 60 N. J. Eq. 394, 397, 45 Atl. 611. As we there said, the court will not for any delinquency of the defendant, lend its assistance to a violation of law; and so it will not assist one who has joined in an effort to deceive the public to prevent his associate from continuing to do the very thing to which he has previously assented.

[5] We think therefore that the decree must be reversed; but it does not follow that the complainant is not entitled to some of the relief granted. The disqualification applies only to the particular matter or transaction with which the wrongful conduct had to do. *Woodward v. Woodward*, 41 N. J. Eq. 224, 4 Atl. 424. In this case the complainant's wrongful conduct had to do with the exploiting of the encyclopedia under the name of Scientific American Compiling Department. The complainant is not shown to have assented to the use of the name Scientific American for any other purpose. So far as the decree enjoins the Scientific American Compiling Department from using its corporate name, it must be reversed; so far as it enjoins the use of the name Scientific American in other ways, it must be affirmed. The defendants are entitled to costs in this court.

WHITE, J. (dissenting). I concur in the legal principles enunciated in the foregoing opinion, but dissent from a finding of fact by this court the existence of which, besides seeming to me quite doubtful, was not raised by the pleadings, nor tried as an issue, nor considered nor found as a fact by the Vice Chancellor who tried the cause. Under such circumstances, it may well be that the record discloses scant proof in denial of what no one has seen fit to assert. This court's finding of fact is that the publication of the *Encyclopedia Americana* under the published name of "Scientific American Compiling Department," and other representations to the effect that the work was edited and issued under the direct editorship and supervision of the editor and editorial organization of the Scientific American, was a fraud upon the public. This finding obviously depends upon whether or not these representations were in fact false or true, and that question was not put at issue, tried, nor decided in the court from the decree of which this appeal is taken. It is true the Vice Chancellor found that, as between the business organizations of the complainants and of the defendants below, the former had contributed toward the co-operative enterprise (1) the reduction of the regular yearly subscription price of the Scientific American magazine, and (2) the

exclusive right during the period of the contract to the use of the name "Scientific American Compiling Department," and had received in return an assurance of at least 10,000 new subscriptions per year to the Scientific American magazine and the payment of the special price therefor; but these findings were in connection with the discussion of the question of an accounting and of the nature of the privilege for the use of the name. They did not pretend to relate to the question of a fraud upon the public, and that question was not considered. The evidence showed that in fact the editor in chief of the Scientific American, Mr. Beach, was made editor in chief of the new work, the encyclopedia, and that he helped select the authors of the treatises going into the work, and that the reference bureau and the plates of the Scientific American were largely, or at least to an extent, used in getting up and printing the encyclopedia.

From this it would seem, and doubtless if the question of a fraud upon the public had been raised or considered it would have otherwise appeared, that the complainants took ample means to see that the encyclopedia was of the high character which the representations that it was edited by the editor in chief of and issued in connection with the Scientific American gave the public the right to expect (in this connection it is significant that no subscriber has appeared to allege that the work was in fact otherwise than of this high character), and, if this was true, I think there was no fraud upon the public. The representations amounted to nothing except in so far as they were a guaranty of the care on the part of the Scientific American people that the work would accord in high character with what their reputation gave the public the right to expect from them. Purchasers of the work were not interested in the typesetters nor in the bookbinders or other mechanics whose labor went into the production of the encyclopedia, except in so far as the result of their labor was concerned; nor were they otherwise interested in the individuality of the authors who wrote the articles comprising the work, nor in how the profits from its sale were divided up. Every one would, of course, know that the encyclopedia is not written by the editor in chief, nor by the assistant editors of the Scientific American, but that necessarily a large number of authorities would be employed to write about subjects upon which they were specialists. The artistic success of the encyclopedia would, of course, therefore depend, more than upon anything else, upon the judicious selection of these specialist authors. That selection is what stamped the character of the work, and that selection was one of the important things to which the editor in chief of the Scientific American gave his attention. Apparently therefore the public got exact-

ly what complainants undertook they should get, and I cannot see where there was any fraud upon the public either practiced or attempted. Certainly, as I view it, the fraud is not so apparent that, in a case where it was not in issue and no one thought of either proving or disproving it, a court of appeal should lay hold of it on its own motion, not only to deprive complainants of what I think would otherwise be their clear right to protect their property right in their business name, but also to perpetuate, in the continued use of the name Scientific American in connection with future editions of the encyclopedia, what, now that the Scientific American editorship and co-operation has been withdrawn, will hereafter certainly be, as I think it was not before, a fraud upon the public.

(83 N. J. Eq. 318)

CLEMENT et al. v. CREVELING et al.

(No. 44.)

(Court of Errors and Appeals of New Jersey.  
June 15, 1914.)

*(Syllabus by the Court.)*

1. WILLS (§ 733\*)—CONSTRUCTION—DISTRIBUTION OF ESTATE.

Testator's will gave to his wife for life the income from 600 shares of the capital stock of a railroad company. It directed that out of such income she should pay to her niece, Emma Chambers, during the life of the niece, \$600 per annum. It further provided that, "in case of the decease of my wife before that of Emma Chambers, I direct and require my executors to retain sixty shares of the said stock and to pay the interest thereon to the said Emma Chambers during her natural life." The sixth paragraph provided that, "after the decease of my said wife and niece, I give my estate to my lawful heirs, to be divided equally among them, share and share alike, the lawful child or children of any of them who may have died to take the share of their deceased parent." The testator was survived by his three brothers and his sister, and these, now all deceased, were his heirs at law at the time of his death. *Held:* (1) That upon the death of the wife, though the niece is still living, the testator's residuary estate, excepting the 60 shares of stock held for the benefit of the niece, is distributable in accordance with the sixth paragraph of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1819-1846; Dec. Dig. § 733.\*]

2. WILLS (§ 630\*)—CONSTRUCTION—DISTRIBUTION OF ESTATE.

*Held:* (2) That by the sixth paragraph of the will the testator's residuary estate vested in his brothers and his sister at the time of the testator's death, subject to the life interest therein of his wife, and the interest of her niece; and upon the death of the wife such part of such estate as is not required to be retained for the benefit of the niece is distributable in equal parts to the respective personal representatives of the testator's brothers and sister.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1464-1480, 1486, 1487; Dec. Dig. § 630.\*]

Appeal from Court of Chancery.

Bill by Cornelia E. Clement and others against Anna M. E. Creveling and others.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

From a decree of the court of chancery dismissing the bill (88 Atl. 189), complainants and the defendant named appeal. Reversed.

Aaron V. Dawes, of Hightstown, for appellants Clement and others. Collins & Corbin, of Jersey City, for appellant Anna M. E. Creveling. Alfred Reed, of Trenton, for respondents Josephine Ellison, George H. Ellison, Mary Camp, and Fred Camp. Peter Backes, of Trenton, for respondents Mary Anna Whittaker, personally and as executor, etc., and Gardner Cain, executor, etc. Bayard Stockton, of Trenton, for respondent Mercer Hospital.

TRENCHARD, J. Albert J. Whittaker died March 28, 1884, leaving a last will and testament by which he gave to his wife for her natural life, without power to sell or transfer the same, 600 shares of the capital stock of the United New Jersey Railroad & Canal Company, with power to collect and receive the dividends therefrom for her own use and benefit. He directed that the stock should not be sold or transferred by his executors, or by anybody else, during the life of his wife. He further provided that, out of the dividends collected on this stock, his wife should pay to her niece, Emma Chambers, for and during the natural life of the niece, \$600 per annum. He then provided as follows:

"In case of the decease of my wife before that of Emma Chambers, I direct and require my executors to retain sixty shares of the said stock and to pay the interest thereon to said Emma Chambers during her natural life."

After giving certain specific legacies to persons named in the will, and authorizing his executors to sell and convey his real estate, he provided that:

"Sixth. After the decease of my said wife and niece, I give my estate to my lawful heirs, to be divided equally among them, share and share alike, the lawful child or children of any of them who may have died to take the share of their deceased parent."

The present bill is filed for the purpose of obtaining a decree directing the immediate distribution of testator's residuary estate, with the exception of 60 shares of this railroad stock, and to have it declared who is entitled to share in this distribution.

It appears that the testator was survived by his three brothers and his sister. These were his heirs at law at the time of his death. They are all now dead; the last dying in 1912. The testator's widow died in 1908. The niece, Emma Chambers, is still living.

The complainants are the children of George R. Whittaker, one of the testator's brothers. The defendant, Anna M. E. Creveling, is the daughter of Ann W. Ellison, the testator's sister. The other defendants are children of a deceased daughter of George R. Whittaker; children of deceased sons of Ann W. Ellison; the personal representatives and legatees of the testator's other brothers who died

without issue; the testator's niece, Emma Chambers; and the trustee under the will.

All parties consent in the pleadings that immediate distribution be made of the entire residuary estate, excepting only the 60 shares of the railroad stock, necessary to be reserved for the benefit of Emma Chambers. The defendants, whilst consenting to such immediate distribution, make varying claims as to the manner of distribution.

The Chancellor properly considered himself bound by an earlier adjudication of Chancellor Runyon in which the construction of the same will was involved (*Whittaker v. Whittaker*, 40 N. J. Eq. 33), and following Chancellor Runyon's adjudication held that the estate was not distributable until after the death both of the testator's wife and of Emma Chambers; and that, this being so, it would be premature to determine who would be entitled to share in the distribution. (Ch.) 88 Atl. 189.

The complainants and the defendant Anna M. E. Creveling appeal.

[1, 2] We are of the opinion that the construction put upon this will by Chancellor Runyon was erroneous. We think it was not the testator's intent that the distribution of the whole of his residuary estate should be postponed until the death both of his wife and her niece. Standing alone that would be the natural effect of the sixth paragraph of the will. But to so construe it is to disregard the provision made for Emma Chambers after the death of the testator's wife. She died in 1908. Upon her death, the will, as will appear from the above citation, imposed a present duty upon the executors, namely, "to retain sixty shares of the said stock." The retention of the 60 shares involves a disposition of the other 540 shares, and those shares are to be disposed of in accordance with the direction of the testator contained in the sixth paragraph of his will.

That brings us to the question of the manner of distribution. The primary question is as to when, under the sixth paragraph of the will, the testator's residuary estate vested. The solution of this question will determine to whom, and in what portion, the estate is to go, whether to the personal representatives of those who were the heirs of the testator at the time of his death, or to such persons as answer the description of the testator's lawful heirs at this time.

In our opinion, by the sixth paragraph of the will the testator's estate vested in his brothers and sister at the time of the testator's death, subject to the life interest therein of his wife, and the interest of her niece; and upon the death of the wife such part of such estate as is not required to be retained for the benefit of the niece is distributable in equal parts to the respective personal representatives of the testator's brothers and sister.

This case is much like that of *Howell, Ex'r*,

r. Greene, Adm'r, 31 N. J. Law, 570, where the will which was construed provided as follows:

"I give and bequeath unto my sister Martha the interest of \$1,000 \* \* \* for her own private use, during her natural life; and after her decease I give and bequeath the said \$1,000 to her two daughters, namely, Deborah and Sarah, equally to be divided."

Sarah died before the testator; Deborah survived the testator, but died in the lifetime of her mother. The question for determination was whether the legacy to Deborah vested at the death of the testator or whether it depended on the contingency of her surviving her mother. Chancellor Green, who wrote the opinion in this court, says:

"It is a well-settled rule of construction that a gift of a legacy 'at,' or 'when,' or 'after' a given event occurs vests only upon the happening of the event. Apart from the context, the gift to the nieces of the testator after the death of their mother would not vest until their mother's death, and would depend upon the contingency of their surviving her. Where the time is annexed, not to the payment merely, but to the gift itself, the legacy does not vest until the period arrives. On the other hand, it is an equally well-settled rule of construction that where an absolute property in a fund is bequeathed in fractional interests in succession, at periods which must arrive, the interests of the first and subsequent takers will vest together. \* \* \* Where it is apparent from the terms of the will that the future gift is postponed to let in some other interest, the gift is vested."

So, also, in *Thomas, Ex'r, v. Anderson's Adm'r*, 21 N. J. Eq. 22, it was held that:

"A gift of the interest of \$12,000 to A. during life, and at her death, of the principal to B., is a vested legacy, and, if A. survives B., goes upon her death to B.'s representative."

See, also, *Beatty's Adm'r v. Montgomery's Ex'r*, 21 N. J. Eq. 324, and *Post v. Herberts' Ex'rs*, 27 N. J. Eq. 540.

We think, not only on the authority of the cases cited and by the application of the rule set out therein, but by the very language of the sixth paragraph of the will, that the testator's intent that his brothers and sister should take a vested interest is clear. In no other way can the words "the lawful child or children of any of them who may have died to take the share of their deceased parent" be given force, for, if the legacy was contingent and went to those who were the lawful heirs of the testator after the decease of his wife and niece, they would all necessarily be in case at the time when the legacy vested.

In *Beatty's Adm'r v. Montgomery's Ex'r*, 21 N. J. Eq. 324, 327, Chancellor Zabriskie said:

"If a legacy given to one at the death of a person named is given to another in case such legatee should die, this is held to refer to death in the life of the person at whose death it is given. Such legacy is held to vest at the death of the testator, subject to be divested on the happening of the event; that is, dying in the life of the person named."

But a legacy is divested only when other disposition is made of the subject of the legacy by the testator in the event of the death of the legatee during the life of "the person

named." If this is not so, then the testator dies intestate. If there is no one in esse to take the gift over, then the legacy is not divested by the dying of the legatee in the lifetime of "the person named." Or, stated in another way, if, as in the will of this testator properly construed, there is no gift over on the death of the legatee during the lifetime of "the person named," then there is no divesting of the legacy, and it goes to the personal representative of the legatee, either his executor or administrator, to be distributed under his will or to his next of kin. *Thomas' Ex'r v. Anderson's Adm'r*, 21 N. J. Eq. 22.

The result is that the testator's residuary estate, with the exception of the 60 shares of the capital stock of the railroad company held for the benefit of the niece, should be immediately distributed in equal parts to the respective personal representatives of the testator's brothers and sister, to be finally distributed under their respective wills or to their respective next of kin, as the case may be.

The decree of the court below will be reversed, and a decree entered in accordance with the conclusions herein expressed.

(85 N. J. L. 432)

#### NEWARK PAVING CO. v. KLOTZ.

(Supreme Court of New Jersey. Feb. 24, 1914.)

(Syllabus by the Court.)

#### 1. RELEASE (§ 29\*) — PARTIES — JOINT TORT-FEASORS.

Where a workman is injured by an accident arising out of and in the course of his employment, and a tort-feasor, other than his employer, is responsible therefor, the right to compensation under the act of 1911 (P. L. 1911, p. 134) is not lost by settlement with and a release of the tort-feasor.

[Ed. Note.—For other cases, see Release, Cent. Dig. §§ 64-70; Dec. Dig. § 29.\*]

#### 2. MASTER AND SERVANT (§ 250%, New, vol. 16 Key-No. Series)—WORKMEN'S COMPENSATION ACT—SUBROGATION—DAMAGES FROM TORT-FEASOR.

The right to compensation under the Workmen's Compensation Act of 1911 (P. L. 1911, p. 134), as originally enacted, and the right to recover damages of a tort-feasor, are of so different a character that the employer has no right by way of subrogation to the claim of the workman against the tort-feasor. The amendment of 1913 (P. L. 1913, p. 303) is not merely declaratory of the legislative intent under the act of 1911.

#### 3. MASTER AND SERVANT (§ 250%, New, vol. 16 Key-No. Series)—WORKMEN'S COMPENSATION ACT—"CHILDREN."

Dependent stepchildren, who have been supported by a deceased workman, are included within the word "children" in the act of 1911 (P. L. 1911, p. 134).

[Ed. Note.—For other definitions, see Words and Phrases, vol. 2, pp. 1115-1141; vol. 8, p. 7601.]

Certiorari to Court of Common Pleas, Essex County.

Proceedings between the Newark Paving

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Company and Hattie Klotz, administratrix. Finding for the administratrix, and the Paving Company brings certiorari. Affirmed.

The following statement of facts is taken from prosecutor's brief:

"Klotz was one of a gang of men employed by the respondent to wheel stone and cement to a concrete mixer at work on Elizabeth avenue on the repaving of that street. He went to his work at 7 o'clock in the morning, but, when he arrived there, it was found that, owing to the pipes of the concrete mixer having been frozen, no work could be done until this had been repaired. The men, therefore, could do nothing whatever, and about 7:40, and at least an hour before the mixer was fixed so as to permit the resumption of work, Mr. Klotz was struck by a car of the public service corporation and killed."

To this must be added the important fact that, at the time he was struck, Klotz was fixing up his wheelbarrow.

Prior to the trial in this case, the petitioner received \$800 from the public service corporation, and released, by a release under seal, that corporation from liability.

Argued November term, 1913, before SWAYZE and BERGEN, JJ.

McCarter & English, of Newark, for prosecutor. John V. Laddey, of Newark, for defendant.

SWAYZE, J. We think the evidence justified a finding that Klotz's death was due to an accident arising out of and in the course of his employment. The case is within the rule of *Bryant v. Fissell*, 84 N. J. Law, 72, 86 Atl. 458.

[1, 2] The question of the effect of the release of the street railway company is more troublesome. The defendant appeals to the rule established in *Weber v. Morris & E. R. R. Co.*, 35 N. J. Law, 409, 10 Am. Rep. 253, Id., 36 N. J. Law, 213, and in *Monmouth County Fire Ins. Co. v. Hutchinson* and another, 21 N. J. Law, 107. It is true that the present defendant is not an insurer, but we are not prepared to say that that fact alone takes the case out of the reason of the rule as stated in the cases referred to, and by Chief Justice Shaw in the case on which they relied. *Hart v. Western Railroad Corp.*, 13 Metc. (Mass.) 99, 46 Am. Dec. 719. We think, however, that the present case is not governed by that rule for the reason that to so hold would conflict with the intention of the act of 1911 (P. L. 1911, p. 134), under which this suit is brought. That act was meant to insure compensation to workmen not generally but by way of weekly payments in lieu of wages. It therefore partakes to some extent of the nature of a pension, and we have held that there must be specific findings of fact to warrant an order commuting the payments into a lump sum. *New York Shipbuilding Co. v. Buchanan*, 84 N. J. Law, 543, 87 Atl. 86. This object of the act is especially emphasized by the amendment of 1913 (P. L. p. 309), which declares that it is the intention that the compensation payments are in

lieu of wages and are to be received by the employé or his dependents in the same manner in which wages are ordinarily paid; that commutation is a departure from the normal method of payment to be allowed only under unusual circumstances and not for the purpose of enabling the injured employé or the dependents of a deceased employé to satisfy a debt or to make payment to physicians, lawyers, or other persons.

Although this enactment is later than the accident for which this suit is brought, it is an express legislative declaration of the intent of the act—an intent which might have been properly inferred from the provisions of the original act. If the statutory compensations were subject to deductions by reason of payments made by a third person, the tort-feasor, to the person injured or to his dependents, in satisfaction of the liability for the tort, this object of the statute would be thwarted, and in effect the commutation to a lump sum would take place without any order of the court and at the will of the injured party or his representatives. If, on the other hand, the employer were allowed to recover of the tort-feasor by action in the name of the employé or his representative, he would be able to recover in advance of payments by him and at a time when the extent of his own liability could not be ascertained. These considerations suffice to show that the right to compensation under the statute and the right to recover damages of the tort-feasor are of so different a character that the rule of law appealed to by the prosecutor is inapplicable. The release, therefore, of the claim against the street railway could not be a bar to the right to compensation under the statute.

It is true this conclusion makes it possible for the employé to secure, under the act of 1911, double compensation. This was probably not the intent of the Legislature, though, as we think, the result of the language of the statute. The difficulty seems to be obviated by the amendment of 1913 (P. L. pp. 312, 313.)

It is argued that the amendment amounts to a legislative declaration of the asserted right of subrogation under the original act. The answer is twofold: (1) It does not purport to be a declaration of the meaning of the act of 1911, but an amendment of that act. (2) The employer is only released, when the employé recovers of the tort-feasor a sum equivalent to or greater than the total compensation payments for which the employer is liable, and the employer is only entitled to receive of the tort-feasor a sum equivalent to the amount of compensation payments which the employer has theretofore paid to the injured employé or his dependents. Neither provision is applicable to the present case.

[3] It is urged that the court erred in allowing compensation as in case of four children, when two of the four were only step-

children. The evidence shows that the deceased supported the stepchildren and bought their clothes and shoes. We think this fact justified the judge in allowing for them as actual dependents. *Mulhern v. McDavitt*, 18 Gray (Mass.) 404. The amendment of 1913 (P. L. p. 305) removes all doubt on this point for cases arising since its passage, and we find nothing in the language of the act of 1911 to prevent us from adopting the same construction. The important words are "actual dependents." The word "children" may well be held to include dependent stepchildren.

The judgment is affirmed, with costs

(86 N. J. L. 1)

### GUTHEIL v. NELSON.

(Supreme Court of New Jersey. July 2, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§ 184\*)—POWER OF POLICE COMMISSIONERS.

Under Hoboken Charter, vesting in the board of police commissioners the power to make such rules and regulations as it might deem proper, the board adopted a manual providing that the police force should consist of a chief of police, captains, a detective sergeant, etc., and that there should be two police precincts in the city, the force in each precinct forming a company, the officers of which should consist of one captain, etc. *Held*, that there was no limitation in the manual as to the number of captains, and the board of police commissioners might, when advisable, create a third captain although there were only two districts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 482-486, 488-491; Dec. Dig. § 184.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 184\*)—POLICE—POWER OF POLICE COMMISSIONERS.

A police captain who is assigned to command a certain precinct is entitled to hold that assignment only so long as the public interests are best served thereby, and he cannot question his removal from that command and the appointment of another by the board of police commissioners.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 482-486, 488-491; Dec. Dig. § 184.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 184\*)—OFFICERS—REDUCTION IN RANK—REVIEW.

Where a former police captain, who had been reduced, sought to oust his successor by quo warranto claiming his appointment was invalid, the right of the board of police commissioners of the municipality to reduce the relator cannot be reviewed where the appointment of his successor was valid.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 482-486, 488-491; Dec. Dig. § 184.\*]

Quo Warranto by the State, on the relation of William Guthell, against Julius Nelson. On demurrer to pleas. Judgment for respondent.

Argued November term, 1913, before GUMMERE, C. J., and PARKER and KALISCH, JJ.

William S. Stuhr, of Hoboken, for relator. Horace L. Allen, of Hoboken, for respondent.

GUMMERE, C. J. The following are the material facts set out in the pleadings in this case: The government of the police force of the city of Hoboken is vested in the board of police commissioners of that city, under the provisions of the municipal charter; and that board has power to make such rules and regulations as it may deem proper for the regulation of the police department. In the exercise of that power the board adopted a manual of rules and regulations in which it was provided, among other things, that the police force should consist of "a chief of police, captains, a detective sergeant, sergeants, roundsmen, and such detectives, patrolmen, van drivers and chancemen" as the board should appoint; that there should be two police precincts in the city; that the force in each precinct should form a company; and that the officers of each company should consist of one captain, three sergeants, three roundsmen, together with the necessary number of patrolmen and detectives. This manual was adopted in January, 1903, and under it Robert H. Bell and John Flattery were appointed captains; Bell being assigned by the chief of police to duty in the First precinct, and Flattery in the Second.

In August, 1907, by a resolution of the board, the respondent, Nelson, was appointed a captain of the police department, and was assigned to take command of the detective bureau which was then, or had been theretofore, created.

On the 11th of November, 1911, Capt. Bell died while in office. On the 16th of that month the board removed Capt. Flattery from his office, and immediately thereafter appointed the present relator, then detective sergeant, Guthell, and Sergeant Foley, captains to fill the vacancies thus created. The chief of police thereupon assigned the relator to duty as captain of the First precinct, and Foley to duty as captain of the Second.

Immediately after his removal, Capt. Flattery began proceedings in this court to test the validity of that action by the board; and on the 3d of February, 1912, we adjudged such removal unwarranted, illegal, and void, and directed his restoration to his office. Twelve days later the board passed a resolution reducing Capts. Guthell and Foley to their original positions, restoring Capt. Flattery to his office, and directing the chief of police to detail him to his original command, and to assign Nelson, the respondent, to the captaincy of the First precinct. The relator, by this proceeding, seeks to obtain an adjudication of this court that Nelson, the respondent, usurps the office which he now holds, and that he (the relator) is the legal incumbent thereof, and entitled to the command of the First precinct.

[1] The first ground upon which the relator rests his claim is that, under the provisions of the manual of rules and regula-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tions of the board above recited, the appointment of the respondent as captain of police in July, 1907, was ultra vires the board and void; the argument being that, because there were only two police precincts in the city, there could be only two captains legally appointed, and, there being already at the time of Nelson's appointment a captain in charge of each of the two precincts, that appointment violated the provision of the manual. But this, we think, is due to a misconception of the language of that document. The provision thereof is that the police force shall consist of a chief of police, captains, detective sergeants, etc., etc. There is no limitation as to the number of captains, or of officers of a lower grade, that may be appointed. How many of each class there shall be rests in the sound discretion of the board. If the exigencies of the public service at any time should require the appointment of a captain of police whose duty should be other than the command of a precinct, it is within the power of the board, under its own manual of rules and regulations, to make such appointment. The action of the board, therefore, in creating the respondent one of the captains of the police force, and assigning him to the command of the detective bureau, was not taken in disregard of its own manual.

[2] It is further contended that the board was without power to remove the relator from the command of the First precinct, after he had once been legally appointed thereto.

The line of duty to be assigned to a particular appointee is a matter to be determined from time to time by the board, in the public interest; subject, of course, to such statutory limitations as may exist. The fact that a particular captain has once been assigned to the performance of a particular line of duty, for instance, to the command of a particular precinct, vests in him no right to continue in the performance of that specific duty contrary to the will of the board. He holds the assignment subject to be transferred from one line of duty to another, required to be performed by an officer of his rank, whenever the board, in its good judgment, shall determine it to be for the public interest. The relator, Guthell, having been appointed captain, and assigned to duty as commander of the First precinct, was entitled to hold that assignment only so long as the public interests, in the opinion of the board, were best subserved thereby. And this is equally true with relation to the assignment of Nelson to duty as head of the detective service. The removal therefore, by the board, of the relator from his command, and its assignment of the respondent to that command, was a valid exercise of the power conferred upon the board by the Legislature.

[3] Whether the action of the board in reducing the relator from the rank of captain

to that of detective sergeant is legally defensible (a matter discussed in the briefs of counsel) is not involved in the determination of the present proceeding, which stands or falls upon the validity of the appointment of Nelson as captain, and his assignment to the command of the First precinct. That appointment, and the subsequent assignment, being within the power of the board, and constituting the defense set up by the respondent, the demurrer to the pleas must be overruled.

The respondent is entitled to judgment on the demurrer.

(83 N. J. Eq. 531)

DECKER et al. v. SCOTTISH UNION & NAT. INS. CO. OF EDINBURGH.

SAME v. COMMONWEALTH INS. CO. OF NEW YORK.

(Court of Chancery of New Jersey. June 30, 1914.)

INSURANCE (§ 143\*)—POLICY—REFORMATION—GROUNDS—MUTUALITY OF MISTAKE.

Complainants, in a suit against an insurance company, were not entitled to reformation of an insurance policy so as to make it payable to themselves as executors instead of a third party to whom it was made payable, where there was no mutual mistake upon the part of the parties to the suit and no fraud upon the part of the insurance company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 265-272; Dec. Dig. § 143.\*]

Suits by Anna M. Decker and another, executors of Pauline Diebold, deceased, against the Scottish Union & National Insurance Company of Edinburgh, and against the Commonwealth Insurance Company of New York. Demurrer of defendants sustained and bills dismissed.

Cecil H. MacMahon, of Newark, for complainants. Alfred S. March, of New Brunswick, for defendants.

LEWIS, V. C. The complainants desire a reformation of a policy of insurance covering the property of one Joseph Diebold. As is apparent from the pleadings, the right of Joseph Diebold to have it insured is unquestioned. The bill asserts that Joseph Diebold and Anna M. Decker are executors of Pauline Diebold, deceased. Among the assets of the estate of Pauline Diebold, which came to the hands of her executors, was a mortgage. A policy of insurance had been issued to Joseph Diebold acting, not as an executor, but as an individual. This bill is filed to reform the said policy of insurance so that it may be made payable to the executors of Pauline Diebold. It is quite evident from an examination of the papers in this case that there was no mutual mistake on the part of the parties to this suit, and no fraud on the part of the defendants is alleged. There was no contractual relationship between the parties. The executors of Pauline Diebold were not parties to the contract of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



insurance and never became parties to it. Joseph Diebold says he told one Harrison to have the policy issued to the executors of Pauline Diebold, and Harrison evidently did not carry out these instructions. The insurance companies had no notice whatever of the wish of Diebold in this respect. The complainants' bills therefore fail to show any mutuality of mistake or right of reformation. The case as presented by the bill is one of mere neglect for which reformation cannot be had in equity. The fact that the complainants are not parties to the contract of insurance, it seems to me, disposes of their right of consideration in this court; but, aside from this, assuming that they were such parties, I do not feel that they present a case for equitable relief. The case referred to by solicitor of the defendants on his argument sustains the position taken by him. *Doniol v. Commercial Fire Insurance Co. of New York*, 34 N. J. Eq. 30; *Henderson v. Stokes*, 42 N. J. Eq. 586-589, 8 Atl. 718; *Ordway v. Chace*, 57 N. J. Eq. 478, 42 Atl. 149; *Rowley v. Flannelly*, 30 N. J. Eq. 612—all deal with the questions involved in this issue. The opinion of Vice Chancellor Howell in the case of *John Plockzek v. St. Paul Fire & Marine Insurance Co.*, 91 Atl. 812, not officially reported, but brought to the attention of the court, is very much in point.

My conclusion is that the demurrers must be sustained and the bill of complaint dismissed.

(36 N. J. L. 381)

**P. BALLANTINE & SONS v. PUBLIC SERVICE CORPORATION OF NEW JERSEY.** (No. 76.)

(Court of Errors and Appeals of New Jersey.  
June 16, 1914.)

*(Syllabus by the Court.)*

**1. WATERS AND WATER COURSES (§ 101\*) — PERCOLATING WATERS — RIGHTS OF LAND-OWNER.**

The landowner has not the absolute and unqualified property, in all water percolating in his soil and collecting in his wells, to do as he pleases with it, but has the right to its use in a reasonable manner and to a reasonable extent for his own benefit for manufacturing purposes, as well as for domestic consumption and the like.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 110, 111; Dec. Dig. § 101.\*]

**2. WATERS AND WATER COURSES (§ 104\*) — PERCOLATING WATERS—POLLUTION.**

A gas manufacturing company has not the right to use its works in the manufacture of gas in such manner as to accumulate polluting matter upon its land and negligently allow it to percolate through the soil and contaminate the well water of its neighbor.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 114; Dec. Dig. § 104.\*]

**3. JUDGMENT (§ 606\*)—RES JUDICATA—ABATABLE NUISANCE.**

The plaintiff, a brewing company, recovered a judgment for substantial damages against the

defendant, a gas manufacturing company owning land adjoining the plaintiff's land, for injury to its well water caused by the negligent management of the gas company in permitting tar products to escape from its works and premises so as to pollute and injure the plaintiff's well water; subsequent to the entry of the judgment the defendant paid and satisfied it of record and the plaintiff brought another suit against the defendant to recover damages for the continuance of the nuisance, and it was held that the original nuisance was abatable in character, and that the judgment was no bar to the subsequent action for the new injury.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1120; Dec. Dig. § 606.\*]

**4. JUDGMENT (§ 606\*)—DAMAGES—RIGHT OF ACTION—MERGER—NUISANCES.**

The continuance and every use of that which is, in its erection and use, a nuisance is a new nuisance for which the party injured has a remedy for his damages.

[Ed. Note.—For other cases, see *Judgment*, Cent. Dig. § 1120; Dec. Dig. § 606.\*]

Appeal from Supreme Court.

Action by P. Ballantine & Sons against the Public Service Corporation of New Jersey. From judgment for plaintiff, defendant appeals. Affirmed.

See, also, 76 N. J. Law, 358, 70 Atl. 167.

Frank Bergen, of Newark, for appellant. Pitney, Hardin & Skinner, of Newark, for appellee.

**VREDENBURGH, J.** The parties to this controversy are each engaged in manufacturing industries of large proportions, in the city of Newark, N. J. Their lands and premises upon which their respective plants are erected adjoin and extend from Front street to the Passaic river. The plaintiff corporation, under the name of "P. Ballantine & Sons" is a brewing industry, manufacturing malt liquors which are well known in that trade, and command a wide market. Its success in such manufacture requires the constant use of large quantities of pure, cool water for the proper preparation of its ale and beer. The water it obtains from its wells in its lands is peculiarly adapted for its use in such preparation. The defendant gas company manufactures on its lands and premises illuminating gas, and its success in that business necessitates the consumption of large quantities of coal and oil, a residuum of which, after distillation by heat and the purification of the gas sufficient for illuminating requirements, is tar and its compounds. These, being heavier than water, will, if allowed to escape from the gasholders and receptacles in which they form, sink down into and permeate surrounding soil and underground percolating waters, and are carried thereby to neighboring wells of water. It is this fact and this penetrating quality of these tar substances to enter into the soil and waters of the plaintiff that has resulted in the injuries which have led to the long-continued litigation between the parties.

The present action was brought in May,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

1912, in the Supreme Court by the brewing company against the gas company to recover damages from the latter under allegations of its negligence in so managing its gas plant as to allow these tar products to escape from its premises, and to pollute and render valueless the plaintiff's property in its well waters. The plaintiff at the circuit trial had verdict, and judgment was entered thereon against the defendant for substantial damages, and the latter, by appeal, has brought up the record for review. This judgment is the second the plaintiff has recovered in the Supreme Court against the defendant for substantial damages to the brewing company's well water, alleged to have been caused by tar pollution negligently permitted by the gas company to escape from its premises at the locus in question. The record in the evidence before us shows that the plaintiff on August 27, 1906, began such a tort action in the Supreme Court and obtained a judgment against the defendant; that a rule to show cause why a new trial should not be granted was, after argument, subsequently discharged by that court, and that in discharging the rule the court rendered an opinion reported in 76 N. J. Law, 358, 70 Atl. 167. The defendant made no further contest, but on October 16, 1913, paid and satisfied that judgment of record.

In passing it is of importance to advert to certain qualifications of the plaintiff's right of property in its subsurface and well waters, which have been held to be limitations upon that right. The plaintiff's claim for damages against defendant in this action is founded upon the latter's *interference with, and prevention of the use* by the plaintiff of its well waters for its *manufacturing* purposes. Its right to such use is clear.

[1] Since the decision of this court (in 1909) in *Meeker v. East Orange*, 77 N. J. Law, 623, 74 Atl. 379, 25 L. R. A. (N. S.) 465, 134 Am. St. Rep. 798, it is the settled law of this state that the landowner has not an absolute and unqualified property in all water found percolating in his soil to do what he pleases with it. Mr. Justice Pitney, in an instructive opinion, there distinguishes between the absolute right of the landowner in such water under the English doctrine and his qualified right as settled in this state. He has the right to its use only in a reasonable manner and to a reasonable extent, for his own benefit for domestic purposes as well as in manufacturing, and his own consumption as in agriculture, irrigation, and the like, and without undue interference with the rights of other landowners to the like use and enjoyment of such water.

[2] A terse expression of this principle is found in the old maxim, "*sic utere tuo ut alienum non lædas*." This maxim, it should be observed, has also an apt application to the defendant's conduct of its gas business. It was not privileged to use its own property

in the manufacture of gas as it might please, if in such use it, by *negligence*, caused damage to the property of its neighbor. This principle is supported by the leading case of *Marshall v. Welwood*, 38 N. J. Law, 339, 20 Am. Rep. 394, followed by *Ulshowski v. Hill*, 61 N. J. Law, 375, 39 Atl. 904; *De Gray v. Murray*, 69 N. J. Law, 460, 55 Atl. 237.

The main contest of fact at the circuit in the case, sub judice, as it was tried out by the parties, centered upon the question whether the defendant had, since August 27, 1906 (the beginning of the former suit), suffered tar matter to escape and be discharged from its gasworks into the wells of the plaintiff. At the defendant's request the court instructed the jury that the plaintiff could not recover in the suit unless it had shown that oil tar or other soil or water-polluting substance had been negligently discharged by the defendant on its own property, or had been negligently allowed by the defendant to escape from its property to or into the property of the plaintiff since August 27, 1906, the date of the commencement of the former suit. In response to this instruction, the jury, after they had viewed and examined the defendant's premises (the counsel of both parties consenting to such view and examination), found against the defendant upon this issue, finding, as we have the right to assume, that oil tar or other soil or water-polluting substance had been negligently allowed by it to escape from its property to and into the property of the plaintiff since August 27, 1906. The defendant now attacks the legality of the verdict, not, of course, upon the ground that it was against the weight of the evidence, but upon an insistent that there was *no evidence* whatever, and *no fact* from which the jury could find that any polluting matter had negligently escaped from its works since August 27, 1906. Our examination of the facts in evidence leads us to a contrary conclusion.

To state, very briefly, but a few of the most salient of these facts, they are as follows, viz.: There is the fact that the tar found in great quantities in plaintiff's land and well water was oil gas tar and coal tar of the same kind produced by the defendant in its works, and that there were no other tar-producing works in the vicinity—Prof. Pond testified that he found these tar substances (which he subjected to careful scientific tests) in plaintiff's wells in October, 1907, and at various times since August, 1906, until April 7, 1908, and that so late as February 15, 1908, upon a hole being dug, in his presence, in plaintiff's premises of about 18 inches in depth "*a stream of tar came bubbling into the hole about like spring water* \* \* \* that consisted of 25 per cent. of tar and 75 per cent. water and sand," and that it was "the same sort of tar, water gas tar, tar oil, that we had previously obtained from the wells"—the fact that tar was found in the brewery cellar four feet above high tides of

the river; the fact that it was found on top of the rocks, and also where the well digger (Conlon) made, after August, 1906, five different borings, at depths from 32 to 50 feet, for wells on the Ballantine property, and found tar in each of the holes bored there, and that in two other of such borings, made in defendant's gasworks adjacent to and north of plaintiff's lands on Front street, tar was found at considerable depths; the fact that in July, 1909, the malthouse well on plaintiff's premises showed tar pollution; the fact that after August, 1906, defendant's drip pots, carrying tar, continued to empty into the ground.

The appellant's contention that this tar since the date in question was prevented from all leakage from its relief holder and other receptacles by the excellence and tightness of their cement floors and brick walls is not sustained by reasonable probabilities. That such tar and its compounds might penetrate through cracks in cement not visible to the eye was the opinion of the expert, Prof. Pond. He testified that it is "perfectly well known that concrete may have lots of regular network with cracks in it yet not be visible to the eye," and that "if such were the case it would leak water and tar." The jury, who went to the premises in question, and who, presumably, closely examined, by the eye and touch, the cement and brick receptacles, rejected the defendant's contention in this regard. How can we now say they saw no evidence of any cracks in the walls or cement through which the tar liquid had escaped? By their verdict they have declared that they saw evidence of such escape and leakage. The jury had exceptional opportunities to arrive at a correct result, particularly as to the leakage of the tar receptacles, quite outside of and beyond the testimony of witnesses appearing in the record, and this important circumstance should not be lost sight of in estimating the weight to be given to the inference to be drawn from the verdict of the jury that such fact of leakage had been made manifest to them by their own observation. This result we also reach from the printed testimony after giving due effect to the importance of defendant's evidence demonstrating that coloring matter placed in the river opposite the wells of the plaintiff can be, and was, pumped, by means of its air-lift system of pumping, from the river to the wells. We fail to see that such fact excludes the possibility of pollution from defendant's premises. Even admitting that it be true that some coal gas tar pollution, found in plaintiff's well water came from the contiguous waters of the river, it did not follow that the pollution proved by the plaintiff's evidence to be in its wells did not come from the *defendant's* works. The defendant's proofs did not, we think, negative those of the plaintiff as to the pollution of plaintiff's wells with *oil gas tar*

*peculiar to the kind originating in defendant's works.*

[3] Error, it is also insisted by appellant, occurred on the trial below because the court refused to direct a verdict in its favor made on the ground that the former recovery of damages by the plaintiff was a bar to any recovery in the present suit. The appellant's insistence is that the injury at the foundation of the first action for damages was a single tort or nuisance, not abatable, and for which injury the plaintiff could recover damages but once and for all, and that if the nuisance sued for in the first suit was of a permanent and continuing character, the plaintiff must recover in that action all the damages past and future which the maintenance of the nuisance has occasioned and will occasion in the future. But, we think, the injury sued for in the former action was not of a permanent character, but was temporary and abatable, and that it was the defendant's duty to abate its continuance, and its failure so to do gave rise to a new cause of action.

[4] The authorities uniformly hold that the continuance and every use of that which is, in its erection and use, a nuisance is a new nuisance for which the party injured has a remedy for his damages. *Staple v. Spring*, 10 Mass. 74; *Hodges v. Hodges*, 5 Metc. (Mass.) 205.

Every continuance of a nuisance is held to be a fresh one. 3 Blac. Com. 220.

In actions for a continued nuisance a judgment recovered in the first cannot have an effect to bar the second, nor to diminish the measure of damages recoverable by it. *Baltimore R. R. Co. v. Fifth Baptist Church*, 137 U. S. 568, 11 Sup. Ct. 185, 34 L. Ed. 784; *Troy v. Cheshire R. Co.*, 23 N. H. 83, 55 Am. Dec. 177.

In *Beatrice Gas Co. v. Thomas*, 41 Neb. 662, 59 N. W. 925, 43 Am. St. Rep. 711, the gas company was sued for damages for permitting injurious matter to percolate through subterranean streams into plaintiff's well, and the court held that the injury was temporary and not permanent in character, and was capable of being avoided in the future without permanent injury to plaintiff's land. Also, see case of *Van Veghten v. Hudson R. R. Co.*, 103 App. Div. 130, 92 N. Y. Supp. 956.

In *Fairbank v. Bahre*, 213 Ill. 636, 73 N. E. 322, it was held that a nuisance by offensive odors was temporary in character for which successive actions could be maintained, but that plaintiff could not recover in the action for injury sustained after the institution of the suit.

In *Hatfield v. Central Railroad Co.*, 33 N. J. Law, 251, an action to recover damages for the erection and continuance of a nuisance, it was held that a verdict could not include prospective damages. See, also, *Lewis v. Penn. R. Co.*, 76 N. J. Law, 220, 68 Atl. 1077.

The defendant's argument that, because there was evidence of other sources of pollution from the Passaic river, the damages found by the jury to have been inflicted upon the plaintiff's property by the defendant were excessive in amount for the injury sustained by the pollution emanating from its works cannot be made the proper subject of error in this court (*Jenkins v. Penn. R. R. Co.*, 87 N. J. Law, 331, 51 Atl. 704, 57 L. R. A. 309), and we find nothing in the record that discloses any legal error.

The judgment should be affirmed.

### GREGUTIS v. WAELARK WIRE WORKS.

(Supreme Court of New Jersey. April 13, 1914.)

#### DEATH (§ 31\*)—WRONGFUL DEATH—RIGHTS OF ACTION.

Under Death Act (2 Comp. St. 1910, p. 1907) § 7, providing that on the death of a person by wrongful act who, if death had not ensued, could maintain an action for damages in respect thereof, the person who would have been liable if death had not ensued shall be liable notwithstanding the death, the nonresident dependents of a servant whose contract was governed by the Employers' Liability Act (Acts 1911, P. L. p. 134) cannot sue for his wrongful death, as the Employers' Liability Act provides no compensation for nonresident dependents, and the employé, had the injuries not been fatal, would only have been entitled to the compensation provided for in the Liability Act, and could not have maintained an action for damages.

[Ed. Note.—For other cases, see Death, Cent. Dig. §§ 35, 37-46, 48; Dec. Dig. § 31.\*]

Action by Eva Gregutis, as administratrix, against the Waclark Iron Works. On motion before a single Justice of the Supreme Court to strike out the complaint. Motion granted.

Argued before BERGEN, J., sitting alone under the statute.

Kallsch & Kalisch, of Newark, for the motion. John J. Stamler, of Elizabeth, opposed.

BERGEN, J. This is a motion to strike out a complaint in an action brought under the Death Act to recover damages for the death of the plaintiff's intestate. The complaint avers that the deceased was killed while in the employ of the defendant; that he left a father, mother, three sisters, and one brother; that all were dependents of his, and all residents of the Empire of Russia; "and therefore the administratrix is not entitled to recover against the defendant" under the Employers' Liability Act of 1911 (P. L. p. 134).

The only question raised, and argued is that the contract of the deceased is governed by the act of 1911, and that, as by it no compensation is provided for alien dependents not resident in the United States, no cause of action is stated; the defendant's claim being that the right of nonresident next of kin to damages is limited by the Employers' Liability Act to the compensation

which it provides, and, as it expressly states that compensation under the schedule established by the act shall not apply to nonresident alien dependents, the right of nonresident next of kin to damages under the Death Act is taken away, and therefore there is no statutory remedy remaining to such persons. No question as to the sufficiency of the complaint, if the action can be maintained under the Death Act, was urged on the argument, and I have considered only the precise question presented and argued, which is: Was the remedy given under the Death Act altered or modified as to nonresident next of kin in cases where an employé is killed while at work under an agreement fixing compensation in case of accidental death according to a schedule which excludes such nonresidents from the benefit of the compensation so established by the act of 1911?

That such nonresident aliens have a right of action under certain conditions is settled in this state (*Cetofonte v. Camden Coke Co.*, 78 N. J. Law, 662, 75 Atl. 913, 27 L. R. A. [N. S.] 1058); but such right depends upon the condition that a party, injured through the negligence of the defendant, would, if death had not ensued, be entitled to maintain an action in respect thereof (P. L. 1848, p. 151; 2 Comp. St. 1910, p. 1907, § 7).

I think it must be conceded that, if the deceased had suffered an injury, not resulting in death, he would have been bound by the compensation provided for in the act of 1911 (P. L. p. 134), and could not have brought suit for his injuries in disregard of that act, and, if he could not, then it would follow that the condition upon which a right of action is given to the personal representative of a deceased person is not present. In addition to this, the act of 1911 covers all cases of death, and compensation therefor, where the contract of the employé is subject to section 2 of the act, and to that extent the act of 1848 is inconsistent with it, as the later act provided a different procedure and rule of damages, and, being inconsistent, it cannot be applied to the class of cases enumerated in the statute of 1911, for that act repeals all inconsistent legislation.

The conclusion I have reached is that, where an employé contracts to work under section 2 of the Employers' Liability Act, the damages to be paid by the employer in case of death are limited by that act, and that an action by next of kin cannot, in such case, be maintained in disregard of the act. Compensation is given, in lieu of damages, to dependents, and not to next of kin as such. The power of the Legislature to give or withhold a right of action in such case, and to declare to whom, and in what amount, compensation shall be made, cannot be doubted.

This complaint admits an employment governed by the second section of the statute of 1911, but avers that because, under that act, nonresident dependents are excluded from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

compensation, it does not apply to them, although it would apply to the compensation of the employé if he were seeking compensation for injuries on his own behalf. This does not state a cause of action in the present state of the law on this subject.

The complaint will be stricken out, with costs.

# KENNEDY v. DAVID KAUFMAN & SONS CO.

(Supreme Court of New Jersey. April 7, 1914.)

## MASTER AND SERVANT (§ 321\*) — LIABILITY FOR INJURY TO SERVANT UNDER INDEPENDENT CONTRACTOR—STATUTORY PROVISIONS.

Under Employers' Liability Act (P. L. 1911, p. 135) § 1, par. 3, providing that, if an employer contracts with an independent contractor to do a part of his work, such contract shall not bar his liability for injury to an employé of the contractor caused by any defect in the ways, works, machinery, or plant, if the defect arose through the negligence of the employer or some one intrusted by him with the duty of seeing that they were in proper condition, etc., the employer is not liable when the entire work is let to an independent contractor who furnishes the ways, works, machinery, etc., over whose negligent conduct, in not remedying defects, the employer has no control, but only where he furnishes the ways, works, machinery, etc., in aid of part execution of his work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1262; Dec. Dig. § 321.\*]

Action by Henrietta I. Kennedy, administratrix of James E. Kennedy, against the David Kaufman & Sons Company. On motion to strike out complaint. Motion allowed.

Francis A. Gordon, of Elizabeth, for the motion. J. A. Kiernan, of Elizabeth, opposed.

**BERGEN, J.** The cause of action set out in plaintiff's complaint is that the defendant purchased from the Standard Oil Company a metal tank and as part of the terms of purchase agreed to take down, remove, load, and ship it; that the defendant thereafter contracted with one Hendrickson to take down the tank and remove it for defendant, which intrusted to him the entire work of furnishing the ways, works, machinery, or plant for doing the work, and also the duty of seeing that these were and should be in proper condition; that Hendrickson engaged plaintiff's intestate as a laborer to take down and remove the tank, and while he was doing the work the tank collapsed through defects in the ways, works, machinery, or plant, which arose, and had not been discovered and remedied, through the negligence of Hendrickson, who had been intrusted by the defendant with the duty of seeing that they were in proper condition, whereby the plaintiff's intestate was killed, by reason of which the action was brought for the benefit of his next of kin under the Death Act of 1848.

The defendant moved to strike out the

complaint upon the single ground that no cause of action is stated because, under the facts averred, defendant was under no legal obligation to the deceased concerning the ways, works, machinery, or plant. The question whether the deceased was subject to the conditions of section 2 of the act prescribing the liabilities of an employer to make compensation for injuries received by an employé in the course of his employment, commonly called the Employers' Liability Act (P. L. 1911, p. 134), is not raised by the notice, and the consideration of this motion is limited to the question whether, if the plaintiff has a right of action against an independent contractor under the first section of the act, it is legally set out in the complaint; and the result is predicated upon the assumption that the parties were not bound by section 2, and stood in the same relation to each other that would exist if either had given notice to the other that the provisions of section 2 should not apply to the contract of employment, or that the contract contained an express statement that it did not.

The plaintiff claims that the complaint states a cause of action against this defendant under paragraph 3 of section 1 of the Employers' Liability Act, which provides that if an employer enters into a contract with an independent contractor to do a part of the employers' work, or if such contractor (the independent contractor) contracts with a subcontractor to do all or any part of such work, such contract shall not bar the liability of an employer for injury to an employé of the contractor or subcontractor, caused by any defect in the condition of the ways, works, machinery, or plant, if the defect arose through the negligence of the employer or some one intrusted by him with the duty of seeing that they were in proper condition. No facts are set out in the complaint showing that this defendant furnished, or was required to furnish, any of the ways, works, machinery, or plant. On the contrary, the complaint alleges that the defendant intrusted to Hendrickson "the entire work of furnishing the ways, works, machinery, or plant for doing the aforesaid work," so that Hendrickson is averred to be an independent contractor intrusted with the entire work without the control, co-operation, assistance, or interference of the defendant, while the statute applies only to cases where part of the work is to be done by the independent contractor. Under this complaint the deceased was employed, not as a subcontractor, but as a laborer, to take down the tank, and therefore an employé of the independent contractor who had assumed, not a part of defendant's contract, but the whole.

The Legislature, when it declared that, in cases where the employer contracted part of his work to an independent contractor, he

should be liable for defects in the ways, works, machinery, or plant, was dealing with a situation not shown by this complaint, but with one where the employer furnished them to the independent contractor for doing a part of the work; otherwise it would not have limited the employer's liability to cases where only part of the work was let to a contractor, for, unless such was the legislative intent, the expression "to do part of such employer's work" might as well have been omitted.

What the plaintiff claims is that in all cases, where the entire work is let to an independent contractor, the employer is liable for defects in ways, works, machinery, or plant belonging to and furnished by such independent contractor. This is not the proper construction of the statute, but, on the contrary, the employer is only liable where he furnishes the ways, works, machinery, or plant in aid of part execution of his work, and does not make him liable where the entire work is let to an independent contractor, who furnishes the ways, works, machinery, or plant, over whose negligent conduct in not remedying defects the employer has no control.

As this complaint charges that the doing of the entire work, as well as the furnishing of the ways, works, machinery, or plant, was let to an independent contractor by the defendant, through whose negligence in not discovering and removing the defects complained of the plaintiff's intestate was killed, it does not state a cause of action under the statute invoked, and it is not claimed that this defendant would be liable for the negligence of Hendrickson, unless paragraph 3 of section 1 of the Employers' Liability Act applies.

The motion to strike out should be allowed. The defendant may take an order striking out the complaint, with costs.

(36 N. J. L. 352)

**O'BRIEN v. STRAIGHT FILAMENT LAMP CO. (No. 56.)**

(Court of Errors and Appeals of New Jersey.  
June 15, 1914.)

*(Syllabus by the Court.)*

**MASTER AND SERVANT (§ 31\*)—UNLAWFUL DISCHARGE—ACTION FOR DAMAGES.**

Where a factory superintendent, under a contract of employment for a term of five years, is, before the termination of that period, forcibly excluded continuously for a considerable time by his employer from the factory and the place where his work has to be done, and his salary is stopped, he may consider himself discharged, and, if his conduct has not justified discharge, may recover damages for the breach of his contract of employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 37; Dec. Dig. § 31.\*]

Appeal from Supreme Court.

Action by Dennis J. O'Brien against the Straight Filament Lamp Company. Judge-

ment for plaintiff, and defendant appeals. Affirmed.

Vredenburg, Wall & Carey, of Jersey City, for appellant. Samuel Koestler, of Elizabeth, for appellee.

**WHITE, J.** This is an action for damages for the breach of a contract of employment.

The plaintiff appellee, the inventor and patentee of an electric lamp, entered into a contract in writing with the defendant appellant, which, after reciting the organization of the defendant company for the purpose of manufacturing and exploiting said electric lamp, and the fact that by reason of said circumstances the services of the plaintiff were of unusual and unique value to defendant company, provided that the defendant company thereby employed the plaintiff as its factory superintendent, with general supervision over the manufacture of said lamp, subject to the control and direction of the officers of the company, for a term of five years, at a salary of \$200 per month. There was ample evidence (most of it uncontradicted) which, if believed, would establish the following facts, viz.: That plaintiff entered into this employment and continued therein for about a year; that another man, Heebner, was then made superintendent, and plaintiff was directed to take entire charge of the laboratory; that upon his objecting to this he was persuaded by the defendant to consent to it on the representation that it did not impair his contract of employment, but would improve the efficiency of the manufacturing department and consequently benefit all the stockholders, of whom plaintiff was one; that shortly after obtaining this consent the defendant dismantled the old laboratory room in the factory, and then proceeded in a desultory manner, during a period of about four months, to go through the pretense of fitting up a new laboratory room, which, however, it never completed; that at about the expiration of this four months it discharged the plaintiff, stopped his salary, and forcibly excluded him from the factory and from the laboratory; and that plaintiff has made proper, but unsuccessful, effort to get other employment.

On the part of the defendant it is contended that it did not discharge the plaintiff, but only suspended him and his salary pending his noncompliance with its reasonable directions, or, if what it did amounted to a discharge, such discharge was justified by plaintiff's failure to obey its reasonable directions. The directions in question were in writing, and the trial judge ruled that they were reasonable. The material one was by the treasurer of the company, as follows:—

"On behalf of the president and committee I respectfully ask you to forward to the committee a statement of material furnished by the factory to the laboratory and the amount of material used in the laboratory work \* \* \* since the 1st day of February last."

To this the plaintiff replied in writing:

"As to the material used or supplied the laboratory since February I asked for a list of it about a month ago. I was informed by Mr. Weber, Mr. Heebner's assistant, that he would furnish me with one, but to date I have not received it."

Mr. Heebner was the new superintendent of the factory, and the evidence indicated that the records of the materials issued from the factory to the laboratory were under his exclusive charge. It therefore was clearly a question of fact, under the circumstances disclosed by the evidence, whether the plaintiff had or had not been afforded proper opportunity to comply with this direction, and this question the learned trial judge very properly left to the jury.

If the plaintiff did all that he was bound to do in performance of his contract, the action of the defendant in excluding him from the premises, not once, but daily, for a long period of time until he stopped coming, and forcibly preventing him from going to the place where he had to perform his work, and cutting off his salary, was tantamount to a discharge, and the learned trial judge was right in so holding.

We find no error in the record and the judgment is affirmed.

(33 N. J. Eq. 324)

**WEST et al. v. RECTOR, ETC., OF ST. JAMES' EPISCOPAL CHURCH OF LONG BRANCH. (No. 50.)**

(Court of Errors and Appeals of New Jersey. June 15, 1914.)

*(Syllabus by the Court.)*

**COSTS (§ 103\*)—ALLOWANCE FROM TRUST FUND.**

The allowance of costs and counsel fees out of a trust fund is, as a rule, limited to suits instituted by executors or trustees for the construction of a will, and suits by claimants to such fund in which the claims are successful.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. § 398; Dec. § 103.\*]

**Appeal from Court of Chancery.**

Bill by the Rector, etc., of St. James' Episcopal Church of Long Branch and Maggle J. West and others. Decree for complainants (89 Atl. 519), and defendants appeal. Reversed, with directions.

William J. Leonard, of Atlantic Highlands, for appellants. Gilbert Collins, of Jersey City (Charles B. Bradley, of Jersey City, on the brief), for appellees.

**PARKER, J.** So far as relates to the principal question in the cause, whether the case is one for the application of the principle of *cy pres*, we think the decree should be affirmed for the reasons given in the opinion of the Vice Chancellor.

The point is now made that the fund in question never vested in St. James' Church, because Rufus T. West had a child who pre-

deceased him, and that this defeated the remainder to the church; but a glance at the language of the will makes it perfectly plain that the issue would take only in case of surviving the parent, and that the death of both life tenants of the income (the principal being committed to trustees), without issue then surviving, vested the right to the principal in the church.

On the appeal of the West heirs the decree should be affirmed.

The Vice Chancellor allowed them costs and a counsel fee of \$500 out of the fund; and this provision of the decree is the basis of a cross-appeal by the church.

We do not think that the case was a proper one for the allowance to the West heirs of costs and counsel fees out of this fund. They were not necessary nor proper parties to the original suit, nor was it strictly a suit for the construction of a will. It was a bill by the trustee of an existing fund established for a charitable purpose, against the Attorney General, setting up that the specific intent of the donor could not be carried out, and asking that the general intent be ascertained and the fund disposed of pursuant to that intent and in conformity with the doctrine of *cy pres*.

In that suit the heirs were permitted without objection to intervene by petition, and thereupon they made the various claims that have been disposed of adversely to their contentions. If they had brought an independent suit against the trustee, claiming title to the fund, they would in all probability have been mulcted in costs. That they were permitted to come into this suit gives them no better standing as to the expense of their litigation. The ordinary rule is that costs will be allowed to executors or trustees under a will and to the other proper parties in a suit by such executors or trustees to clear up some obscurity or doubt in the will. But costs should not be awarded to an unsuccessful claimant who has brought suit to recover part of the estate.

"If a person claims as legatee, and his bill is dismissed, he will not be entitled to his costs out of the estate, notwithstanding there is an ambiguity in the will which renders it necessary to apply to the court for its construction." *Dan. Ch. Prac. c. 30, § 3, p. 1502.*

A similar rule should apply to heirs claiming intestacy, as in this case. So, also, in *Larkin v. Wikoff*, 79 N. J. Eq. 209, 81 Atl. 365, this court refused costs and counsel fees out of the fund to complainants asking enforcement of the trust.

The award has been almost invariably confined to suits by the administrators of a fund for the construction of a will, and not applied to such suits brought by interested parties. And the reason is obvious that to award costs and counsel fees to unsuccessful complainants in such cases would be to encourage unnecessary and frivolous litigation.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion. In *Halsted v. Meeker*, 18 N. J. Eq. 136, the complainant was a cestui que trust and sought a construction of a will in her favor. The Chancellor allowed her costs out of the estate on a decree adverse to her claim, but refused a counsel fee. In the case at bar the interveners for reasons already given are not entitled to their costs.

So much of the decree below as allows them costs out of the fund will be reversed, with directions to enter a decree that the parties in the cause below pay their own costs. The respondent-appellant *St. James' Church* is entitled to costs in this court.

(87 N. J. L. 607)

**MICK v. ROYAL EXCH. ASSUR.** (No. 52.)

(Court of Errors and Appeals of New Jersey.  
June 15, 1914.)

*(Syllabus by the Court.)*

**1. INSURANCE (§ 146\*)—INSTRUCTION OF POLICY.**

Where a policy of fire insurance is written in a standard form approved by governmental authority, the maxim, "Verba chartarum fortius accipiuntur contra proferentem," has no special applicability.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 292, 294–298; Dec. Dig. § 146.\*]

**2. PRINCIPAL AND AGENT (§ 158\*)—FRAUD OF AGENT—LIABILITY OF PRINCIPAL.**

A principal is liable for the fraud of his agent acting within the scope of his authority, whether or not the principal would benefit by the success of the fraud.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 589–598; Dec. Dig. § 158.\*]

**3. INSURANCE (§ 111\*)—AGENCY FOR INSURED—FRAUD OF AGENT—LIABILITY OF PRINCIPAL.**

Where an insurance policy provided that it should become void in case of any fraud or false swearing by the insured touching any matter relating to the insurance or the subject thereof, whether before or after a loss, and the insured delegated to agents the duty of doing everything required to make complete proof of loss, without question or supervision, held, that the act of such agents in presenting false and fraudulent vouchers to the company pursuant to demand was imputable to the insured, and that the policy was vitiated.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 111.\*]

Garrison, Kalisch, and White, JJ., dissenting.

**Appeal from Supreme Court.**

Action by Jacob Mick, for whom Lewis Starr, trustee in bankruptcy, was substituted, against the Royal Exchange Assurance. Judgment for plaintiff, and defendant appeals. Reversed.

French & Richards, of Camden, for appellant. Wilson & Carr, of Camden, for respondent.

**PARKER, J.** The question to be determined is whether the forfeiture clause in a standardized fire insurance policy, making it void "in case of any fraud or false swear-

ing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss," is under any circumstances available to the company after a loss, when there is fraud in the claim committed by an agent of the insured without specific knowledge thereof or assent thereto by the insured himself, and, if so, whether the circumstances of this case are such as to make the forfeiture applicable.

Stripped of disputed questions of fact which the jury resolved at the trial in favor of the plaintiff, the case presents these facts which were conceded or fully proved without substantial contradiction: In 1911 Jacob Mick, of whom the plaintiff is trustee in bankruptcy, was the owner of a blacksmithing and wagon repairing shop, which he conducted himself, and which required practically all of his own time. He also owned the property that was the subject of the fire loss, consisting of a hardware store and a small lumber yard adjoining thereto, which were conducted by his son Wilbert H. Mick, a young man of 19 or 20. Wilbert was not a partner but an employé; still, he had entire control of the store and lumber yard, even to signing checks on the bank accounts in connection therewith. He consulted his father with respect to increases of stock, and so on, but he ran the business, and his father ran the blacksmith shop, occasionally walking through the store and lumber yard, but not interfering beyond asking some general questions and looking generally over the stock at inventory time. An inventory of the store and yard was made up in May or June, 1911; the work being done entirely by Wilbert with the assistance of a clerk. Shortly after this, in June, the insurance was greatly increased. A fire on June 28th destroyed the lumber yard and store with most of the stock. Jacob Mick then employed a professional adjuster named Dawson, to whom, in conjunction with the son Wilbert, was intrusted the entire responsibility of dealing with the companies in collecting the insurance. The proofs of loss bear Dawson's imprint and were doubtless prepared by him; they were sworn to by plaintiff before a local notary.

The crucial situation in the case was created by what follows. On September 11th the companies in the exercise of rights reserved in the policies sent to the plaintiff letters identical in tenor, of one of which the following is a copy:

"September 11, 1911.

"Mr. Jacob Mick, Laurel Springs, N. J.—Dear Sir: This company is in receipt of a document purporting to be a proof of loss under policy No. 2943468, issued by the Laurel Springs, N. J., agency for damage by fire of June 28, 1911. You are hereby notified that said document is not accepted as a satisfactory proof of loss as required by said policy. You are hereby required to file with this company a statement of your purchases (lumber and merchandise) and sales between October 1, 1910,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and June 28, 1911, together with duplicate bills showing such purchases and sworn statement of your entire sales between these dates; also statements from the banks in which you did business of the money deposited therein during the same period and copy of inventory of June 1st, 1911, referred to in said document.

"Yours very truly,

"Royal Exchange Assurance,  
"By W. E. Miller, Adjuster."

To which, under date of November 6, 1911, Dawson replied as follows:

"Nov. 6, 1911.

"Mr. Wm. E. Miller, 434 Walnut St., Phila., Representing \* \* \* Royal Exchange Assurance Co.— \* \* \* Dear Sir: Replying to your letter of Sept. 11, 1911, addressed to Mr. Jacob Mick, of Laurel Springs, N. J., I would state that he is unable to comply with your request of an exact copy of his purchases and sales from Oct. 1, 1910, to June 28, 1911, from the fact that he has no books of account to show same. However, I send you herewith duplicate copies of bills of purchases so far as he has been able to obtain, also statement from banks of deposits and copy of inventory of June 1, 1911, which you also requested.

"Hoping this information will prove satisfactory, I am,

"Very truly yours, Louis Dawson,  
"Adjuster for Jacob Mick."

It appeared conclusively on the trial that among these inclosed bills or invoices were several, amounting in all to nearly \$8,000, which to the extent of over \$5,000 were false and fraudulent in that they specified alleged purchases which had never been made by plaintiff and were purely fictitious. It was a fair, if not a necessary, inference that Wilbert Mick, or Dawson, or both, had intentionally procured and put in these false bills to augment the amount of recovery. Jacob Mick denied all knowledge of them, and took refuge behind the general agency of his son, who was not present at the trial, and whose whereabouts did not appear. Jacob testified that he received this demand from the insurance companies but did not give any bills to Dawson and did not know where Dawson got them; that he took the registered letter and passed it over to the adjuster to comply with the request contained therein and thought his son got the bills and gave them to Dawson; that he did the same with the other letters of like purport; that Dawson was employed to do everything that was necessary to adjust the loss. Again he testified that he gave the insurance company letter to the "boy" to pass over to Dawson and that this was done; that the son had practically unlimited power as far as plaintiff was concerned, to conduct the lumber and hardware business.

[1] With these facts in mind, we turn to the policy itself. It is apparently of the standard form, approved by the Commissioner of Banking and Insurance of this state pursuant to legislative authority (C. S. 2862, § 77; P. L. 1902, pp. 407, 436, 437), and consequently there is no special applicability of the maxim, "Verba chartarum fortius accipiuntur contra proferentem." Nelson v. Traders' Insurance Co., 181 N. Y. 472, 74

N. E. 421. The provisions pertinent to the case in hand are these:

"The insured, as often as required, shall exhibit to any person designated by this company all that remains of any property herein described, and submit to examinations under oath by any person named by this company, and subscribe the same; and as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this company or its representative, and shall permit extracts and copies thereof to be made."

"This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein; or in case of any fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof, whether before or after a loss."

It was argued at the trial, first, that the requirement for the production of books, papers, etc., constituted a condition precedent to recovery, and that, failing its bona fide performance in full, plaintiff could not recover.

This breach, however, was not specified in the pleadings as required by the statute (Practice Act of 1903 [P. L. p. 570] § 118) and hence it was not error to overrule the particular defense. It is suggested that the pleas should be now amended to let in this defense; but on the trial counsel after deliberation concluded not to apply for leave to amend, and appellate courts do not ordinarily, if ever, permit amendments of the record for the purpose of reversal. Secondly, it was argued that under the clause secondly quoted the fraud of the agent was imputable to the principal, and hence that as a result of the presentation by Wilbert Mick and Dawson as plaintiff's agents, of false and fraudulent invoices, the policy became forfeited. This was likewise overruled, and the court instructed the jury that:

"In order to hold Mick answerable to the extent of defeating his claim by reason of the introduction of false vouchers, Mick himself must in some wise have been a party to it. In other words, he must have been guilty of fraud. If they came into the case and were sent to the insurance company from a totally irresponsible source, why, of course, he would not be responsible for it. If they came in as a result of fraud on the part of his agent, my view is he would not then be responsible for it, and that that would not defeat a recovery. Now, gentlemen, do not misunderstand me; that applies to the question of the vouchers that were put in. When it comes to the question of the valuation which Mick swore to, if you were to find that he did overstate his valuations and overstated them in a way indicating to you false swearing, then of course that would defeat his recovery as well.

"I take it that the important question for you to determine is Mick's relation to these bills on the question of the effect of the bills as defeating his claim. If he was a party in any wise to them, he cannot recover here, nor can his trustee in bankruptcy recover here. If he was innocent of any wrongdoing in that respect, then I say to you that the presence of those bills does not defeat his recovery."

Defendant submitted, among others, these requests to charge, which were refused:

"(18) If from the evidence you find that Jacob Mick delegated to any one as his agent the duty of complying with the company's demand for copies of bills, and such agent, with or without the knowledge of Jacob Mick, designed, invented, or procured and filed fraudulent bills for goods never purchased or owned by Jacob Mick, such action would be connected with the service and within the scope of the employment, and the verdict should be for the defendant.

"(19) If you find from the evidence that his son was the general agent of Jacob Mick for the purpose of carrying on his business and was well acquainted with such business, and that the duties of such agent included that of complying with the company's demand for bills of purchases, and that said agent in pretended compliance with such demand furnished to or caused to be filed with the defendant company bills for goods never purchased or owned by Jacob Mick, the verdict should be for the defendant."

[2] The responsibility of an innocent principal for the fraud of an agent has been one of the vexed questions of the law. That an innocent principal cannot, as a general proposition, be permitted to benefit by the fraud of his agent, has been settled in this court. *Marsh v. Buchan*, 46 N. J. Eq. 595, 22 Atl. 123; *Reitman v. Florillo*, 76 N. J. Law, 815, 72 Atl. 74. It seems to be settled that a principal is not liable in tort for deceit, upon fraudulent representations made by his agent without his knowledge or consent (*Kennedy v. McKay*, 43 N. J. Law, 288, 39 Am. Rep. 581; *Decker v. Fredericks*, 47 N. J. Law, 469, 1 Atl. 470; *White v. N. Y. S. & W. R. R. Co.*, 68 N. J. Law, 123, 52 Atl. 216); the remedy in such case resting on a rescission of the contract. But this seems to relate mainly to the form of the remedy. In many cases the controlling factor was the extent of the agent's authority; and such authority was held to have been exceeded in such cases as *National Iron Armor Co. v. Bruner*, 19 N. J. Eq. 331; *Kennedy v. Parke*, 17 N. J. Eq. 415. And it was held nonexistent in *Belcher v. Manchester, B. & L. Ass'n*, 74 N. J. Law, 833, 67 Atl. 399; *Ayle v. Same*, 74 N. J. Law, 840, 67 Atl. 87. While in others, the scope of the authority was held to cover the fraudulent acts and the principal had to suffer. *Putnam v. Clark*, 29 N. J. Eq. 412, affirmed on another ground in 33 N. J. Eq. 338; *Campbell v. Nichols*, 33 N. J. Law, 81; *Chetwood v. Berrian*, 39 N. J. Eq. 203. Naturally, when an agent intrusted with powers to deal with a particular subject-matter misuses those powers so as to deal unlawfully, and the principal is sought to be held responsible, the plea is that the powers are exceeded, and the unlawful acts are not within the scope of the agency. But, as was said by Mr. Justice Willes in the leading case of *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; 36 L. J. Exch. 147, 12 E. R. O. 298:

"In all these cases it may be said, as it was said here, that the master had not authorized the particular act, but he has placed the agent in his place to do that class of acts, and he

must be answerable for the manner in which that agent has conducted himself in doing the business which it was the act of his master to place him in."

That case was quite generally considered to limit the responsibility of the principal for fraudulent acts of the agent to those committed for the benefit of the principal; but this misapprehension is set right by the House of Lords in the recent case of *Lloyd v. Grace, Smith & Co.*, 1912 A. C. 718, where a solicitor was held accountable for the fraudulent procurement of a transfer of property from a client by the solicitor's managing clerk, though the solicitor in no way benefited or could benefit thereby, knowing nothing of the transaction. The rule is laid down that, irrespective of the question of benefit, the principal is liable for the fraud of the agent acting within the scope of his authority. These, and other English cases, are cited with approval, and the general question discussed by Mr. Justice Kalisch, speaking for this court, in *Corona Kid Co. v. Lichtman*, 84 N. J. Law, 363, 86 Atl. 371. In this state we have decided, it is true, that in such case an action of deceit will not lie against the innocent principal; but those decisions go to the form of the remedy and not to the denial of relief. That fraud of an agent within the scope of his employment will invalidate a contract so procured by him for his principal, may be considered settled and is not disputed here. Thus, if Wilbert Mick under general authority to procure insurance on the lumber yard obtained the policies by fraudulent misstatements, the companies of course could not be held on them.

But it is said that this rule does not extend to cases where the contract was bona fide entered into, and a forfeiture is claimed by reason of some subsequent act of the agent, fraudulent in its character, though this, if done by the principal himself, would render the policy void because of the operation of the forfeiture clause; and a number of cases are cited in support of this doctrine. An examination of this array of authorities will demonstrate that they are very far from possessing the weight that is claimed for them.

The decision principally relied on is *Metzger v. Manchester Fire Assurance Co.*, 102 Mich. 334, 63 N. W. 650, in which the property belonged to a wife, and the husband had the general management of the business, kept the books, and in proving loss swore to the books as true, while in fact they were largely fictitious. The court held, it is true, that the plaintiff, if innocent, should not be prejudiced under the forfeiture clause because of the husband's fraud, and that that clause, guarding against fraud or false swearing by the insured, should not be extended by construction to include fraud or false swearing by her agent. But the value of the decision as authority is somewhat impaired, first by the fact that, although this doctrine should have led to an affirmance of the judgment

for the plaintiff, that judgment was reversed on another ground, and the deliverance by the court is saved from being purely obiter only by its effect in saving to the plaintiff a second trial; and, secondly, by a vigorous dissenting opinion, reading in part thus:

"Did the facts in this case make the plaintiff a party to the deceit? This, of course, depends upon the determination of the question whether the acts of her agent were in fact her acts. It will be conceded that, if she made false and fraudulent representations, the policy would have been rendered void. I cannot assent to the rule that, where one trusts the entire management of his business to an agent, the principal is not responsible for the fraudulent acts and representations of the agent in connection with the business. It is manifest from this record that the plaintiff knew nothing about the business. It was carried on in her name. Grant that it was carried on for her benefit, still she constituted her husband her sole agent to buy and sell, attend to the insurance, and exercise exclusive control and management of the entire business. When the adjusters came to adjust the loss, he appeared as her sole representative. The defendant desired that he should obtain from the plaintiff a written authority to act for her. She voluntarily executed a power of attorney giving him full authority in the premises. She should be held responsible for his acts and conduct. Seldom do the records of insurance litigation exhibit a more deliberate and glaring attempt to defraud an insurance company. Such attempts should not be made successful, under the guise of agency, especially where there exists the intimate relation of husband and wife; the one claiming to be an innocent principal, and the other a confessedly dishonest agent. The judgment should be reversed, and no new trial ordered."

The next case relied on is *Boston Marine Insurance Co. v. Scales*, 101 Tenn. 628, 49 S. W. 743. While the doctrine of the *Metzger Case* is adopted generally in the opinion, the court seems to rest its affirmance of a judgment for plaintiff on the failure of appellant to point out the evidence of fraud relied on, and its own failure to find it in the printed book.

In *Evans v. Crawford County Insurance Co.*, 130 Wis. 189, 109 N. W. 952, 9 L. R. A. (N. S.) 486, 118 Am. St. Rep. 1009, the husband, who was owner and insured under the policy, was away at the time of the loss, and the wife as his agent ex necessitate made the proofs. The court was evidently unwilling to accept fully the doctrine in the *Metzger Case*, and said:

"We go no further than the facts of this case in adopting that view. \* \* \* In the instant case \* \* \* there was neither an express turning over \* \* \* to the wife as agent," of the mailing of proofs, "nor a careless omission to verify" them; but merely an agency ex necessitate, the husband being away.

In *Fields v. German American Insurance Co.*, 140 Mo. App. 158, 120 S. W. 607, the defendant company relied on false swearing by one of the parties in the trial of the very action and requested an instruction of a verdict for defendant if such partner had sworn falsely. A refusal so to instruct was upheld, and properly so; for this request evidently assumed the fact of agency because the partner was a witness. But there was

no such partnership agency because the claim had been assigned to plaintiff before the suit was begun.

In *Virginia Fire & Marine Insurance Co. v. Hogue*, 105 Va. 355, 54 S. E. 8, the property was owned by a wife and managed by the husband, who made proof of loss. The court relied largely on the proposition that a refusal to charge a request that the wife was responsible for a false statement by the husband was justified on the ground that it failed to distinguish an untrue statement and a fraudulent one. The *Metzger* doctrine appears in the syllabus, but it is not at all plain in the text, and apparently not relied on for a decision of the case.

The case of *Mullin v. Vermont Mutual Fire Insurance Co.*, 58 Vt. 113, 4 Atl. 817, is to the contrary. The inventory of household goods was made up for the insured by his wife, and sworn to by the husband without examination into its truthfulness. It turned out to be grossly incorrect and false. The trial court was requested to charge that if the plaintiff adopted any false statement of the wife respecting a loss, or the value of goods lost, without investigating the facts, he thereby became guilty of a fraud himself; and if he made representations assuming to know the facts, when he had no knowledge, and such statements turned out to be false, it was a fraud within the meaning of the policy. A refusal of these requests was held error leading to a reversal; the court saying:

"The company was entitled to a truthful inventory of the property lost. The plaintiff's duty, under the policy, was to supply it; his representations must be true in fact. He cannot even be honest by turning the matter over to his wife, and omit to inspect her inventory to see if it be correct. If he had looked it over, and wished to be honest, he would have discovered many false statements which were calculated, and probably were intended, to work a fraud upon the defendant. He could have arrested this intended fraud, if he had done his duty. On the contrary, he recklessly indorsed it without examination, and by so doing made it his own fraud, within the meaning of the policy."

The case is one of first impression in this state, and we are therefore at liberty to declare the rule that seems best to accord with reason and justice. In our view the Vermont rule is the better one. We consider that it is unreasonable and illogical to say that the owner of insured property who is under the obligations by the terms of his policy to make sworn proofs of loss and to furnish on demand full details of his books, papers, invoices, and vouchers, or copies thereof when lost or destroyed, may, when such demand is made, voluntarily turn over the entire responsibility of complying therewith to an agent, dismiss the matter from his mind, reap the benefit of what the agent does that makes in his favor and is in genuine compliance with the demand, and at the same time evade the penalty that is laid by the policy upon fraud and false swearing. He

should not be heard to adopt the agent's acts where they make for him, and disclaim them where they are to his prejudice. It is he, and not the insurance company, who reposes the confidence in the agent; and when that confidence is abused, especially by acts of fraud that if successful will be greatly to his pecuniary advantage at the expense of the company, he that reposes the confidence should pay the penalty. We do not overlook the wording of the forfeiture clause, nor the rule, relied on by plaintiff, that forfeitures are not favored, and will not be enforced unless they come within the strict words of the policy. That rule has been more than once enunciated by this court as well as by the Supreme Court. *Carson v. Insurance Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584; *Snyder v. Insurance Co.*, 59 N. J. Law, 544, 37 Atl. 1022, 59 Am. St. Rep. 625; *Hampton v. Hartford Fire Insurance Co.*, 65 N. J. Law, 265, 47 Atl. 433, 52 L. R. A. 344. We do not deem our present decision to be a departure from that rule. The question is whether in a case where forfeiture is invoked for the most meritorious cause on which it can be rested, viz., fraud, which the law abhors, and that fraud has been committed by an agent vested with the most complete and ample powers by a principal who is entirely passive and looks to the agent for the performance of every act relating to settlement of the loss, the fundamental maxim, "*Qui facit per alium facit per se*," shall be applied, or the court shall declare the clause futile for not having added to the phrase, "fraud or false swearing by the insured" the words "or his agent." Of the two alternatives, we consider that justice requires the adoption of the former, and that no violence is done thereby to the terms of the policy.

This is not a case of agency *ex necessitate*. It is not the case of an insured relying necessarily upon a subordinate or agent for the information required to make up a proof of loss, revising and supervising it as best he may. Where the insured, though exercising due care, is himself deceived by his own agent, and in good faith presents a statement which turns out to be untrue in respect to matters which could not reasonably have been discovered by the insured in the exercise of due care, there is no fraud, for he has been himself deceived. But where he undertakes to wash his hands of the entire matter, and without question or supervision of any kind delegates to an agent the contractual duty of making a true statement, he cannot be heard to say, where fraud is committed by the agent in the exercise of his general powers, the consequences of that fraud should not be visited on him.

We do not overlook the fact that an honest loss may be thus defeated by a dishonest agent. The answer is that he who employs and relies entirely on an agent to deal with

others takes the risk of his dishonesty in such dealings. And it should not be forgotten that if these fraudulent bills had not been discovered, the companies would probably if not certainly have been mulcted in some \$5,000 in excess of the real liability. It will not do to say that plaintiff should recover the real loss and lose the false claim; for this would throw wide open a door to wholesale fraud, and deprive the provisions under consideration of much of their practical value. The forfeiture provision should be regarded as based on the maxim *falsus in uno, falsus in omnibus*; and amounts to a declaration that where there is any fraud or false swearing, the whole claim is tainted thereby. The justice of so regarding it in cases where the insured personally commits the fraud is manifest; and a fair interpretation of the clause in the light of its recognition by the state as a matter of public policy requires its application also to cases where the responsible party undertakes to shift the entire responsibility to an agent as his alter ego.

We hold therefore that there was error in refusing the eighteenth and nineteenth requests to charge, although in view of the outside authorities cited, and of the absence of controlling decisions in this state on the precise point, the trial judge acted judiciously in ruling as he did. Our consideration of the case after full argument leading us to a different result, the judgment below will be reversed, to the end that a venire de novo be awarded.

GARRISON, J. (dissenting). My vote for the affirmance of these judgments is based upon two fundamental propositions of law, the soundness of neither of which has ever been questioned. The first of these is that a verdict upon a material issue made by the pleadings and submitted to the jury establishes the fact in the appellate court; and the other is that language in a contract imposing a forfeiture will be construed in a manner as favorable to the party whose property is to be forfeited as is consistent with fair principles of interpretation. Citation of authority for these common-law maxims is surely unnecessary.

Applying the first of these propositions to the question whether the respondent was guilty of fraud in the production of the vouchers or had conspired or attempted to conspire with any one for their fraudulent production, we find that these material facts were directly placed in issue by two of the defendant's pleas, and that such issues were submitted to the jury, whose verdict was that the respondent was not guilty of fraud in either respect.

Assuming that this verdict is binding upon this court, it follows that, if false vouchers were produced without the respondent's fraud, the most he can be charged with is

negligence (which is not made a ground of forfeiture in the policy) unless such forfeiture clause properly construed penalizes him for the fraud of another. This brings us to the established canon for the construction of forfeiture clauses in contracts. Such clause in the contract before us is in these words:

"This entire policy shall be void in case of fraud or false swearing by the insured touching any matter relating to this insurance or the subject thereof whether before or after the loss."

The natural construction of the words "fraud or false swearing by the insured," under the maxim *noscitur a sociis*, is that, as false swearing must be the act of the insured, so the fraud referred to must also be his act, i. e., a fraud perpetrated by him or with his consent or to his knowledge. *Carson v. Jersey City Ins. Co.*, 43 N. J. Law, 300, 39 Am. Rep. 584.

This, if it be not the necessary construction, is at least a permissible construction, which is all that is required by the canon stated, viz., that the language of a forfeiture is to be construed as favorably to the party whose property is to be forfeited as is consistent with the fair principles of interpretation, and surely no one will contend that the interpretation of associated words according to the maxim *a sociis* is not a fair principle of interpretation. The notion that this established canon of construction does not apply to a contract of insurance because the policy is in standard form has no foundation in law or reason. As was said by this court, in *Hampton v. Hartford Fire Ins. Co.*, 65 N. J. Law, 267, 47 Atl. 434, 52 L. R. A. 844:

"The court will never seek for a construction of a forfeiture clause in a policy which will sustain it, if one which will defeat it is reasonably deducible from the terms or words used to express it."

Yet it is only by ignoring such established canon that the forfeiture of this policy can be visited upon the insured, for the verdict of the jury effectively negated the only fraud that under the proper interpretation of the contract would work a forfeiture. The failure to observe and apply this familiar canon results, therefore, in the present case, in a forfeiture by the insured of over \$25,000 of actual fire losses, for no other fault than his possible negligence in intrusting to a professional insurance adjuster the duty of collecting and transmitting to the insurance companies the mass of bills called for by their notice to him, a fault, if such it be, by which not a penny's worth of harm came to the insurer and not a penny's worth of benefit inured to the insured.

The fact that this harsh result can be reached only by ignoring the firmly established canon evolved by the law for the express purpose of preventing just such unconscionable consequences is the plenary ground of

my inability to concur in the reversal of these judgments.

I am requested by Mr. Justice KALISCH and by Judge WHITE to say that they concur in the foregoing views and vote to affirm.

(33 N. J. Eq. 257)

MCCOMB v. MCCOMB.

(Court of Chancery of New Jersey. May 19, 1914.)

DIVORCE (§ 133\*)—DESERTION—EVIDENCE.

In a suit for divorce, evidence held insufficient to establish defendant's desertion of complainant for two years prior to the filing of the bill.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 446-448; Dec. Dig. § 183.\*]

Bill by Almee Greene McComb against William McComb for divorce. Bill dismissed.

Thomas G. Haight, of Jersey City, for petitioner. Marshall Van Winkle, of Jersey City, for defendant.

GRIFFIN, V. C. The petition in above cause is filed for a divorce on the ground of desertion. The parties, who were acquainted from childhood, were married October 15, 1907. One child, a son named Galen, now aged about five years, was born of the marriage. At the time of the marriage the defendant was deputy city collector of Jersey City, receiving a salary of \$1,500 a year. He was in receipt of no other income, had substantially no property, and relied wholly upon his salary for the maintenance and support of his family. Prior to the marriage the mother of the petitioner (a widow) very properly questioned the defendant as to his ability to support her daughter, and was informed by the defendant of his position and income; he said there was likely to be a change in the Jersey City administration; that he would probably lose his position; but had secured a better one in the health board. The petitioner was also advised of this situation.

After returning from their wedding trip, they occupied a house at Hackensack, the rent of which was \$40 a month. The petitioner's mother, and son, aged about 13 years, also resided with them and paid board. The defendant paid the first two months' rent, lost his position on the 1st of January, 1908, did not secure the position in the health board, and, after being for some time out of employment, secured a position in the Union Trust Company as a clerk on a salary of first \$60 and later \$75 a month.

In the course of his employment with the Union Trust Company he became acquainted with a business called the "wet wash business," and conceived the idea that it was very profitable. He told his wife that he was going to engage in it, and here his lack of judgment and discretion is made to appear. He borrowed \$600 from the Union

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Trust Company and invested it in the business, without making a reasonable investigation. His wife advised against this course until he made a proper examination of the business and consulted a lawyer on the subject. This advice he did not heed, with the result that within a very short time the wet wash business became a failure, the money embarked in the enterprise was lost, and he was driven to seek other employment.

His next venture was in a corporation which, with Mr. Mason, they formed for conducting the laundry business, called the M. & M. Laundry. He represented to his mother-in-law that it was a very good business; that ample money could be made in it; and borrowed from her \$1,200. Afterwards, in the summer of 1909, and while he knew the business was running down and was virtually a failure, he borrowed from her an additional \$1,000, on the representation that they were doing a splendid business; that the money was necessary to enable them to properly handle the same; and that he would repay her in a short time. On these representations the money was loaned. At the same time he borrowed \$350 from his wife. During his stay in the laundry business he delivered to his wife checks in small amounts, made payable to the order of the M. & M. Laundry, which he, as president of the company, indorsed. She demurred to accepting them, thinking that it was suspicious, and inquired why the money was not put into the account of the company. He, however, allayed her suspicions. The day after Thanksgiving, 1909, he said he was going away, that the laundry business was doing nicely; that he was going with the knowledge and assent of Mr. Mason; that Mr. Mason was to draw \$25, and he \$15, a week, and let it accumulate for the purpose of paying for the stock or dividends; that he had a good offer of a position at \$40 a week at Belle Vernon, Pa. This story was absolutely untrue. It is apparent from the testimony that the creditors were pressing the company for payment; that he had taken those moneys which he gave his wife wrongfully, and, having secured a position at Belle Vernon (not at \$40 a week), suddenly departed, and within a few days afterwards his wife learned of the true situation in a conference with Mr. Mason. When defendant reached Pittsburgh he telegraphed his wife, and wrote her, inclosing all the money he had \$5. His position at Belle Vernon was that of a solicitor of bank accounts, for which he received \$10 a week, and a commission on all over and above a certain sum deposited through his solicitation. At Belle Vernon he says he averaged \$15, \$18, and \$20 a week, and sent his wife \$10, \$12, and \$15 every week, being all he made, excepting about \$4 a week which he paid for his board. He next went to Masontown. From Masontown he went to Rocking-

ham, N. C.; then came back to New Jersey from Rockingham. He says that from all these places, down to the time he left Rockingham and returned to Hackensack, he sent his wife from \$10 to \$15 a week. He returned to Hackensack in March, 1910. He found that during his absence the dining room had been closed up and was used for boarders; and he says that his wife said to him during the night, "You can stay here, if you want, but you can have the room in the attic; that is the best I can do for you;" and he said, "What is the matter with our room?" "Oh," she said, "Mother sleeps with me." He did not stay there that night, but left somewhat offended; he does not recall when he returned to Hackensack. He lived in Jersey City for two weeks after his return, but did not visit at her home during that time but telephoned that he wanted to see her. They met by appointment on Montgomery street, Jersey City. He did not further communicate with her unless, perhaps, by letter. He says that when he came back from Rockingham, N. C., this time in March, his wife met him, that he looked very shabby. They went to Rogers, Peet & Co. and she bought him a suit of clothes so that he might take a managership. He was next employed as manager by the same company, the Burns Company, in the same business of soliciting bank accounts, at a salary of \$25 a week; and he says he sent her \$20 a week; that this continued so long as he was a manager. He was next sent to Mt. Jackson, Va., and from there sent her \$20 a week; from there to Henderson, N. C., where business was not good; and it appears from the correspondence that his wife was willing to join him there, but he inquired of the Burns Company for assurances about his staying South as manager (because, he says, he did not want to bring her down on a fool's errand), and they could give no assurances; thereupon he advised her not to come. While at Henderson his board cost him \$7 a week, the balance he sent to his wife. He returned to Hackensack in July, 1910. He says Mrs. McComb did not object to his going away, and she bought him a suit of clothes to go away as manager. She knew his plans. He says it was on this visit in July that his wife told him he could have a room in the attic, but his testimony leaves it in doubt whether it was in March or July he was asked to sleep in the attic, and she bought him the clothing. He next entered the service of the Bankers' Corporation, in the same line, at Mt. Vernon, N. Y., where he remained until September 21, 1910. During this period of service he made \$12, \$15, \$18, and \$20 a week, and sent it to his wife, outside of what he had to pay for board. During the month of August, 1910, while he was so employed, the petitioner's mother was not at home, and the defendant visited petitioner on week-ends, and they co-

habited and were on friendly relations. From August, 1910, down to the date of the filing of the petition the parties had no sexual relations. After leaving the Bankers' Corporation he was employed by the Aetna Life Insurance Company on Long Island during the month of September, 1910, receiving \$20 a week, and paid it to his wife, excepting what he paid for board; he living with his parents in Jersey City. He next worked for his brother-in-law, Alfred Lewis, in the dairy products business, until December, 1910, receiving \$15 a week, all of which he gave to his wife, his compensation being \$15 a week and board. He says he left his brother-in-law in December, 1910, obtaining employment in Winston-Salem, N. C., from the Burnis Company as solicitor and was there until January 18, 1911, earning \$12, \$15, \$18, \$20, and \$25 a week, paid his board, and sent the balance to his wife. From Winston-Salem he went to Roxborough, N. C., for the same concern in the same line of business, and earned from \$12 to \$18 a week, and stayed there until February 10, 1911, and sent the money that he earned to his wife as before. Leaving there he came back to Jersey City, worked for his brother-in-law until the latter end of April, 1911, at \$15 a week and board, and sent all of his wages to his wife. About February, 1912, or shortly prior thereto, he went into business for himself. From that time down to January, 1913, he was in the cigar business and milk business. See Exhibits P 31, 32, and 37. In this last letter, which was written in October, 1912, he says he is in the cigar business, and was particularly unfortunate "this summer, and did not have any money to send." He did, however, send some money, as appears by the exhibits; and it also appears that he did not visit her from December, 1911, until November, 1912, the visit at this latter time being brought about by a letter to him from his wife saying that she was going to Suffern, and offering to come down to meet him if he should write. He telegraphed, and she returned from Suffern and met him on the 6th or 7th of November. The conversation at this meeting was like most of the others, simply talking about the future and about his earning possibilities, and nothing came of it. About January, 1913, he was in the milk business, and said he was making from \$12 to \$15 a week, with \$200 or \$300 invested. He sent some money to his wife during this month, and said he ceased sending her money during the baby's illness, which was the latter end of January, or the early part of February, 1913, because he learned that the baby was ill, and the doctor had ordered that no one be admitted to see him. She had asked the doctor if Mr. McComb could not see the child, and he said: "No; under no circumstances." The defendant then wrote to his wife, saying that, regardless of the doctor's orders, he

would see his child. She then wrote back Exhibit D 1, saying: "The doctor's orders *must be obeyed*. You must not annoy me further." This last letter, it appears, so incensed him that he stopped sending money. The petition was filed within a month thereafter.

Aside from the foregoing, other facts appear which shed some light on the case. The petitioner says that on a visit to her about Labor Day, 1910, the first thing he said was:

"I will send you some money; I have consulted my lawyer, and you will never get a divorce from me. I will send you some money from time to time, and, if necessary, have it registered." He told me that."

She, in reply, said she did not want a divorce. He denies that he ever spoke to her about a divorce, or that he consulted a lawyer until this suit was brought. Owing to his admitted untruthfulness in dealing with his wife and her mother, and the fact that he did send her a registered letter, which he says was sent so that he could have something to fall back on in case anything happened, which might naturally be taken to mean if his wife applied for a divorce, I am inclined to the belief that the petitioner is telling the truth. Prior to leaving the laundry business, which was in November, 1909, she learned that her husband owed money to the Glen Island Hotel, which she said was a notorious resort, and her suspicions were aroused. Taking these suspicions in 1909 and his statement as to how he would prevent her from obtaining a divorce, made about October, 1910, into consideration, she consulted a lawyer some time in July, 1911, and laid the circumstances before him, acting upon whose advice, she employed a detective to follow defendant, and only discontinued his services because her funds gave out. She kept copies of her letters written to him, as well as his letters to her, after this date, because of her lawyer telling her to be very careful. The married life of the petitioner down to this date having been so unsatisfactory, with such little hope of betterment in sight, I am inclined to believe she then conceived the idea of obtaining a divorce if conditions did not improve. The defendant explains that the bill referred to was contracted on the day of the Hudson-Fulton celebration, when he went into the hotel with a number of friends hoping to secure all the laundry work of the hotel.

Some of the letters which she offered in evidence she says were shown to her lawyer before they were sent, others were not. While the defendant was wandering throughout the country in an effort to make money, his wife and child, during the summer, were at Asbury Park, and sometimes, in the spring and fall, at Foxwood Inn, Suffern, N. Y. It is very apparent that the defendant was practicing a great deal of self-denial, and endured a great deal

in keeping away from the society of his friends in his travels through Pennsylvania, Virginia, North Carolina, and New York, seeking to earn money, all of which, outside of his bare means of support, he sent her. This rather indicates quite some love and affection for his wife and child. Another fact seems to not only demonstrate this, but also that this love was reciprocal, appears in two letters (Exhibits P 33 and P 34) which passed between the parties in April, 1912, less than a year before this petition was filed, the defendant wrote inclosing a receipt for premium on \$1,000 policy in the Prudential, and said:

"I have taken an additional \$2,000 (policy), the quarterly payment of which falls due on July 15th, Galen's birthday. Should anything happen to me, you will collect \$3,000, as everything is payable to you."

To which she replied, saying:

"I sincerely hope that I shall never be the one to profit by it. You know you have many tasks to perform yet, and it is our ambition, or should be, to live until we have done them well."

While before his marriage and for some time afterwards his conduct towards the petitioner was rather reprehensible, he seemed to be filled with a desire to do his best for his family. But he says that the constant talk in the house when he went to Hackensack was "Money, money, money," which was very annoying. I think perhaps he exaggerates this; yet, under the circumstances, it was but natural that there should have been some talk of money matters that made it rather disagreeable to him, considering the large amounts of money of his mother-in-law and wife he had squandered in such a short time, and afterwards finding how difficult it was, in open competition, to earn a livelihood. But it did not excuse his failure to visit his wife while he was in business at North Arlington and living at Jersey City and Nutley for a period beginning with December, 1911, and ending with November, 1912.

The whole aspect of the case is peculiar. The petitioner contends that the desertion commenced in October, 1910; that at that time he had a deserting mind; that this is evidenced by the fact that he told her, two weeks after Labor Day of 1910, that she would not get a divorce, because he had consulted a lawyer, and would send her money, which would defeat it. If his intent at that time was to desert his wife and never afterwards resume the marital relation, the mere fact that he sent her money would not of itself prevent a decree being entered against him; the mere sending of money to a wife does not constitute the full measure of duty which a husband owes to his wife. His desertion could be willful, and yet he might support her. The strange part of the case, however, is that while he was with the laundry company he actually took about \$300 of the company's funds and gave it to his

wife for her support. It is unlikely that he would do this if he was not anxious to care for her. On these various trips he sent her virtually all he earned, less a sufficient sum to pay his board. He did not even have money to buy clothing, and was reduced to such a degree that when he came to New York from Roxborough to become a manager his wife took him to Rogers, Peet & Co. and bought him clothing. If he was carrying out a preconceived design of sending her money for the purpose of defeating a divorce, he certainly punished himself severely to accomplish this end. He might readily have sent less and fully subverted the purpose intended. I can hardly believe this. I think he endeavored to do the best he could, but, by reason of some mental characteristics, which are evidenced a great deal in his letters, he seemed incapable of acquiring a position to properly care for his wife and child. Some of these characteristics appear plainly in his letters. They are filled with the most exaggerated statements as to his earning capacity and the money he was making. They were filled with such expressions as that he was "making a barrel of money," and he explained that the reason why he wrote such things to his wife was that he desired to buoy her up and make her cheerful. Some of his letters, however, are rather harsh. About August, 1911, he wrote the letter, Exhibit P 21, in which he told her, after saying that he loved and thought of her all the time, and wanted her to be with him, and that he wished her to come and live with him, he says:

"I will provide the very best I can for you and my baby. Your answer must be 'yes' or 'no,' as my future actions will depend on your reply."

This letter was registered, and is apparently the only registered letter he ever sent her. To this letter she replied on August 8, 1911. (Prior to which time, July, 1911, she had consulted a lawyer.)

In her reply she pointedly asked him why he registered the letter when it contained no money and he had never sent her a registered letter before, even letters that contained money; his explanations were rather lame, thus provoking comment on the fact in her subsequent letters. It is apparent that the registry of the letter, taken in connection with his previous statement, as to the manner in which he would prevent her from obtaining a divorce, conveyed to her the idea that the letter was registered with the same end in view.

On the stand he testified that he determined to write the letter to have something to fall back upon in case anything happened.

While it has not been testified to, I am inclined to the belief that the defendant wrote this letter for use in case his wife should sue for divorce; that it must have been in his mind that his absence might amount to a desertion. He says, however,



he did not consult a lawyer about the matter, and was not advised until this suit was brought. It appeared that the defendant wrote his wife that he would secure an apartment, and, at another time, that he would secure quarters in a boarding house. Her letters indicate an acquiescence in these plans, which he then abandoned, saying he could get neither the apartment nor the boarding house. He says the reason why he could not get them was that when he went to Hackensack to see his wife her talk was different from her letters. She also says that his talk was different from his letters, and so the parties did not resume marital relations. I am satisfied that, if the defendant was earning sufficient to enable them to live in substantially the style adopted by them at the time of their marriage, or in somewhat inferior style, if there was any certainty as to its continuance, this proceeding would never have been brought.

She had lived hoping for the arrival of the day when he would be capable of properly caring for his family, and this continued down to the date of the illness of their son, Galen, in January or February, 1913, during which he, becoming incensed at not being permitted, against the doctor's orders, to see his child, stopped sending her further moneys. When it is considered that this man for a whole year lived within a few miles of his child and did not make an effort to see him, it is plain that his conduct on this occasion was absolutely unjustifiable, and was properly so looked upon by his wife. This, to my mind, completely weaned her love for him, and she then finally concluded to put into effect what for a long time was inchoate in her mind, restrained only by her hope and love—to seek a divorce. But I am unable to determine at what particular period it can be said that a desertion commenced. She consented to his leaving on these various trips. She bought clothes for him to go as manager on one of the trips. Her letters, after his undertaking this latter trip, were substantially of the same tenor as before. There is nothing in the letters written by or to him during two years prior to the filing of the petition, or even down to the date of the filing of the petition, nor is there anything in the testimony, as I read it, which could, in any manner, be treated as information to the defendant that the wife demanded a resumption of marital relations. These letters and the evidence indicate an acquiescence in their living apart until he could earn enough to support her. *Provost v. Provost*, 71 N. J. Eq. 204, 63 Atl. 619, affirmed 73 N. J. Eq. 418, 75 Atl. 1101; *Footte v. Footte*, 71 N. J. Eq. 273, 65 Atl. 205; *McAllister v. McAllister*, 71 N. J. Eq. 13, 62 Atl. 1131.

I am constrained to decree that the bill be dismissed.

(86 N. J. L. 120)

## STATE v. QUINLAN.

(Supreme Court of New Jersey. June 5, 1914.)

## 1. CRIMINAL LAW (§ 13\*) — CREATION AND DEFINITION OF OFFENSES.

Crimes Act (2 Comp. St. 1910, p. 1744) § 5e, making it a high misdemeanor to advocate, encourage, justify, or incite the killing or injuring of any person or class of persons, is not uncertain as leaving to the jury to determine what is meant by "advocate, encourage, justify, praise, or incite."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. § 13.\*]

## 2. CRIMINAL LAW (§ 13\*) — CREATION AND DEFINITION OF OFFENSES.

That Crimes Act (2 Comp. St. 1910, p. 1744) § 5e, making it a high misdemeanor for any person, in public or private, by speech, writing, or printing, or by any other mode, to advocate, encourage, justify, praise, or incite the killing or injuring of any individual or class of persons, groups together various means by which the end may be accomplished and makes any one of them an offense does not render it uncertain and void.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. § 13.\*]

## 3. CRIMINAL LAW (§ 13\*) — CREATION AND DEFINITION OF OFFENSES.

Crimes Act (2 Comp. St. 1910, p. 1744) § 5e, making it a high misdemeanor to advocate, encourage, justify, praise, or incite the killing or injuring of any individual or class of persons, is declaratory of the common law.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 13, 14; Dec. Dig. § 13.\*]

## 4. CRIMINAL LAW (§ 45\*)—SOLICITATION.

Under Crimes Act (2 Comp. St. 1910, p. 1744) § 5e, making it a high misdemeanor to advocate, encourage, justify, praise, or incite the killing or injuring of any individual or class of persons, it is immaterial whether any person or class of persons were, in fact, killed or injured; the gravamen of the offense being in the incitement or encouragement, and not in the actual commission of the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 52; Dec. Dig. § 45.\*]

## 5. CRIMINAL LAW (§ 368\*) — EVIDENCE — RES GESTÆ.

Where, in a prosecution for advocating, encouraging, and inciting the injuring of a class of persons, the language used by accused at a public gathering was, "I make a motion that we go to the silk mills; \* \* \* no matter how we get them out, we got to get them out," the court properly permitted the state to show as a part of the *res gestæ* that a speaker immediately preceding used this language: "I want you people to go to the mills, and I want you people to advise the people to join you in this strike. If they refuse, I want you to go into the mills, and I want you to drive them out of the mills. I want you to knock them out of the mills, even if it takes your extreme force."

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 806, 812, 814, 815, 821; Dec. Dig. § 368.\*]

## 6. CRIMINAL LAW (§ 661\*)—INCITING CRIME — ADMISSIBILITY OF EVIDENCE.

Where, in a prosecution for advocating, encouraging, and inciting the injuring of a class of persons, the state showed that accused used language tending to incite strikers to injure strike breakers in a mill, evidence that the strikers did, in fact, disturb and injure the strike breakers was properly admitted, though

It was unnecessary for the state to prove it to make out the offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 758, 1006; Dec. Dig. § 661.\*]

**7. CRIMINAL LAW (§ 377\*)—EVIDENCE—GOOD REPUTATION OF ACCUSED.**

It is within the discretion of the court whether to permit a witness to testify as to accused's good reputation three or four years prior to the finding of the indictment; there being no offer by accused to show a continuation of such good reputation.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 836, 837, 840; Dec. Dig. § 377.\*]

**8. CRIMINAL LAW (§ 1170½\*) — APPEAL — HARMLESS ERROR—EVIDENCE.**

In a prosecution for inciting the injuring of a class of persons, though it was error under Evidence Act (2 Comp. St. 1910, p. 2217) § 1, providing that a witness may only be asked on cross-examination if he has been convicted of crime to affect his credibility, to permit the prosecutor to ask a witness for accused whether she had ever been arrested for picketing, it was harmless, as she had already answered without objection that she had been picketing and was still doing so.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3129-3135; Dec. Dig. § 1170½.\*]

**9. WITNESSES (§ 277\*)—CROSS-EXAMINATION—SCOPE AND EXTENT.**

In a prosecution for inciting strikers to injure strike breakers, the court properly permitted accused to be asked on cross-examination: "When you came here, did you not advocate the doing away with all wage relations between capital and labor?"

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 925, 979-983; Dec. Dig. § 277.\*]

**10. WITNESSES (§ 372\*)—IMPEACHMENT—INTEREST AND BIAS.**

In a prosecution for inciting strikers to injure strike breakers, it was within the discretion of the court to permit the prosecutor to ask one of accused's witnesses on cross-examination, as bearing on her interest and bias, concerning her views on economic questions.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.\*]

**11. INDICTMENT AND INFORMATION (§ 125\*) — JOINDER OF OFFENSES—DUPLICITY.**

The words "advocate," "encourage," "incite," as used in Crimes Act (2 Comp. St. 1910, p. 1744) § 5e, making it a high misdemeanor to advocate, encourage, or incite the killing or injuring of persons, are cognate terms, and hence may be used in a single count of an indictment without rendering it duplex.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

Error to Court of Quarter Sessions, Passaic County.

Patrick Quinlan was convicted for encouraging and inciting the killing or injuring of a class of persons, and he brings error. Affirmed.

Argued November term, 1913, before GUMMERE, C. J., and PARKER and KALISCH, JJ.

Henry Marelli, and Hunziker & Randall, all of Paterson, for plaintiff in error. Michael Dunn, Prosecutor of the Pleas, of Paterson, for the State.

KALISCH, J. The plaintiff in error was convicted in the Passaic county quarter sessions court on an indictment based upon section 5e of the Crimes Act (C. S. p. 1744), which provides as follows:

"Any person who shall, in public or private, by speech, writing, printing or by any other mode or means, advocate, encourage, justify, praise or incite the unlawful burning, destruction of public or private property or advocate, encourage, justify, praise and incite assaults upon the army of the United States, the National Guard, or the police force of this or any other state or of any municipality, or the killing or injuring of any class or body of persons, or of any individual shall be guilty of a high misdemeanor."

The legality of the judgment pronounced upon this conviction is brought up for review on a strict bill of exceptions and under the section 136 of the Criminal Procedure Act.

The essential part of the indictment, the validity of which is attacked by the plaintiff in error, reads as follows:

"The said Patrick Quinlan did willfully and unlawfully in public by speech advocate, encourage, and incite the said persons so assembled at said meeting to assault, beat, and do injury to a certain class and body of persons residing in said city of Paterson, the township of Acquackanonk and the borough of Haledon, who were silk operators employed in said silk mills in said different municipalities, in said county, and who were not on strike; in that the said Patrick Quinlan did then and there utter and speak the following words: 'I make a motion that we go to the silk mills, parade through the streets, and club them out of the mills; no matter how we get them out, we got to get them out'—contrary to the form of the statute," etc.

Before the jury was sworn the plaintiff in error moved to quash the indictment upon these grounds: (1) That the statute under which the indictment is found restrains and abridges liberty of speech in violation of article 1 and section 5 of the state Constitution; (2) that the indictment does not set forth any offense against the statute on which it is based; (3) that the language set forth in the indictment which is charged to be unlawful does not import the meaning attributed to it or any meaning which is unlawful.

The trial judge refused to quash the indictment, and allowed the plaintiff in error an exception to his ruling.

[1] The first ground urged in the court below for quashing the indictment is not mentioned or argued here, and was apparently abandoned, and the proposition substituted for it and argued and urged before us is that the indictment is ineffective to charge a crime, because the statute under which it is framed violates the Constitution of this state, in that the statute is uncertain in describing the offense, and therefore void. The argument builded on this head is that, since the Legislature alone has the power to define what shall constitute a crime, it cannot delegate this power to a jury. It is claimed that the Legislature has practically

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

delegated its power, in this respect by leaving to the jury to determine what is meant by "advocate, encourage, justify, praise, or incite," etc.

This contention is palpably unsound. A plain reading of the statute makes it manifest that it is not open to the attack leveled against it. There is no organic law or rule of sound public policy that requires the Legislature to define the meaning of English words in common and daily use.

Moreover, we think the sense of the statute is clear. It denounces, as a high misdemeanor, the act of any person who, in public or private, shall by speech, writing, printing, or by any other mode or means advocate, encourage, justify, praise, or incite the killing or injuring of any class or body of persons or of any individual. The Legislature has in express terms defined what shall constitute an offense under the statute. Counsel of plaintiff in error seem to have wholly misconceived its purport. We are unable to discern anything contained therein which leaves it to a jury, as claimed by the plaintiff in error, to determine what is meant by "advocate," "encourage," or "incite."

This statute, like every other legislative act, is subject to judicial interpretation. When the occasion arises it will become the province of the court to determine what constitutes in law an "incitement" or as the case may be, under the statute, and for the jury to determine the facts tending to establish a breach of the statute, under the law as defined by the court.

[2] The fact that the statute groups together various means by which the end may be accomplished and makes any one of them an offense when done to attain the object denounced by the act does not render such statute uncertain and void. Such legislation has received the sanction of a practice extending back to time immemorial, and we need only refer to our crimes act in which there will be found numerous instances of legislation of this sort from the earliest period in the history of this state, down to the present time, and among which may be mentioned statutes relating to arson, burning, forgery, abortion, etc.

[3,4] But it is further insisted by counsel of plaintiff in error that the indictment fails to charge an offense within the contemplation of the statute. The argument made on this head is that, in order to charge a crime within the purview of the statute, the indictment must set out not only the uttering of the words which are alleged to advocate, encourage, and incite the injury or killing of the class or body of persons or of any individual, but also that, as a result of such uttering of the words, there was a killing or injury of a class or body of persons or of an individual.

This contention is unsound. In *State v. Murphy*, 27 N. J. Law, 112, on page 113, the

defendant was convicted under an indictment charging him with having advised, without lawful justification, a pregnant woman to take some noxious thing, with intent to cause her miscarriage. It was objected that the indictment did not aver that the drug, medicine, or noxious thing advised to be taken or swallowed, was, in fact, taken or swallowed by the woman: *Green, C. J.*, in disposing of the objection said:

"The language of the enactment is: 'If any person \* \* \* maliciously or without lawful justification, with intent to cause and procure the miscarriage of a woman then pregnant with child, shall administer to her, prescribe for her, or advise or direct her to take or swallow any poison, drug, medicine, or noxious thing \* \* \* such offender shall, on conviction thereof, be adjudged guilty,' etc. The crime of which this defendant is convicted, as defined by the statute, consists in advising, without lawful justification, a pregnant woman to take some noxious thing, with intent to cause her miscarriage. The actual taking or swallowing of the drug, by the terms of the statute, constitutes no element of the crime. The offense charged in the indictment falls clearly within the letter of the statute."

It is germane to the matter under discussion to observe here that the section of the Crimes Act on which the indictment in the case sub judice is founded is not an innovation upon, but declaratory of, the common law.

Stephen, in his *Digest of Criminal Law* (Ed. 1877) p. 33, says:

"Every one who incites any person to commit any crime commits a misdemeanor, whether the crime is or is not committed."

The author's text is supported by *Rex v. Higgins*, 2 East, P. C. 5-22; *Rex v. Scofield*, Cald. 397; *Rex v. Plympton*, 2 Lord Raymond, 1378; *Rex v. Vaughn*, 4 Burr. 2499. In *King v. Philipps*, 6 East, Lord Ellenborough, in reviewing some of the cases above cited, on page 472 said:

"And if the sending of the letter in the case of *King v. Vaughan* to solicit a party to commit that misdemeanor were properly held indictable, I am at a loss to see why a letter sent to provoke and excite a person to the commission of the offense in question is not equally so."

The common-law doctrine is founded upon the principle that public policy requires that the solicitation or incitement to the commission of an act which is injurious to the public shall be punished as a criminal offense. Thus in *Regina v. Daniel*, 1 Salk. page 381, where the defendant was indicted for enticing an apprentice from his master, and was convicted, judgment was arrested upon the ground "that this was a private injury for which case lies, and not in its nature public to maintain an indictment."

In the case of *Regina v. Gregory*, 1 L. R. C. Co., p. 75, it was held to be a misdemeanor to solicit and incite a servant to steal his master's goods, though no other act was done except the soliciting and inciting.

Enough has been said upon this topic to demonstrate the fallacy of the contention of the plaintiff in error that the indictment does

not charge a complete offense, because it does not set out that there was a killing or injuring of a class or body of persons or of an individual. But, before leaving this topic, it would be well to mention another potent reason against the claim made by the plaintiff in error in this respect. Bearing in mind the conditions under which the statute came into vitality, it lends force to the view that the Legislature had the purpose to make the punishment for encouraging, inciting, or advocating murder or assault and battery more drastic than formerly. It raised violations under the act from simple misdemeanors to high misdemeanors.

The framers of the act had evidently in mind the prevention of breaches of the public peace and the protection of human life and limb, and deemed that these could be best effected by making it a high misdemeanor for any one who shall, in public or private, by speech, etc., or by any other mode and means, advocate, encourage, or incite to such breaches of the law, irrespective of the fact whether such breaches of the law actually took place or not. The gravamen of the statutory offense lies in the incitement or encouragement to the commission of the offenses denounced, and not in the actual commission of them. The motion to quash therefore was properly denied.

[5] It is further urged before us that the admission of testimony against defendant's objection as to what was said by Elizabeth Gurley Flynn Jones, who was addressing an audience assembled in the hall, immediately preceding the utterance made by the defendant as set forth in the indictment, was harmful error, necessitating a reversal of the judgment. It appears that several witnesses called by the state were permitted to testify, against the defendant's objection, as to remarks made by Mrs. Jones immediately preceding a motion made by the defendant, which motion was as follows:

"I make a motion that we go to the silk mills; no matter how we get them out, we got to get them out."

A reference to Mrs. Jones' remarks shows them to have been of an inflammatory character, but the argument made is that they were irrelevant, incompetent, and immaterial, because the issue before the court and jury was whether the defendant at that time and place uttered the language charged on the indictment. It is further argued that her remarks were not part of the *res gestæ*, since it was not shown that they were made in furtherance of a common design, or that the defendant was in any way concerned in their making. But this objection is fully answered by the language used by the defendant when he rounded out the peroration of Mrs. Jones, as described by the state's witness Tracey. Mrs. Jones said:

"I want you people to go to the mills and I want you people to advise the people to join you in this strike. If they refuse, I want you

to go into the mills and I want you to drive them out of the mills. I want you to knock them out of the mills, even if it takes your extreme force."

It was following this that the defendant made the motion in which he used the language set out in the indictment. We think the testimony was properly admitted as a part of the *res gestæ*. It was clearly within the issue, for the defendant was charged with advocating, encouraging, and inciting the injuring of a class of persons, and the testimony tended to show that he was participating with Mrs. Jones in a common design to that end.

[6] The validity of the judgment is further assailed upon the ground that it was harmful error for the trial judge to have permitted the state to introduce testimony against the defendant's objection as to what took place at the "Miesch mill." The "Miesch mill" was a silk mill. The workmen of that mill were on a strike, and strike breakers had taken some of their places. We think the state assumed an unnecessary burden when it undertook to show that as a result of the defendant's utterances the strikers went to the "Miesch mill" and behaved in a riotous manner. The utterances ascribed to the defendant were unambiguous. The sense in which they were made and used needed no explanation. The defendant's crime was complete when he uttered the words. Although it was unnecessary under the language used in this case to show what effect it had on the persons addressed, proof of circumstances or acts showing that it had the effect designed, as expressed by the defendant, cannot be said to be irrelevant.

[7] Another ground relied on by the plaintiff in error for a reversal of the judgment is the exclusion by the court of testimony of George Gordon Battle, offered by the defendant to prove his reputation as a law-abiding citizen. On the preliminary examination of this witness it appeared that he knew the defendant five or six years; that he did not know where the defendant resided at the time of the trial, but understood he resided in New York City, and that this was three or four years ago, perhaps two; the witness could not exactly tell. The defendant when on the stand had previously testified that for the last two years preceding the trial he lived in Jersey City. The question was then put by the defendant's counsel to the witness, as follows:

"Now, I ask you again whether you can say what the general reputation of this defendant is as a law-abiding citizen in the neighborhood in which he lived at the time you came in frequent contact with him, as you have mentioned?"

It is to be observed that the inquiry is directed not to the reputation of the defendant as a law-abiding citizen in the community in which he had been living for the past two years, but in a community where he had lived two, three, or four years ago.

We think, under the circumstances, it became a matter which called for the exercise of sound judicial discretion whether or not to permit the witness to testify as to the reputation of the defendant as a law-abiding citizen in New York City two, three, or four years ago.

A different situation might have been presented if counsel had offered to show a continuation of such good reputation up to the time of the finding of the indictment. But where there are two or more years immediately preceding the finding of the indictment during which the defendant lived in another community, and no proof is offered as to his reputation, as a law-abiding citizen, in that community, it then becomes a matter largely within the discretion of the court whether to admit such proof or not. This court, in *Schuster v. State*, 62 N. J. Law, 524, 41 Atl. 702, affirmed by the Court of Errors and Appeals, in 63 N. J. Law, 355, 46 Atl. 1101, said:

"The present reputation of a witness is all that is pertinent when he is impeached. Considerable range of time and place is permissible, but how wide a range is largely a matter of discretion with the court."

From the cases where the question has arisen it appears that a greater latitude is allowed in the admission of evidence to sustain reputation than in admission of evidence to impeach it. 3 Encyc. of Ev. p. 33, and cases cited in note. But after a careful examination of the testimony of the witness leading up to the question which was excluded, we cannot say that there was an abuse of discretion by the court in excluding it.

[8] From the record it appears that one Carrie Tarella; a witness sworn in behalf of the defendant, in her cross-examination by the prosecutor of the pleas was asked: "Q. Have you been arrested for picketing?" Objection was interposed by counsel of defendant, and in overruling the objection, the trial judge said: "It is a question for the jury to say whether this witness is biased or prejudiced or interested in giving her testimony." The witness then answered the question in the affirmative. The question undoubtedly was improper, and should have been excluded. But that does not lead to a reversal of the judgment, if it also appears that it was neither harmful nor prejudicial to the defendant.

Under section 1 of the Evidence Act (2 C. S. p. 2217), a person offered as a witness may only be asked on cross-examination if he has been convicted of crime for the purpose of affecting his credibility. In *Roop v. State*, 58 N. J. Law, 479, 34 Atl. 749, where, upon the trial of an indictment for keeping a disorderly house, the defendant was permitted to be asked upon cross-examination whether he had not been indicted for keeping a disorderly house at another place, it was held error.

We think, however, that in the case sub

judice the error was harmless. It is to be observed that the witness Tarella had already answered on cross-examination without objection being interposed that she had been picketing and was still doing it. We are therefore unable to perceive how the question whether she had been arrested for picketing and her answer that she had been three times was harmful to the defendant. The fact that she had been arrested for picketing did not aggravate the fact that she had been picketing. The fact that she had been picketing for the strikers was a matter to be considered by the jury as to her bias or interest in the case. The bias or interest of the witness rested wholly upon her admission that she had been and still was doing picket duty.

The fact that she was arrested for it was wholly immaterial. It lent no force to the interest or bias that the witness might have had in the case by reason of her active participation with the strikers as a picket. The trial judge in his remarks overruling the defendant's objection evidently referred to the bias or prejudice or interest that the witness might have arising out of the fact that she was a picket. Clearly it cannot be said that because she said she was arrested for picketing that it affected her credibility in the eyes of the jury to any greater extent than her own admission that she has been, and still was, a picket.

[9] It is further argued that the trial judge erred in permitting the following questions to be asked of, and answered by, the defendant on his cross-examination, against his objections: "When you came here did you not advocate the doing away with all wage relations between capital and labor?" The witness answered that he did not. Counsel of defendant have not pointed out to us wherein the court erred, and, if so, that the defendant was harmed by such error. The other question was: "I am asking you wasn't that an event in your life?" The answer was: "Well, it will depend upon the outcome of the strike." The question put related to a matter brought out by the defendant on his direct examination, wherein he related his actings and doings, and described how he was arrested, etc. The question was proper cross-examination.

[10] Nor do we find any merit in the argument relating to the questions put to Mrs. Jones on cross-examination, and which were objected to by defendant's counsel as immaterial and irrelevant.

The witness had been testifying on her cross-examination as to the difference between the principles espoused by the I. W. W. organization and those of the Socialistic Labor party without objection, and, when asked if they (both organizations) were working or representing labor in the uplift of labor or to wipe out the relationship between capital and labor, the question was objected to upon the ground that it was immaterial

and irrelevant, which objection being overruled, the witness answered: "They both claim to be." The witness was then asked: "(2) Are they also working for the doing away with the relationship of the wage-earner and master?" This question was objected to upon the additional ground that it was indefinite, and, the objection being overruled, the witness replied: "I would prefer that you would specify what you mean by master and wage-earner." It appears that the question was not answered, and the cross-examination of the witness proceeded without further objection.

It is argued that it was error in compelling the witness to answer regarding her views on economic questions. We think, however, that the mental attitude of a witness who in this case seems to have been engaged on the same mission with the defendant was subject to be probed as to her interest or bias. To what extent such an examination may proceed rests within the sound discretion of the trial judge.

We do not find that this discretion was abused in this instance. A conclusive answer, however, to the appellant's argument is that, if the questions were immaterial and irrelevant, as the appellant contends, they would form no basis to disturb the judgment, unless it further appeared that answers thereto prejudiced the defendant in maintaining his defense on their merits. But this does not appear.

[11] The only other objection presented by the plaintiff in error against the validity of the judgment is that the trial judge committed harmful error in instructing the jury as follows:

"In order to ascertain that you have the right to ask yourselves what did the defendant mean when he said, 'I make a motion that we go to the silk mills, parade through the streets and club them out of the mills, drag them out of the mills.' What did he mean by that? You also have the right to ask yourselves, Does such language as that have a tendency to advocate, encourage, justify, praise, or incite persons to kill or injure any class or body of persons or an individual?"

The argument addressed to us on this head, by the plaintiff in error, is that by this instruction the jury were made to understand that if the language charged had a tendency to do that which is prohibited by statute they might find the defendant guilty.

It must not be overlooked that immediately preceding this instruction the court was discussing whether the language used by the defendant came within the contemplation of the statute, and said:

"That is, does the language alleged to have been used by him advocate, encourage, justify, praise, or incite the unlawful killing or injuring of any class or body of persons or of any individual."

We think the view taken by the trial judge was more favorable to the defendant than he was entitled to. In order to ascertain in

what sense the defendant used the language, it was not improper for the trial judge to say to the jury that they have the right to ask themselves whether such language as that has a tendency to advocate, encourage, etc., persons to kill or injure, etc.; for later on in the charge the court said:

"If you find that the defendant did use those words, and that the words were such as would advocate, encourage, justify, praise, or incite the killing or injuring of any class or body of persons or of any individual, then it is your duty to convict the defendant; if not, then he should be acquitted."

If the trial judge erred in this respect, it was advantageous to the defendant. The trial judge evidently overlooked the fact that the defendant was charged in the indictment "that he did advocate, encourage, and incite," etc., and not also that he did justify and praise. In the sense in which the words "advocate," "encourage," and "incite" are used in the statute they are cognate terms, and therefore may be used in a single count of an indictment without rendering such indictment subject to the charge of being duplex.

The words "justify" and "praise" were intended to meet other conditions and circumstances. The pleader very properly in this case did not use these terms in the indictment. It was not necessary, in order to find the defendant guilty, that the jury should have found that he did advocate, encourage, and incite, etc., for if the defendant did any one of them he could be convicted under the indictment. Thus it is plain that the trial judge put a heavier burden on the state than the law required, which circumstance inured to the defendant's benefit, and of which he cannot be heard to complain.

For the reasons stated, judgment will be affirmed.

(83 N. J. Eq. 428)

MOORE v. DOWNEY et al.

(Court of Chancery of New Jersey. June 25, 1914.)

# 1. WILLS (§ 619\*)—"ANNUITY"—NATURE AND CREATION.

A bequest to trustees to pay the testator's wife "annually in quarter payments during her natural life an amount equal to one-half the net income" from his estate, which consisted of both real and personal property, was not an "annuity," which is the bequest of a sum certain which does not even include the gift of the interest of a fixed and certain sum of money.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1437; Dec. Dig. § 619.\*]

For other definitions, see Words and Phrases, vol. 1, pp. 404, 405; vol. 8, p. 7575.]

# 2. ANNUITIES (§ 4\*)—APPORTIONMENT.

Annuities are not generally apportionable.

[Ed. Note.—For other cases, see Annuities, Cent. Dig. §§ 13, 14; Dec. Dig. § 4.\*]

# 3. WILLS (§ 733\*)—BEQUEST—INCOME.

A bequest in trust to pay the testator's wife quarterly during her natural life an amount equal to one-half the net income accruing from his estate, which included both real and personal property, was not a bequest of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

income payable at fixed times, and the wife's representatives were entitled to such an apportionment of the income as would have given her so much as accrued from day to day during her life, including interest accruing on mortgages and dividends declared during her life, although not payable until after her death.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1819-1846; Dec. Dig. § 733.\*]

#### 4. WILLS (§ 687\*)—TESTAMENTARY TRUST—INTEREST OF BENEFICIARIES—INCOME.

Testator, after specific legacies; devised the entire residue to trustees for investment and to pay out of the balance one-half of the net income to his wife for life, and after her death certain amounts to each of two legatees for life with cross-survivorship, and a certain amount to another legatee for life, such legatees being the wife's kin, and to pay out of the principal certain amounts to the issue of two of the legatees in contingencies which had not occurred, and out of the remaining one-half of his income not disposed of directed two annual payments of \$2,500 each to a nephew and niece for life, and a payment out of the principal to the issue of such nephew and niece, respectively, of \$50,000, with cross-remainders on survivorship, upon contingencies which had not occurred, and gave all the remaining surplus income equally to two sisters during their natural lives, and three-ninths of all the residue to each of them, their heirs and assigns, and one-ninth each to a nephew and two nieces. The payments to legatees other than his sisters amounted to less than the annual income of the estate, leaving a surplus. *Held*, that during their joint lives the sisters were equally entitled to the surplus income of the entire estate, after deducting the special legacies, and that until the happening of the contingency requiring the payment out of one-half of the principal of the legacies to the issue of the nephew and niece or either of them, the principal was to be held as an entire fund.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1638-1643; Dec. Dig. § 687.\*]

Bill by Edward J. Moore, surviving trustee, etc., of Thomas C. Barr, deceased, against J. Nethermark Downey and others for a construction of the will of deceased. Will construed.

Frank Bergen, of Newark, for complainant. Chauncey G. Parker, of Newark, for defendants Dorey & Birch. H. M. Barrett, of Newark, and William R. Brinton, of Lancaster, Pa. (Barrett & Barrett, of Newark, of counsel), for defendants Downey & Lees. Norman W. Harker, of Philadelphia, Pa., for defendants executors of Mrs. Barr.

EMERY, V. C. [1, 2] This bill is filed by Edward J. Moore, the surviving trustee under the will of Thomas C. Barr, for a construction of his will on three contested points. The first is a question arising on the claim of the executors of the widow of the testator for the payment to them of certain income of the estate, amounting to \$2,760.76, now in the hands of the trustee, and being a portion of the income of the residue of the estate which was given and devised to the executors and trustees by the eleventh clause of his will, upon trusts therein specified. The first trust (as to payments) was as follows:

"First. I direct that my said executors or trustees pay to my beloved wife Loraine H. Barr annually in quarterly payments, during her natural life, an amount equal to one-half the net income accruing from my said estate."

The testator died February 26, 1908, and during the lifetime of the widow payments to her under this clause were made quarterly on the 28th days of February, May, August, and November of each year. The last payment to her was made on February 28, 1913, and she died on May 21, 1913. If the income is apportionable, then the sum of \$2,760.76 is the proportion of the quarterly payment to which the widow at the time of her death would have been entitled out of the entire income up to the quarter ending on the 28th of May, 1913. Her executors claim that they are entitled to such apportionment of this entire income. The ground upon which counsel for these executors base this claim is that this bequest to the widow is a gift of an annuity, and, while admitting that annuities are not generally apportionable, claim that this annuity was in lieu of dower and for the maintenance and support of the widow, and therefore, under the decisions of our courts, is excepted from the general rule and is apportionable. This bequest of income is not, however, in my judgment, an annuity. An "annuity" is the bequest of a sum certain, and even the gift of the interest of a fixed and certain sum of money is not an annuity. 3 Pom. Eq. Juris. § 1134 (3d Ed.), citing, *inter alia*, *Whitson v. Whitson*, 53 N. Y. 479, 481 (1873); 2 Redf. Wills, 453. Much less can the gift of the income or of a specified portion of the net income of the general residue of the estate, including, as here, real as well as personal estate, be considered an annuity or the gift of a sum certain.

[3] Treating this devise and bequest to the wife not as the income payable at fixed times, her executors are, however, under the general rule well settled, entitled to such an apportionment of the income as will give to the widow the benefit of so much of the income as accrued from day to day during her life. *Brombacher v. Berking*, 56 N. J. Eq. (11 Dick.) 251, 255, 39 Atl. 134 (Reed, V. Ch., 1897). This would include interest accruing on mortgages and also dividends declared during her lifetime, although not payable until after her death. The case does not show what the apportionment would be on this basis and this may be the subject of further inquiry, if necessary.

[4] The second and third questions are connected and involve the general question whether the entire principal trust estate or fund in the hands of the surviving trustee must be held intact for the purpose of paying the income of the entire estate (after certain deductions) to the two sisters of the testator during their joint lives, or whether, after the death of the widow, who was entitled to

one-half of the net income during her life, one-half of the principal of the estate becomes immediately divisible among the persons entitled as residuary legatees to the estate, and whether therefore the sisters of testator are entitled to require only one-half of the principal to be retained for the payment of income to them on this half for their lives. For the sisters it is contended that the entire principal must be held at least during their joint lives for the payment to them equally of all the income thereon, including that previously enjoyed by the wife, after deducting specific annual payments of income to other relatives under the will. These payments to other legatees, together amounting to \$10,500 annually, are much less than the income of the estate, which exceeds \$800,000, and which as now invested yields an annual income of about \$48,000.

The sisters are also the residuary legatees to the extent of one-third each of the entire fund not otherwise disposed of, but they claim that no portion of the principal is yet divisible. The residuary legatees of the trust fund, other than the sisters, being a nephew and nieces of the testator and a niece of his wife, and who are each entitled to one-ninth of the residue, claim that the sisters are entitled only to the income of one-half of the principal fund (less the special deductions) and that after the death of the wife one-half of the principal became immediately divisible among the residuary legatees. These two questions, the right of the sisters to the income of the entire fund, and the right to distribute any portion of the principal, are thus inseparably connected, and decision upon one point affects the disposition of the other. The difficulty in reference to the construction of the will on these questions—for there is a difficulty—arises from the fact that the will is not only inartificially drawn; but, in reference to the particular point now in question, it is drawn confusedly, as will appear from a recitation of its provisions.

The will after a direction for payment of debts and funeral expenses, and for the payment of specific legacies (all of which amounted to about \$50,000), gave and devised the entire residue of his estate to his executors and trustees, in trust for the uses thereafter named. This residuary clause vested in the executors the legal estate in the entire residue, leaving, however, the equitable or beneficial estate therein to be further declared. Directing that the trustees invest and keep the estate invested and collect the rents and profits therefrom, pay all taxes or other charges, the testator then directed that they pay over the balance after such payment. This "balance" must be taken on the face of it to relate to and include only the payment of net income of the estate, considered as a whole. The first payment to be made is to his wife annually in quarterly payments during her life "of an amount equal to one-half of the net income." This direction contem-

plates apparently a division into two parts of the net income of the whole estate invested as one trust fund. A provision for the payment of one-half of the net income of an entire principal fund is manifestly a different thing from a direction to pay the net income of one-half of the principal fund. And under this direction, I think the trustees have no authority to make such division of the principal fund into two separate parts or funds. This direction completes the eleventh item or paragraph, and the next or twelfth paragraph provides for the payment after the death of his wife, to each of two legatees, Mrs. Fretz and Miss Nippes, of \$2,500 during their respective lives, with cross-survivorship to each of these legatees, and to Frank P. Nippes, Jr., of \$500 during his life, without survivorship provision. These three legatees are, it is said, of testator's wife's kin; but, although these payments are not to be made until after his wife's death, there is no direction that they are to come out of the half of the net income, which would have been paid to the wife, had she been living, nor is there any direction which would make them payable otherwise than out of the income generally after his wife's death. Following this is the thirteenth paragraph, which provides for the payment out of the principal of the estate of two sums of \$50,000 each to the issue of these two legatees, Mrs. Fretz and Miss Nippes, in certain contingencies. These contingencies have not yet occurred and at present only have a bearing, as being required to be provided for in case any distribution of principal be now directed. The important features of the thirteenth paragraph, on the present questions, are: (1) That this payment of principal is not specially directed to be made out of a half of the principal, nor is there any provision that would indicate it is not payable out of the principal generally; and (2) that these payments of principal to the issue of these two life tenants are not, by this clause or any other, made expressly dependent on Mrs. Barr's death. They only become so dependent by reason of the fact that such payment out of the principal (considered as a single trust fund) would pro tanto deprive Mrs. Barr during her life of one-half of the net income of the whole estate, previously given upon this trust, and might therefore by implication be payable only after her death. After these directions, which, it will be seen, fall far short of one-half of the net income and do not dispose at all of the balance of the one-half of the net income payable to the wife during her life, the testator, without any further special express reference to this balance of the one-half of the net income which the wife had received, seems to assume by the next paragraph of his will that he had in fact already made such direction as to this balance of income.

The fourteenth paragraph reads:

"I further direct that out of the remaining one-half of the income of my estate *not yet*



*disposed of*" (the italics are mine) "there be paid two annual payments of \$2,500 each" to a nephew and niece during their respective lives.

This clause apparently treats the "remaining one-half income," i. e., the income which remained after the half income given to the wife for life, as a separate fund, and apparently authorizes the inference that the payments of income to the wife's relatives after her death were by the testator considered as being made as, in part at least, "disposing of" the one-half income previously given to the wife. But while the entire income is apparently divided, there is so far no indication or suggestion that the principal is to be divided, or is not to remain entire.

The next paragraph, the fifteenth, provides for a payment to the issue of this nephew and niece respectively of the sum of \$50,000, with cross-remainders on survivorship, and these two sums of \$50,000 each are to be paid on contingencies which have not yet occurred. These payments, however, are specially directed to be made "out of the principal or corpus of the second one-half of my estate." Up to this point in the will, as I have said, there had been no indication of an intention that the entire principal of the trust estate should at any time be divided into two portions, and this direction for manner of payment at this time by a division of principal cannot, in my judgment, avail or be considered sufficient to establish the right to make such division or principal into two funds from the inception of the trust. It seems to be, however, a plain clear direction that these payments, when made, shall be made in this manner, and when the contingency arises requiring the payments, or either of them, to be made, under this clause, a division of the principal into two trust funds may then be required, in order to carry out all the express provisions of the will. Had similar directions been given that the \$50,000 legacies previously given to the issue of the wife's kin be paid "out of the first half of my estate," I am inclined to think that the division of the entire estate into two trust funds would then have been required on the happening of the contingencies therein provided for payment, and that, in the absence of any special direction for a previous division, the division into two funds must have taken place, as soon as the contingency for payment out of either specified half of the principal first arose. But no such provision for payment of the two \$50,000 legacies to the issue of the wife's kin was made, and, in the absence of any other provision controlling the holding of the trust estate as an entire estate, it must, I think, be so held, at least, until this contingency for payment under this fifteenth paragraph arises, and the trustee under the will has no authority to divide the principal of the trust estate into two portions until that time. The matter of the disposition of the "surplus income" until the

time arrives for the division of the principal, remains to be specially considered.

Up to this point in his will (the fifteenth paragraph), the testator had made provision, first, for the entire one-half of the net income during his wife's life, with an express disposition after her death, among her relatives, of a portion only of this one-half income which would have come to her, leaving the balance of this one-half undisposed of by any express direction; and he had also, secondly, made express provision for only a portion of the other one-half of the income of the entire estate.

Then follows a separate distinct paragraph, the sixteenth, dealing with income alone, as follows:

"I further direct that all remaining surplus income be divided equally and annually between my two sisters Katherine V. Dorey and Helen L. Birch, during their natural lives."

This provision gives rise to the principal dispute, which is whether "surplus income" under this clause means the income not previously effectively disposed of by the previous bequests of income, or whether the "surplus income" bequeathed by this clause is the surplus only of the second half of the income, being that not given to the wife during her life. The latter contention is based on the general claim above discussed that it sufficiently appears on the whole will that a division of the principal into two funds from its inception is contemplated, and that, if this be established as the true construction of the will, then the "surplus income" referred to in this paragraph must be the surplus only of the income of the second or remaining half of the principal fund referred to in the fourteenth paragraph as being the surplus "of the remaining one-half of the income not yet disposed of" by the legacies to the wife and others after her death, by the paragraphs preceding the fourteenth.

The "surplus" income, taking this in the sense of income not actually or effectively disposed of, certainly included a balance of income after the wife's death not absorbed by the payments to the previous legatees, and the precise question is whether this express direction as to "surplus income" includes all income not actually disposed of, or whether this bequest of the surplus income is to be treated as a specific bequest of the surplus of the remaining or second one-half. If so, the "surplus" of the first one-half falls into the general residuary bequest of the equitable or beneficial estate in which the trustee has the residuary legal title. This clause, the seventeenth, directs all the residue to be divided into nine equal parts and paid over, three-ninths to each of his sisters, her heirs and assigns, and one-ninth each to his nephew J. N. Downey, his niece Helen L. Downey, and Katherine N. Nipper, his wife's niece. The time for this payment is not expressly fixed; but treating the previous clause as one disposing of the entire surplus income of the estate, not merely of the

surplus of one-half of the income, this last residuary clause applies to the principal fund alone of the equitable estate, leaving the previous clause to be construed as the residuary clause applying to the income.

It must be conceded, I think, that by reason of the confused and inartificial character of the will as bearing on these points of dispute, the contention can fairly be made that such division of principal into two funds from its inception and a separation of the incomes into two distinct portions is suggested or indicated; but, as I have stated, it cannot be safely said that, taking the whole will, such division has been directed, or that there are any directions in the will sufficient to justify the conclusion that the testator intended in the sixteenth paragraph to restrict the "surplus income" to that of the second half of the fund referred to in the fourteenth paragraph.

On considering the whole will and the arguments and briefs of counsel, I reach the conclusion: (1) That during the joint lives of the sisters they are equally entitled to the surplus income of the entire estate after deducting the special legacies; and (2) that until the happening of the contingency requiring the payment out of one-half of the principal fund of the legacies to the issue of J. Nethermark Downey and Helen L. Downey, or either of them, the fund is not divisible under the will, but is to be held as an entire fund. And this construction as to the time of division does, I think, carry out all the provisions of the will. Any construction fixing either the inception of the trust or any other time for the division of the principal must necessarily rest more on a supposed plan, indicated or suggested by the partial and incomplete provisions rather than on the construction of the words of the entire will actually used by the testator and from which his intention must finally be determined.

Whether, on the death of either of the sisters, the payment to the survivor of either the entire or any portion of this surplus income is to be continued, is not decided. Decision upon this point should not take place until the question arises and the parties then interested are heard, and at this time would be premature.

(83 N. J. Eq. 361)

#### TANTUM v. CAMPBELL et al.

(Court of Chancery of New Jersey. May 28, 1914.)

(Syllabus by the Court.)

#### 1. WILLS (§ 634\*)—CONSTRUCTION—ESTATE BEQUEATHED.

J. M. devised certain land to C. C. for life, and after her death to the lawful issue of her body begotten, her surviving, in equal shares as tenants in common in fee simple; but in case she should die without such lawful issue surviving, then to M. and P. as tenants in common, or to the survivor of them. *Held*, C. C. took an estate for life, with a contingent remainder to her issue in esse at the time of her

death or to M. and P. or the survivor of them for want of such issue alive at the determination of the particular estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488–1510; Dec. Dig. § 634.\*]

#### 2. WILLS (§ 608\*)—RULE IN SHELLEY'S CASE—APPLICATION—REMAINDERS.

The remainder is contingent as to the person or persons who shall take at the death of the life tenant; and therefore the rule in Shelley's Case, which is a rule of law, and not of construction, does not apply.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372–1378; Dec. Dig. § 608.\*]

#### 3. EQUITY (§ 264\*)—PLEADING—DEMURRER.

C. C., the life tenant, and her surviving children, executed two mortgages upon the devised premises. M. M. S., one of the children, died leaving a child, L. B. S. On foreclosure of the two mortgages mentioned (with a prior one not here in dispute) L. B. S., who was made a defendant, moved to strike out of the bill the prayer that she may be decreed to pay the complainant's mortgages or be foreclosed of her equity of redemption in the mortgaged premises. *Held*, further, the motion is tantamount to a demurrer, and a demurrer will lie to the prayer of a bill in chancery.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 536–540; Dec. Dig. § 264.\*]

#### 4. REMAINDERS (§ 14\*)—WILLS (§ 498\*)—MORTGAGE BY REMAINDERMAN—CONSTRUCTION—"ISSUE OF ONE'S BODY"—MOTION TO STRIKE.

That part of the prayer of the bill in this cause to which objection is made must be struck out, because: As L. B. S.'s mother had only a contingent remainder (with others) at her death, which became extinguished, as to her (mother's) interest, by the happening of that event, she (L. B. S.) inherited nothing from her mother; and, as her great-grandfather by his will created that remainder, which has as yet become a vested remainder in nobody, she has not taken as a purchaser from him, although she may, and will, yet do so, if she survives her grandmother, the life tenant, because she is one of the issue of her grandmother's body begotten, according to the legal meaning of that term, which comprehends issue ad infinitum, and not that of the body of an immediate ancestor only.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 10; Dec. Dig. § 14;\* Wills, Cent. Dig. §§ 1087–1089; Dec. Dig. § 498.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3782–3792; vol. 8, p. 7693.]

#### 5. REMAINDERS (§ 14\*)—POWER TO CONVEY—CONTINGENT ESTATES.

Neither M. M. S., daughter of the life tenant, nor any of her (life tenant's) other children, were empowered by section 19 of the Conveyancing Act (2 Comp. St. 1910, p. 1539), to dispose of, or in any manner charge, the land described in the bill; they being within the proviso that no person shall be empowered to dispose of (mortgage) any contingent estate where the contingency is as to the person in whom the estate may vest.

[Ed. Note.—For other cases, see Remainders, Cent. Dig. § 10; Dec. Dig. § 14.\*]

Bill by Margaret W. Tantum against Catherine Campbell and others to foreclose mortgages. On motion to strike out part of the prayer of the bill. Motion granted.

William J. Backes, of Trenton, for the motion. Charles H. English, of Trenton, opposed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

**WALKER, Ch.** The bill in this cause was filed to foreclose three mortgages, two of which are involved in the pending motion; one of the latter made by Catherine Campbell and her then surviving children to James D. Tantum, guardian, January 7, 1898, and the other by Catherine Campbell and her then surviving children to James D. Tantum, guardian, November 1, 1899. All three mortgages became the property of the complainant by virtue of several assignments. The title to the mortgaged premises was in James McGuire at the time of his death, and passed from him by devise.

[1] So much of his will as is pertinent to the present inquiry provides as follows:

"I do give and bequeath the said lot of land and the dwelling to be erected thereon, when the same is completed, to my daughter, Catherine, for and during the term of her natural life, to her sole use and benefit, entirely free of any charge or control whatever of any husband she now has or hereafter may have; and after the decease of my said daughter Catherine, I give and devise the said lot of land and dwelling to the lawful issue of her body begotten, her surviving, to hold in equal shares as tenants in common in fee simple. \* \* \* It is my will in case my said daughter, Catherine, shall die without lawful issue of her body begotten, her surviving, and I do in such event give and devise the said lot of land and dwelling to my daughter Mary and my son Phelix in equal shares as tenants in common, or to the survivor of them at the time of the decease of my said daughter Catherine without surviving issue as aforesaid, to hold respectively as follows," etc.

There is no doubt but that Catherine Campbell, daughter of the testator, has but a life estate in the premises; and the question pressing for solution is: Did the estate devised to her for life become a vested estate in remainder in her issue in esse at the time the devise took effect—that is, upon the death of the deviser—or was the remainder to her issue a contingent one?

It is to be observed that, if all of Catherine's issue be dead at the time of her decease, then the land in question will go to the testator's daughter Mary and his son Phelix, or to the survivor of them.

[3, 4] One of the mortgagors in the last two mortgages above mentioned was Mary M. Sweeney, a daughter of Catherine Campbell, the life tenant. Mrs. Sweeney has since died leaving a daughter, Lida B. Sweeney, one of the defendants, her surviving. Motion is made on behalf of Lida—

"to strike out so much of the bill of complaint in the above-entitled cause as prays that this defendant, Lida B. Sweeney, may be decreed to pay to the said complainant the amount due to her on the bonds and mortgages secondly and thirdly set out in the said bill of complaint, and in default thereof that this defendant may be foreclosed of and from all equity of redemption or claim of, in, and to the said mortgaged premises, and that the same be sold to satisfy the amount due on the bonds and mortgages aforesaid, for the following reasons: First. Because this defendant did not, nor did any person through whom she claims an interest in the said lands create the debt or any part thereof, nor did she, or any person through whom

she claims an interest in the said lands, execute or deliver any of the bonds and mortgages aforesaid. Second. Because neither the mother of this defendant nor any of the other children of Catherine Campbell were empowered to dispose of, or in any manner charge, the lands described in the bill of complaint, by the act entitled 'An act to authorize the transfer of estates in expectancy' (Gen. Stat. p. 881, § 138); the estate being an estate in expectancy or a contingent estate, where the contingency is as to the person or persons in whom the state may vest."

This motion is made under rule 213, and is, in effect, a demurrer to the bill, and affords a proper opportunity to deliberately determine the merits. *Bigelow v. Old Dominion Copper Co.*, 74 N. J. Eq. (4 Buch.) 457, 461, 462, 71 Atl. 153. The motion is confined to a portion of the prayer of the bill, and it appears that a demurrer, and consequently a motion such as this, will lie to relief prayed in a bill in chancery. *Dan. Ch. Pl. & Pr. \*547*. That the general demurrer in *Hoppock's Ex'rs v. United, etc.*, R. R. Co., 27 N. J. Eq. (12 C. E. Green) 286, was considered as affecting the prayer of the bill is apparent from the language of Chancellor Runyon at the end of his opinion on page 292, and also from the observation of Mr Justice Reed, speaking for the Court of Errors and Appeals, in the same case, sub nom. *United, etc., R. R. Co. v. Hoppock*, 28 N. J. Eq. (1 Stew.) 261, at page 263.

The defendant Lida B. Sweeney contends that her contingent estate is not charged with the incumbrances which her mother assumed to create. She claims that she will take immediately from her grandfather as a purchaser, and not immediately from her mother as an heir, upon the death of her grandmother, the life tenant, and therefore her contingent estate, should it ripen into a vested remainder by her outliving her grandmother, will not be charged. These contentions I am bound to support as well founded in law.

As Lida's mother had only a contingent remainder (with others) at her death, which became extinguished, as to her (mother's) interest, by the happening of that event, she inherited nothing from her mother, and as her grandfather by his will created that remainder, which has as yet vested in nobody, she has not taken as a purchaser from him, although she may, and will, yet do so, if she survives her grandmother, the life tenant, because she is one of the issue of her grandmother's body begotten, according to the legal meaning of that term.

I say that she (Lida B. Sweeney) will have a vested interest in the land if she survives her grandmother, the life tenant; and that is because the term "issue of one's body" means issue ad infinitum, and not that of the body of an immediate ancestor only.

In the treatise on estates tail in 16 Cyc. it is laid down, at page 608:

"Estates tail are estates of inheritance, which, instead of descending to heirs generally, go to the heirs of the donee's body, which means

his lawful issue, his children, and through them to his grandchildren in a direct line, so long as his posterity endures in a regular order and course of descent."

And Blackstone observes (2 Bl. Com. 113):

"Tail general is where lands and tenements are given to one, and the heirs of his body begotten; which is called tail general because, how often soever such donee in tail be married, his issue in general by all and every such marriage is, in successive order, capable of inheriting the estate tail."

As was said by Vice Chancellor Leaming in *Coyle v. Coyle*, 73 N. J. Eq. (3 Buch.) 528, 68 Atl. 224:

"The word 'issue,' in its ordinary legal meaning, embraces grandchildren and remoter descendants, as well as children. When used in a will a more restricted meaning may be attributed to it, if from the terms of the testamentary disposition it clearly appears that the testator used the word in a particular meaning less general than the ordinary meaning."

See, also, the remarks of Chancellor Magle in *Inglis v. McCook*, 68 N. J. Eq. (2 Robb.) 27, 39, 59 Atl. 630.

In the case at bar I can find no language indicating an intention on the part of the testator to limit the contingent remainder in the estate devised to the children only of Catherine Campbell; and, no such intention being discoverable in the testament, the word "issue" must be given its usual significance, and be held to include all of the descendants of Catherine Campbell. And, as the limitation over is to Catherine's lawful issue in equal shares, all of her descendants, at her death, will take per capita, and not per stirpes.

The devise in the case at bar is very like that in *Teets v. Weise*, 47 N. J. Law (18 Vroom) 154, in which it was held by the Court of Errors and Appeals:

"Under a devise of lands to A. for her life, and at her death to her children who may be living at the time of her decease, no estate vests in a child who dies before A."

And Mr. Justice Parker, who wrote the opinion for that court, quoting from *Van Tilburgh v. Hollinshead*, 14 N. J. Eq. (1 McCart.) 32, remarked (47 N. J. Law, at page 156):

"Chancellor Green said that, when the limitation over of the estate upon the death of a devisee is to the surviving children of such devisee, a contingent estate is created, and, if a child should die before the devisee for life, the estate passes to the survivors. Perhaps the principle is more clearly stated in the syllabus to that case, prepared by the Chancellor, viz.: 'The rule is that where an interest is given to one for life, and after his death to his surviving children, they only can take who are alive at the time the distribution takes place, and the estate is therefore contingent.'"

The doctrine in *Van Tilburgh v. Hollinshead* was expressly approved and applied by Chancellor McGill in *Dutton v. Pugh*, 45 N. J. Eq. (18 Stew.) 426, 18 Atl. 207. And he was affirmed by the Court of Errors and Appeals. S. C. sub nom. *Jones v. Jones*, 46 N. J. Eq. (1 Dick.) 554, 21 Atl. 950.

Catherine Campbell, the life tenant, is still living, and Mary M. Sweeney, her daughter,

one of the makers of the mortgages in question, is dead. The devise was to Catherine for life, and after her death to the lawful issue of her body begotten, her surviving, but, should she (Catherine) die without lawful issue her surviving, then over to testator's daughter Mary and son Phelix in equal shares, or to the survivor of them.

It is plainly apparent that the remainder to the issue of Catherine Campbell was contingent as to the persons who should take. I cannot find any intent in the will to vest in the children of the devisee for life an indefeasible estate; therefore no estate in the land described in the bill vested in the defendant Lida B. Sweeney upon her mother's death.

[2] The complainant insists that the rule in *Shelley's Case* applies, and that Catherine Campbell took a fee simple or a fee tail under the will of her father; that, if section 10 of the statute of descent (2 Comp. St. 1910, p. 1921), is applicable, the estate vested in Catherine Campbell, the devisee for life, and in her children equally, to be divided between them as tenants in common in fee, after her death; and if section 11 of the statute is applicable, the estate devised being such as would have been an estate in fee tail, Catherine has a vested estate for life, and her children took a vested estate in remainder as tenants in common in fee.

But the rule in *Shelley's Case* does not apply. As was said by Mr. Justice Depue, speaking for the Court of Errors and Appeals, in *Martling v. Martling*, 55 N. J. Eq. (10 Dick.) 771, at page 782, 39 Atl. 203, at page 206:

"The rule in *Shelley's Case* is a rule of positive law, and not of construction. Where, upon the construction of a grant or devise, the rule is found to be applicable, it cannot be controlled by any expression of a contrary intent. In such cases the devolution of the estate is irresistibly fixed. But whenever the word 'heirs' is used in a conveyance or devise, and the rule in *Shelley's Case* is invoked, a preliminary question arises whether the word 'heirs' has been used in such a sense as will make the rule in *Shelley's Case* applicable."

And as was said by me, when Vice Chancellor, in *Robeson v. Duncan*, 74 N. J. Eq. (4 Buch.) 746, at page 749, 70 Atl. 685, at page 687:

"Whether or not the rule in *Shelley's Case* applies depends upon the construction of the grant or devise under consideration. *Martling v. Martling*, 55 N. J. Eq. (10 Dick.) 771, 782. In my opinion, the estate with which we are here dealing is one in which the limitation over is by way of contingent remainder, and therefore the rule in *Shelley's Case* does not apply."

The devise under consideration having created an estate for life in Catherine Campbell, with remainder to her issue surviving at her death, and, for want of any such survivor, then over to third persons, etc., the contingency being as to the person or persons who shall take at the death of Catherine, who is still alive, there is no room for the operation of the rule in *Shelley's Case*.

[5] The act of March 14, 1851, now section 19 of "An act respecting conveyances (Revision of 1898)" (2 Comp. Stat. p. 1539), does not come in aid of the complainant's case. That act provides that any person may convey by any deed (and a mortgage falls within the description) any contingent interest or other future estate in expectancy in any lands, although the contingency on which such estate is to vest may not have happened, and that every person to whom any such estate shall have been conveyed, his heirs and assigns, shall, on the happening of any such contingency, be entitled to stand in the place of the person by whom the same shall have been conveyed; provided, that no person shall be empowered to dispose of any contingent estate or expectancy, where the contingency is as to the person in whom, or in whose heirs, the same may vest. As already remarked, the contingency in this case was as to the person. There never was a vesting in fee in Mary M. Sweeney, daughter of Catherine Campbell, the life tenant, as she (Mrs. Sweeney) died in her mother's lifetime. Her contingent estate was always within the proviso of the act of 1851. See *Cantine v. Brown*, 46 N. J. Law (17 Vroom) 579.

The result reached is that that part of the prayer of the bill to which objection is made must be struck out, with costs.

(33 N. J. Eq. 424)

ADRAIN et al. v. KOCH et al.

(Court of Chancery of New Jersey. June 5, 1914.)

1. WILLS (§ 439\*)—CONSTRUCTION—GENERAL RULES—INTENTION OF TESTATOR.

Where the language of a will can be read in its ordinary and natural sense, no construction is necessary, but, where it cannot be so read, it must be interpreted as a whole to make it speak, and speak intelligibly, the intention of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.\*]

2. WILLS (§ 497\*)—CONSTRUCTION—RESIDUARY CLAUSE—CHILDREN—ADOPTED CHILD.

Testator, who left him surviving a widow, two daughters, their children, and the children of a deceased son, including a daughter of one of testator's daughters, who had been legally adopted by testator as a child, her son by her first husband, and an infant son by her second marriage bequeathed the income of the residuary estate to his widow for life, and after her death gave the residue in trust to executors to pay over the income thereof unto "my children living at the death of my said wife," and the issue of any deceased child who might have died leaving issue her surviving, per stirpes and not per capita, until his youngest grandchild living at testator's death reached 21 years or died, and then the residue over to his children, living at the death of his wife, and to the issue of any deceased child leaving issue surviving, and gave each of his children a legacy of \$12,000, and the income of a trust fund of \$180,000 for life, with remainders to their issue and cross-remainders, if there should be no issue, and bequeathed the income of \$50,000 for life to the adopted child referred to as "granddaughter," with remainder to her

child by her first marriage. *Held*, that the adopted daughter did not take under the residuary clause as one of the children of the testator living at the death of his wife, as he evidently did not mean that she should take one-fourth of his residuary estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1080-1086; Dec. Dig. § 497.\*]

3. WILLS (§ 733\*)—CONSTRUCTION—RESIDUARY CLAUSE—INTEREST.

Under a will providing for the support, maintenance, and education of testator's grandchildren, they would be entitled to the interest and income of the money set apart for them from the date of the testator's death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1819-1846; Dec. Dig. § 733.\*]

4. TRUSTS (§ 182\*)—PROVISION FOR INFANT—ADMINISTRATION OF FUNDS.

Under a will giving the widow the income from a residuary estate for life and, on her death, the residue to executors in trust for investment and to pay the income over to children and grandchildren until the youngest grandchild reached the age of 21, the income set apart for minor grandchildren was intended to be left in the hands of the trustees, though the custody of such grandchildren might be in, and the expenditures for their benefit might be actually made, by their guardians, respectively.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 236; Dec. Dig. § 182.\*]

5. TRUSTS (§ 271½\*)—MINOR DEVISEES—EXPENDITURE OF INCOME—INSTRUCTIONS.

Where a will did not indicate how much of the income from a residuary fund in trust for minor grandchildren ought to be expended annually for their benefit, reference would be made to a master to inquire what amount should be periodically transferred by the trustees to the general guardians for that purpose.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 382; Dec. Dig. § 271½.\*]

6. TRUSTS (§ 280\*)—CONSTRUCTION—PAYMENT FROM INCOME—MAINTENANCE OF INFANT CHILDREN.

The amount to be paid from the income of a trust fund for the maintenance, support, and education of minor devisees should be limited to the actual necessities of the situation, and, if there is any surplus, it should be accumulated by the trustees for their benefit until they arrive at the age when they can control their own funds.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 400; Dec. Dig. § 280.\*]

Bill by Jennie R. Adrain and others, executors under the will of William Rowland, deceased, against Jean Livingston Koch and others, for construction of the will. Will construed.

John R. Hardin, of Newark, for complainant. Hugh K. Gaston, of Somerville, for Jennie R. Rowland, guardian. Edward M. Colie, of Newark, Alan H. Strong, of New Brunswick, and E. J. Myers, of New York City (Myers & Goldsmith, of New York City, of counsel), for Jean Livingston Koch. Kinsey Twining and R. V. Lindabury, both of Newark, for Mrs. Grace R. Riva. Frank P. McDermott, of Jersey City, guardian ad litem of the Riva children.

HOWELL, V. C. This is a bill for the construction of the will of William Rowland, late of Somerset county, who died on July

30, 1911; leaving a will bearing date December 7, 1910, which was admitted to probate, and on which letters testamentary were issued to the complainants, as executors and trustees.

Mr. Rowland left him surviving his widow, Jane, his two children Mrs. Adrain and Mrs. Riva, and his grandchildren William, Charles and John, sons of the testator's deceased son William, the two children of his daughter Mrs. Riva, and the two children of his daughter Mrs. Adrain; the Adrain children being Robert Adrain, Jr., and Jean Livingston Koch. There were also living at the time of the testator's death William Dorman, who was the son of Jean Livingston Koch by her first husband, also her present husband, and an infant son of her second marriage. These parties were also all in esse at the time of the execution of the will in question. The widow died in 1911.

In the early part of 1884 proceedings were taken by the testator and his wife for the adoption by them of Jean Livingston Koch, their granddaughter. These proceedings resulted in a decree made by the orphans' court of Somerset county on June 27, 1884, whereby the adoption by Mr. and Mrs. Rowland of their grandchild as their child was accomplished. I may say at this point that some question was made at the hearing as to the legality of these proceedings. There is no allegation of their invalidity in any of the pleadings; I have examined them with considerable care and find, as a matter of law, that they are regular in form and in accordance with the statute, and that they therefore cannot be attacked collaterally. The results of these proceedings was embodied in a decree which seems to satisfy all the requirements of the statute and to put the validity of the adoption beyond question.

The widow of the testator was, by the terms of the will, entitled to the income from the residuary estate for the term of her natural life. Upon the falling in of her life estate, the income of the residue became divisible. The trustees, being in doubt as to the proper construction of the residuary clause of the will, now lay the same before the court and seek its direction as to the manner in which the distribution shall be made.

The residuary clause of the will provides that, upon the death of the widow, the residue shall go to the executors upon the trust—"to invest the same and keep the same invested and pay over the semiannual income thereof unto my children living at the death of my said wife, and the lawful issue of any deceased child of mine who may have died in her lifetime leaving lawful issue her surviving per stirpes and not per capita, until such time as my youngest grand child living at the time of my death shall attain the age of twenty-one years, or until the death of my said youngest grand child, upon my said youngest grand child living at the time of my death attaining the age of twenty-one years, or in the event of the death of my said youngest grand child before he or she attains the age of twenty-one years, then and in that event

I give, devise and bequeath my said residuary estate, or so much thereof as shall then remain, unto my children living at the death of my said wife, and the lawful issue of any deceased child of mine who may have died in her life time leaving lawful issue her surviving per stirpes and not per capita."

Under this clause two questions arise: First, whether Jean Livingston Koch, the adopted child of the testator, takes a share in the residuary fund as one of "my children living at the death of my said wife" by virtue of the decree of adoption; and, second, whether the trustees are to administer the income accruing to the minor grandchildren of the testator in pursuance of the terms of the will, or whether such administration devolves upon their general guardian, and likewise whether interest runs on the legacies to the grandchildren from the date of the testator's death.

[1] The remarks of Lord Halsbury in the House of Lords in the case of *Inderwick v. Tatchell* (1903) A. C. 120, 72 L. J. Ch. 393, apply with peculiar force to this case. He said:

"I confess I approach the interpretation of a will with the greatest possible hesitation as to adopting any supposed fixed rule for its construction. If I can read the language of the instrument in its ordinary and natural sense, I do not want any rule of construction, and, if I cannot, then I think one must read the whole instrument as well as one can, and conclude what really its effect is intended to be by looking at the instrument as a whole. By the hypothesis it does not speak for itself, but you must arrive at some interpretation which will make it speak and make it speak intelligibly, and go so far with the contention of the appellant here \* \* \* that, if the testator had contemplated the particular event that has happened in this case, he would have provided for it; but with that single observation I am not at liberty, because an event has happened which I think has not been provided for to conjecture what the testator would have provided if he had thought of it beforehand. I am not at liberty to disregard the application of the ordinary rule of construction of every document, namely, that you must look at the whole document, and, if you can, you must read the words according to their natural and reasonable meaning."

A comparison of particular clauses of this will leads only to confusion. Its construction requires a broad general view and a careful reading of the whole instrument in order to determine the meaning of the particular clauses. The general scheme of the whole instrument must be examined and its meaning determined therefrom and thereby.

[2] The general plan of the will, so far as relates to descendants of the testator, appears to consider them in two classes determined by their nearness in blood to himself. Manifestly these classes are "children" and "grandchildren," using the words in their natural sense and not in the artificial sense that comes from the decree of adoption above referred to. In the first of these classes he puts his two natural daughters, Mrs. Adrain and Mrs. Riva. To those who belong in this class he gives: First, a money legacy of \$12,000; second, he provides for each of them a trust fund of \$160,000, giving the income of

the fund to them for life, with remainders to their issue, and cross-remainders if there should be no issue. It is significant that, if the testator, at the time of the execution of his will, had in mind the artificial relation which had been created between him and his granddaughter Jean Livingston Koch, he did not make the same provision for her that he had made for his two natural children, and at once the question arises whether the testator intended that his adopted daughter should belong to the class known as his "children," or whether he intended that she should take her natural place in the next class. The will seems to answer that question. The second class of beneficiaries includes the seven grandchildren, Mrs. Adrain's two children, Robert Adrain, Jr., and Jean L. Koch; William R. Rowland's three children, William, Charles, and John; and the two Riva children—for each of whom he made substantially the same provision. The variations relate only to the Adrain family. Robert Adrain's devise is absolute. Jean Livingston Koch's bequest is for life, with remainder to the child of her first marriage. To his other grandchildren, viz., the children of William R. Rowland and of Mrs. Riva, he makes bequests payable when they shall arrive at the age of 30 years, respectively, but with the receipt of the income meantime. This is approximately equal treatment of the class of "grandchildren," and it seems to me to exclude the idea that he had in mind the advancement of Mrs. Koch from the degree of granddaughter to that of child. This appears to be the scheme of the will, and to allow it to be broken in upon would, in my opinion, be violative of the intention of the testator.

There is in the will one other reference favoring this view. It is contained in the fourteenth clause, wherein he provides for Mrs. Koch. He there gives her the income of \$50,000, with remainder to her son William Dorman, and in that connection refers to her twice as his "granddaughter." In my opinion that fact so clearly and aptly expressed almost of itself puts the question at rest. I think it is quite apparent that, when the testator gave instructions for the drafting of his will, he not only forgot to inform the draftsman of the fact that he had adopted his grandchild, but had likewise dropped it entirely but temporarily from his memory.

There is another consideration which must operate against the claim of Mrs. Koch. If she is to share in the residuary estate as a "child," she will at once become invested with the title to one-fourth of the residuum in her own right, and, upon the death of her mother, to one-half of the trust fund, the interest on which is payable to the mother for her life, and in another contingency, very remote perhaps, she might get a share in the trust fund set apart for Mrs. Riva. This, I think, would be a complete variation from the scheme of the

will which Mr. Rowland had in mind, because it would give Mrs. Koch a much larger share in his estate than would be received by any of the others, and there is nothing in the will to indicate that he meant her to enjoy a larger share of his bounty than the others.

The only thing in the will which militates against this view is found in the provision for disposing of the principal of the trust funds of \$160,000 each for the benefit of Mrs. Adrain and Mrs. Riva. After the death of Mrs. Adrain and Mrs. Riva, respectively, the trustees are directed to invest and keep invested the said trust funds of \$160,000 and pay over the net semiannual income thereof to her children living at the time of her said death, respectively. It is quite apparent that upon the death of Mrs. Adrain, Mrs. Riva surviving her, the testator's use of the word "children" would be inapt, because, as it has turned out, there could be only one child left. But I look upon this rather as a lapse of thought and not as an indication that the testator meant to include Mrs. Koch as a child. It will be observed that the same phrase is used in the residuary clause. It seems to have been a form of words used by the scrivener rather than evidence of a settled determination on the part of the testator to have Mrs. Koch included as one of his children.

My conclusion, therefore, is that Mrs. Koch does not take under the residuary clause as one of the children of the testator living at the death of his wife, and that the testator did not mean that she should be a recipient of his bounty to the extent of one-fourth of his residuary estate.

[3] It is quite apparent, from reading the will, that the testator meant that the provisions made for his grandchildren were made for their support, maintenance, and education, in which event they are entitled to the interest and income of the money set apart for them from the date of the death of the testator.

[4] There remains only the question: Who shall administer the income from the funds set apart for the minor grandchildren? There is no direction in the will about it; and, inasmuch as the will is silent on the subject, it would seem as if the management of the fund had been intended to be left in the hands of the trustees, while the management of the minor children and the expenditures for their benefit should be actually made by their general guardians, respectively, who have also charge and custody of their persons. This would make it necessary for the trustees to transfer to the general guardians, respectively, from time to time, such funds as may be needed for the support, maintenance, and education of these children. The income upon their invested funds ought to be from 4 to 5 per cent., producing an income of from \$2,000 to \$2,500 for each one of them.



[5] Inasmuch as there is little or nothing in the case to indicate how much of this fund ought to be expended annually at the present time or in the near future for the benefit of the minors, it will be necessary to refer the matter to a master to inquire what amount should be periodically transferred for the purpose by the trustees to the general guardians. Such an inquiry was made in the case of *McKnight v. Walsh*, 24 N. J. Eq. 498.

[6] The principle is in cases of this class that the amount to be paid for the maintenance, support, and education of the minors should be limited to the actual necessities of the situation, and, if there is any surplus, it should be accumulated by the trustees for the benefit of the cestui que trusts until they arrive at the age when they may control their own funds.

There are some discrepant cross-references from one paragraph to another in several places in the will; but, inasmuch as counsel have agreed in relation thereto, it is unnecessary that any mention should be made thereof at the present time.

(83 N. J. Eq. 369)

**NATIONAL BISCUIT CO. v. PACIFIC COAST BISCUIT CO. et al.**

(Court of Chancery of New Jersey. June 4, 1914.)

**1. TRADE-MARKS AND TRADE-NAMES (§ 67\*)—UNFAIR COMPETITION—ELEMENTS.**

One may not palm off his goods as the goods of a rival and thereby cheat the purchasing public and injure the business of the rival.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 78; Dec. Dig. § 67.\*]

**2. TRADE-MARKS AND TRADE-NAMES (§ 70\*)—UNFAIR COMPETITION—ELEMENTS.**

A manufacturer of bakery products, which adopted as its trade-mark a seal known in the trade as "In-er-Seal," which seal was placed on each end of paper cartons containing its products, and had become an identifying mark of its products, thereby acquired the right to the exclusive use of the seal, and a rival manufacturer would be restrained from subsequently adopting a seal of similar general appearance, and similarly placed on its cartons, so as to mislead the purchasing public.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.\*]

**3. TRADE-MARKS AND TRADE-NAMES (§ 70\*)—UNFAIR COMPETITION—ELEMENTS.**

A manufacturer of bakery products, which adopted the word "Uneeda" displayed on paper cartons containing its product and so advertised its business as to make the name identify its product, thereby acquired the exclusive use of the word as applied to its product, and a rival could not use on its product the word "Abetta" displayed on its cartons, and thereby confuse the purchasing public.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. § 70.\*]

**4. TRADE-MARKS AND TRADE-NAMES (§ 75\*)—UNFAIR COMPETITION—ELEMENTS.**

A manufacturer suing to restrain unfair competition need not show intentional fraud, or

that any one has been actually deceived, but need only show that the marks, words, or other special arrangement of a rival manufacturer are such as will likely mislead persons in the ordinary course of purchasing goods and inducing them to suppose that they are purchasing the article of the manufacturer.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 86; Dec. Dig. § 75.\*]

**5. TRADE-MARKS AND TRADE-NAMES (§ 16\*)—UNFAIR COMPETITION—ELEMENTS.**

A paper carton constructed by superimposing on the cardboard carton blank a sheet of waxed paper of the size and shape of the blank, so that, when folded, it will form a unit box and possess the capacity of preserving the contents equally with hermetically sealed tin boxes, and bundle packages, may not be exclusively appropriated by a manufacturer as devised to mark and indicate its product, but a rival manufacturer may use similar cartons and bundle packages without being guilty of unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 19; Dec. Dig. § 16.\*]

**6. TRADE-MARKS AND TRADE-NAMES (§ 97\*)—UNFAIR COMPETITION—ELEMENTS.**

Where a manufacturer of bakery products has adopted for its products paper cartons of various sizes and trade-marks placed on each end thereof and trade-names, such as "Uneeda Biscuit," "Uneeda Milk Biscuit," "Oysterettes," "Marshmallow Dainties," "Cocoanut Dainties," "Oatmeal Crackers," etc., a rival manufacturer will be restrained from adopting any seal on its cartons or trade-names which are calculated to deceive the purchasing public, but it will not be restrained from selling such cartons with their asserted trade-mark thereon so differentiated in general appearance and application from the manufacturer's trade-mark that it could not deceive the ordinary purchaser, nor will the rival manufacturer be restrained from selling cartons of the size, weight, and shape of the manufacturer's packages, nor from using the representative colors as wrappers for such packages, provided the packages are so differentiated in general appearance from the manufacturer's packages that they will not deceive the ultimate purchaser.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. § 97.\*]

Suit by the National Biscuit Company against the Pacific Coast Biscuit Company and others, to restrain unfair competition. On final hearing on pleadings and proofs. Decree for complainant.

Vredenburg, Wall & Carey, of Jersey City, Charles K. Offield, of Chicago, Ill., and Earl D. Babst, of New York City, for complainant. Collins & Corbin, of Jersey City, and William D. Fenton, of Portland, Or., for defendants.

**WALKER, Ch.** The object of this bill is to restrain unfair competition in trade.

The complainant and defendant companies are corporations organized under the laws of this state. Both are engaged in the same line of trade—the manufacture and sale of bakery products. The business of the defendant company is confined to the Pacific Coast states and adjacent territory, while the field of activity of the complainant company is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



nation-wide. The complainant's career commenced in 1898, when it acquired some of the leading bakery plants in the country, with which it began operations. It already had a market for its goods, brought to it by these plants, and, by the exercise of a superior order of scientific and mechanical intelligence and of commercial acumen and industry, acquired a wide and enviable reputation for the high quality of its products. A market for these wares was established in the defendant's territory shortly after the complainant started business in 1898.

The principal innovation made in the bakery line by the complainant is that of housing and transmitting to the ultimate consumer bakery products with a minimum of deterioration, and practically as they leave the ovens. This is accomplished by the use of paper cartons. Up to the complainant's advent, shipments were mainly in "bulk"; that is, in barrels and wooden boxes. Paper cartons, of the shoe-box style, with loose paper lining, and hermetically sealed tin boxes, were also used, but only to a very limited extent. The tin boxes were commercially too costly, and the shipment in bulk was objectionable because of the tendency of the contents to absorb moisture and deleterious and offensive odors, and to breakage. Uncleanliness in the handling by the retailer was also to be reckoned with.

The paper cartons adopted by the complainant were much smaller than those theretofore used and were of a size to permit of sales at popular prices—five and ten cents per package. These cartons are constructed by superimposing upon the carton blank, made of cardboard, a sheet of wax paper of the size and shape of the blank, which, when folded, form a unit box, and, it is said, possess the quality and capacity of preserving the contents equal to the hermetically sealed tin box. The cartons are of various sizes and shapes, adapted to the forms of the proposed contents; and to identify the contents as its products, and to distinguish the same from those of other dealers, the complainant adopted a trade-mark and a variety of trade-names for its various products and peculiar and distinctive labels and wrappers to envelope the cartons, all of which, it is claimed, the defendant fraudulently simulated, to the injury and damage of the complainant's trade.

The alleged infringement of 15 widely different styles of cartons and carton wrappers and applied trade-names, for as many kinds of crackers or biscuits, the methods of construction of the carton and of the form of bundle package of assembled cartons, as well as the trade-mark, is involved in this litigation.

[1] The law relating to fraudulent or unfair competition between traders is so firmly established and has been so lucidly illustrated and defined by the courts of England and of this country that extended citation of

authorities will be profitless. The underlying principle that no man has a right to palm off his wares as those of another, thereby cheating the purchasing public and fleecing the business of a rival, is so essentially an element of natural justice and so solidly imbedded in our jurisprudence that all that is necessary to quicken a court of equity is to show that in the particular instance the offense has been committed. The cases cited by counsel in their briefs exemplify the illimitable conditions and circumstances under which this simple doctrine, requiring men to be honest towards each other, may be invoked.

The case of *Wirtz v. Eagle Bottling Co.*, 50 N. J. Eq. 164, 24 Atl. 658, is a striking example of the adaptation of the principle to unfair competition in the use of imitative labels and wrappers. The opinion in that case so fully covers the whole scope of the law applicable to the facts presently to be considered, and furnishes so clear a guide, that I am persuaded to quote from it in extenso. The complainant in that case, by his industry and fair dealing, had built up a large and valuable trade as a bottler of beer and identified his goods by a peculiar and distinctive label, which label the defendant substantially copied. Vice Chancellor Van Fleet, in granting a preliminary injunction, subsequently made perpetual, at page 166 of 50 N. J. Eq., and at page 659 of 24 Atl., said:

"If we speak with accuracy, these labels cannot be called trade-marks, but they serve substantially the same purpose. They are the marks by which the complainant's goods are distinguished in the market from all like goods put upon the market by other persons, and are, for that reason, according to many decisions, just as much under the protection of the law as trade-marks are. The law protects them for the same reasons and in precisely the same way that it does trade-marks. The leading principle of the law on this subject is that no man should be permitted to sell his goods on the reputation which another dealer has established in the market for his goods, and this principle applies with equal force to the case where the goods of such other dealer are known in the market by a label as it does to the case where they are known by a mark which is strictly a trade-mark. No dealer can lawfully adopt the label of another dealer, or one so near like it as to lead the public to suppose that the article to which it is affixed was put upon the market by such other dealer. *Miller Tobacco Manufactory v. Commerce*, 45 N. J. Law, 18, 24 [46 Am. Rep. 750]. The reasons upon which this rule rests were stated by Mr. Justice Knapp, in the case just cited, substantially as follows: While the markets are open and free to all, and fair competition should be encouraged, still every dealer must be required, for the protection of the public and to promote fair dealing, to depend for his success upon his own reputation and the quality of his own productions. If he were allowed to deal under false colors and sell his productions for those of others, the result would be that he would not only cheat the public, but also defraud him whose right place in the market he filled with spurious goods. Such competition would not be fair competition; it would be closer akin to piracy.

"The defendant's labels were prepared under the direction of its general manager. \* \* \*

He further says that, in designing the defendant's labels, he had no purpose or design of palming off the defendant's goods for those of the complainant. Admitting all this to be true, it is manifest it constitutes no defense. The vital question in cases of this kind is not, what did the defendant mean? but what has he done? The legal quality of an act, resulting in injury, must be decided, not by the motive with which it was done, but by the consequences which have necessarily resulted from it. The law, in civil cases, does not attempt to penetrate the secret motive which induced the act brought in judgment, but judges of its legal quality solely by the consequences which have actually and necessarily proceeded from it. It is no less a dictate of justice than of sound reason that every person must be understood to have intended to do just what is the natural consequence of his act deliberately done, \* \* \* for it is a matter of common knowledge that the ordinary buyer does not, as a general rule, exercise as much caution in buying an article for which he pays a few pennies as he does in purchasing a more valuable thing. The instances are very rare, I suppose, where a purchaser exercises as much care in buying a bottle of beer as he does in buying a bottle of whisky, a box of cigars, or a hat or a coat.

"\* \* \* Where, as in this case, the subject-matter of the controversy is labels, and the question is whether one is a fraudulent simulation of the other, the decision must always, to a large extent, be controlled by the evidence furnished by the labels themselves. As a general rule, they constitute the very best evidence of which the case is susceptible. That is the case here. A comparison of these labels, whether made singly or in a group, shows conclusively, as I think, that the use of the defendant's labels constitutes a plain violation of the complainant's right. It is difficult to believe that one set of labels could have been made so near an exact copy, in all their special characteristics, of another set without an effort at simulation."

[2] In 1900 the complainant, the National Biscuit Company adopted as its trade-mark a sign or symbol known in the trade as the "In-er-Seal" or "In-er-Seal Trade-Mark." This seal is square, and of a peculiar shade of red, with clipped corners and white lines thereon forming an ellipse, divided equally by a horizontal line, from which extends a perpendicular line halving the upper half of the ellipse, with two horizontal lines crossing the perpendicular line above the ellipse. This configuration of white lines on the seal is said to have been the sign and mark of the first printers in the early period of that art, taken by them from the Catholic Church, and by the latter from Paganism, and signifies the triumph of the spiritual over the material world. These seals were placed upon each end of all the paper cartons containing the bakery products placed on the market by the complainant, and, in addition to the purpose they serve in sealing the cartons, are an attractive and conspicuous feature of the carton wrapper.

The initial trade-name coined and applied by the complainant to an important part of its cracker output is "Uneeda" or "Uneeda Biscuit." The association of the "In-er-Seal" trade-mark and the name "Uneeda Biscuit" formed the slogan of the complainant's business. By the expenditure of a stupendous

amount of money in lavish, but judicious, advertisement, they became known to almost every man, woman, and child in this country as the identifying mark and name of the complainant's goods. I quite agree with the statement of one of the witnesses, who testified that:

"Uneeda Biscuit and the In-er-Seal, it may be said, are woven into the fabric of the National Biscuit Company. In fact, they are the business. As to their value, they are probably worth millions of dollars to the National Biscuit Company. Its physical properties, such as plants, machinery, and so forth, if destroyed, could be replaced within a reasonably short time, while the loss of the In-er-Seal and Uneeda Biscuit and the good will that goes with them would be, if not irretrievable, at least a very great calamity."

The defendant, the Pacific Coast Biscuit Company, succeeded to the business of the Portland Cracker Company in 1899. The latter named company had been engaged in the cracker baking business at Portland, Or., since 1886, and in the carrying on of its business used a variety of labels, some descriptive of the package contents and others to identify its various kinds of cracker and biscuit output, and to mark them as the product of that company, but none that bore any resemblance to the "In-er-seal," the label of the complainant; none square in shape, with clipped corners, a red field with white marking and applied to either end of paper cartons of the dimensions of those of the complainant. When the defendant bought the property of the Portland Cracker Company, it took over these seals and for a time used them, substituting only its name for that of its predecessor, until about the year 1903, when they were practically discarded, and a seal known as "Gold Coast End Seal" was adopted, which was also far unlike the complainant's "In-er-Seal." In 1907 this one was also abandoned, and red-end seal, termed "Swastika Red-End Seal," with clipped corners and white line markings upon a background of red of exactly the same shade as the complainant's seal, and which is the infringing seal complained of, was substituted. It is described in the record as a symbol of prehistoric origin, emblematic of a beneficent Deity, eternal life, benediction and blessing, good wishes and good augury, and was and is used by Indian basket makers and blanket weavers, potters, and silversmiths, and is known as the Navajo Indian cross, and was well known and in use as a religious emblem in India 15 centuries before the Christian era. Like the complainant's "In-er-Seal," it is being used by the defendant on both ends of paper cartons of identically the same size and shape as the complainant's cartons. The two labels, the "In-er-Seal" and the "Swastika," differ only in their markings. Laid side by side, and disassociated from the cartons, the resemblance is not marked; but when the defendant's seals are applied to the end of cartons resembling, as to size, shape, wrapper application, and euphony of coined names,

the similitude is striking, and when thus associated is of a character calculated to mislead and deceive the unwary and unsuspecting purchaser.

The federal courts have had occasion, by injunction, to protect this complainant in its seal and seal application against an infringing seal, under circumstances much like those present in this case. *Ohio Baking Co. v. National Biscuit Co.*, 127 Fed. 116, 62 C. C. A. 116; *National Biscuit Co. v. Swick* (C. C.) 121 Fed. 1007.

The claim of the defendant that it and its predecessor, the Portland Cracker Company, used a red-end seal, square in outline with clipped corners, upon the end of cartons, to denote its wares, prior to the adoption by the complainant of its In-er-Seal, is not sustained by the testimony. Moreover, the red-end seals which were used by the defendant were, as I have already stated, discarded for the "gold coast seal" in 1903.

Inspection and comparison of the cartons of the complainant and defendant, of the nomenclature and wrapper embellishment, and of the red-end seal application, are sufficient to satisfy me of the copying by the defendant of the complainant's trade-name and carton and carton wrappers. I cannot conveniently deal with the cartons collectively, nor will it be possible, within the limits of these conclusions, to advert in detail to all of the points of similarity between the two sets of cartons, to which my attention has been called, and therefore reference will only be made to the prominent features.

Generally, as to size, shape, and capacity (and the 15 cartons of the complainant differ in these respects), it may be said that the defendant's cartons are exact and substantial counterparts of the complainant's. The red-end seal on both ends of the infringing cartons, and the superimposed wax-paper interior, are also uniform points of likeness. The resemblances in other respects, submitted by the complainant, I will take up in the order in which the infringements are charged in the bill.

1. This relates to the red-end seal already disposed of.

[3] 2. Complainant's "Uneeda"; Defendant's "Abetta" Biscuit. The wrappers of the two cartons to which these words are applied are of a dark body color, with white parallelogram decorations. The style of type and the location of the display of the name of the biscuit and of the reading matter is the same, and the latter conveys the same meaning. That the complainant is entitled to the exclusive use of this coined word, as applied to crackers or biscuits, seems to me to be beyond question, and this extends to any word similarly applied, which rings with the same tone. "Abetta" was coined by the defendant with knowledge of the use and application by the complainant of the suggestive name "Uneeda." This, coupled with the circumstances of two consecutive abandonments

by the defendant of similar and graduating, but less offensive, infringing cartons, and the obvious purpose of creating the impression of an alliance between the two biscuits, and of superiority in that of "Abetta" (a better than Uneeda), evinces that the selection by the defendant of the word "Abetta" was intended to bring to it profit from a confused purchasing public.

3. Complainant's "Nabisco"; Defendant's "Parfait" and "Fiesta." The word "Nabisco" is made up practically of the initial syllable of each of the words "National Biscuit Company." Both packages are of tin. The contents of each is a sweet cracker. The color scheme of the wrappers is the same. It is of a white background, with red and gold decorations, clearly a case of copying.

4. Complainant's "Social Tea Biscuit"; Defendant's "Elite Biscuit." There is a pronounced resemblance in the decorations and appearance of these two packages. "Social" and "Elite" convey the same impression, and the substitution of the latter for the former on the defendant's cartons evinces but a single motive—confusion.

5. Complainant's "Uneeda Milk Biscuit"; Defendant's "Abetta Milk Biscuit." These are as nearly alike as "two peas in a pod." The answer of the defendant respecting its carton and its statement that it has stopped making it impliedly confesses copying.

6. Complainant's "Oysterettes"; Defendant's "Toke Point Oysterettes." This word "oysterettes" was coined by the complainant and applied to a particular brand of its crackers, in the year 1901. The word is indicative of the contents of the cartons. Up to 1909 the complainant had marketed some 50,000,000 of these carton contents, under this trade-name, and, on the Pacific Coast, in excess of a million. The claim of the defendant that its predecessor originated and applied this name to a brand of its goods prior to the adoption by the complainant is not borne out by the testimony. The prominent eye object on the carton is, of course, the word "Oysterettes." The defendant's "Toke Point" is printed with type comparatively obscure. The boxes are of the same size.

7. Complainant's "Fig Newtons"; Defendant's "Fig Sultana." The copying here is manifest. The body color of the wrapper in each carton in white, with gold scroll work embellishments and red-end seal. Obviously the defendant's carton is an imitation.

8. Complainant's and Defendant's "Marshmallow Dainties." The complainant was the first to originate and apply this trade-name to one of its carton bakery products. This was in 1905. Up to the time of the taking of the testimony in 1909, it had sold under this name some 5,000,000 of these carton contents. The exact trade-name has been appropriated by the defendant, and is the subject of complaint.

9. Complainant's "Zu Zu"; Defendant's

"Hoo Hoo" Gingersnaps. "Zu Zu" and "Hoo Hoo" are merely catch words, with the same general sound when spoken, and not widely different to the nondiscriminating when printed. The words, respectively, on the two cartons have the same general appearance, and with the box arrangement and red-end seals show similarity, and leave the impression that imitation was intended. "Zu Zu," as a trade-name, was adopted by the complainant in 1901, and applied to gingersnaps. The sale of these cartons to June, 1909, was approximately 100,000,000, and over a million in the Pacific Coast states. The defendant claims the right to the use of "Hoo Hoo" because of prior appropriation by its predecessor. The record does not satisfy me that this contention is well founded.

10. Complainant's "Frotana"; Defendant's "Maritani" Fruit Biscuit. Similarity of size of cartons, of wrapper coloring, of red entering largely into the decorations, the red-end seal application, the fruit biscuit contents, and the confusion between the two names as to pronunciation of their ending syllables, taken as a whole, evidence copying.

11. Complainant's and Defendant's "Coconut Dainties." This term was originated by the complainant as a mark for one of its products. The trade-name has been copied. Both cartons are of the same size. The general arrangement of the lettering, the light color of the two boxes, and the red-end seal, all tend towards confusion.

12. Complainant's "Old Time Sugar Cookies"; Defendant's "Old Fashioned Sugar Cookies." The only change made by the defendant in appropriating this trade-name is the substitution of the word "Fashioned" for the word "Time," both of which, in connection with the remainder of the name, have the same significance. The same size and shape of the carton, of the white colored wrappers, and the application of the red-end seal complete the likeness.

13. Complainant's "Celebrated Zwieback"; Defendant's "Genuine Zwieback." These packages are approximately of the same size and shape. The German and English printed matter bears comparatively the same appearance and meaning. Aside from this and the red-end seal application, there does not appear to be other similarity.

14. Complainant's "Fancy Assortment"; Defendant's "Fancy Assorted Cakes." The size and dress of these cartons have a single eye appearance. The term, applied to the defendant's, carries with it the same meaning as that adopted by the complainant. The decorations as to red border lines are attracting similarities.

15. Complainant's "Oatmeal Crackers"; Defendant's "Abetta Oatmeal Crackers." Both wrappers are green. The shade of the defendant's varies slightly from that of the complainant's. The prominent sight object on both is "oatmeal crackers." On the de-

fendant's in dim type and small print, apparently intended not to be readily observed, is the word "Abetta."

16. Complainant's and Defendant's "Animal Box." These seem to be counterparts, even to the cord handle. Here the copying is complete.

The history, as disclosed by the voluminous record, of the progressive steps of the defendant in the work of seal imitation, which culminated in the adoption of the "Swastika" seal, read in connection with the history relating to the constant advance in copying, and the gradual approach by the defendant in the use of cartons and wrappers, in appearance like those of the complainant, convinces me that the "Swastika" red-end seal was fashioned and applied by the defendant to the ends of its cartons, and that these cartons and wrappers and trade-names, so much like those of the complainant, were simulated by the defendant for no other purpose than to mislead the public into purchasing its goods for those of the complainant, and thus to purloin the complainant's business. I cannot escape this conclusion.

The Portland Cracker Company and the defendant built up a cracker trade, with seals of a distinctive type, the more prominent and generally used one of which was a red seal with a boy sitting on a cracker box, apparently exhibiting a cracker in each hand, dividing the words "Our Brand." The defendant also created its own style of cartons and wrappers to individualize and distinguish its output. After the complainant entered the industry and introduced its novel and successful methods, a campaign of simulation upon the part of the defendant began. Seals were abandoned and cartons and carton wrappers of the defendant's selection and origin were from time to time discarded and eventually replaced by those the subject of this suit. The deadly parallel between the entire line of the complainant's and defendant's seals, cartons, carton wrappers, and trade-names is so conspicuous that it requires no great perspicuity to observe that the defendant's present methods of displaying and vending its wares are not attributable to any desire on its part to honestly build up a trade of its own, but rather that they are the culmination of a premeditated and single purpose of dealing under the cover of the good will of a successful rival.

[4] It is unnecessary in these passing-off cases to find intentional fraud or that it is shown that any one has been actually deceived, to entitle a complainant to protection. It need not appear that there is precise copying of any one of the cartons of the complainant. In *Ball v. Siegel*, 116 Ill. 137, 4 N. E. 667, 56 Am. Rep. 766, it was said:

"It is true that in cases of this kind, as a general rule, exact similitude is not required to constitute an infringement, or to entitle the complaining party to protection; but if the form, marks, contents, words, or other special

arrangement or general appearance of the words of the alleged infringer's device are such as would be likely to mislead persons in the ordinary course of purchasing the goods, and induce them to suppose that they were purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection, if he takes seasonable measures to assert his rights and prevent their continued invasion."

And Vice Chancellor Van Fleet, in the Wirtz Case, 50 N. J. Eq. at page 168, 24 Atl. at page 659, puts it thus:

"If it appears that the resemblance between the two labels is such that it is probable, in the sale of the goods of the parties, the one will be mistaken for the other, enough is shown to make it the duty of the court to interfere. *Edelsten v. Edelsten*, 1 De G. J. & S. 185, 290. As was said by Mr. Justice Clifford in *McLean v. Fleming*, 96 U. S. 245 [24 L. Ed. 828]—a case in which all the principles pertinent to the case in hand were stated with great clearness and fullness—no rule, as to what degree of similarity must exist in order to constitute an infringement, can be laid down which may be applied to all cases. All that can be done in that regard is to say that where the similarity is sufficient to convey a false impression to the public mind, and is of a character to deceive the ordinary purchaser, buying with the caution usually exercised in such transactions, there sufficient ground exists to entitle the injured person to redress. There are cases which lay down a more liberal rule in favor of persons claiming protection, and declare that if the resemblance is only such as is calculated to deceive the careless and unwary, a sufficient degree of similarity will exist to justify the court in interdicting the use of the counterfeit."

The facts in the case sub judice, in my judgment, abundantly establish that the defendant's cartons and carton wrappers, its seal trade-mark and trade-name, associated as they are, tend towards deceiving, and are likely to deceive, the purchasing public into the belief that the defendant's crackers and biscuits are those of the complainant.

[5] The carton formation and the bundle packages are not the subject of exclusive appropriation by the complainant, as devices to mark and indicate its products. The cartons known as the "Peter's Patent" were declared in *Union Biscuit Co. et al. v. Peters*, 125 Fed. 601, 60 C. C. A. 337, as not a patentable invention. There can, of course, be no monopoly of the shape, size, or capacity of a box. The lining of such boxes, with wax or paraffin paper superimposed thereon, and forming a unitary structure capable of interfolding at the ends, for the inclosing of perishable goods, is a system or method which, it seems to me, must necessarily be common to all bakers. I have not a doubt but that the complainant used this form of package before the defendant, and that the secondary purpose of the defendant in adopting it was a part of its general plan of imitating the complainant's line of operation. Nor do I think it can be disputed that, in connection with the other simulations which have already been pointed out, this particular one failed of its mission. This may also be said of the bundle package. Instead of

using wooden boxes to inclose for shipment an assembled assortment of filled cartons, the complainant used paper shaped into box form. The only service in this case of the imitation of the carton package and the bundle package is to emphasize the trend of the defendant towards copying the complainant's style.

[6] There will be an injunction restraining the defendant, including the director defendants (for the sake of convenience I have heretofore referred to all of the defendants as one), from putting up and selling or offering for sale:

(a) Any carton of bakery products having thereon an imitation of complainant's "Iner-Seal" trade-mark, calculated to mislead or deceive, like the defendant's "Swastika" trade-mark. This shall not be construed to restrain the defendants from selling such cartons with their asserted trade-mark thereon, provided the trade-mark is so differentiated in general appearance and application from the complainant's trade-mark that it is not calculated to deceive the ultimate ordinary purchaser.

(b) Any carton of bakery products having thereon an imitation of complainant's "Uneeda Biscuit" trade-name, calculated to mislead or deceive, like those on defendant's carton "Abetta Biscuit."

(c) Any carton of bakery products having thereon an imitation of complainant's trade-names "Uneeda Milk Biscuit," "Oysterettes," "Marshmallow Dainties," "Cocoanut Dainties," and "Oatmeal Crackers," calculated to mislead or deceive, like those on defendant's cartons respectively, "Abetta Milk Biscuit," "Toke Point Oysterettes," "Marshmallow Dainties," "Cocoanut Dainties," and "Abetta Oatmeal Crackers."

(d) The particular forms of cartons or packages referred to in the bill of complaint and identified therein as "Complainant's Exhibit Defendant's Abetta Biscuit and Red-End Seal Carton No. 2" and "Complainant's Exhibit Defendant's Infringing Packages Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16, respectively," which shall, by reason of the collocation of size, shape, colors, lettering, spacing, and ornamentation, present a general appearance as closely resembling complainant's exhibits, respectively, referred to in the bill of complaint and marked as "Complainant's Exhibit Complainant's Cartons Trade-Name Uneeda Biscuit Wrapper No. 2" and "Complainant's Exhibit Complainant's Cartons Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16," as do the said defendant's respective infringing packages above-mentioned, but this shall not be construed as restraining the defendants from selling packages or cartons of the size, weight, and shape of complainant's packages, nor from using the respective colors as wrappers for such packages, provided such packages are so differentiated in general appearance from said complainant's respective pack-

ages that they are not calculated to deceive the ultimate ordinary purchaser.

The complainant's prayer for an accounting will be denied, upon the grounds and for the reason stated by Vice Chancellor Stevenson in *International Silver Co. v. William H. Rogers Corporation et al.*, 66 N. J. Eq. 140, 57 Atl. 725. The complainant is entitled to costs.

(86 N. J. L. 41)

**COGHLAN v. SUPREME CONCLAVE IMPROVED ORDER HEPTASOPHS.**

(Supreme Court of New Jersey. July 1, 1914.)

(Syllabus by the Court.)

**1. INSURANCE (§ 795\*)—CONSTRUCTION OF CONTRACT—BENEFICIARY.**

Where a contract between a fraternal beneficial association and a member provides that a benefit fund shall be paid on the death of the member to his "estate," it is payable to his executor or administrator.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1973; Dec. Dig. § 795.\*]

**2. STATUTES (§ 263\*)—CONSTRUCTION—RETROSPECTIVE EFFECT.**

Statutes are not to be given a retrospective effect or operation if their language reasonably admits of another construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 344, 349; Dec. Dig. § 263.\*]

**3. INSURANCE (§ 719\*)—BY-LAWS OF BENEFICIAL ORGANIZATION—RETROSPECTIVE OPERATION.**

The established rule "that words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them," should be applied to the interpretation of by-laws of social and beneficial organizations in controversies with members in the civil courts.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.\*]

**4. INSURANCE (§ 719\*)—BY-LAWS OF BENEFICIAL ORGANIZATION—RETROSPECTIVE OPERATION.**

A by-law of a fraternal beneficial association, limiting the designation of beneficiaries in its endowment certificates to a certain class, and providing that "any designation of beneficiaries, except by their individual names, shall render [the endowment certificate absolutely void]," has no retrospective operation, so as to affect the validity of a prior contract not in harmony therewith.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.\*]

**5. INSURANCE (§ 719\*)—BENEFICIARIES—RETROSPECTIVE OPERATION OF STATUTE.**

The provision of section 210 of the Maryland statute Code Pub. Gen. Laws 1904, art. 23 (Laws 1894, c. 295, § 143e) that "payments of death benefits may be made only to the widow," and certain others of a class in which the plaintiff is not included, has no retrospective operation, so as to affect the validity of a prior contract not in harmony therewith.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.\*]

**6. INSURANCE (§ 719\*)—BY-LAW OF FRATERNAL BENEFICIAL ASSOCIATION—RETROSPECTIVE OPERATION.**

A by-law of a fraternal beneficial association, providing that no entry shall be made in any application or benefit certificate, or otherwise,

permitting the designation of the beneficiary by reference to a will, and further providing that no will shall be permitted to control the appointment of the beneficiary, has no retrospective operation, so as to affect the validity of a prior contract not in harmony therewith.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.\*]

**7. INSURANCE (§ 726\*)—CONTRACT—FORFEITURE CLAUSE—CONSTRUCTION.**

So far as fair construction of the language used will permit, the provisions and conditions of a contract of insurance with reference to forfeiture should be strictly construed in favor of the insured and against the company.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1870-1872; Dec. Dig. § 726.\*]

**8. INSURANCE (§ 719\*)—CONTRACT—CONSTRUCTION.**

An agreement by an applicant for a benefit certificate of a fraternal benevolent association, to be bound by after-enacted by-laws, refers only to such by-laws as tend to further the subsistence of the contract between the association and the member, and not to such by-laws as defeat or impair the contract.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1855; Dec. Dig. § 719.\*]

**9. INSURANCE (§§ 719, 780\*)—IMPAIRMENT OF CONTRACTS—RIGHT TO DESIGNATE BENEFICIARY.**

Where a fraternal beneficial association, for a valuable consideration, has issued to one of its members a benefit certificate payable on his death to a stated beneficiary, it is incompetent for the association by by-laws, or for the Legislature by statute, thereafter, without such member's consent, to impair the obligation of such contract by depriving the member of the valuable property right of such designation of the beneficiary of the certificate.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1855, 1946; Dec. Dig. §§ 719, 780.\*]

**10. PLEADING (§ 5\*)—ANSWER—DEFENSE—OPINION OF COURT.**

The opinion of another court in another case is not a defense to be pleaded in answer to an action.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 7; Dec. Dig. § 5.\*]

Action by Jasper Coghlan, executor of the will of A. Judson Clark, deceased, against the Supreme Conclave Improved Order Heptasophs. Motion to strike out defenses. Certain defenses ordered stricken.

Argued February term, 1914, before GARRISON, TRENCHARD, and MINTURN, JJ.

Young & Bigelow, of Newark, for plaintiff. W. Holt Apgar, of Trenton, and Olin Bryan, of Philadelphia, Pa., for defendant.

**TRENCHARD, J.** This is a motion to strike out five separate defenses contained in the defendant's answer on the ground that they disclose no defense to the action. The action is brought by the executor of the will of A. Judson Clark, deceased, against the Supreme Conclave Improved Order Heptasophs, a fraternal beneficial association of Maryland, operating by the usual subordinate lodge method. Plaintiff claims \$2,000, the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

amount due on a contributor's endowment certificate made by the defendant as follows:

"This certifies that A. J. Clark has been initiated, and is a contributing member of Unity Conclave No. 189 in good standing. In accordance with and under the provisions of the laws governing the order, the sum of two thousand dollars will be paid by the Supreme Conclave Improved Order Heptasophs as a benefit, upon due notice of his death and the surrender of this certificate, to such person or persons as he may, by will or entry on record book of this Conclave, or on the face of this certificate, direct the same to be paid, provided he is in good standing when he dies."

On the face of the certificate is the following direction:

"To the Officers and Members of Supreme Conclave Improved Order Heptasophs: It is my will that the benefits named in this certificate be paid to estate [Signed] A. J. Clark."

The application for membership also directs that:

"In case of my decease all benefits to which I may be entitled from the Improved Order Heptasophs be paid to my estate."

The certificate is dated April 2, 1889.

The first defense alleges that defendant adopted a by-law in June, 1889, restricting the class to whom endowments might be made payable to certain relatives and dependents; that the plaintiff's testator was notified to surrender his certificate and failed to do so. The second defense sets forth a statute of Maryland enacted in 1894 of similar import to the by-law mentioned in the first defense. The third defense recites a decision of the Maryland Court of Appeals construing a by-law of the Knights of Columbus. The fourth defense states that defendant, in June, 1893, amended its by-laws so as to prohibit designation of beneficiaries by will. The fifth defense is that, by reason of defendant's constitution and by-laws revised in 1911 and in force at the death of A. Judson Clark, defendant is indebted, not to plaintiff, but to Mr. Clark's next of kin. All of these by-laws and the statute were adopted after the endowment certificate had been issued. We shall hereafter state more fully their provisions.

We are of opinion that the matters above mentioned constitute no defense to this action; that the statute and by-laws are not retrospective or intended to affect the certificate in question; that even if so intended, neither plaintiff nor his testator consented thereto or was bound thereby.

The endowment certificate created a contract between the defendant and Mr. Clark. In essence it is a contract of a life insurance. *Holland v. Chosen Friends*, 54 N. J. Law, 490, 25 Atl. 367; *O'Neill v. Supreme Council*, 70 N. J. Law, 410, 57 Atl. 463, 1 Ann. Cas. 422; *Sautter v. Supreme Conclave*, 76 N. J. Law, 763, 71 Atl. 232. It differs from the ordinary insurance contract only in that its terms are interpreted in the light of the application for membership, and of the constitution and by-laws of the association. Inasmuch as the constitution and

by-laws, as they were at the time of the issuance of the certificate, do not appear in the record, they throw no light on the meaning of this contract.

The complaint alleged and the answer does not deny, that the contract was made in Newark in this state.

[1] By the contract the defendant agreed with Mr. Clark to pay \$2,000, at his death, to his "estate." While the word "estate" is not very apt, its meaning is clear. The parties undoubtedly meant that the money should be paid to the insured's executor or administrator, to be administered as a part of the property which the insured might leave at his death. *Sulz v. Mutual Reserve*, 145 N. Y. 563, 40 N. E. 242, 28 L. R. A. 379; *Daniels v. Pratt*, 143 Mass. 216, 10 N. E. 166. As there is no suggestion in the record that this designation of a beneficiary was improper when made, it only remains to be considered whether any subsequent matter alleged in defense avoids this contract.

[2] It is a familiar and important principle, always to be kept in mind in the construction of statutes, that they are not to be given a retrospective effect or operation if their language reasonably admits of another construction. *Frelinghuysen v. Morristown*, 77 N. J. Law, 493, 72 Atl. 2.

[3] The established rule "that words in a statute ought not to have a retrospective operation, unless they are so clear, strong, and imperative that no other meaning can be annexed to them" should be applied in the interpretation of by-laws of social and beneficial organizations in controversies with members in the civil courts. *Roxbury Lodge v. Hocking*, 60 N. J. Law, 439, 38 Atl. 693, 64 Am. St. Rep. 596.

[4, 5] The by-law adopted by the defendant in June, 1889, and recited in the first defense, with unimportant omissions, reads:

"Sec. 3. The endowment may be made payable to the following classes of persons only, viz.: (a) To a member's father, mother, wife, children, grandchildren, grandparents, brothers or sisters, or any, or as many of them as the member shall desire and specify; in any of which cases no proof of dependency shall be required by the Supreme Secretary before issuing the endowment certificate. (b) To any person or persons \* \* \* who may be dependent altogether or in part upon the member \* \* \* in which latter cases \* \* \* written evidence of the dependency \* \* \* must be furnished to the satisfaction of the Supreme Secretary before the endowment certificate shall be issued \* \* \*"

"Sec. 4. All beneficiaries shall be designated in accordance with the foregoing regulations; \* \* \* and any designation of beneficiaries, except by their individual names, shall render the endowment certificate absolutely void and of no effect."

Clearly this by-law is not retrospective. It limits the class to whom benefits may be made payable, but does not attempt to avoid or alter certificates theretofore issued.

The use of the word "shall" in the last clause indicates that a prospective operation only was intended. No doubt if this clause



had been intended to affect outstanding certificates, it would have so declared. The fact that the improper designation is made to render the certificate absolutely void makes it clear that outstanding certificates are not intended to be affected, for the defendant cannot be supposed to have had the extraordinary intention to make absolutely void certificates which were valid when issued, and which were accepted and paid for in good faith.

[5] The gist of section 210 of the Maryland statute (Laws 1894, c. 295, § 143e) cited in the second defense, is the provision "Payments of death benefits may be made only to the widow," and certain others of a class in which the plaintiff is not included. This sentence is part of a lengthy statute regulating fraternal organizations, prescribing the method of their incorporation, the privileges they shall enjoy, the reports they shall make to the insurance commissioner, etc. There is nothing in this statute as a whole to indicate that the Assembly of Maryland intended to vitiate any past transaction, or to alter the effect of any outstanding certificate. The obvious purpose of the provision quoted is to limit and regulate the future activities of fraternal organizations, and it should be so interpreted.

The superior court of Delaware, in a well-considered opinion by Chief Justice Lore, discussed the act now before the court, and also the by-law pleaded in the first defense, and held that they were not retrospective, and did not affect certificates issued before their enactment. *Emmons v. Supreme Conclave*, 6 Pennewill (Del.) 115, 63 Atl. 871.

The fourth defense sets up an amendment to the defendant's by-laws, made in 1893, providing that no entry shall be made in any application or benefit certificate, or otherwise, permitting the designation of the beneficiary by reference to a will, and further providing that no will shall be permitted to control the appointment of the beneficiary. The two clauses of this amendment have one purpose, to prevent appointments by will, and the first clause indicates that this purpose is prospective only, and does not relate to prior outstanding certificates.

The foregoing observations apply with full force to the matter set up in the fifth defense, and dispose of it.

But even if the by-laws and statute before mentioned were intended to have a retroactive operation, they would still be ineffectual to defeat the plaintiff's claim. The endowment certificate evidenced a contract. That contract, like all other contracts, could only be altered by the consent of both parties, by a new meeting of minds. There is no suggestion in the answer that Mr. Clark, or the plaintiff, ever consented, after the making of the contract, to a change in it. On the contrary, the first defense states that Mr. Clark was notified to surrender his cer-

tificate, and failed to do so. The defendant, however, contends that Mr. Clark's consent was given in advance, and is set forth in the application and in the certificate itself. The application contains the statement:

"I agree to make punctual payments of all dues and assessments for which I may become liable, and to conform in all respects to the laws, rules and usages of the order now in force, or which may hereafter be adopted by the same."

The certificate states that the sum of \$2,000 will be paid to the estate "in accordance with and under the provisions of the laws governing the order." The law mentioned in the certificate presumably was the law existing at the time the certificate was issued. Also it was a law authorizing payment to the estate, for otherwise the payment would not be "in accordance with and under" the law.

[7] The agreement to "conform" contained in the application requires more consideration. This application was for membership in a fraternal organization. The natural meaning of the agreement by the applicant to conform to the by-laws, is that he shall conduct himself as a Heptasoph, in his relations with the society and his fellow members, in conformity with its rules in force at the time of his election, or thereafter adopted. That Mr. Clark conformed to the rules of the society is indicated by the admitted fact that he was a member in good standing at his death. It would certainly be a strained construction of the agreement to conform in all respects to the laws to construe it to mean that the applicant's insurance policy may be altered by the insurer at its pleasure. So far as fair construction of the language used will permit, the provisions and conditions of a contract of insurance with reference to forfeiture should be strictly construed in favor of the insured and against the company. *Harris v. American Gas Co.*, 83 N. J. Law, 641, 85 Atl. 194, 44 L. R. A. (N. S.) 70; *Bohles v. Prudential Ins. Co.*, 84 N. J. Law, 315, 86 Atl. 438.

[8] The rule is established in this state that an agreement by an applicant to be bound by after-enacted by-laws refers only to such by-laws as tend to further the subsistence of the contract between the association and the member, and not such by-laws as defeat or impair the contract. *O'Neill v. Supreme Council*, 70 N. J. Law, 410, 57 Atl. 463, 1 Ann. Cas. 422; *Sautter v. Supreme Conclave*, 76 N. J. Law, 763, 71 Atl. 232; *Poole v. Supreme Circle*, 85 Atl. 821, affirmed 80 N. J. Eq. 259, 87 Atl. 1118. Moreover it has also been decided in those cases that such contract conferred upon the member a property right; "that even the power of appointment (of a beneficiary) incidental to the status of membership in a fraternal association is a valuable property right." *O'Neill v. Supreme Council*, 70 N. J. Law, 410, 57 Atl. 463, 1 Ann. Cas. 422.



[8] Mr. Clark had by his original contract the right to have the amount of his policy paid on his death to his executor, to be distributed according to his will to such of his kindred and friends or to such charities as he preferred. This was the motive which induced Mr. Clark to make the contract, and when the defendant sought to take away Mr. Clark's freedom of disposing of the benefit, and to restrict payment to certain next of kin, for whom he may have had no affection, it attacked the very essence of the contract. Clearly, therefore, if the by-laws and Maryland statute in question be regarded as intended to apply to prior contracts between the defendant and its members, they are ineffectual for such purpose, since it was not competent for either the defendant or the Legislature to impair the obligations of such contracts. *Ball v. Board of Trustees*, 71 N. J. Law, 64, 58 Atl. 111; 15 A. & E. Enc. of Law (2d Ed.) 1044.

[10] The fifth defense sets up the opinion of the court in *Mathieu v. Mathieu*, 112 Md. 625, 77 Atl. 112.

But this opinion, while of course worthy of the consideration which we have given it in the decision of this present case, does not constitute a defense to be pleaded. The result is that the first, second, third, fourth, and fifth defenses will be stricken out, with costs.

#### JACOBUS et al. v. CAHILL et al.

(Supreme Court of New Jersey. May 27, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§ 981\*)—TAXATION—REDEMPTION FROM SALE.

The tax adjustment act, commonly known as the Martin act (Act March 30, 1886 [P. L. p. 149], as amended by Act April 18, 1889, § 3, [P. L. p. 309]), prescribing the procedure for redemption of land from municipal tax sales, is applicable where the owners are unknown.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2134-2139; Dec. Dig. § 981.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 981\*)—TAXATION—REDEMPTION FROM SALE.

Under the tax adjustment act, commonly known as the Martin act (Act March 30, 1886, [P. L. p. 149], as amended by Act April 18, 1889, § 3 [P. L. p. 309]), prescribing the procedure for redemption of land from municipal tax sales in case of unknown owners, and providing that if such owner, or any person interested, fails to redeem within the time limited, the circuit court shall make an order directing the comptroller to make a deed to the purchaser which shall convey the lands free from all interest of such unknown owners, the order is final, and hence the land cannot be redeemed subsequent thereto, even though the deed has not been executed and delivered by the comptroller.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2134-2139; Dec. Dig. § 981.\*]

Certiorari to Circuit Court, Essex County.

Application by Florence E. Cahill and others for an order requiring the Comptroller of

the City of Newark to execute to them a deed. From an order directing the execution of the deed, Charles L. Jacobus and others bring certiorari. Affirmed.

Argued before GUMMERE, C. J., sitting alone, by consent of parties.

Clark McK. Whittemore, of Elizabeth, for prosecutors. McCarter & English, of Newark, for defendants.

GUMMERE, C. J. The writ in this case brings up proceedings had before the circuit court of Essex county instituted by Florence E. Cahill, one of the defendants, for the purpose of obtaining from that court an order directing the comptroller of the city of Newark to execute and deliver to her a deed of conveyance for certain lands in the county of Essex purchased by her at a tax sale held by the city comptroller on the 23th of May, 1906, including the final order made therein directing the execution and delivery of such conveyance by the comptroller.

At the hearing had before the circuit court Adams, J., delivered the following opinion:

"The petitioner, Florence E. Cahill, bought at a tax sale the property known as the Moses Roberts tract, and received certificate No. 7215, and bought also premises known as the Jonathan Lyon tract, for which she received certificate No. 7218. In each case, after the preliminary proceedings required by law in the case of unknown owners, the petitioner obtained orders to show cause directed to unknown owners and persons in interest, which were duly published, and upon the return of the order in each case a final order was made in each case on December 19, 1908, for the execution of a deed.

"The comptroller of the city of Newark, acting under legal advice, has refused to execute the deeds, upon the ground that the premises had been already redeemed from the sales upon which the proceedings were based. Accordingly, in order to test the question, petitions have been filed in this court, and the comptroller has been called on to show cause why he should not give a deed pursuant to the direction of the previous order.

"It appears that on December 19, 1908, the same day upon which the orders for deeds were granted, one H. A. De Raismes deposited with the comptroller the moneys to redeem his properties. The question at issue between the petitioner and the city is, therefore, whether the redemption was, in each case, effectual. The position of the comptroller is that the time for redemption from a tax sale does not expire until he has actually delivered a deed to the purchaser, and that, as these moneys were deposited in the comptroller's office before the execution and delivery of the deeds which the court has directed the comptroller to give, the redemption was effective.

"The answer to this question must depend upon the language of the statute which regulates the procedure in the case of unknown owners. I will refer, for convenience, to Griffith's edition of the tax adjustment act, commonly called 'Martin act,' with its supplements.

"In 1905 an act was passed, approved June 2, 1905, which is to be found on pages 490 to 492 of the Pamphlet Laws of that year. It amends section 6 of the act commonly known as the Martin act, which in Griffith's edition is designated by the Roman numeral VI, and con-

tains the following language: 'Any person or persons having an estate or interest in, or mortgage or lien upon, any lands and premises sold in pursuance of the fourth section of this act, whose estate, interest, mortgage or lien appears of record in the county, may at any time, before the expiration of six months after notice shall have been given to him of such sale by the purchaser, his heirs, or assigns, in the manner hereinafter provided, or before a deed of said premises shall have been delivered, as provided in this act, redeem said lands and premises.'

"If this statute is applicable to this proceeding, it undoubtedly sustains the position taken by the comptroller. It is necessary in order to determine the question of its applicability to notice that there are two distinct cases, with somewhat different procedures, provided for by the Martin act and its supplements. One is the case of a known owner or owners, and the other the case of unknown ownership, or, to use the language of section 23 of the act (Griffith's edition), 'where the owner is unknown to or cannot be ascertained by the purchaser or his legal representatives or assigns after due inquiry.' The earlier sections of the act of 1886, including section IV and section VI, and statutes supplementary to or amendatory of sections IV and VI, such as chapter 162 of the Laws of 1902 and chapter 251 of the Laws of 1905, appear to relate to the case of known owners. As to such owners payment in redemption before the delivery of the deed is good.

[1, 2] "Section 23 in Griffith's edition gives the procedure in the case of unknown ownership. This section, after saying that, if the ownership is unknown, application may be made to the circuit court for an order for a deed, and that the court thereupon, upon being satisfied that the ownership is unknown, after due inquiry, may make an order requiring such owner, mortgagee, or other persons interested to appear and show cause at a date to be specified in the order, not less than six months from its date, why the deed should not be made and delivered to the purchaser, goes on to provide: 'That in case such unknown owner, mortgagee, or other interested person shall not appear and show cause or redeem the said lands within the time limited by the said order, then the court shall, on the return day thereof, or afterwards, make an order directing the comptroller to make a deed of conveyance to said purchaser, which shall convey the lands free from all interests or estate of any such unknown owner.'

"If the section ended here, the result would be that in the case of an unknown owner the order is final, and that no subsequent redemption can excuse the comptroller from not executing or delivering a deed in accordance with the direction of the order. There is a further provision in this section as to publication, but it evidently refers to publication of the order to show cause, and not to publication of the order for the deed, and so does not affect the question now under consideration. For present purposes the section ends with the quotation just made.

"The case in hand is the case of an unknown owner, and, if it be true, as I think it is, that the case is controlled by section 23, the conclusion results that the redemption was too late.

"In considering the case I have assumed that a judicial proceeding antedates an ordinary transaction done on the same day.

"The conclusion thus reached is that the prayer of the petitions will be granted, with costs in each case, and that the terms of the original orders should be carried out by the comptroller."

I agree in the views expressed by Judge Adams in the foregoing opinion, and for the reasons therein set forth conclude that the final order made in the proceedings under review is in all respects legal and should be affirmed.

The defendants are entitled to judgment.

(128 Md. 212)

STATE, to Use of BICKEL et al., v. PENNSYLVANIA STEEL CO. OF PHILADELPHIA, PA. (Nos. 8, 9.)

(Court of Appeals of Maryland. April 8, 1914.)

1. APPEAL AND ERROR (§ 70\*)—DECISIONS REVIEWABLE—FINALITY OF DETERMINATION—ORDER QUASHING RETURN TO SUMMONS.

An order quashing the return to a summons, because the defendant, a foreign corporation, was not engaged in business within the state, and the summons was not served upon an agent authorized for the purpose, was a final order, from which an appeal could be taken, since, if such grounds be upheld, not only would no action lie within the state, but there would be no agent, as disclosed by the record, upon whom process could be served, and the order, therefore, prevented the further prosecution of the suit.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 70.\*]

2. CORPORATIONS (§ 641\*)—FOREIGN CORPORATIONS—ACTIONS—PROCESS.

Code Pub. Civ. Laws, art. 23, § 92, authorizing suits against any foreign corporation regularly doing business or exercising any of its franchises within the state and the service of process upon a resident agent authorized for that purpose under section 93, but if there be no such agent, upon any agent or other person in its service, is valid.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2519, 2604, 2607; Dec. Dig. § 641.\*]

3. CORPORATIONS (§ 668\*)—FOREIGN CORPORATIONS—ACTIONS—PROCESS.

Where the state, in permitting foreign corporations to do business therein, provides that in suits against them for business there done process shall be served upon their agents, the provision is deemed a condition of the permission, and to have been assented to by those subsequently so doing business, but they must be engaged in business in the state, and the agents appointed to act there.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.\*]

4. CORPORATIONS (§ 668\*)—FOREIGN CORPORATIONS—ACTIONS—PROCESS—"DOING BUSINESS."

A foreign steel corporation which did a large business in the state, consisting of construction work, such as the bridge in the construction of which plaintiff was injured, and the sale of its products, its state agents, maintaining an office bearing its name on the door and stationery, was "doing business" in the state within Code Pub. Civ. Laws, art. 23, § 92, authorizing service of summons in such case upon agents, at the time of the injury down to the time of service of summons, though it had done no construction work for about a year previous thereto.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2155-2160; vol. 8, pp. 7640, 7641.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**5. CORPORATIONS (§ 668\*)—FOREIGN CORPORATIONS—ACTIONS—PROCESS.**

A corporation which was the exclusive agent of a foreign steel corporation for the transaction of its business within the state, upon the entire amount of which it received a commission, its office door and stationery bearing the steel company's name, had implied authority to receive service of summons under Code Pub. Civ. Laws, art. 23, § 92, authorized service upon any agent or other person in the service of a foreign corporation, though the agency paid the office rent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2603-2627; Dec. Dig. § 668.\*]

Appeal from Circuit Court, Washington County; M. L. Keedy, Judge.

"To be officially reported."

Suit by the state of Maryland, to the use of Frances L. Bickel and another, against the Pennsylvania Steel Company of Philadelphia, Pa. From an order quashing the return to the summons, plaintiffs appeal. Reversed and remanded.

Argued before BOYD, C. J. and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Palmer Tennant and Frank G. Wagaman, both of Hagerstown (Wagaman & Wagaman, of Hagerstown, Marshall McCormick, of Roanoke, Va., and Samuel B. Loose and Alexander Armstrong, Jr., both of Hagerstown, on the brief), for appellants. Henry H. Keedy, Jr., of Hagerstown (J. Clarence Lane, of Hagerstown, on the brief), for appellee.

**PATTISON, J.** This suit was brought by the appellants, Frances L. Bickel and Margaret Bickel, as equitable plaintiffs, against the Pennsylvania Steel Company, a corporation, incorporated under the laws of the state of Pennsylvania, to recover damages for the death of Ross L. Bickel, husband and father of the equitable plaintiffs, caused, as it is alleged, by the negligence of the defendant while he was engaged as its employé in the erection of the steel superstructure of a bridge across the Potomac river at Williamsport, Washington county, Md.

The accident resulting in the death of Bickel occurred on the 16th day of December, 1908, and this suit was instituted on December 11, 1909, and after many renewals, the summons issued to the April term, 1913, was returned:

"Summoned, the Pennsylvania Steel Company of Philadelphia, a corporation, by service on R. C. Hoffman & Co., Incorporated, its agent, by service on Howard E. Kernan, treasurer, and a copy of the process left with R. C. Hoffman & Co., Incorporated, by leaving the same with Howard E. Kernan, treasurer of R. C. Hoffman & Co., Incorporated; also, notice of said summons left at the principal office of said corporation."

A motion filed to quash the return to the summons was granted and the return to the summons quashed. Among the grounds assigned in the motion, and those upon which the defendant relies and upon which the

court below sustained the motion are: First. That the "defendant is not now doing business in the state of Maryland, nor has it been doing any business therein, nor been engaged in doing any business in the state of Maryland, since the 17th day of January, 1910." Second. That R. C. Hoffman & Co., Incorporated, upon which the summons was served, was not at the time of the institution of this suit, or had it ever been, an agent of the defendant company upon which process could have been served for and on behalf of defendant company.

A motion to dismiss the appeal having been filed in this court, it will first be considered.

[1] It is contended by the appellee that the order sustaining the motion and quashing the return is not a final, but an interlocutory, order from which an appeal to this court will not lie, and to sustain its contention cites us to the cases of *Oland v. Agricultural Insurance Co.*, 69 Md. 248, 14 Atl. 669, *Bolgiano v. Gilbert Lock Co.*, 73 Md. 132, 20 Atl. 788, 25 Am. St. Rep. 582, *Mullen v. Sanborn*, 79 Md. 364, 29 Atl. 522, 25 L. R. A. 721, 47 Am. St. Rep. 421, and *Central of Georgia Ry. Co. v. Elchberg*, 107 Md. 363, 68 Atl. 690, 14 L. R. A. (N. S.) 389; *Long v. Hawken*, 114 Md. 234, 79 Atl. 190, 42 L. R. A. (N. S.) 1101. In the first of these cases, the one upon which the appellee mainly relies, the plaintiff instituted suit in the circuit court for Frederick county against an insurance company incorporated under the laws of the state of New York, and the summons issued against the defendant was returned served on the local agent of the defendant insurance company, and a summons directed and sent by mail to the general agent or attorney of the company, residing in the city of Baltimore, especially appointed to receive process against the company, but whether such summons was ever received by the attorney or agent of the company was a controverted fact in the case. The court there held that, as the statute applicable to foreign insurance companies require them, before doing business in this state, to file with the Insurance Commissioner "a power of attorney appointing a citizen of this state, resident within this state, the agent or attorney for the company upon whom process of law can be served," and as the defendant company in that case had met such requirement, good faith required that the process should have been served upon the attorney so selected and appointed and not upon the local agent. The court in that case dismissed the appeal, but in doing so said:

"The case against the appellee is still pending in the court below, and process may be renewed and properly served in accordance with the provisions of the statute to which we have referred."

In this case, however, the defendant company contends that it is not doing busi-

ness in the state, and, further, that the party upon whom the process was served was not at such time its agent within the meaning of the statute. In that case the court held that the defendant corporation was doing business in the state of Maryland, and that it could be properly sued in this state, and, further, that there was a party upon whom process could be served, binding upon the defendant corporation. But if it be held under the motion in this case that the defendant company is not doing business in this state, and that R. C. Hoffman & Co. is not the agent of the defendant company as aforesaid, then not only will no action lie against the defendant in this state, but there is no one, as disclosed by the record, upon whom process may be served, binding upon the defendant corporation, in the jurisdiction in which this suit is instituted, and therefore the order sustaining the motion to quash the return is so far final as to prevent the further prosecution of the suit, and thus an appeal will lie from said order to this court.

In the case of *Central of Georgia Ry. Co. v. Eichberg*, supra, the question here raised was not presented to, nor decided by, this court. That case, however, differs from the case before us in that the motion in that case was overruled and there was nothing, by reason of such ruling, to prevent the further prosecution of the suit. In this case the motion was sustained and the return quashed. The other cases cited contain nothing inconsistent with the conclusion that we have reached.

[2] Section 92 of article 23 of the Code of 1912 provides that:

"Any person or corporation, whether a resident or a nonresident of this state, may sue any foreign corporation regularly doing business or regularly exercising any of its franchises herein for any cause of action. \* \* \* If such corporation has a resident agent authorized and prepared to accept service as provided by section 93 of this article, such process shall be served upon him. If the corporation has no resident agent so authorized and prepared, process may be served \* \* \* upon any president, manager, director, ticket agent or officer of the corporation, or upon *any agent or other person in its service.*"

The defendant company in this case, although coming within the provisions of section 93 of article 23, failed to file with the Secretary of State a certificate, giving "the name and address of its agent, resident in this state, authorized to accept service of process upon it," as required by said section.

The validity of statutes of the character of the one above quoted is generally recognized.

"When a corporation has so far identified itself with a locality beyond the state of its creation and domicile as to be found there for practical business purposes, it is reasonable to treat it as there also to respond to its obligations when called upon to do so in the courts of that locality. \* \* \* The inconvenience and practical injustice of permitting corporations to invoke the comity of a foreign state,

for the exercise of their franchises and the transaction of their business, and at the same time to obtain exemption from suit, have been met by legislative enactments in many states authorizing the service of process, in such cases, upon the agents of the corporations. The judgments obtained in suits thus commenced by service upon such agents, pursuant to the laws of the state, are valid everywhere, provided the corporation was engaged in business in the state, and service was made upon an agent there, actually representing the corporation at the time." *Good Hope Co. v. Railway Barb Fencing Co.* (C. C.) 22 Fed. 635; *Lafayette Ins. Co. v. French*, 18 How. 404, 15 L. Ed. 451; *Conn. Mutual Life Ins. Co. v. Spratley*, 172 U. S. 602, 19 Sup. Ct. 308, 43 L. Ed. 569; *St. Clair v. Cox*, 106 U. S. 350, 1 Sup. Ct. 354, 27 L. Ed. 222.

[3] If the state permits a foreign corporation to do business within her limits and at the same time provides that, in suits against it for business there done, process shall be served upon its agents, the provision is to be deemed a condition of the permission; and corporations that subsequently do business in the state are to be deemed to assent to such condition as fully as though they had specially authorized their agents to receive service of the process. There is no authority, however, for the service of a summons upon such agent of a foreign corporation unless the corporation be engaged in business in the state and the agent be appointed to act there. *St. Clair v. Cox*, supra.

The difficulty in these cases is in determining what acts of the foreign corporation constitute "doing business" in the state, so as to render it liable to be sued in such state. So far as we have been able to find, there has been no general definition of the term "doing business" in the sense that we are now dealing with that term. This question, it seems, must be largely determined upon the facts of each individual case, and so it must be determined in this case.

"In the state where a corporation is formed it is not difficult to ascertain who are authorized to represent and act for it. Its charter or the statutes of the state will indicate in whose hands the control and management of its affairs are placed. Directors are readily found, as also the officers appointed by them to manage its business. But the moment the boundary of the state is passed, difficulties arise; it is not so easy to determine who represents the corporation there, and under what circumstances service on them will bind it." *St. Clair v. Cox*.

"In the absence of any express authority, the question depends upon the review of the surrounding facts and upon the inferences which the court might properly draw from them. If it appear that there is a law of the state in respect to the service of process on foreign corporations, and that the character of the agency is such as to render it fair, reasonable, and just to imply an authority on the part of the agent or receive service, the law will and ought to draw such an inference and to imply such authority, and service under such circumstances and upon an agent of that character would be sufficient.

"The question turns upon the character of the agent, whether he is such that the law would imply the power and impute the authority to him, and if he be that kind of an agent,

the implication will be made notwithstanding a denial of authority on the part of the officers of the corporation." Conn. Mutual Life Ins. Co. v. Spratley, supra.

[4] The defendant corporation was in the year 1908, and is now, engaged in the manufacture of steel products of various kinds in the state of Pennsylvania. In August, 1908, it entered into a contract with the Washington and Berkeley Bridge Company a West Virginia corporation, to furnish the material and erect for it a steel superstructure of a bridge spanning the Potomac river at the town of Williamsport, Washington county, Md. It was while the said Ross Bickel, a nonresident of Maryland, was employed by the defendant company in the work of erecting the said superstructure that he on the 16th day of December, 1908, by reason of the defendant's alleged negligence was hurled and thrown from said bridge into the river below, sustaining injuries from which he died.

The record discloses that there has never been any written contract of agency between R. C. Hoffman & Co. and the defendant corporation, but as expressed by John C. Jay, "general manager of sales" for the defendant company, the existing agreement between R. C. Hoffman & Co. and the defendant is the result of a "gradual growth of mutual confidence," by the terms of which R. C. Hoffman & Co., as the exclusive agent of the defendant company in Maryland, solicited contracts therein, not only for the sale of defendant's manufactured products but in some instances, as in the case before us, for the construction of steel bridges and were compensated therefor by commissioners upon all the "business" done by the defendant company within this state, whether such business was procured through their solicitation or not.

The office occupied by R. C. Hoffman & Co. as such agents is in the Continental Trust Building, Baltimore, Md., the rent for which is paid by the said R. C. Hoffman & Co., but upon its doors appears in large letters the following:

**"BALTIMORE OFFICE**

**"PENNSYLVANIA STEEL COMPANY**

**"R. C. HOFFMAN & Co., INC., SOUTHERN  
SALES AGENTS."**

The officials of the defendant company, including its president and vice president, at times visited the said office occupied by R. C. Hoffman & Co., and John C. Jay, its general manager of sales, is frequently there; all of these officials were fully aware of the above notice appearing upon the door of the office.

It is shown by the testimony that all contracts were executed by the defendant company but it is not shown whether such contracts were issued within or without the state. Upon the letter heads used by R. C.

Hoffman & Co. in corresponding with the defendant company and others appears the following:

"Baltimore Office, Pennsylvania Steel Co., R. C. Hoffman & Co., Inc., Southern Sales Agent."

The R. C. Hoffman & Co. is now and has been since its incorporation in 1905, the exclusive agent of the Pennsylvania Steel Company in the state of Maryland and it is shown by the record that the business done in this state by the last-named company amounts to at least \$1,000,000 annually.

The witness Jay, when asked "Confine yourself to the time since you have been general Manager of Sales and state whether or not the Pennsylvania Steel Company of Philadelphia has been engaged in any business within the state of Maryland other than the sale of its products," answered, "It has not." This witness has for many years been in the employment of the defendant corporation, and his evidence discloses that he was familiar with the affairs of the company. Therefore, in saying that the company had not been engaged in any business in this state other than the sale of its products since his appointment to his present position in 1912, he practically admitted that prior to that time it had been engaged in other business in the state of Maryland which was undoubtedly true, as shown by the facts of this case. No other witness was placed upon the stand by the defendant and no other testimony was given that in any way reflects upon the time when the defendant company ceased, if it has ceased, to exercise its franchises in this state in the construction of bridges, or in the performance of any similar work. It may have been that the company within the period mentioned, between March, 1912, and April, 1913, when the witness was upon the stand, had not done any construction work in the state, yet it does not follow from the fact that the company had abandoned this state in respect to their branch of its business. It may not have been able within such period to secure work upon terms satisfactory to it, and for that reason had not, during said period, been engaged in such work. This, the only evidence offered in support of the motion, is by no means conclusive of the fact therein alleged that the defendant company was not doing business in the state at the time of the service of the process upon R. C. Hoffman & Co., its agent in this state, within the meaning of the statute.

It cannot, we think, be successfully contended, under all the facts and circumstances of this case, that the defendant corporation, while engaged generally in its aforesaid construction work and in the sale of its products in this state was not doing business and exercising its franchises therein within the meaning of the statute; and it was at such time that the defendant's employé, Ross Bickel, while at work upon the bridge aforesaid, sustained injuries that resulted in his

death, to recover damages for which this suit is instituted.

[5] The R. C. Hoffman & Co. has continuously, since its incorporation in 1905, served the Pennsylvania Steel Company as its exclusive agent in the transaction of its business in this state, and so far as the record discloses its agency agreement has at all times during the existence of such agency remained practically the same. It is now, and has been during the period of its agency, compensated for its services by commissions paid to it by the defendant company upon the entire amount of business done by such defendant company in this state. This was true when the defendant company was actually engaged in both the sale of its products and in the aforesaid construction work and it is now true, when it is claimed by the defendant company that its business within the state is confined to the sale of its products. At all times during the existence of such agency an office has been maintained in Maryland upon the door of which appears a notice stating it to be the "Baltimore Office of the Pennsylvania Steel Co., R. C. Hoffman & Co., Inc., Southern Sales Agents," and the character of such agency is also further imparted to the public by like notice found upon the letter heads of R. C. Hoffman & Co. used by it in its correspondence as such agent. It is true, the record discloses that the rent of the office is paid by R. C. Hoffman & Co., but this fact in itself should not, we think, outweigh all the surrounding facts and circumstances which so strongly indicate that it is the office of the defendant corporation. The business of the defendant company in this state was large and lucrative; and, as R. C. Hoffman & Co. was paid for its services by commissions upon the entire business done by the defendant company in this state, the fact that it was to pay the rent of the office may have been, and probably was, taken into consideration in fixing and determining the compensation to be paid its agent.

After a thoughtful consideration of all the facts of this case, we are of the opinion that it is sufficiently shown that the defendant company, a foreign corporation was doing business and exercising its franchises in this state at the time of the injuries sustained by Bickel which resulted in his death, and that it

continued to do so, and was so doing business and exercising its franchises in this state at the time of service of process upon its agent, R. C. Hoffman & Co. And we are likewise of the opinion that it may be properly inferred from the character of the agency, as established by the facts here produced, that R. C. Hoffman & Co., as agents of the defendant corporation in this state, had at least the implied authority to receive service of process.

There are other grounds stated in the motion upon which the court below was asked to quash the return to the summons, but, in our opinion, upon none of them should the motion have been granted.

Therefore the court below, in our opinion, erred in granting the motion to quash the return to the summons. We will therefore reverse the order quashing the return and remand the case.

Order reversed and case remanded, with costs to the appellants.

(123 Md. 224)

STATE, to Use of STANLEY, v. PENNSYLVANIA STEEL CO. OF PHILADELPHIA, PA. (No. 29.)

(Court of Appeals of Maryland. April 8, 1914.)

Appeal from Baltimore City Court; Henry D. Harlan, Judge.

Suit by the State of Maryland, to the use of Lillian Mildred Stanley, against the Pennsylvania Steel Company of Philadelphia, Pa. From an order quashing the return to the summons, plaintiff appeals. Reversed and remanded.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

R. Lee Slingsluff and Thomas Foley Hisky, both of Baltimore, for appellant. Clarence A. Tucker, of Baltimore (Samuel J. Harman, Charles H. Knapp, and Joseph N. Ulman, all of Baltimore, on the brief), for appellee.

PATTISON, J. The material facts in this case are identical with the facts of the case of State of Maryland, to Use of Frances L. Bickel and Margaret Bickel, v. Pennsylvania Steel Company of Philadelphia, Pa., 91 Atl. 136, argued with this case at the January term, 1914, of this court, and for the reasons stated in the opinion filed in that case, the order quashing the return to the summons in this case will be reversed and the case remanded.

Order reversed, and case remanded, with costs to the appellant.

(123 Md. 355)

COX et al. v. BENNETT et al. (No. 26.)

(Court of Appeals of Maryland. May 12, 1914.  
Rehearing Denied June 26, 1914.)**1. EQUITY (§ 430\*)—DEFENSES—FRAUD.**

Where a suit was instituted to set aside an order declaring a specified section of a bar under water to be barren bottom, and excluding it from a survey of natural oyster beds, bars, and rocks, for fraud in obtaining the order, any defense that might have been presented in the original proceeding could only be raised by answer, and not by plea.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1034-1047; Dec. Dig. § 430.\*]

**2. FISH (§ 7\*)—SHELL FISH—LAND UNDER WATER—JURISDICTION TO CLASSIFY—PETITION—DESCRIPTION OF LAND.**

Code Pub. Civ. Laws, art. 72, § 93, provides for the classification of land under water for the propagation of oysters, etc., on a petition filed either for including bars within or excluding barren bottoms from the lines of a survey, declaring that a plat designating the location shall be filed, or, in the absence of a plat, the location shall be designated with reasonable certainty by landmarks. *Held*, that where a petition for the exclusion of certain barren bottoms contained a sufficient description of the land sought to be excluded, it was immaterial to the court's jurisdiction that no plat thereof was filed.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 9, 10, 15; Dec. Dig. § 7.\*]

**3. ATTORNEY AND CLIENT (§ 77\*)—SURVEY OF LAND UNDER WATER—EXCLUSION OF BARREN BOTTOMS—PETITION—SIGNING BY ATTORNEY.**

Where a petition, in the name of at least 24 residents of a county for the exclusion of certain alleged barren bottoms from a survey of natural oyster beds, bars, and rocks, as provided by Code Pub. Civ. Laws, art. 72, § 93, was signed by attorneys of the court, it sufficiently complied with the statutory requirement that if residents of any county, exceeding 24 in number, within four months after the filing of a survey and report, shall file in the circuit court a petition in writing, attested by some one or more of the petitioners, alleging that five acres or more of adjacent oyster beds, bars, or rocks have been omitted, or that any such quantity of barren bottoms have been included, etc., the question may be considered, and the objection determined, without the actual signing of the petition by the petitioners.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 88-90, 132, 136, 148, 149; Dec. Dig. § 77.\*]

**4. FISH (§ 7\*)—SHELL FISH—LAND UNDER WATER—NATURAL OYSTER BEDS, BARS, AND ROCKS—BARREN GROUND—SURVEY—AMENDED PLAT—FILING.**

Where certain alleged barren bottoms were severed from a survey of natural oyster beds, bars, and rocks, as authorized by Code Pub. Civ. Laws, art. 72, § 93, the fact that an amended plat, showing the changes in location by reason of such order, was not filed in the office of the clerk, as required by section 94, was not a jurisdictional defect.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 9, 10, 15; Dec. Dig. § 7.\*]

**5. FISH (§ 7\*)—OYSTER BEDS—ORDER—VACATION—FRAUD—EVIDENCE.**

Where an order severing certain alleged barren bottoms from a survey of natural oyster beds, bars, and rocks, was passed after full and open hearing, on ample testimony that the land was barren, the order could not thereafter be

set aside for fraud on mere proof that the land in fact constituted a natural oyster bed.

[Ed. Note.—For other cases, see Fish, Cent. Dig. §§ 9, 10, 15; Dec. Dig. § 7.\*]

Appeal from Circuit Court, Somerset County, in Equity; Robley D. Jones, Judge.

"To be officially reported."

Bill by George W. Bennett and others against George A. Cox and others, to vacate an order declaring a certain bar to be barren bottom, and excluding it from a survey of natural oyster beds, bars, and rocks under Code Pub. Civ. Laws, art. 72. Decree for complainants, and defendants appeal. Reversed and dismissed.

Argued before BOYD, C. J., and BURKE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Alonzo L. Miles, of Salisbury (H. Fillmore Lankford, of Princess Anne, on the brief), for appellants. James E. Ellegood, of Salisbury (Harry C. Dashiell, of Princess Anne, on the brief), for appellees.

CONSTABLE, J. This appeal involves the validity of certain leases of oyster planting grounds made by the board of shell fish commissioners to the appellants, under the provisions of article 72 of the Public General Laws of Maryland. By said article the said board was authorized and directed to have made a survey of the natural oyster beds, bars, and rocks of the state, and to designate, upon charts, the limits and boundaries of the natural beds, bars, and rocks, as established by the survey. By section 93, of said article, Bagby's Code, it was provided that:

"If residents of any county, exceeding twenty-four in number, shall, within four months after the filing of said survey and report in such county, file in the circuit court for said county a petition, in writing, attested by the oath of some one or more of the petitioners, alleging that five or more adjacent acres of oyster beds, bars or rocks, in such county, have been omitted from such survey, or that five or more acres of barren bottoms have been included in such survey, and designating the location of same by a plat, or as near as may be with reasonable certainty by such landmarks as will locate and designate the beds alleged to have been omitted or included, a judge of the circuit court for the said county, after due notice given to the board of shell fish commissioners, shall proceed to hear testimony and decide the case, as provided in the succeeding section."

The succeeding section, 94, provided that:

"Upon hearing a case presented by petition under the preceding section, the judge shall determine the question whether the ground referred to in said petition is a natural bed or barren bottom, and his finding on said question shall be final, and shall be entered upon the records of the board of shell fish commissioners in their office in the city of Annapolis, and properly marked on the copies of the plats as hereinbefore required."

Provision was therein made for the leasing of the barren bottoms for the purpose of oyster culture. Within four months after the filing of the said survey in Somerset county, 37 residents of that county filed a petition

in the circuit court for that county, attested by the oath of three of the petitioners, alleging, in substance, that the board of shell fish commissioners had, on the 1st day of July, 1908, filed in the office of the clerk of the circuit court of Somerset county the charts of the natural oyster beds in that county and the adjacent waters, and a written report of the survey made by it of the natural beds, bars, and rocks, describing the same by courses and distances; that on one of the charts a large body of barren bottom, containing more than five acres of adjacent lands covered by water, had been included as a part of a natural bar, and describing said alleged barren bottom as:

"All that section of Carmol Bar as laid down on said chart No. 7 and described in said report of survey which lies southeasterly of a straight line connecting a position six hundred yards northwest by west of Carmol Point and a position five hundred yards west northwest of a point known to these petitioners and the general public as well as to the said board of shell fish commissioners as St. Pierre Point."

And further alleged that no part of the section of Carmol Bar southeasterly of said straight line was a natural bed, bar, or rock, but that that section was composed entirely of barren bottom. The prayer of the petition was that that section of Carmol Bar might be declared to be barren bottom, and be excluded from the said survey of natural bars. The board of shell fish commissioners appeared, through its attorney, and filed an answer, admitting all of the allegations, and admitting specifically that the section of Carmol Bar alleged to be barren bottom was in fact barren bottom, and consenting that an order be passed as prayed in the petition. On the 5th day of August, 1908, the circuit court for Somerset county, "after hearing testimony," passed an order declaring that section of Carmol Bar, as described in the petition, to be barren bottom, and excluding it from the survey of natural oyster bars, beds, and rocks. In April, 1912, the appellants herein made application to the board of shell fish commissioners for leases to each of 30 acres of the land declared in the proceedings of 1908 to be barren bottom, for the purpose of cultivating oysters. In May, 1912, leases were regularly granted to them each for a tract of 30 acres and for a period of 20 years. On the 22d day of November, 1912, the appellees filed a bill against the original petitioners and the board of shell fish commissioners, alleging, in substance, that they were residents of Somerset county and directly and indirectly interested in the oyster industry of said county, and in the security and protection of their common right of fishery in the waters thereof; that the tracts leased to the appellants were natural bars, beds, and rocks; that the appellants applied for said leases well knowing they covered natural bars, but fraudulently pretended the bottoms applied for were barren; that by false and fraudulent representations the court and shell fish commissioners were imposed upon; that the

petition was filed without the knowledge or consent of at least 14 of the petitioners, none of whom signed the petition. The prayers were that the order of 1908 be vacated, that the leases to the appellants be vacated and annulled, and that the appellants be enjoined from obstructing the appellees and all residents of the county in the exercise of the privilege of catching oysters on said bars. The board of shell fish commissioners answered, setting up the proceedings under the petition and the leases made in pursuance thereof. The appellants filed a plea of *res adjudicata* to so much of the bill as alleged that the lots of ground covered by the leases were natural bars, and an answer, under oath, supporting the plea and especially denying the fraud. Answers were filed by 12 of the original petitioners, admitting that the bottoms, declared to be barren by the 1908 proceedings were natural bars, and denying that they ever admitted, or intended to admit, that all of said bottoms were barren. Answers were filed by 22 of the original petitioners, denying that the petition was filed without their knowledge and consent. It appears that in several instances the same defendant signed both classes of answers. The appellees had the plea of the appellants set down for argument, and the court overruled the plea, with leave to file an amended answer.

[1] We have no doubt but that this was a proper ruling. It will be noticed that the relief prayed in the bill did not embrace any prayer that the bars, declared in the proceedings of 1908 to be barren, should be determined to be natural bars, but that the order declaring them to be barren should be vacated, because procured through fraud. The effect, upon such relief being granted, would have been merely to set aside the original order and the leases made in pursuance thereof. It was not proper, therefore, to raise any defense they might have had under the proceedings of 1908 by a plea thus presenting a question of law, but to have availed themselves of this defense by way of an answer. See *Miller's Equity*, § 147.

In our opinion the only question presented by the pleadings is whether the court had jurisdiction to pass the order of 1908, and, if so, were the proceedings free from fraud? The act conferring jurisdiction provided that the finding of the court should be final, and therefore this court would have no power to review the findings therein unless the lower court exceeded its jurisdiction. Of course a court of equity is always open when a charge of fraud is raised, and all the more so when it is charged that the court itself has been imposed upon by false representations, but the question then presented is, shall the act, the consequence of the fraud, stand? If the fraud is established, of course there can be but one answer to that.

[2-4] The appellees contend that the lower court had not jurisdiction for three reasons:



(1) Because the petition contained insufficient location; (2) because it was not signed by the petitioners; and (3) because the changes in location were not marked upon the chart, and the amended chart not filed in the office of the clerk of the court. The first of the reasons is, in our opinion, without merit. Section 93 of article 72, quoted in full above, provides that upon a petition being filed, either for including bars within or excluding barren bottoms from the lines of the survey, a plat designating the location shall be filed, or in the absence of a plat, the location shall be designated with reasonable certainty by landmarks. A plat was not filed, but the designation contained in the petition was a full compliance with the alternative requirement. As to the second contention, we are of the opinion that, when a petition, in the name of at least 24 residents of the county, is signed by attorneys of the court, the requirement that the petition should be filed in writing is met without the actual signing by the petitioners. The presumption is that the attorney has authority to act, and the court thereupon assumes jurisdiction. *Henck v. Todhunter*, 7 Har. & J. 275, 16 Am. Dec. 300; *Kelso v. Stigar*, 75 Md. 376, 24 Atl. 18; *Benton v. Stokes*, 109 Md. 117, 71 Atl. 532. The third reason assigned why that court did not acquire jurisdiction does not raise a jurisdictional fact at all. The amended plot, under the terms of the act, is not to be filed until after the finding of the court, and then is to be considered as conclusive evidence. The failure to file cannot vitiate the finding.

[5] We have examined all the testimony most carefully, to ascertain whether the charge of fraud has been so established as to induce a court of equity to set aside its decree, passed almost five years previously, and have reached the conclusion that fraud has not been shown in anything like the satisfactory and clear manner in which, under all of the decisions of this court, it must be shown in order to obtain the drastic relief prayed for in this bill.

The greater part of the testimony is upon the question, of whether the lots in question are composed of natural bars or barren bottoms. This was not the point to be determined in the inquiry. That had been settled by the proceedings of 1908, and was to be considered as final, unless the charge of fraud was established, and in that event it was an open question to be later established as a fact by appropriate proceedings. Was or not the action of the appellants so tinged with fraud in those proceedings as to vitiate the finding therein, was the question to be determined, and the testimony should have had bearing upon that phase. The fact that testimony could be and was produced to the effect that this section was a natural bar would not show that these appellants were guilty of fraud because they had alleged the contrary as a fact. That was the fact that

the petition had asked the court to determine in an open proceeding, and which that court had so determined as recited in its order "after hearing testimony." To have the court say, because certain witnesses now testify that this section is contrary to what the court previously found it to be, that that in any way gives ground or reason for imputing fraud to those who previously alleged, and now support, the court's original view, would be to permit fraud to be shown in a way different from any adjudged case that has come to our attention. But we are not to be understood as saying that fraud must necessarily be shown by direct evidence alone.

It appears from the evidence that before the petition was presented to the court 40 residents of Somerset county, practically all of whom were those mentioned as the petitioners, signed a paper of the following tenor:

"We, the undersigned tongmen, reside in Somerset county and are engaged in tonging for oysters in Manokin river and vicinity. We hereby affirm that the ground located between Carmen Point and San Pierre Point, which is now designated by the shell fish commission as natural oyster bar, is not properly designated as such, but should have been made subject for lease for oyster culture."

Carmen Point was admittedly meant for Carmol Point. This plain and unequivocal statement was prepared by the secretary of the commission at the request of one of the appellants, and circulated for signatures by another appellant. And although several of the signers testified they signed it under a misrepresentation of facts, yet it is difficult to see how there could be any such misrepresentation as to induce any one to attest to such a plain statement of fact as was contained therein, unless at the time of so signing they believed the truth of the written statement. Several of the petitioners testified that the misrepresentation consisted of the appellant, who circulated the paper, stating that he wanted to take up 10 acres for a dumping ground. While that appellant denied having stated such a reason, yet if we assume he did, one is met with the fact that at that time, under the law then in effect, one person was limited to a lease of 10 acres. The testimony establishes that shortly after the filing of the survey one of the appellants visited the commission at its office in Annapolis, at a full meeting of the board, and informed the members of the mistake he thought had been made; that he was advised by them to file the petition as the only way of correcting the survey. It also appears that the engineer of the commission gave in writing the description of the location which was later embodied in the petition. This writing was filed, as an exhibit. It would be difficult to have a proceeding more open and frank than this one, from the record, appears to have been, and we therefore are of the opinion that the appellees have failed to establish fraud.

We do not deem it necessary to prolong this opinion with a discussion of the constitutional questions raised, other than to say we do not think any objection well taken, for the constitutionality of this class of legislation has been recognized since *Jackson v. Bennett*, 80 Md. 76, 30 Atl. 612.

Decree reversed and bill dismissed; with costs to the appellants.

(128 Md. 290)

**MAYOR AND CITY COUNCIL OF BALTIMORE et al. v. FOREST PARK CO. OF BALTIMORE CITY. (No. 38.)**

(Court of Appeals of Maryland. April 9, 1914.)

**1. WATERS AND WATER COURSES (§ 158\*)—CONSTRUCTION OF DRAINAGE AGREEMENT—RIGHTS OF CITY—INJUNCTION.**

Plaintiff company, engaged in residence development in defendant city, entered into a written contract with two other development companies, reciting that plaintiff had constructed a storm and waste water drain, and that a connection with the lower drainage system of the other two companies was subject to the terms of the agreement, and for the sole purpose of providing a drain for storm and waste water originating upon the property of plaintiff company the area of which was particularly defined, that no other property should be permitted to drain through, over, or under the property of the plaintiff company, into its drains, and that no one should connect with or use such drains without the written consent of the other two companies and a resolution by plaintiff company authorizing the same. Thereafter defendant city entered into an agreement with the other two companies, authorizing it to connect a drain connecting with the system below the point where it was joined by plaintiff's drain. *Held*, in an action to enjoin the city from acting upon such permission, on the ground that the system was not of sufficient capacity to carry the additional flow, and that if overcharged the utility of plaintiff's system would be destroyed, that the agreement did not prevent the other companies from permitting a connection by the city, or require the consent of plaintiff company thereto, and hence that injunction would not lie.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 184, 186–188; Dec. Dig. § 158.\*]

**2. WATERS AND WATER COURSES (§ 158½\*)—DRAINAGE AGREEMENTS—ACTION TO ENJOIN—ADMISSIBILITY OF EVIDENCE.**

In such action, where the defendant city establishes a right to connect with the drain, its evidence, offered to meet plaintiff's contention that the utility of its system would be thereby destroyed, to the effect that the system was of sufficient capacity to prevent any injury to plaintiff's right, was material and admissible.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 189; Dec. Dig. § 158½.\*]

Appeal from Circuit Court of Baltimore City; Henry Duffy, Judge.

"To be officially reported."

Action for injunction by the Forest Park Company of Baltimore City against the Mayor and City Council of Baltimore City and the Sewerage Commission of Baltimore City. Judgment for plaintiff, and defendant appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Robert F. Leach, Jr., Asst. City Sol., and Robert P. Graham, both of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellant. Wm. Pepper Constable and Thomas G. Hayes, both of Baltimore, for appellees.

URNER, J. The Forest Park Company is the proprietor of a residence development in the suburbs of Baltimore city. The property included in the project consists of a tract of land containing about 42 acres, bounded by Liberty Heights avenue on the south and by Garrison avenue on the east. An important feature of the development was the establishment of a sewerage system. As the natural slope of the ground was towards the south, it was necessary to conduct the drainage in that direction. On the southern side of Liberty avenue were other suburban developments under the ownership of the Park Land Corporation and the West Forest Park Company. The two last-mentioned corporations had jointly installed a system of concrete and terra cotta drains, extending southwardly through their properties from Liberty Heights avenue to an outlet in an open water course. The Forest Park Company, in constructing the sewerage system for its property north of the avenue, depended upon the use of the drains and outlet of the two companies operating to the south. An agreement for such user was effected upon terms which are set forth in an instrument dated June 1, 1909, executed by the three companies and duly acknowledged and recorded.

It was recited in the written agreement that the Forest Park Company had constructed a concrete storm and waste water drain along and across the Liberty turnpike road (now known as Liberty Heights avenue) to connect with the drainage system south of the highway belonging to the other corporations, and that permission for the making and maintenance of the connection was given upon the understanding that its use by the Forest Park Company should be subject to the terms of the agreement, and "for the sole purpose of providing a drain for the disposal, carriage and emptying of the storm and waste water as now used that would originate upon the property of the party of the third part (the Forest Park Company) and of George R. Webb," the area of which was particularly defined. There was a recital also that:

"It was understood and agreed between the parties hereto that no other property except as aforesaid, should be permitted to drain through, over or under the property of the said Forest Park Company or of George R. Webb as aforesaid, into its said storm and waste water drains, nor permission granted any other person or body corporate whatsoever except as aforesaid, to connect with, use or drain in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to said storm and waste water drains without the written consent of the board of directors of the Park Land Corporation of Baltimore city and the written consent of the board of directors of the West Forest Park Company through whose lands the aforesaid storm and waste water drains are extended and a resolution passed by the board of directors of the Forest Park Company, authorizing the same."

After a further statement in the preamble, to the effect that it was to the interests of the parties that their rights with respect to the drains should be accurately defined, the agreement proceeded to formally provide, in consideration of the premises, and of the sum of \$1 paid by each of the parties to the other, that the Forest Park Company, its successors and assigns, should have and enjoy, at all times thereafter, the right to maintain and use the connection existing between its concrete storm and waste water drain with the system of drainage to the south for the sole and exclusive purpose of carrying and disposing of the storm and waste water originating upon its property and that of George R. Webb, as previously described. It was further agreed that the Forest Park Company, its successors and assigns, should "not permit nor allow any other person or body corporate, except as aforesaid, to connect with, use, or drain any other property through, over or under its property, or in any other manner, into its said storm and waste water drains as now or hereafter constructed, without the consent in writing of the board of directors of the Park Land Corporation of Baltimore city and the West Forest Park Company, through whose lands the aforesaid storm and waste water drains are extended, and a resolution of the board of directors of the Forest Park Company of Baltimore city, authorizing the same." There was a stipulation that if the Forest Park Company, its successors or assigns, should violate any of the terms or conditions of the agreement, "or allow any person or body corporate, except as aforesaid, to drain their property through, over or under its property, or in any other manner, into any of its storm or waste water drains," the other contracting companies should have the right, upon 30 days' notice, to discontinue the connection between the two systems. The final provision in the agreement was to the effect that the Forest Park Company and George R. Webb, and those who succeeded them in title, should have the right and privilege to authorize any purchasers of lots included in their respective properties to connect with and use the drains in the manner and for the purposes specified.

The city of Baltimore, through its sewerage commission, has constructed a storm water drain under the bed of Liberty Heights avenue, and has instituted condemnation proceedings, under Act 1912, c. 117 and Act 1904, c. 349, against all the corporations interested in the sewerage systems described, with a view to acquiring the right to connect the city drain with that of the Forest Park

Company just above its junction with the sewer belonging to the developments south of the highway. That proceeding has not yet been brought to a conclusion. Since it has been pending the city and its sewerage commission have entered into an agreement with the companies owning the lower drainage system by which the city was authorized to connect its drain directly with the system below the point where it was joined by the drain of the Forest Park Company; all the questions involved in the condemnation suit being reserved without prejudice for future judicial determination. The Forest Park Company seeks to have the city restrained from acting upon the permission thus secured, and it has filed the present bill for that purpose. The bill objects to the proposed connection on the ground that the drains of the companies operating to the south are not of sufficient capacity to carry the flow from the city drain in addition to that contributed by the Forest Park and other properties originally intended to be served, and that if the conduits should be allowed to be thus overcharged, the efficiency and utility of the plaintiff's sewerage system would be destroyed. It is stated in the bill that the right of the city to connect with the drain of the plaintiff or of the other companies, and the compensation to be paid for such a privilege, are questions which can properly be decided in the pending condemnation suit. The answer of the city and the sewerage commission avers that the drain which has been constructed by the commission under the bed of Liberty Heights avenue, and for which an outlet is desired through the existing sewers of the development companies, was intended for the relief of objectionable drainage conditions in that vicinity, and that the capacity of the drain furnishing an outlet to the south is more than sufficient to accommodate the flow from the city sewer and the present tributary systems as well, and that no damage or injury would result to the plaintiff from the connection which the bill seeks to prevent. The right of the city to connect its drain with the sewer of the Park Land Corporation and the West Forest Park Company while the condemnation proceedings are pending is predicated in the answer on the agreement to which we have already referred.

In the trial of the case below the plaintiff proved its right to use the sewer of the two neighboring companies as an outlet for its own drain, and offered evidence tending to show that the probable flow from the city sewer, when added to the volume of drainage already receivable by the lower system, would overtax its capacity. The city then sought to sustain the defense stated in its answer by producing evidence that the discharge from its drain would not overcharge the system upon which the plaintiff is dependent, and by proving the agreement under which the city was authorized by the cor-

porations owning the outlet drain to make the connection now in controversy. These offers were refused by the court below upon the theory that, under the terms of the agreement by which the plaintiff acquired the right to use the sewerage system to the south of its property, the city, as a stranger to that agreement, could not be permitted to make any connection with the system except by the plaintiff's consent, which had not in fact been procured. In accordance with this view it was held that the city had no available defense to the pending suit. Exceptions were reserved to the refusal of the proffered evidence, and the appeal is from a decree making permanent the preliminary injunction.

[1] The decision of the question before us depends upon the construction of the provisions and recitals we have reproduced from the agreement by which the plaintiff secured its right to the use of the sewerage system belonging to the other parties to that instrument. If it was the intent of the agreement that the owners of the developments south of the highway should not permit the use of their sewers by any other persons or corporations without the consent of the plaintiff, it is clear that the city could not support its claim to such use under a license to which the plaintiff was not a party. But if, on the contrary, the agreement does not properly admit of this interpretation, then the remaining objection urged by the plaintiff as to the probable effect of the discharge from the city's drain upon the value and usefulness of the upper sewers would present a material issue upon which the defendants, as well as the plaintiff, should have been allowed to offer evidence. It was plainly the fundamental purpose of the agreement to provide an outlet for the sewerage system constructed by the plaintiff for the benefit of its property and the associated development of George R. Webb adjoining it on the north. Without such a provision the plaintiff's system was unfinished and useless, but the connection which the agreement permitted made it available and efficient. The drains of the other companies, however, were in no wise dependent upon those of the plaintiff, and did not require the connection to make them serviceable. It is apparent from the agreement that in dealing with the conditions just mentioned the object which the parties had in view was simply to secure to the plaintiff the drainage outlet it needed, and to prescribe the limitations of the right thus conferred. There is no attempt to define the extent to which the system may be used for the property now owned or hereafter acquired by the Park Land Corporation or by the West Forest Park Company, but its use by the *Forest Park Company* was restricted to the drainage from its own and the adjacent Webb property which the contract particularly described. There is an explicit provision to the effect that the *Forest Park Company* shall not permit any other person or cor-

poration to connect with its sewers for the benefit of other property without the consent of the companies owning the system to the south, but we find no corresponding prohibition against the granting of permission by the latter companies for the use of their system by other persons or corporations for other property without the consent of the *Forest Park Company*. The stipulation on this subject is contained in the second paragraph of the agreement, and by its express and unequivocal terms the *Forest Park Company* is the only contracting party to whom the restriction is made to apply. That company is forbidden to allow "any other person or body corporate, except as aforesaid, to connect with, use or drain any other property, through, over or under its property, or in any other manner into its said storm and waste water drains as now or hereafter constructed," without the consent of the other contracting parties and a resolution of its own board of directors. The phrase "except as aforesaid" manifestly refers to the provision in the next preceding paragraph by which the *Forest Park Company* was authorized to use the sewers for the drainage of the Webb property in addition to its own. The effect of the provision was clearly and simply to prohibit the *Forest Park Company* from allowing any drainage, except from the two areas particularly defined, to enter its sewers as tributaries to the system of the other companies without their express permission, and without formal action of its own board of directors on the subject.

In support of its theory that the city could not be authorized to use the lower drain without the consent of the company owning the upper system the appellee relies mainly upon the recital we have quoted from the preamble of the agreement as to the understanding that "no other property except as aforesaid, should be permitted to drain through, over or under the property of the said *Forest Park Company* or of *George R. Webb* as aforesaid, into its said storm and waste water drains, nor permission granted any other person or body corporate whatsoever except as aforesaid, to connect with, use or drain into said storm and waste water drains without the written consent" of the *Park Land Corporation* and the *West Forest Park Company* and a resolution of the *Forest Park Company* authorizing such user. It is urged that the effect of this language is to require the consent of *all* the contracting companies before any third parties should be allowed to make connections with *either* of the systems mentioned in the agreement. According to our reading of the recital quoted it contemplates, like the formal stipulation we have already considered, that the restriction to which it refers should apply exclusively to the *Forest Park Company* and its property in the use of the connecting drain, except in so far as the benefit of the agreement is extended by its terms to the adjacent

development which it specially designates. The drainage prohibited from other sources was such as the Forest Park Company might possibly have allowed to pass "through, over or under" *its own property* "into its said storm and waste water drains." In effect the recital stated that drainage from property other than that described was understood and agreed not to be allowed to enter the Forest Park Company's sewers, and that permission should not be granted by that company to any person or corporation, with the exception mentioned, "to connect with, use or drain into said storm and waste water drains," without the consent of the other parties. The only drains to which the term "said" can be held to refer as thus used are those of the Forest Park Company which had just been distinctly specified. The evident purpose of the recital was to emphasize the prohibition it was undertaking to express by applying it both to *property* and to *persons or corporations* for whose benefit the drains might be desired in excess of the service contemplated by the agreement. It was stated that no *other property should be permitted to drain* into the sewer of the Forest Park Company, and that no permission should be granted any *other person or corporation*, with the exception mentioned, to *connect with its drains*, without the approval of the two companies through whose sewers the additional drainage would have to be discharged. There is nothing in the preamble or in the main body of the agreement which, in our opinion, forbids the Park Land Corporation and the West Forest Park Company to allow others to use their sewers without the consent of the Forest Park Company, or to entitle that company to object to any use of the former companies' drains, which would not impair the efficiency of its own system.

[2] In the disposition of the case below the question as to the effect which would probably be produced upon the appellee's use of the outlet by the admission of the drainage from the city's sewer was treated as immaterial, but this was only upon the theory that the appellee's consent was prerequisite to the proposed connection. It is apparent that in the view we have adopted as to the proper construction of the agreement before us the issue just stated is material and vital to the case presented by the pleadings. The city is sought to be enjoined from connecting its drain with that of the Park Land Corporation and the West Forest Park Company, on the ground, as stated in the bill of complaint, and as already indicated, that the plaintiff's sewerage system would be thereby irreparably injured. In order to show that it was not acting as a mere trespasser the city offered to prove that the owners of the drain it was about to use had given it that right by formal agreement, and,

for the purpose of meeting the allegation made and the evidence adduced by the plaintiff as to the anticipated injury to its interest from the additional volume of drainage thus required to be accommodated, the city proffered the testimony of a number of expert witnesses to show that the sewer leading to the outlet was of such ample capacity as to preclude any reasonable apprehension of injury to any of the interests involved from the action proposed to be restrained. The plaintiff's right to the remedy by injunction prayed in its bill depended upon its ability to prove the injury it had alleged, and as it had offered evidence in support of that averment, the defendants should have been allowed an equal opportunity to present proof to the contrary. It results from the view we have stated that the decree making the injunction permanent must be reversed and the cause remanded for further proceedings.

Decree reversed, with costs, and cause remanded.

(123 Md. 73)

GOLDSBOROUGH et al., State Roads Commission, v. POSTAL TELEGRAPH CABLE CO. (No. 18.)

(Court of Appeals of Maryland. May 1, 1914.)

1. BRIDGES (§ 29\*)—STATE HIGHWAYS—CONTROL—ACTION—ROAD COMMISSION.

While the state roads commission is not a corporate body, yet it is a quasi corporation vested with the powers to control the public highways, and hence the commissioners may sue to recover compensation to which the state is entitled for the exclusive use of part of a bridge acquired by the commission.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. § 71; Dec. Dig. § 29.\*]

2. BRIDGES (§ 29\*)—STATE HIGHWAYS—CONTROL—RIGHT TO RECOVER.

LAWS 1910, c. 116, § 32P, authorized the state roads commission to acquire a certain bridge across the Susquehanna river, together with all land, approaches, franchises, and easements belonging to any person or corporation. The bridge, over which the former owners had permitted defendant telegraph company to carry its wires in return for a stipulated compensation, was acquired by purchase, and the conveyance expressly gave to the commission the right to collect all rental. Held that, despite Declaration of Rights, art. 14, declaring that no aid, charge, tax, burden, or fees shall be rated without consent of the Legislature, the telegraph company, which enjoyed a right distinct from other members of the public, was, despite the acquisition of the bridge by the state, liable for payment of the agreed rental.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. § 71; Dec. Dig. § 29.\*]

Appeal from Superior Court of Baltimore City.

"To be officially reported."

Action by Phillips Lee Goldsborough and others, constituting the State Roads Commission, against the Postal Telegraph Cable Company. From a judgment sustaining a demurrer to the declaration, plaintiffs appeal. Reversed and remanded.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Leon E. Greenbaum, of Baltimore, for appellants. Watson E. Sherwood, of Baltimore (Lemmon & Clotworthy, of Baltimore, on the brief), for appellee.

CONSTABLE, J. This is an appeal by the state roads commission from a judgment rendered upon the sustaining of a demurrer filed by the appellee to the declaration in a suit instituted by the appellant, for and on behalf of the state of Maryland.

The declaration is in the following language:

Phillips Lee Goldsborough, Ovington E. Well-er, Ira Remsen, William Bullock Clark, Edward E. Goslin, Walter B. Miller, and Andrew Ramsay, constituting the state roads commission of Maryland, for and on behalf of the state of Maryland, by Leon E. Greenbaum, their attorney, sue the Postal Telegraph Cable Company, a corporation.

For that on the 22d day of August, in the year nineteen hundred and eleven, the Conowingo Bridge Company granted and conveyed to the state roads commission of Maryland, for and on behalf of the state of Maryland, in consideration of the sum of \$88,000, a certain bridge in the state of Maryland over the Susquehanna river, and in said grant the right was expressly given to the state roads commission, for and on behalf of the state of Maryland, to collect any and all rentals and income accruing from the use of said bridge by the defendant, and that at said time, and for a long number of years prior thereto, the defendant had been using said bridge for the conveyance of wires thereover with the consent of the Conowingo Bridge Company, and had been paying the Conowingo Bridge Company rentals and income for the use thereof, which said rentals and tolls had amounted from the year 1906 to 1911 to the sum of \$95.75 semi-annually in each year, for which amount bills were regularly sent by the Conowingo Bridge Company to the defendant and paid by the defendant, up to and including the installment due on the 1st of July, 1911; and for that since the 22d day of August, 1911, said wires have remained on said bridge to the same number and in the same manner as theretofore, and without any change in the arrangement between the parties as to the price to be paid or the use to be made by the defendant of said bridge, and that said use continued with the intention on the part of the plaintiffs that payments would be made of the same amount as had been paid to the Conowingo Bridge Company, but although bills have been sent and demand made by the plaintiffs for the installments of \$95.75 due on the 1st day of January, 1912, and on the 1st day of July, 1912, payment thereof has been refused and is still refused by the defendant, and the plaintiffs allege that the sum of \$191.50 is due and owing at the present time by the defendant to the plaintiffs for the use of said bridge for its wires from the 1st day of July, 1911, to the 1st day of July, 1912.

And the plaintiffs claim \$400.

[1, 2] The ground of the appellee's demurrer is based upon the provisions of article 14 of the Declaration of Rights, wherein it is declared:

"That no aid, charge, tax, burthen or fees ought to be rated, or levied, under any pretense, without the consent of the Legislature."

It is not contended that the Legislature could not impose a charge for the use of a public bridge by telegraph companies; indeed that is conceded, but it is denied, in the absence of legislative authority, that the roads commission has the power to so charge. That is a question about which much can be said on both sides, under the act creating the state roads commission; but the declaration in the present case does not render the settlement of that question necessary for a determination of this particular case. We do not, therefore, deem it expedient, under this record, to go into the broad question as to what rights in general the state roads commission can exercise over corporations using the public highways of the state in carrying out their corporate purposes. We will therefore confine ourselves to the inquiry whether the allegations of this declaration warrant a recovery.

The suit was instituted in the names of the members constituting the board of the state roads commission, "for and on behalf of the state of Maryland." If, then, the state is entitled to money due for use of public roads, it was proper that the agency having charge and control of that department should bring suit in its behalf. The commission, by the terms of the act creating it, was not in the full sense a corporate body, yet was a quasi corporation, vested with powers of control and regulation over the public highways, and charged with the duty of administering and supervising that department of the state. For all matters coming within the scope of their duties and obligations they could therefore sue, and were liable to be sued. See *O'Neal v. School Commissioners*, 27 Md. 227; *School Commissioners v. School Commissioners*, 35 Md. 201; *Clark v. Harford Agricultural Ass'n*, 118 Md. 608, 85 Atl. 503; *Frances' Principles of Corporation Law* (2d Ed.) 19 and 20; 28 Cyc. 128.

By Act of Assembly 1910, c. 116, § 32P, now section 48, art. 91, of Bagby's Code, the commission was authorized and directed to acquire by purchase, condemnation, or otherwise the Conowingo bridge across the Susquehanna river, together with all land, roads, approaches, rights, franchises, and easements belonging to any person or corporation, for the purpose of connecting the improved roads of Cecil and Harford counties. The narr. alleges that the bridge was acquired by purchase, and that in the deed of grant the right was expressly given to the commission to collect all rentals, for and on behalf of the state, accruing from the use of the bridge by the appellee. It was further averred that the appellee, by virtue of a contract with the Conowingo Bridge Company, had been paying a certain annual rental for the occupancy by its wires of said bridge, that this payment continued until the acquisition by the commission of the bridge, and that, although the appellee continued to use the bridge as for-

merly, it had nevertheless refused to pay the plaintiff for said use since the day of acquisition. Even if we assume that under the act creating the commission there is no power given the commission to impose rental charges upon new users of the public highways, what reason can there be for not permitting the charge to be made as the assignee of a private owner? There is no attempt under this narr. to enforce a new liability, but the enforcement of an old existing liability, founded upon contract, and which was acquired by the commission as a part of the consideration of the purchase. Although it can be argued that the state never intended to authorize the charging for future privileges upon the public highways, can it be seriously contended that the Legislature, in contemplating large expenditures of money in the purchasing of private bridges and turnpikes, intended that those who were enjoying an exclusive occupancy of a portion of them, for a consideration, were to be relieved of that charge at the expense of the state? The wording of the act shows that the Legislature knew that persons or corporations had certain rights, franchises, and easements in this bridge to which the rights of the traveling public might be subject, for it authorized the commission to acquire them. Can it be conceived that it intended to permit them to be still exercised, without being subject to whatever previous liability there might have been? It cannot be doubted but that, in fixing a price for its property, the bridge company took into consideration the value of this lease it had with the appellee and increased its price accordingly.

We are of the opinion that under the allegations of the narr. there is a liability, and that there was error in sustaining the demurrer.

Judgment reversed, and new trial awarded, with costs to the appellant.

(123 Md. 120)

STATE to Use of STANSFIELD et al. v. CHESAPEAKE & POTOMAC TELEPHONE CO. (No. 30.)

(Court of Appeals of Maryland. March 19, 1914.)

**ELECTRICITY (§ 15\*) — DANGEROUS APPLIANCES — POLES—PROJECTING SPIKES — INVITEE OR LICENSEE.**

Defendant maintained a pole in front of decedent's dwelling on which electric light wires were carried. Projecting from the pole were iron spikes, adapted and intended by defendant for use in ascending the pole. A kitten belonging to decedent's children climbed the pole and remained thereon; whereupon decedent, to rescue the kitten, also climbed the pole by means of the spikes, and, while there, came in contact with defectively insulated wires, and received a shock from the effects of which he died. *Held*, that the presence of the spikes was not an implied invitation to any person to climb the pole for a purpose in no way connected with decedent's business, and that decedent was therefore not an invitee, but, at most, a mere li-

censee, as to whom defendant owed no duty, except not to willfully expose him to risk of injury.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 8; Dec. Dig. § 15.\*]

Appeal from Baltimore City Court; Carroll T. Bond, Judge.

Action by the State to the use of Amanda Stansfield, individually and as next friend of certain minor children, against the Chesapeake & Potomac Telephone Company. From a judgment sustaining a demurrer to the declaration, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, STOOK-BRIDGE, and CONSTABLE, JJ.

Arthur W. Machen, Jr., of Baltimore (Edward M. Hammond, of Baltimore, on the brief), for appellants. R. Lee Slingluff and Shirley Carter, both of Baltimore (Bernard Carter & Sons and Marbury, Gosnell & Williams, all of Baltimore, on the brief), for appellee.

URNER, J. The appeal in this case is from a judgment entered on demurrer to a declaration which alleges, in substance, that the defendant company maintained in one of the highways of Howard county, passing through Ellicott City, a series of poles supporting wires carrying electric current used for telephone and lighting purposes, and that one of the poles was located in front of the dwelling occupied by Harry Stansfield and his family; that projecting from this pole were iron spikes adapted and intended by the defendant for use in ascending the poles, and that the spikes, being conveniently arranged for such use, operated as an invitation to the public, and more particularly to the owners and occupiers of the abutting properties, to ascend the pole by means of the spikes, whenever they might have occasion to do so for any proper purpose, and especially for the preservation of the life of animals or human beings, or for the recovery of personal property, and that, as arranged for such use, the spikes constituted also a representation that the ascent of the pole might be accomplished with safety; that the maintenance of such a series of spikes on a pole used for the support of wires carrying a high-tension current of electricity in a street or highway of an incorporated city was negligent, unusual, antiquated, unnecessary, and improper; that on March 25, 1913, a kitten belonging to the said Harry Stansfield, and a favorite pet of his infant children, climbed said pole and remained thereon, and, his children being greatly distressed at the loss of the kitten, the said Harry Stansfield, relying upon said invitation and representation of the defendant, ascended the pole by means of the spikes for the purpose of recovering the kitten and satisfying his children; that on previous occasions, as the de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



fendant well knew, various persons, including the said Harry Stansfield, had been accustomed to use the spikes to climb the pole in order to recover personal property, and for other purposes; that the defendant negligently permitted the insulation on certain of the wires attached to the pole and carrying a high-tension current of electricity to be insufficient, although it appeared sufficient to persons who, like the said Harry Stansfield, were not familiar with electricity; and that the defendant neglected to warn him of the concealed danger, or to warn the public by sign or notice against climbing the pole by means of the spikes; that the said Harry Stansfield, in ascending the pole in reliance upon said invitation and representation of the defendants, and acting (as he reasonably supposed) in accordance with the intention of the defendant in placing the spikes on the pole, and being ignorant of the hidden danger caused by the insufficiency of the insulation and by the high-tension current, and without any fault or negligence on his part, accidentally came in contact with the insufficiently insulated wires, and in consequence of such contact was instantly killed. Upon the case thus stated the widow and children of the deceased seek to recover damages for the loss they have sustained by this unfortunate accident.

The injury for which the suit was brought having occurred to one who had reached the place of danger by climbing the pole maintained by the defendant for the very purpose of suspending the wires at a suitable and safe elevation above the highway, the question to be determined is whether the declaration shows any violation of duty on the part of the defendant with reference to a person thus situated. While the pole and wires were located on and over a public thoroughfare, they were the defendant's property, and were necessarily subject to its control in order that its obligations to the public might be performed, and that its own interests might be protected. The theory of the suit is that in providing a permanent and convenient means of ascent the defendant impliedly invited the public to use the pole for such purposes as the one which led to the accident. In our opinion, the principle of implied invitation is not applicable to the case presented. There was no community of interest between the defendant and the injured party which induced his visit to the place where he came in contact with the wires. The principle invoked does not apply to those who receive injuries on premises they have entered from motives which have no relation to the business or interest of the proprietor. *Benson v. Baltimore Traction Co.*, 77 Md. 535, 26 Atl. 973, 20 L. R. A. 714, 39 Am. St. Rep. 436; *Kalus v. Bass*, 122 Md. 467, 89 Atl. 731; *Heskell v. Auburn Light, Heat & Power Co.*, 209 N. Y. 86, 102 N. E. 540; *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463; *Purtell v. Philadelphia Coal Co.*, 256 Ill. 110,

99 N. E. 899, 43 L. R. A. (N. S.) 193, Ann. Cas. 1913E, 335. The most favorable view of the case from the standpoint of the declaration is that the defendant passively permitted the use of the pole by the deceased and others for the purposes mentioned. This might relieve them of the character of trespassers, but would leave them in the position of mere licensees, to whom the defendant would owe only the duty to avoid exposing them willfully to the risk of injury. *Heskell v. Auburn Light, Heat & Power Co.*, supra; *Fitzpatrick v. Glass Mfg. Co.*, 61 N. J. Law, 378, 39 Atl. 675; *Rooney v. Woolworth*, 74 Conn. 720, 52 Atl. 411; 15 Cyc. 475. By the decision of this court in *Benson v. Baltimore Traction Co.*, supra, the principle of implied invitation was held not to be intended for the protection of "those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or other relations with the occupant." In *Heskell v. Auburn Light, Heat & Power Co.*, supra, a telephone company, without previous permission, attached its wires to the pole of an electric light, heat, and power company in a public street, but the latter company afterwards tacitly permitted such use to continue. An employé of the telephone company, in mounting the pole to ascertain the condition of the telephone lines, was fatally injured by coming in contact with a wire belonging to the other company which was dangerously placed or defectively insulated. The suit was against the light, heat, and power company. It was held that there was no mutuality between the two companies, and that the injured employé of the telephone company was not on the pole in pursuance of an implied invitation from the defendant, but as a volunteer or mere licensee, "who used the pole subject to all the concomitant conditions and perils, and to whom the sole duty of the defendant was abstention from inflicting intentional or wanton or willful injury."

The demurrer in the case before us admits the allegation of fact that the spikes projecting from the pole afforded a convenient method of ascent, but it does not have the effect of conceding, as a conclusion of law, that the plaintiff was thereby impliedly invited to visit the defendant's overhead fixtures. There could be no possible doubt in the mind of any observer that the spikes were intended for the exclusive use of those engaged in the work of keeping the equipment in order. The very nature of the appliances and of the service in which they were employed made it apparent that their use or occupation by strangers would not be in accord with the interests of those operating the franchise. It is perfectly obvious, therefore, that there was no mutuality of interest between the defendant and the deceased which would enable us to hold that his ascent of the pole was induced by an implied invitation,



In *Simonton v. Light & Power Co.*, 28 Tex. Civ. App. 874, 67 S. W. 530, a child seven years of age was injured by falling from the defendant's pole which it was climbing by means of spikes arranged like those in the present case. It was contended that the provision thus made for ascending the pole constituted an attraction to children, but the court rejected this theory and sustained a demurrer to the declaration.

There is a very broad difference between the case now under consideration, where the injury occurred at a place intended for exclusive possession by those maintaining the fixtures alleged to be unsafe, and the class of cases in which the appliances causing the injury were so placed as to be dangerous to persons who might be reasonably expected to come in close proximity to them while occupying adjacent premises or positions. The case of *Ziehm v. United Electric L. & P. Co.*, 104 Md. 48, 64 Atl. 61, illustrates this distinction. In that case several wires of the light and power company were strung quite near a telephone pole, and while a lineman of the telephone company was descending the pole his hand struck against one of the former company's wires, which was defectively insulated at that point, and he was injured by the current. In his suit against the light and power company it was held that the plaintiff was in the exercise of a duty that required him to go upon the pole, and that it was incumbent upon the defendants to have its lines so placed and insulated as to enable him to perform his work in safety. The same rule was applied to analogous facts in *Hipple v. Edison Electric Illuminating Co.*, 240 Pa. 91, 87 Atl. 297. In *Brown v. Edison Electric Co.*, 90 Md. 400, 45 Atl. 182, 46 L. R. A. 745, 78 Am. St. Rep. 442, a boy who was engaged in cleaning a rain spout at the edge of a narrow roof over the front window of a store was injured as the result of accidentally touching with his head an uninsulated part of an electric light wire suspended about seven inches from the roof. The company owning the wire was sued on account of the accident, and the court said that the nature of the business conducted by the defendant "imposed upon it a legal duty toward every person who, in the exercise of a lawful occupation in a place where he had a legal right to be, was liable to come in contact with the wires charged with this invisible but deadly power." It was held that, as the boy was engaged in a service which he had a right to perform, at a place where he was entitled to be when he was injured, and the evidence did not prove contributory negligence on his part, the case was a proper one for submission to the jury. In *Mullen v. Wilkes-Barre Gas & Electric Co.*, 229 Pa. 54, 77 Atl. 1108, and *Temple v. McComb City Elec. L. & P. Co.*, 89 Miss. 1, 42 South. 874, 11 L. R. A. (N. S.) 449, 119 Am. St. Rep. 698, 10 Ann. Cas.

924, the defendant companies were held liable for injuries sustained by boys who in climbing trees in public streets came in contact with improperly insulated wires strung through the branches.

In all of the cases we have examined on this subject in which the asserted liability was enforced the persons involved in the accidents were not trespassers or mere licensees on the defendant's property, but were in adjacent positions where they could rightfully be, and where they might be reasonably expected to come in close proximity to the source of danger. Where, however, as in the present case, those engaged in the distribution of electric current have placed their wires above and beyond the sphere of peril to the public and to the occupants of neighboring premises, it would be subjecting them to an unduly strict responsibility to require them to provide against the possibility that their own appliances might be utilized by strangers as a means of access to the conditions which prove to be injurious.

The averments of the declaration do not, in our opinion, present a state of facts which, upon any just theory, can be held to impose liability upon the defendants, and we concur in the action of the trial court in sustaining the demurrer.

Judgment affirmed, with costs.

(123 Md. 6)

BAUGH v. ARNOLD. (No. 3.)

(Court of Appeals of Maryland. March 18, 1914. On Motion for Reargument, May 14, 1914.)

1. EASEMENTS (§ 30\*)—CREATION, EXISTENCE, AND TERMINATION—ABANDONMENT OR NON-USER.

Nonuser of an easement for more than 20 years does not afford conclusive evidence of abandonment, but nonuser for the prescriptive period with an adverse use of the servient estate inconsistent with the easement extinguishes it.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77-79; Dec. Dig. § 30.\*]

2. EASEMENTS (§ 24\*)—CREATION, EXISTENCE, AND TERMINATION—TRANSFER OF RIGHT.

No special reference in a deed to an easement appurtenant to the land was necessary in order to convey such easement.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 64-69; Dec. Dig. § 24.\*]

3. EASEMENTS (§ 32\*)—CREATION, EXISTENCE, AND TERMINATION—ADVERSE POSSESSION.

The plowing up of a right of way and the sowing and cultivation of crops thereon year after year was inconsistent with the rights of the owner of such easement, and such obstruction, continuing for 35 years, extinguished the right of way.

[Ed. Note.—For other cases, see Easements, Cent. Dig. § 84; Dec. Dig. § 32.\*]

Appeal from Circuit Court, Howard County; Wm. Henry Forsythe, Jr., and Jas. R. Brashears, Judges.

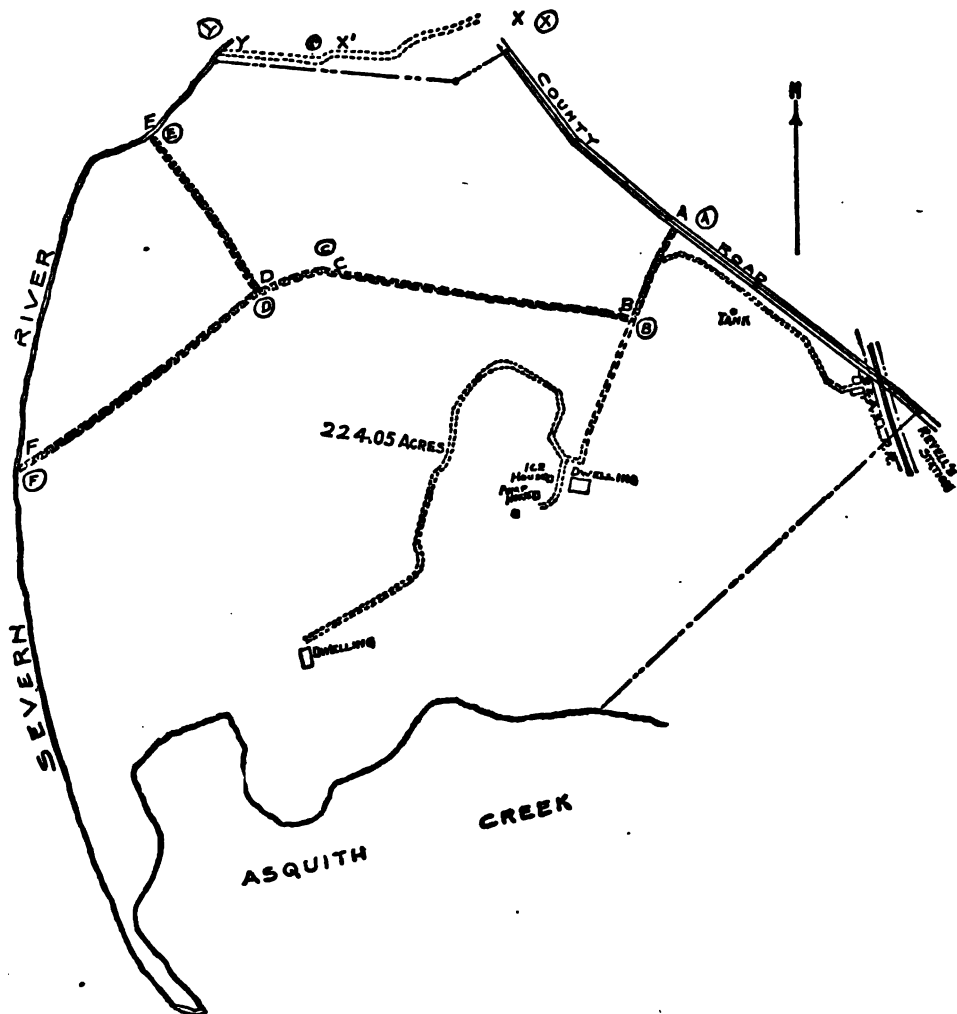
"To be officially reported."

Action by Alton R. Arnold against Edwin P. Baugh, Jr. From a judgment for plaintiff, defendant appeals. Reversed.

The following is a plan of the premises in question:

fused, and, the evidence being submitted to a jury, a verdict was rendered for the plaintiff, upon which judgment was entered.

One of the questions raised by this appeal is: Does the evidence of the plaintiff, cor-



Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Arthur R. Padgett and John Philip Hill, both of Baltimore, for appellant. Robert Moss, of Annapolis (Joseph L. Donovan, of Ellcitt City, on the brief), for appellee.

**PATTISON, J.** This is an action brought by the appellee against the appellant to recover for damages for the obstruction of an alleged right of way of the plaintiff over the lands of the defendant. At the conclusion of the plaintiff's testimony the defendant offered a prayer asking the court to take the case from the jury. This was refused, and at the conclusion of the defendant's testimony the prayer was renewed and was again re-

roborated as it is by the evidence of the defendant, show an abandonment and extinguishment of the easement? After a careful examination of the evidence and the law applicable thereto, it is our opinion that the right of way of the plaintiff, if it ever existed, has been extinguished by its nonuser for a prescriptive period united with an adverse use of the servient estate inconsistent with the existence of the alleged easement.

[1] The law as established in this state (Canton Co. v. Baltimore City, 106 Md. 69, 66 Atl. 679, 67 Atl. 274, 11 L. R. A. [N. S.] 129) and elsewhere is that the mere nonuser of an easement even for more than 20 years will not afford a conclusive evidence of abandonment, but such nonuser for a prescriptive period, united with an adverse use

of the servient estate inconsistent with the existence of the easement, will extinguish it. Washburn on Easements, §§ 551, 552; 14 Cyc. 1195; 10 A. & E. Ency. of Law, 436; Woodruff v. Paddock, 130 N. Y. 618, 29 N. E. 1021; Matter of City of New York, 73 App. Div. 394, 77 N. Y. Supp. 31; Smyles v. Hastings, 22 N. Y. 224; Smith v. Langewald, 140 Mass. 205, 4 N. E. 571; Spackman v. Steidel, 88 Pa. 453; Horner v. Stillwell, 35 N. J. Law, 307; Bently v. Root, 19 R. I. 205, 32 Atl. 918; McKinney v. Lanning, 139 Ind. 170, 38 N. E. 601; Lathrop v. Elsner, 93 Mich. 599, 53 N. W. 791; Louisville v. Quinn, 94 Ky. 310, 22 S. W. 221.

The right of way in this case is claimed by the plaintiff under a grant dated the 19th day of November, 1853, from one Elijah R. Arnold, the then owner of the servient estate, to one Levi Sheckells, the owner at such time of the dominant estate, as claimed by the plaintiff, whereby the grantor therein conveyed unto the grantee "his heirs and assigns, the right and privilege of the original road through his (the grantor's) farm lying in Anne Arundel county that leads to Chaney's creek." The grant by which Sheckells became the owner of the dominant estate, if there was a dominant estate, is not in evidence, but by a deed executed on the 23d day of October, 1877, by Ann M. Insley and Caroline E. Sherbert, the only children and heirs at law of Sheckells, certain lands therein described, said by the defendant to have been the dominant estate, were granted to Thomas H. Arnold, the grantor of the plaintiff; and in said deed reference is made to the fact that the land thereby conveyed "was a part of the same land that is described in a deed executed on the 19th day of November, 1853, by E. R. Arnold and wife to Levi Sheckells," and recorded among the land records of Anne Arundel county in liber N. H. G. No. 2, folio 626, etc.; and in this deed were granted to Thomas H. Arnold the right and ways, etc., appurtenant to the lands so conveyed, "especially the right of way granted to the said Levi Sheckells and assigns by deed from E. R. Arnold, dated the 19th day of November, 1853, and recorded among said land records in liber N. H. G. No. 2, folio 630.

[2] The lands mentioned in the deed from Ann M. Insley and Caroline Sherbert to Thomas H. Arnold were thereafter conveyed, on the 23d day of February, 1885, by the said Thomas H. Arnold unto his son, Alton R. Arnold, the plaintiff, together with the ways, appurtenances, and advantages thereto belonging. In this deed, however, no special reference is made to the right of way granted on November 19, 1853, by Elijah R. Arnold to Levi Sheckells, nor was special reference thereto necessary to convey such right had it existed at such time. The failure to mention it specially is referred to only as reflecting upon the fact whether or not at such time it existed.

The plaintiff, when upon the stand, located

upon the lands of the defendant the right of way mentioned and described in the grant from Arnold to Sheckells dated November 19, 1853, as "*the original road*" through the farm at that time owned by Elijah R. Arnold, the grantor, and, at the request of the defendant, located the said right of way upon a plat, which the reporter is requested to insert in his report of this case. The original road as located by him is designated on said plat as A, B, C, D, E. The point A is on the county road at or near the present entrance of the defendant's property, and is the place at which the obstruction complained of is located, and the point E is on the bank above Chaney's creek. The line from D to F upon the plat represents a private road leading from D to the Severn river and over which the plaintiff claims no right of way, although he and others have frequently used it, by the permission of the prior owners of the land now owned by the defendant. The bank of Chaney's creek at point E is variously estimated by the witnesses to be from 30 to 60 feet.

[3] The evidence of the plaintiff discloses that about 35 or 40 years ago Sheckells used the road or way from A to E in hauling wood to Chaney's creek; that, upon reaching the point E, they would throw the wood down the bank into the water below. The plaintiff states that he recalls the use of this road by Sheckells for the purposes aforementioned, but he (the plaintiff) never used the way from D to E, nor has he ever heard of any one else using that part of said road, since it was used by Sheckells 35 or 40 years ago, and, in fact, he never knew of the alleged right of way over the land of the defendant until about 3 years ago, when he discovered it in the grant above referred to from Elijah R. Arnold to Levi Sheckells. He further testified that the land between D and E has been continually plowed up, sowed, and cultivated in crops—that is, such part of it as lies between D and the wooded lands bordering upon the bank of the creek—and that it is now impossible to distinguish at such place exactly where the road once ran.

John Day, a witness produced by the plaintiff, testified that he was 82 years old; that he had lived near the defendant's property all his life; that he knew Mr. Sheckells, also knew his daughters, the grantors in the deed to Thomas H. Arnold; he was also familiar with the alleged right of way over the lands of the defendant as located by the plaintiff, and that Sheckells used this right of way to haul wood to Chaney's creek "as long as there was any wood to be hauled"; that he had recently seen the road, but he could not locate it over the field, because it had been cultivated over; that it had been cultivated for "a good ways back" in rye, corn, and other crops; he could not say that Mr. Arnold had cultivated it or that Mr. Baugh had, but it had been cultivated by Mr. Revell.

John Y. Hall, another witness produced by

the plaintiff, testified that he was 47 years of age. He knew the property now owned by the defendant, and had lived on the adjoining farm all his life. He was then asked:

"Did you know the road that led through Baugh's farm to Chaney's creek? Ans. I know the road that used to before it was ploughed up 35 years ago."

Mr. William T. Revell, a witness produced on the part of the defendant, testified that he owned the property now owned by the defendant until he conveyed it to the defendant in the year 1907; that he owned it for about 4 years; prior to that his mother owned it for 25 or 30 years; that he lived upon the farm all the time that his mother and he owned it; that the whole time he was upon the farm, so far as he knew, no one claimed or exercised any right of way over it; he permitted Mr. Arnold and others to use the landing on Asquith creek and the Severn river for "the loading of manure and the loading of watermelons." He further testified that when he first went upon the farm there was a peach orchard between D and E, upon the alleged right of way. This orchard he grubbed up, and thereafter the land was planted and cultivated in crops by him, and that during the whole 30 years thereafter that he was upon the property no one ever used any road or way from D to E, in going to Chaney creek.

"An adverse and hostile use of the servient estate inconsistent with the rights of the owner of the easement will start the statute of limitations running to defeat his right, and a continuous adverse use for the period of the statute will establish a right by prescription in the adverse claimant." Jones on Easements, § 865.

The plowing of the ground and the sowing and cultivation of crops therein, such as rye and corn, year after year, upon the alleged right of way, as shown by the plaintiff's testimony, was inconsistent with the rights of the owner of the easement, and this obstruction, continuing for 35 years, extinguished such right of way or easement, and thus the plaintiff was not entitled to recover, and therefore the prayer of the defendant taking the case from the jury should have been granted.

There are some other questions presented, but, inasmuch as we are of the opinion that the plaintiff failed to make out a case for the jury, and is therefore not entitled to recover, we will not consider them. We will reverse the judgment below without granting a new trial.

Judgment reversed without a new trial, with costs to the appellant.

#### On Motion for Reargument.

BOYD, C. J. Motion for reargument overruled, but, owing to certain briefs, etc., being improperly in the record, the judgment will be modified to extent of requiring the appellant to pay one-fourth of the costs in this court.

(123 Md. 327)  
CARTER et al. v. MULLIN et al. (No. 35.)  
(Court of Appeals of Maryland, May 14, 1914.)  
TRUSTS (§ 191\*)—CONSTRUCTION OF TESTAMENTARY POWER.

Under a residuary clause bequeathing and devising all the remainder of property to trustees in trust to invest and collect and invest the rents so as to increase the corpus of the estate, and empowering them "to invest the trust funds in their hands," "and the same to sell again and convey for the purposes of reinvestment, etc., as often as in their judgment, etc., it shall be wise to do so," the trustees had power to sell the property, including the leasehold property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 243; Dec. Dig. § 191.\*]

Appeal from Circuit Court of Baltimore City, Carroll T. Bond, Judge.

"To be officially reported."

Action by Michael A. Mullin and another, trustees of Thomas W. Slater, deceased, against Julian S. Carter and others. Decree for plaintiffs, and defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Shirley Carter, of Baltimore (Bernard Carter & Sons, of Baltimore, on the brief), for appellants. Michael A. Mullin, of Baltimore, for appellees.

CONSTABLE, J. The sole question involved in this appeal is whether or not, under the powers in the will of Thomas W. Slater, the trustees had power to make sale of the leasehold property, the subject of this case.

By will Thomas W. Slater left a large estate to three trustees. After, by different clauses thereof, bequeathing certain definite sums to the trustees for certain trusts therein set out, he devised and bequeathed all the rest and residue of his estate to the trustees to execute the trusts therein set out for the benefit of his son and his son's children, upon the contingencies therein set out. The trustees named were also named as executors.

In March, 1896, upon application, the parties thereto being all the parties in interest who were in esse at the time, the circuit court of Baltimore City assumed jurisdiction of the trusts, and an auditor's account was passed, setting apart certain portions of the estate to be held by the trustees in divisions, under the different clauses of the will. Held under the residuary clause was the leasehold property which is the subject of the sale in this case.

In April, 1913, the trustees, the appellees herein, entered into an agreement with Julian S. Carter for the sale of the said leasehold property, subject to the ratification thereof by the court. Said sale was reported and duly ratified without objection. In said report it was stated that Julian S. Carter

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was acting as the agent of the Pennsylvania Railroad Company. Thereafter, upon the purchaser refusing to pay the purchase price upon the tender of a deed by the trustees, the trustees filed a petition praying that the purchaser be compelled to comply with the terms of sale. Julian S. Carter and the Manor Real Estate & Trust Company answered, disclosing that the said Carter was acting as agent for the Manor Real Estate & Trust Company in the purchase, and claiming that the trustees had no power under the will of Thomas W. Slater to make sale of the said property, and therefore the court was without jurisdiction to ratify the same, and denying that the court could ratify the sale under its general chancery jurisdiction, since the requirements of the act of 1868, c. 273, or of section 198 of article 16 of the Code (Bagby's Code, § 228, art. 16), had not been complied with. The court thereupon decreed that the said Carter and the Manor Real Estate & Trust Company pay the amount of purchase money, and the trustees convey the property, and, upon the failure of the purchaser to comply before a certain day, that the writ of *feri facias* issue. This appeal was thereupon prosecuted.

So much of the residuary clause as is important for the purpose of a determination of this question is as follows:

"In trust and confidence nevertheless that they will invest the same, so far as the same may be uninvested, and collect and invest the rents, issues, and profits thereof in such manner as to increase the corpus or principal thereof."

In a subsequent clause there is this provision:

"For the purpose of enabling the trustees, hereinbefore named, the better to execute the several trusts, hereinbefore provided, I hereby authorize and empower them to invest the trust funds in their hands in such good and sufficient securities as they, or a majority of them, shall select, and the same to sell again and convey for the purposes of reinvestment or distribution as often as in their judgment, or that of a majority of them, it shall be wise to do so."

This court has so recently, in two carefully considered cases, reviewed the authorities on the question here involved and announced the law applicable that we deem an extended discussion unnecessary. The appellants contend that by the last clause "the testator had reference only to the income, which he had already given them power to invest so as to increase the corpus, and the moneys he had bequeathed for investment by them," and did not refer to that part of the corpus which was invested in the lifetime of the testator. In the case of *Schloendorn v. Schmidt*, 115 Md. 74, 80 Atl. 309, the same contention was made.

"It is contended by the appellee that the power conferred upon the trustees in this case, under the will of Frederick W. Schloendorn, 'to invest and reinvest said rest, residue and remainder of my estate, in their judgment and discretion, and to pay the net income, \* \* \* etc., has reference only to the 'trust moneys'

coming into the hands of the trustees,' and confers no power upon them 'to sell the real estate of which the testator took title during his lifetime,' and which forms a part of 'the rest, residue and remainder' of the estate."

After a thorough review of the authorities the opinion concludes:

"We therefore think that it can be inferred from the power given, under the will, to the trustees 'to invest and reinvest, in their judgment and discretion, the said rest, residue and remainder' of his estate, that it was the intention of the testator to confer upon such trustees the power to sell, in their judgment and discretion, the property of the estate, real or personal, including the property of which the testator died seised and possessed, as well as any property thereafter acquired by the trustees."

To the same effect is the case of *Preston v. Safe Deposit & Trust Co.*, 116 Md. 211, 81 Atl. 523, Ann. Cas. 1913C, 975.

When, therefore, the testator, for the purpose of enabling the trustees "the better to execute the several trusts hereinbefore provided," empowered them to invest the "trust funds in their hands," we think, upon the authority of the above cases, that it is clear that his intention was to arm them with full powers to sell the property of the estate, irrespective of whether or not the title to that particular portion had been held by the testator in his lifetime. That the words used were "trust funds," instead of trust estate, we do not think indicates that he intended that only money accruing by way of income was to be used for investments for all through the will the words are used in the sense adopted by us. A study of the language of the whole will shows that by the use of the language "so far as the same may be uninvested" the testator did not intend to limit the power of the trustees to invest, and, even though it should appear that he had done so, yet it becomes apparent that such was not his intention, when, in the effort to remove any doubt that might arise from the expressions used in the different clauses, he adds the general clause to enable them the better to execute the several trusts—not all but the one under the residuary clause but "the several trusts hereinbefore provided."

The case of *Ball v. Safe Deposit & Trust Co.*, 92 Md. 503, 48 Atl. 155, 52 L. R. A. 403, relied upon by the appellants, is readily distinguishable, from the fact that in the will in that case the testator expressly said that the property in question was not to be sold.

Since the appointment by will had been sanctioned by the court upon assuming jurisdiction, it was proper and necessary that the sale should have been made subject to the ratification by the court.

The decrees appealed from will therefore be affirmed; but under the circumstances of this case we think it proper that the costs of these proceedings in this court be paid by the trustees out of the estate in their hands.

Decrees affirmed, appellees to pay the costs in this court.

(123 Md. 320)

**MAYOR AND CITY COUNCIL OF BALTIMORE v. JOHNSON. (No. 32.)**

(Court of Appeals of Maryland. May 12, 1914.)

**1. MUNICIPAL CORPORATIONS (§ 278\*) — ASSESSMENT OF BENEFITS—BENEFITS TO PROPERTY.**

Before a city can assess abutting property with benefits caused by the opening of a street, the grade of the street should be first established; since the cost of cutting or filling necessary to make the abutting land conform to the established grade should be considered in determining the benefits.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 734-738, 744; Dec. Dig. § 278.\*]

**2. EMINENT DOMAIN (§ 101\*) — DAMAGES — CHANGE IN GRADE OF STREET.**

The rule that damages are not ordinarily recoverable for an injury to adjacent land caused by a lawful change in the grade of a public highway is confined to cases in which no part of the abutting property is taken for the purpose.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 269, 270; Dec. Dig. § 101.\*]

**3. MUNICIPAL CORPORATIONS (§ 513\*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—INJUNCTION—JURISDICTION—ADEQUATE REMEDY AT LAW.**

Since a property owner has an adequate remedy by appeal under Local Laws of Baltimore City, § 179 (Baltimore City Code 1892, art. 48, § 10), providing for an appeal to the Baltimore city court by any person dissatisfied with an assessment of benefits, etc., he could not maintain a bill in equity to enjoin proceedings for the assessment of benefits on the ground that the assessment was made before the street grade was established.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1188-1193, 1195-1206; Dec. Dig. § 513.\*]

Appeal from Circuit Court No. 2 of Baltimore City; James P. Gorter, Judge.

"To be officially reported."

Bill by Jessie C. Johnson against the Mayor and City Council of Baltimore, a corporation. Decree for plaintiff, and defendants appeal. Reversed, and bill dismissed.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Robert F. Leach, Jr., of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellants. Ward B. Coe, of Baltimore, for appellee.

**PATTISON, J.** The appellee in this case filed her bill in circuit court No. 2 of Baltimore city against the appellant, alleging therein that she is the owner of a lot of land on the southwest side of Green Spring avenue, in the city of Baltimore, and that the city, in extending Park Hill avenue from Park Heights avenue to Green Spring avenue, has condemned a strip of said land 1,000 feet in length and 50 feet in width, for which the appellee has been awarded by the commissioners for opening streets the sum of \$4,935, and has been assessed with benefits to her abutting land a like sum of \$4,935;

from which action of the commissioners an appeal has been taken by her to the Baltimore city court, where the case is now pending.

The bill further alleges that in condemning said lands for the purposes aforesaid the grade of the street has not been established, and the city engineer has refused to establish such grade, although the appellee has requested him to do so, and has tendered him the costs thereof. The reason assigned by the engineer for his refusal to establish the grade being "that the proceedings of the commissioners for the opening of the Green Spring parkway have not advanced to the point where we can request the city surveyor to officially establish this grade," but suggested that the tentative street grade made by Joseph W. Shirley, chief engineer of the topographical survey, in compiling his preliminary plans for the parkway would, no doubt, be finally adopted without any material change as grade establishments, and that such grade would answer the purpose in ascertaining the quantity of excavation or fill to be made.

The bill also alleges that:

"Until the grade is established it is impossible that said appeal can be tried fairly and with justice either to your oratrix or the defendant, because one of the factors or elements in determining either benefits or damages will be the necessary cost of cutting or filling her adjacent property abutting on said avenue so to be opened, and this cost cannot be estimated until said grade is established."

The bill further alleges that the plaintiff has asked that the trial of the case on appeal be postponed until the grade of the street be established, but the defendant has refused to consent to such postponement, and the case has been set for trial and will soon be reached in regular course upon the docket.

The prayer of the bill asks that the defendant be "enjoined from proceeding with the trial and hearing of the appeal in Baltimore city court until the establishment of the grade of Park Hill avenue so condemned and to be opened."

The defendants demurred to the bill, and, their demurrer being overruled, the appeal is taken from the order overruling such demurrer.

[1] The main question presented by this appeal is whether the grade of the street opened through the lands of the appellee should be first established by the city before it be permitted to assess the appellee with benefits to her adjacent lands, caused by the opening of said street.

It was said by Judge Boyd in the case of *Mayor and City Council of Baltimore v. Smith*, 80 Md. 470, 81 Atl. 425:

"The evidence shows that a number of the lots of the company which will front on the proposed street, and have been assessed for benefits, were below the established grade of the street. The company offered to prove the amount of filling necessary to bring them to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that grade, to fit them for use for building purposes. The city objected, but the court overruled the objection, and permitted the company to prove the estimated amount of filling necessary in each of the lots. In such cases jurors are entitled to have before them any facts that will aid them in reaching proper conclusions. The opening of the street having been determined to be a direct benefit to these lots, the next inquiry was how much will they be benefited. Different modes may be adopted for determining that question. A lot which would be left eight feet below the grade of the street after it is opened would not be benefited as much as it would be if on the level of the proposed street. Hence, in ascertaining the amount of benefits, testimony tending to show the cost of filling the lots to the level of the established grade will be relevant. The jury was authorized by the ordinance to view the premises, and did so in this case. When they went upon the property the ground to be included upon the bed of the street might appear to be level, or nearly so with that adjoining it on either side, and hence, in assessing benefits, they might have been misled, unless they were informed how much filling would be required to bring the adjoining property to the level of the established grade and what the cost would be. If a lot was worth \$1,000 before the opening of the street and would be worth \$2,000 after it was opened, without any work being done on it, the benefit to it would manifestly be \$1,000; but, if it would cost \$500 to bring it to the grade of the street, so as to give it the value of \$2,000, it is equally clear it would really only be benefited \$500."

And the court there held that the evidence objected to by the city was properly admitted by the court below.

[2] The rule established by the decisions of this court that damages are not ordinarily recoverable for any injury to adjacent land caused by a lawful change in the grade of a public highway (*Green v. City & Suburban Ry. Co.*, 78 Md. 294, 28 Atl. 626, 44 Am. St. Rep. 288; *Offutt v. Montgomery County*, 94 Md. 115, 50 Atl. 419; *Cumberland v. Willison*, 50 Md. 138, 33 Am. Rep. 304) is confined to cases in which no part of the abutting property is taken for the purpose (*Baltimore v. Garrett*, 120 Md. 608, 87 Atl. 1057), and in cases like the one before us, where the grade of the street is established for the first time when the street is opened, the cost and expense of making the abutting land conform to the use of the street should be considered in determining the extent that such abutting lands are benefited by the opening of the street.

In this case the benefits to the appellee's abutting land were assessed at \$4,935. The grade of the street not being established at the time, the estimate of benefits was made by the commissioners for opening streets, the amount of cost or expense of cutting or filling necessary to make the abutting land conform to an *established* grade of the street was not considered by them, and their estimate was made without regard to such cost and expense.

When a public street or highway is to be opened, and land is to be condemned for the bed of the street or highway, it is but fair and equitable that the grade of such street or highway should first be established, in order that those who are to determine the ben-

efits, if any, that the opening of such street or highway will be to the abutting lands may estimate the necessary cost of placing such abutting lands in a condition to receive the advantages of the street or highway as opened and graded; and the grade so established should be the one, so far as it can then be determined after a proper consideration of the rights and interests of the adjacent landowners, that for all times will best subserve the public interest and convenience. Not to establish a grade at the time when the street is opened, but at such time to assess the benefits without regard to the costs and expenses to which the adjacent landowners may be subjected in cutting or filling their lands so as to enable them to receive the advantages of the road so opened, would, we think, be unfair and inequitable to them. The grade of a street is so materially involved in ascertaining the amount of benefits to be assessed against the abutting lands, that it is right and proper, in our opinion, that a permanent grade, and not a tentative one, such as is here referred to by the city engineer, should be established before the city should be permitted to assess benefits to abutting lands, caused by the opening of such street or highway.

[3] But this appeal presents the further question whether the court of equity had jurisdiction to grant the relief sought in this case.

In cases like the one before us section 179 of the Local Laws of Baltimore City (section 10, art. 48, of the Baltimore City Code of 1892) provides for an appeal by "any person or persons or corporation who may be dissatisfied with the assessment of damages or benefits," etc., by petition in writing to the Baltimore city court, and that court is given "full power to hear and fully examine the subject and decide upon said appeal."

The appellee had the right to have her appeal heard by the Baltimore city court, to which she appealed, and it was within the jurisdiction of that court to hear and determine all questions connected with those proceedings in which she was interested (*Baltimore v. Coates*, 85 Md. 535, 37 Atl. 18), including the question here presented—that is, whether or not the grade of the street opened through the lands of the appellee should be first established by the city before it be permitted to assess the appellee with benefits to her adjacent lands, caused by the opening of said street; and from the action of that court in ruling upon this question a further appeal will lie to this court. The appellee had her adequate remedy in the Baltimore city court, or in this court on appeal from its action, and thus the equity court was without jurisdiction to grant the relief sought.

We must therefore reverse the order of the court below.

Order reversed, and bill dismissed, with costs to the appellant.

(123 Md. 301)

**PAINTER et al. v. UNITED STATES FIDELITY & GUARANTY CO.** (No. 6.)  
(Court of Appeals of Maryland. April 17, 1914.)

**1. INSURANCE (§ 549\*)—INSPECTION OF DEAD BODY.**

Insured, whose life was covered by life and accident policies, was seized with a fit of vomiting on a steamer and fell into a river where death ensued. Upon recovery of the body, his vital organs were removed and sent to a medical expert for examination to ascertain the cause of death. Complainant, who had insured deceased against death resulting directly from bodily injuries and sustained solely through accidental means, was denied the right to participate in the examination, although repeated demands were made for that right and for portions of the vitals. *Held* that, though complainant did not pay, as was agreed, part of the cost of the examination, from which it was excluded, its right to an examination of the vital organs pursuant to the provision of a policy was not lost.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1356; Dec. Dig. § 549.\*]

**2. DEAD BODIES (§ 1\*) — RIGHT TO DEAD BODIES.**

A person may dispose of his body by will; but, in case he makes no disposal, the surviving husband or wife or next of kin have a quasi-property right in the body which allows them to decide who shall have its custody in preparing it for burial.

[Ed. Note.—For other cases, see *Dead Bodies*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

**3. INSURANCE (§ 549\*)—AUTOPSY—RIGHT TO MAKE.**

An accident policy provided that the insurer should have the right to examine the person of the insured and to make an autopsy. After insured's death, his vital organs were removed from the body, which was buried. *Held*, that the heirs and next of kin of the insured could not deny complainant the right to examine the vitals, which the contract of insurance accorded to complainant.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1356; Dec. Dig. § 549.\*]

Appeal from Circuit Court of Baltimore City; Henry Duffy, Judge.

"To be officially reported."

Bill by the United States Fidelity & Guaranty Company, in which Martha S. Painter and another intervened. From a decree for complainant, defendants appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Arthur L. Jackson, of Baltimore, for appellants. Randolph Barton, Jr., and J. Kemp Bartlett, both of Baltimore (Barton, Wilmer & Stewart and Bartlett, Poe, Claggett & Bland, all of Baltimore, on the brief), for appellee.

CONSTABLE, J. The appellee, a corporation of the state of Maryland, engaged in the general surety and casualty business, filed a bill on its own behalf and on behalf of all others similarly interested, against the appellant Charles Glasor, alleging, in substance, as follows: That on the 21st day

of April 1913, it issued a policy to Edward O. Painter of Jacksonville, Fla., providing, among other things, that it would pay to the family of the assured the sum of \$20,000 in the event of his death "resulting directly and exclusively of all other causes from bodily injuries sustained during the life of the policy solely through accidental means (excluding suicide, sane or insane, or any attempt threat, sane or insane)." That on the 22d day of May, 1913, the said Painter died, it being claimed that he fell from a ferry boat near the city of Jacksonville and was drowned. Whether death was the result of the fall, or whether he was drowned, or whether death was the result of natural causes or other cause, was unknown to the complainant, but was being carefully investigated. That shortly after the death of said Painter portions of his brain, lungs, stomach, liver, kidneys, and other organs were taken from his body and shipped to Baltimore for the purpose of having an analysis made thereof. That in pursuance of the clause in said policy providing as follows, "The company shall in case of injury or disability, have the right and opportunity to examine the person of the assured or beneficiary, when and as often as it requires, and shall also have the right and opportunity to make an autopsy in case of death," the complainant demanded an opportunity to make an autopsy, but said opportunity had been refused it. That an examination of said organs was made by the said Charles Glasor, a chemist, and by a Dr. McCleary, a pathologist, acting under the instructions of the said Glasor, and that a report of said examination had been forwarded to the coroner of Duvall county, Fla. That the complainant claims, under the said provision of the policy, the right to have independent examination made by a chemist and pathologist. It is further alleged that the family of the deceased or their representatives have demanded the organs from the said Dr. Glasor, and it is charged that, if the organs are allowed to pass out of the possession of the said Glasor and into the possession of the representatives of the family, the ability of the complainant, and all the other insurance companies carrying insurance on the life of the assured, amounting to more than \$1,000,000, will be interfered with, and the question of the condition of the assured at the time of his death may be impossible to determine. The relief prayed for was an injunction restraining the defendant Glasor from parting with the possession of the organs then in his possession, subject to the further order of the court. The court granted the relief prayed, and two days thereafter the appellee filed in the cause a petition setting out just what portion of the organs of the deceased Dr. Glasor admitted having in his possession, and alleging that Dr. Glasor

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



had informed it that, shortly before the granting of the injunction, he had turned over to representatives of the family a portion of the remains previously in his possession. It is further alleged that from the attitude of the representatives of the family it was impossible to reach an agreement as to a further examination. Therefore the prayer was that a receiver might be appointed to take charge of the organs then in possession of Charles Glasor, and that said receiver be authorized and directed to make a complete chemical and pathological examination under the direction of the court. Thereafter petitions were filed by the widow and only child and daughter of the deceased asking to intervene as defendants, the former because as widow she was entitled to the custody of the organs and was also the beneficiary under certain of the policies upon the life of her husband; the latter because she was the beneficiary named in the policy issued by the complainant. The court granted the prayers, and Martha S. Painter, widow, and Okle C. Painter, daughter, were made defendants. Charles Glasor filed an answer denying all objection to the relief sought, but Martha S. and Okle C. Painter each filed demurrers to the bill and petition. The court, however, overruled the demurrers and answers were filed by each of them.

The testimony taken is so voluminous that it is utterly impossible, in this opinion, to give any more than the result we have reached from a careful reading of it as contained in the record.

Edward O. Painter, a business man of Jacksonville, Fla., while crossing the St. John's river on a ferryboat, was seized with a violent coughing and vomiting attack. Going to the side of the boat, presumably to avoid vomiting on the deck of the boat, he fell to the water and was not recovered until a few hours later, when his dead body was taken to an undertaker's establishment. At its arrival there it was met by Drs. Perry and Boyd, family physicians of the deceased, who were later joined by Dr. Upchurch, representing the coroner of the county. The body was opened and certain organs were forwarded to Dr. Simon of Baltimore for an analysis. Dr. Simon being out of Baltimore, the organs were turned over to Dr. Charles Glasor. Drs. Boyd and Perry immediately after the shipment of the organs took train for Baltimore, and upon their arrival seemed to dominate the situation. At the beginning there seemed to be a conflict as to who was in control—whether the examination was under the authority and control of the coroner of Duval county or of the representatives of the family. Dr. Glasor finally, after frequent telegraphic communications from the coroner, decided in favor of the authority of the coroner. Afterwards it was determined to have a pathological as well as a chemical examination made, and Drs. Perry, Boyd,

and Glasor agreed to have this made by Dr. Standish McCleary. In the meantime officials of the complainant had been notified, by their representatives in Florida, that the organs had been shipped to Baltimore. Dr. Carroll, a representative of the complainant, finally succeeded in locating the whereabouts of the organs and received permission from Dr. Glasor to be present at the chemical examination to be made by him, but upon demanding from Drs. Perry and Boyd the same privilege, under the right given by the policy, he was denied the right. The representatives of the company made every effort to be present at the examinations but were repeatedly refused, but were offered by the family physicians and their attorney portions of the different organs to make a separate examination therefrom, but this offer was refused, on the ground that a complete examination could not be made from parts only. Further Drs. Glasor and McCleary both testified that as they were working under the control of the coroner they would not have consented to give up any portion of the organs, since that would have interfered with their making a proper examination. The chemical examination was then made by Dr. Glasor and the pathological by Dr. McCleary. It is not necessary to go into detail as to the methods of these examinations, except to say that Dr. Glasor was of the opinion that he had found antimony, a poison, and in fact had written his report to that effect, but later upon further tests being made was of the opinion that the object found was bismuth, a harmless drug, instead. The examination made by Dr. Glasor, so far as it went, seems to have been thorough, but that it was incomplete is evidenced by the testimony given by him.

"Q. Dr. Glasor, it is a fact, is it not, that you stated to Messrs. Barton and Stewart that your examination was not complete and thorough, and that it should go further; do you remember saying that? A. Yes; I said it in the sense that I simply obeyed orders. Q. That is, orders from whom? A. Perry and Boyd, the order to examine the stomach. It was not left to my judgment how far I should go."

On May 31st, the attorney for the family wrote Dr. Carroll that he withdrew all objections to a representative of the complainant being present at the pathological examination to be made by Dr. McCleary. Dr. Carroll testified that he had no recollection of having seen this letter until after his return from Jacksonville on June 20th. However, the opportunity was not accepted.

There was considerable testimony as to the action of the representatives of the complainant in Florida as to its bearing upon the question of waiver; but we are of the opinion that, so far as the objects of this cause are concerned, nothing was done there to affect the right here demanded. The cost of the Baltimore examination was borne by the family and the life insurance companies—\$2,000 each. There was the attempt to show that the complainant had agreed to

share in this expense, but the weight of the evidence was against this. There was also proof of the large amount of both life and accident insurance carried by the deceased, and its comparatively recent issuance. From a reading of the testimony the impression is very strong, indeed, that although Dr. Glasor finally acknowledged the control of the coroner, nevertheless the family physicians and attorney were the dominating forces throughout, and the complainant's representatives were treated as though they had no interest or rights in the matter. The lower court passed an order appointing Dr. George H. Whipple of Baltimore receiver to take charge of the organs then in custody of the clerk of the court, and directing him to make a full and complete chemical and pathological examination of such organs or remains of organs or to such partial examination as the complainant might require. From that decree this appeal was taken by the widow and daughter.

[1] Two of the main contentions relied upon by the appellants are those of laches and waiver upon the part of the appellee. Necessarily, cases with facts similar to this are rare. This presents no question of the examination of a dead body, with all of its attendant harrowing incidents. The body was buried and no right pressed to exhume it soon after nor at any time. The appellee was not interested in the body, for it had learned, in its first information after the death, that the vital parts had been removed, and it thereupon turned its attention to them for any information it could gather as to the cause of death. It is not apparent what could have been done by it that was not done to exercise the right given by the positive terms of the policy. The record discloses amazing persistency upon the part of the representatives of the appellee in demanding from the unquestioned representatives of the appellants the privilege or right to be represented at the examination and were finally driven to file this bill to enforce their rights. It is inconceivable that it should be seriously contended there was any laches upon the company's part. We have above expressed our opinion on the question of waiver, but we can further say that, even if the company had agreed to bear a portion of the expense of the examination, the facts clearly show that it should not be bound by an examination made under the circumstances surrounding this one.

[2, 3] The appellants made the contention, both in the demurrers and the answers, that the proposed examination would amount to a deprivation of their property without the process, within the meaning of the fourteenth amendment to the Constitution of the United States and also within the meaning

of the like provision of the Constitution of Maryland. Some of the American courts have followed the old English rule that one cannot dispose of his body after death, but the great weight of authority in this country is that one can dispose of his body by will. See cases cited in 40 Cyc. 1050. The courts hold that the surviving husband or wife or next of kin have a quasi-property right in the body in the absence of testamentary disposition. The right is not a property right in the general meaning of property right, but is extended for the purpose of determining who shall have the custody of the body in preparing it for burial. And courts of equity will protect those having this right from unreasonable disturbance. But courts have never hesitated to have a body exhumed where the application under the particular circumstances appeared reasonable and was for the purpose of eliciting the truth in the promotion of justice. *Gray v. State*, 55 Tex. Cr. App. 90, 114 S. W. 635, 22 L. R. A. (N. S.) 513; *Grangers L. Ins. Co. v. Brown*, 57 Miss. 308, 34 Am. Rep. 446; *Mutual L. Ins. Co. v. Griesa* (C. C.) 156 Fed. 398. There are several reported cases where the courts have refused such an examination while recognizing the right but deeming the application to have been made at too remote a period of time with no attendant circumstances to explain the delay.

In this particular case the bill was filed for the purpose of discovering and preserving evidence, and under virtue of an express agreement entered into by the assured with the insurer that an examination would be permitted. If this assured died as the result of any cause exclusive of accident, then this appellee is not liable for the amount of the policy. We are not concerned in the question of what was the cause of death, but only as to whether the appellee has the right under its contract to investigate so as to learn the truth so far as these organs will show. That these constitutional defenses were not allowed by the lower court we have no doubt was correct. We are of the opinion that under its contract the appellee had the right to make an examination of the parts superior to any property right in any member of the family of the assured, and, when the demand was refused their representatives, it was the proper course to file a bill for discovery such as has been filed, and the relief granted was correct.

We have examined carefully the several exceptions to testimony and do not deem it necessary to deal with them in detail, for, irrespective of the rulings, we have been unable to discover anything which prejudiced the appellants so as to compel us to reverse the decree rendered.

Decree affirmed, with costs to the appellee.

(123 Md. 233)

**ETCHISON v. MAYOR AND ALDERMEN  
OF FREDERICK CITY et al. (No. 31.)**  
(Court of Appeals of Maryland. April 9,  
1914.)

**1. MUNICIPAL CORPORATIONS (§ 667\*)—REGU-  
LATION OF STREETS — POWERS — GRANT OF  
POWERS.**

Acts 1908, c. 560, authorizing the mayor and aldermen of Frederick City to regulate the use of sidewalks for use of signs, sign posts, awnings, etc., authorizes the mayor and aldermen to require an abutting owner whose awning was supported by posts to remove the posts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1443, 1494-1496; Dec. Dig. § 667.\*]

**2. MUNICIPAL CORPORATIONS (§ 667\*)—POWER  
OF COUNCIL.**

The power to regulate the use of sidewalks for signs, sign posts, awnings, etc., conferred upon the mayor and aldermen of Frederick City by Acts 1908, c. 560, is a reasonable one intended to preserve the highways in the condition most suitable for public use.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1443, 1494-1496; Dec. Dig. § 667.\*]

**3. MUNICIPAL CORPORATIONS (§ 667\*) —  
STREETS—RIGHT TO USE OF.**

The right of the public to use the streets and sidewalks is paramount, although abutting owners are permitted to encroach to a limited extent.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1443, 1494-1496; Dec. Dig. § 667.\*]

**4. MUNICIPAL CORPORATIONS (§ 661\*)—ORDI-  
NANCES—VALIDITY.**

The necessity, propriety, or wisdom of the exercise by a municipality of a grant of legislative power over the streets and sidewalks of a town must be left to the municipal authorities, and, if an ordinance passed in pursuance thereof does not impair some vested right or conflict with the Constitution, it must be upheld.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1432, 1434-1436; Dec. Dig. § 661.\*]

**5. CONSTITUTIONAL LAW (§ 208\*)—MUNICIPAL  
CORPORATIONS (§ 667\*)—CLASS LEGISLATION  
— UNREASONABLE CLASSIFICATION — ORDI-  
NANCES.**

A municipal ordinance prohibiting abutting owners on certain streets in a town from erecting poles in front of their property to support awnings, or to use for hitching horses to, cannot be overthrown as class legislation, because only designating certain streets, where the rule operates alike as to all on such streets.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 649-677; Dec. Dig. § 208.\* *Municipal Corporations*, Cent. Dig. §§ 1443, 1494-1496; Dec. Dig. § 667.\*]

**6. MUNICIPAL CORPORATIONS (§ 111\*)—ORDI-  
NANCE—REASONABLENESS.**

In determining the validity of municipal ordinances, their reasonableness will be presumed.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 245-256; Dec. Dig. § 111.\*]

**7. CONSTITUTIONAL LAW (§ 292\*)—DUE PRO-  
CESS OF LAW.**

A municipal ordinance prohibiting owners whose property abuts on certain streets from erecting poles for awnings or hitch racks is only a regulation of the use of property, and

does not work a deprivation without due process.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 807; Dec. Dig. § 292.\*]

Appeal from Circuit Court, Frederick County, in Equity; Hammond Urner, Edward C. Peter, and Glenn H. Worthington, Judges.

"To be officially reported."

Bill by Marshall L. Etchison against the Mayor and Aldermen of Frederick City and Emory C. Crum, City Surveyor. From a decree sustaining a demurrer to the bill, complainant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

George M. Brady, of Baltimore, and H. Dorsey Etchison, of Frederick (Maloy & Brady, of Baltimore, on the brief), for appellant. Leo Weinberg and Edward J. Smith, both of Frederick, for appellees.

BRISCOE, J. By chapter 560 of the Acts of 1908, the General Assembly of Maryland conferred upon the mayor and aldermen of Frederick City certain powers and authority as to the control of its streets and highways, and among other things provided as follows:

"To regulate the use of sidewalks for use of signs, sign-posts, awnings, posts, horse-troughs, telegraph posts, trolley poles, electric light poles, telegraph wires, electric light wires, and for any and all other purposes, and to prohibit the erection of any posts, poles, or wires and to compel the removal of any posts, poles or wires in, over or above any street, side-walk or highway."

On the 1st day of August, 1913, the mayor and aldermen of Frederick, in pursuance of the power thus conferred by the act of 1908, passed an ordinance prohibiting the erection and providing for the removal of all hitching posts, sign posts, awning poles, and posts and poles of every description (except telegraph, telephone, electric light, and trolley poles, and ornamental lighting posts) on the pavements, within three feet of the curb lines, and prohibiting the tying of animals of the horse kind to any trees, tree boxes, telegraph, telephone, electric light, and trolley pole, and ornamental lighting posts, on Market street, between Clerk Place and Fifth street, and on Patrick street, between Court street and Middle alley, in Frederick City, Md., and providing a penalty for violation thereof.

The ordinance is set out, in the record, marked Plaintiff's Exhibit No. 2, and provides, in addition to a fine and imprisonment for its violation or failure to comply with its terms, that, if the owner of the premises in front of which such poles or posts may stand shall fail to comply with the ordinance within 60 days after notice from the city engineer, they shall be removed by that officer at the owner's expense.

The plaintiff is the owner of a business

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
91 A.—11

building situate on Market street, in Frederick City, within the designated limits prescribed by the ordinance, and maintains an awning built in and fastened to the front wall of the building, and supported at the sidewalk by three iron poles, about three inches in diameter, and about nine feet apart. The awning is on or about seventeen feet above the sidewalk, and is supported by these three iron posts, poles, or uprights.

On the 19th of August, 1913, the plaintiff received from the city engineer of Frederick City a notice to remove these posts or poles as provided by the ordinance, and the plaintiff by this proceeding asks a court of equity by injunction to enjoin the defendants from removing the iron posts or uprights supporting the awnings, and from in any way enforcing the ordinance. The case was heard upon the bill of complaint, the defendants' motion to dissolve the preliminary injunction, which had been previously issued, and upon a demurrer to the bill. The defendants' demurrer to the bill of complaint was sustained, and the plaintiff's bill was dismissed by an order signed by a majority of the circuit court for Frederick county dated on the 13th of December, 1913, and it is from this order an appeal has been taken.

It is objected, upon the part of the appellant: First, that the mayor and aldermen of Frederick City were not authorized by their charter to pass the ordinance in question, because the power to remove awning posts and poles was not specifically conferred by the act of 1908; second, that if they had the authority and power to do so, the ordinance is invalid because arbitrary, oppressive, unreasonable, and discriminative; third, that the ordinance and its enforcement would deprive the plaintiff and those similarly situated of their property without due process of law, and would deprive them of the equal protection of the law.

[1] As to the first objection, we need only say that we think the ordinance is entirely within the legislative grant, which authorizes the mayor and aldermen of Frederick City to regulate the use of awnings, and to compel the removal of any poles or posts on any of the streets of the city.

The language of the act of 1908, c. 560, it will be seen, is broad and comprehensive, and provides in terms that the mayor and aldermen of Frederick shall have power to provide by ordinance, among other things:

"To regulate the use of sidewalks, for use of signs, sign posts, awnings, posts, \* \* \* and for any, and all other purposes, and to prohibit the erection of any posts, poles or wires, and to compel the removal of any posts, poles, or wires, in, over and above any street, side walk or highway."

It is difficult to see what words the Legislature could have used that would have more explicitly and expressly conferred the power here in question upon the mayor and aldermen than the language used in the act itself.

[2-6] The power as conferred was a reason-

able one, and was intended for the purpose of enabling the mayor and aldermen to maintain and preserve the streets and highways of the city in the character of streets in such condition as may be most suitable for the public use. *Lake Roland R. R. Co. v. Baltimore*, 77 Md. 380, 26 Atl. 510, 20 L. R. A. 128.

In *Brauer v. Refrigerating Co.*, 99 Md. 387, 58 Atl. 21, 66 L. R. A. 403, 105 Am. St. Rep. 304, this court said the cases upon the subject agree that the fundamental right to the enjoyment of the streets is that of the general public for passage over and along them. In the exercise of this right, persons employing vehicles are primarily entitled to occupy the bed of the street, while pedestrians have a similar priority of claim upon the sidewalk.

The owners of lots abutting on streets are permitted to encroach to a limited extent for the necessary transaction of their business upon this primary right of the public, provided they do not unreasonably interfere with its exercise. But it must always be borne in mind that the right of the public to employ the streets for purposes of travel and transportation is the paramount one, and that of the abutter to occupy them for other purposes is a permissive and subordinate one.

We come now to section 2 of the ordinance itself, which contains the enactment here involved and assailed. It is urged with much earnestness that the ordinance is invalid because unreasonable, discriminative, arbitrary, and oppressive. While it is true the ordinance provides for the removal of "awning poles, and posts, and poles of every description" (except certain poles mentioned therein) erected on the pavements within three feet of the curb lines on the streets named therein, it nowhere appears that it in any way prohibits the use of awnings in front of these buildings unless supported by poles and posts. In other words, as stated by a majority of the court below, "so far as the effect upon the awnings is concerned, the ordinance amounts simply to a regulation of their construction, and not to a prohibition of their use."

It may be stated as a general proposition sustained by all the authorities that the necessity, propriety, or wisdom of the exercise of a legislative grant or power such as this must be left to the municipal authorities, and, if an ordinance passed in pursuance thereof does not impair some vested right or conflict with some constitutional mandate, the court will not interfere to prevent its enforcement.

As was said by Chief Justice Waite in *Richmond Railroad Co. v. City of Richmond*, 96 U. S. 521, 24 L. Ed. 734, it is not for us to determine in this case whether the power has been judiciously exercised. Our duty is at an end if we find that it exists. The judgment of the court below is final as to the reasonableness of the action of the council.

In *State v. City of Trenton*, 68 N. J. Law,

501, 53 Atl. 202, the Supreme Court of New Jersey, in passing upon a somewhat similar case, held, where the ordinance is within the powers delegated in the charter, its reasonableness is presumed, and, unless the contrary is clearly shown, the court will not interfere. And to the same effect are the cases of *Baltimore v. Clunet et al.*, 23 Md. 449; *State v. Mott*, 61 Md. 304, 48 Am. Rep. 105; *Storck v. Baltimore City*, 101 Md. 483, 61 Atl. 330; *Gould v. Baltimore*, 120 Md. 534, 87 Atl. 818; *Church v. Baltimore*, 6 Gill, 391, 48 Am. Dec. 540; *Alexander v. Baltimore*, 5 Gill, 384, 46 Am. Dec. 630; *Lacy v. Oskaloosa*, 143 Iowa, 704, 121 N. W. 542, 31 L. R. A. (N. S.) 853; *Olympia v. Mann*, 1 Wash. 389, 25 Pac. 337, 12 L. R. A. 150; *New Orleans v. New Orleans*, 164 U. S. 471, 17 Sup. Ct. 161, 41 L. Ed. 518; *Dillon on Municipal Corporations*, § 600.

The contention that the ordinance is unreasonable and arbitrary in respect to the classification proposed, we think, is without force, and is fully answered by the cases cited herein.

In *Richmond R. R. Co. v. City of Richmond*, supra, the Supreme Court said:

"All laws should be general in their operation; but all places within the same city do not necessarily require the same local regulation. It is the special duties of the city authorities to make the necessary discriminations in this particular."

The recent cases of *Luman v. Hitchen Bros.*, 90 Md. 14, 44 Atl. 1051, 46 L. R. A. 393, and *Clark v. Harford Agricultural Ass'n*, 118 Md. 620, 85 Atl. 503, hold that, if the classifications under the act operate alike upon all persons and property under the same circumstances and conditions, and bear a reasonable and just relation to the act in respect to which the classification is proposed, the act will not be declared invalid, because it subjects persons coming within the classifications to burdens or duties not imposed upon individuals outside of the classes.

The objection that the ordinance in this case is invalid because it is discriminative, and applies only to designated streets, cannot be sustained.

It will be seen that the same contention and argument was made and urged against the validity of somewhat similar ordinances in the cases of *State v. City of Trenton*, supra, and in *Lacy v. Oskaloosa*, supra. The court in both of those cases overruled the contention there made, and held the ordinances to be valid, and not to be an arbitrary or unjust discrimination, or an oppressive interference with the business and property rights of the owner. *Storck v. Baltimore City*, 101 Md. 476, 61 Atl. 330.

[7] The further contention that the ordinance and its enforcement would deprive the appellant and those similarly situated of their property without due process of law, and of the equal protection of the law, we think, have been sufficiently answered in the

disposition of the other questions raised in the case. All of the cases hold that a proper regulation of the use of property is not a taking of property within the meaning of the Constitution.

As we find no reason to hold the ordinance invalid in this case, the order of the circuit court for Frederick county passed on the 18th day of December, 1913, will be affirmed. Order affirmed, with costs.

(123 Md. 225)

WARBURTON v. DAVIS et al. (No. 14.)

(Court of Appeals of Maryland. April 8, 1914.  
Rehearing Denied May 14, 1914.)

1. PARTNERSHIP (§ 317\*)—ACCOUNTING—RIGHT TO ACCOUNTING.

Where it is manifest that the party asking for a partnership accounting has no real cause of complaint, and that no good purpose could be accomplished by directing an account, it will not be ordered.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 733; Dec. Dig. § 317.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 437\*)—ACTIONS—ACCOUNTING—LACHES.

An action by the administrator of a deceased partner for an accounting by the surviving partner, not brought until more than 15 years after the death of the intestate, during which time no demand for an accounting had been made on the surviving partner, who had submitted an account showing the condition of the firm, which had been accepted by the parties in interest, some of whom gave a receipt, was barred by laches and limitations.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1729-1761, 1764; Dec. Dig. § 437.\*]

Appeal from Circuit Court, Cecil County; Philemon B. Hopper and Wm. H. Adkins, Judges.

"To be officially reported."

Bill by William T. Warburton, as surviving administrator of the estate of James A. Davis, deceased, against Anthony S. Davis and Kate T. Davis. Decree for defendants dismissing the bill, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Robert P. Shick, of Philadelphia, Pa., and George Whitelock, of Baltimore (Henry A. Warburton, of Elkton, on the brief), for appellant. William S. Evans and James F. Evans, both of Elkton, for appellees.

BRISCOE, J. The bill of complaint in this case was filed by the appellant, as surviving administrator of one James A. Davis, late of Cecil county, against Anthony S. Davis, the surviving partner of James A. Davis & Son, and against Kate T. Davis, the wife of Anthony S.; for an accounting of the partnership property and estate of James A. Davis and Anthony S. Davis, partners, trad-

ing as James A. Davis & Son. The partnership was formed about the year 1882.

James A. Davis died in the year 1894, and letters of administration were granted to his two sons, Anthony S. and James C. Davis. Subsequently the two sons resigned, and in May, 1896, letters of administration were granted to Charles C. Crothers and the appellant. Charles C. Crothers died on or about the year 1897, and the administration of the estate devolved upon the surviving administrator.

The bill was filed on the 29th of September, 1910, and in substance avers: That James A. Davis was a member of the firm of James A. Davis and Anthony S. Davis, partners, trading as James A. Davis & Son, and; at the time of the death of James A. Davis as a member of the firm, he was seised and possessed of real and personal property located in the states of Maryland, Pennsylvania, Virginia, North Carolina, and elsewhere. That the defendant as surviving partner, after the death of James A. Davis, sold the real and personal property belonging to the firm and located in the states, and converted the same into cash or made other disposition of it. That the surviving partner has caused some of the real estate to be sold, and had the same conveyed to his wife, Kate T. Davis. The bill further avers: That, from the sums of money realized from the partnership, there is a large sum due and owing from the surviving partner, belonging to the estate, which should be paid to the surviving administrator to be distributed under the directions of the orphans' court of Cecil county. That the appellant has been unable to get a statement from the surviving partner as to the partnership estate, or what interest the surviving partner had in the partnership firm at the time of the death of James A. Davis. The bill then avers that the surviving partner has not, from the date of the death of the appellant's intestate, to the present time, made any account to the appellant, as administrator of the deceased, of the money and estate belonging to him in the partnership, but has controlled the same as his own property.

The prayer of the bill is the usual one for an accounting, and is to the effect: First, that the defendant Anthony S. Davis may on oath answer the bill and set forth in detail all property of every kind, real and personal, wheresoever located, belonging to the firm of James A. Davis & Son at the time of the death of the appellant's intestate, and to account for all of his interests in the partnership property from the date of his death up to the time of filing the bill; second, that the defendant Kate T. Davis answer under oath the bill and discover and set forth in detail all sums of money received by her from the partnership assets of the firm, or any property she now holds, real or personal, connected with and formerly be-

longing to the partnership estate; third, that the defendant be decreed to pay over unto the appellant all sums of money arising out of the proceeds of any sale or sales made of the partnership property or in any way belonging to the estate of the deceased; and, fourth, a prayer for general relief.

The defendants filed separate answers to the bill.

The defendant Kate T. Davis in her answer denies holding any real estate in this state which was conveyed by her husband, as surviving partner, and avers, if she holds or owns any outside of the state, this court has no jurisdiction to inquire into it, and that the administrator has no interest therein, as it is her individual property.

The answer of the defendant Anthony S. Davis was filed on the 30th of December, 1910, wherein he sets forth the property and estate of James A. Davis & Son that came into his hands as surviving partner, in order to close up the partnership affairs on the 11th day of November, 1894, and also a statement of accounts, as surviving partner, showing the manner of his dealing with the partnership property and effects. He filed with the answer a detailed statement marked Exhibit A. S. D. No. 1, which he avers contains a correct and just account of the facts therein set forth. This statement covers over 50 pages of the record and will be found set out from page 14 to 71 of the record. The answer avers that the partnership property was ample to pay all the creditors in full except himself, and that there is still a large sum due him for his one-half interest in the partnership firm. It further avers that there is no money in his hands belonging to the separate personal estate of the plaintiff's intestate; that Minnie J. Harner, a daughter, and her husband, on the 6th of July, 1906, executed and delivered to him a release for her interest in the estate, and that James C. Davis, a son, on the 28th of March, 1896, gave him a receipt for all his distributive share in the partnership estate. The answer further avers that no demand has ever been made by the plaintiff upon the defendant to pay over to him any money belonging to the separate estate of James A. Davis, but, on the contrary, he has accounted to and paid over to him, from time to time, moneys collected by him as attorney, due him as surviving partner; that he was the defendant's attorney, as well as administrator of James A. Davis, and either knew, or ought to have known, the status of the estate at the time of the death of the senior partner. The answer then denies all allegations of improper conduct in the administration of the property of the firm or in the conduct of the business thereof.

There were exceptions filed to these answers, and on the 3d day of April, 1911, after a hearing, the exceptions to the answer of Kate T. Davis were overruled and the

bill dismissed as to her. The second, third, fourth, fifth, sixth, eighth, and ninth exceptions to the answer of Anthony S. Davis were sustained, and the first and seventh were overruled.

On the 4th of September, 1911, the defendant, in pursuance of the order of court, filed an additional and supplemental answer, accompanied by a supplementary report of certified accountants and 27 exhibits setting out in detail a full statement of the account of the partnership effects and estate as surviving partner. Subsequently a large mass of testimony was taken by each side, and the case was heard upon a motion by the plaintiff to refer the case to the auditor to state an account, and, from an order of court refusing the plaintiff's motion and dismissing his bill, this appeal has been taken.

As we concur in the conclusion reached by the court below in its determination of this case, it will not be necessary to discuss all the questions raised on the voluminous record now before us or presented in the argument at the hearing.

[1] The court below held that, under the facts and circumstances as disclosed by the proof, no good purpose or end could be accomplished by ordering an account, and that, even if the plaintiff ever had any real cause of complaint or right to relief in a court of equity, it would be barred by the lapse of time.

In *McKaig v. Hebb*, 42 Md. 227, this court said it is no doubt the general rule, when a partnership is alleged and admitted, to order an account, as a matter of course, unless the right of the plaintiff to relief is barred by lapse of time. But where it manifestly appears from the proof that the party asking the interposition of the court has no real cause of complaint, and that no good purpose or end can be accomplished by directing an account to be taken, it ought not to be ordered. The points of analogy between that case and this is somewhat obvious.

In *McKaig's Case* the court said that the fact that the parties did not contemplate any further account of the partnership affairs was strengthened when we consider that more than eight years elapsed after the dissolution before the bill was filed.

[2] In the present case it appears that more than 15 years elapsed after the death of the senior partner before this bill was filed, and it is now on or about 20 years since his death.

The evidence shows that on or about the 1st day of December, 1894, all of the heirs at law and representatives of the deceased partner, their counsel, and the plaintiff here met after the death of the senior partner, when and where an account was stated and submitted showing the condition of the firm and accepted by the parties in interest. Since that date, all of the creditors of the firm have been paid by the surviving partner except the defendant Anthony S. Davis, who

holds a large claim against the partnership's estate.

No demand has ever been made, during the length of time stated, upon the surviving partner for an account of the partnership affairs, other than what has been stated, and it appears that a release has been executed by Mrs. Harner and husband, and a receipt by James C. Davis to the defendant, for their interest in the estate. But it is insisted, upon the part of the appellant, that the appellee is not entitled to the benefit of the doctrine of laches or staleness of claim because not specially set up by demurrer or in the answer and was not raised until the hearing.

In *Syester v. Brewer*, 27 Md. 319, laches and lapse of time were held to be a full bar to the appellant's recovery. In that case the court said it was contended that the defendants in their answer had not relied upon this defense, and could not avail themselves of it at the hearing. But we are of opinion that the court itself, in its own discretion, may refuse to grant relief after a limited period, even though the statute is not pleaded and the bill is not demurred to. *Lewin on Trusts*, 617. Laches and lapse of time are as effectual as the plea of limitations, and they are analogously applied in equity. 2 *Story's Equity*, § 1520; *Battaille v. Fisher*, 36 Miss. 32; *Wickliffe v. Lexington*, 11 B. Mon. (Ky.) 161. What will constitute such laches and lapse of time as will bar the right of parties to recover on a claim purely equitable all the authorities say must depend upon the particular facts and circumstances of each case. *Hanson v. Worthington et al.*, 12 Md. 441.

*Syester's Case*, *supra*, was cited and approved by this court in *McCoy v. Poor*, 56 Md. 204, *Haugh v. Maulsby*, 68 Md. 428, 14 Atl. 65, and *Kelso v. Stigar*, 75 Md. 399, 24 Atl. 18, and cited in 16 Cyc. 177.

In *Preston v. Horwitz*, 85 Md. 164, 36 Atl. 710, it is said the policy of the law is to give quiet and repose to titles, and courts of justice ought not to countenance laches or long delays on the part of claimants.

As was said by Judge Alvey in *Wilhelm v. Caylor*, 32 Md. 151, that courts of equity in such cases act upon its own inherent doctrine of discouraging, for the peace of society, stale demands, by refusing to interfere in favor of a party guilty of laches or unreasonable acquiescence in the assertion of an adverse claim.

There are numerous other authorities to the same effect with those cited, and they are amply sufficient to dispose of this case, upon this ground alone. *Phelps' Equity*, § 262; 16 Cyc. 177.

But apart from the doctrine of laches and lapse of time being a complete bar to the appellant's right to an account in this case, we think the plaintiff has failed to make out a case, upon the merits, to entitle him to the relief asked by his bill. It is therefore not

necessary to extend this opinion by discussing the subject further.

The result is that the decree appealed from will be affirmed.

Decree affirmed, with costs.

(123 Md. 98)

**WOODWARD v. DUDLEY A. TYNG & CO.**  
(No. 28.)

(Court of Appeals of Maryland. March 19, 1914.)

**1. SALES (§ 335\*)—FAILURE OF BUYER TO PERFORM—RIGHT OF SELLER—RESALE.**

A seller's right of resale on the refusal of the buyer to complete the purchase must be exercised in good faith and at such times, by such methods, and under such circumstances as are most likely to produce the fair value of the property, and he has the burden of showing such facts.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 921; Dec. Dig. § 335.\*]

**2. SALES (§ 333\*)—FAILURE OF BUYER TO PERFORM—RIGHT OF SELLER—RESALE.**

A seller, intending to exercise his right of resale on the buyer's refusal to complete a purchase, need only give the buyer notice of intention to resell, and not notice as to the time and place of sale.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 919; Dec. Dig. § 333.\*]

**3. CORPORATIONS (§ 121\*)—SALE OF STOCK—FAILURE OF BUYER TO PERFORM—RIGHT OF SELLER—RESALE.**

Where a seller of corporate stock adopted on a resale on the buyer's refusal to complete a purchase the customary method in buying and selling stock, the court could not, as a matter of law, say that due diligence was not exercised by the seller in selling the stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.\*]

**4. EVIDENCE (§ 113\*)—RELEVANCY—VALUE.**

Where, in a suit by a stockbroker against a buyer of stock refusing to complete the purchase for the difference between the purchase price and the amount realized at a resale, it appeared that the stock was listed on one exchange, but the secretary thereof testified that sales were infrequent, it was not error to permit the broker to prove the fact and extent of fluctuations in the market value of the stock; the resale having been conducted in the customary method of buying and selling the stock.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 259-296; Dec. Dig. § 113.\*]

**5. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ERRONEOUS ADMISSION OF EVIDENCE.**

Where, in a suit by a seller against a buyer of stock refusing to complete the purchase, for the difference between the purchase price and the amount realized at a resale, the issue was whether the buyer had received notice from the broker of the purchase for his account prior to the buyer sending notice of a cancellation of the order for purchase, the error, if any, in admitting evidence of the general practice of the broker to notify buyers of purchases made for their account was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

**6. WITNESSES (§ 275\*)—CROSS-EXAMINATION—PARTIES.**

Where, in a suit by a stockbroker against a buyer of stock, who refused to complete the purchase, for the difference between the pur-

chase price and the amount realized at a resale by the broker, the buyer when testifying as a witness for the broker, stated that he thought he had read in newspapers a quotation as high as \$419 after the end of 1911, but that he could not name the newspaper, a paper purporting to give bids for the stock in 1911 was properly excluded on cross-examination because not germane.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967-975; Dec. Dig. § 275.\*]

**7. CORPORATIONS (§ 121\*)—SALE OF STOCK—EVIDENCE.**

Where, in a suit by a stockbroker against a buyer of stock refusing to complete the purchase for the difference between the purchase price and the amount realized at a resale by the broker, a letter, purporting to be written by a dealer in securities to a third person, inquiring if the latter had stock of the corporation for sale and purporting to give a bid of a specified sum, but not making a direct bid, nor purporting to record any sale, was properly excluded on the issue whether in making the resale the broker acted in good faith and fairly made the sale for the best price obtainable.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 504, 505; Dec. Dig. § 121.\*]

**8. WITNESSES (§ 275\*)—CROSS-EXAMINATION—EXTENT.**

The cross-examination of a defendant called as a witness by plaintiff must be confined to the subjects brought out by the examination in chief, and plaintiff may present his view of the case as shown by the direct examination of defendant, unprejudiced by claims of defendant sought to be shown by cross-examination as to matter not brought out by the direct examination.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 924, 926, 967-975; Dec. Dig. § 275.\*]

**9. DEPOSITIONS (§ 107\*)—OBJECTIONS—TIME TO MAKE.**

Where a deposition is objected to on grounds other than those which have to do with the execution and return of the commission, an objection, to be available, need not be made before swearing the jury.

[Ed. Note.—For other cases, see Depositions, Cent. Dig. §§ 309-319; Dec. Dig. § 107.\*]

**10. EVIDENCE (§ 153\*)—DEPOSITIONS—ADMISSIBILITY.**

Where, in a suit by a stockbroker against a buyer of stock, refusing to complete the purchase, for the difference between the purchase price and the amount realized at a resale by the broker, the issue was whether the broker in making the resale acted in good faith and whether the sale was fairly made for the best price obtainable, and it appeared that the buyer at the resale resided in a state under the law of which she could not be compelled to appear and testify by deposition, a deposition of a witness which purported to show an invitation to her to give her deposition, but which in fact did not show such an invitation or give her any notice of a hearing, was properly excluded.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 442; Dec. Dig. § 153.\*]

**11. TRIAL (§ 267\*)—INSTRUCTIONS.**

Where a party requests two instructions which are in the alternative, the court granting one may properly refuse the other.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 668-672, 674; Dec. Dig. § 267.\*]

**12. TRIAL (§ 258\*)—INSTRUCTIONS—SUBMISSION OF ISSUES.**

The parties to an action are entitled to have their respective theories of the case pre-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



sented to the jury by the instructions, and instructions of a party are not objectionable for failing to embody the contention of the adverse party presenting a requested charge thereon.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 646, 647; Dec. Dig. § 258.\*]

Appeal from Baltimore City Court; Henry D. Harlan, Judge.

Action by Dudley A. Tyng & Co. against Frederick E. Woodward. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, STOOKBRIDGE, and CONSTABLE, JJ.

C. Howard Millikin and Arthur L. Jackson, both of Baltimore, for appellant. Thomas F. Cadwalader and Horace S. Whitman, both of Baltimore, for appellee.

STOCKBRIDGE, J. The facts and legal principles involved in this litigation were so fully and clearly set out in the opinion prepared by Chief Judge Boyd, when this case was first before this court (121 Md. 422, 88 Atl. 243) that a restatement of them would serve no useful purpose. It will be sufficient to note any variation in the evidence adduced in the present record from that which appeared in the first appeal, and certain rulings of the court as to evidence and upon prayers, which were not previously presented.

This record contains 19 bills of exception, but at the argument the first, fifth, sixth, seventh, sixteenth, seventeenth, and nineteenth were expressly waived or practically abandoned, and therefore may be excluded from consideration.

Upon the remand of the case from this court the eleventh count of the declaration was amended in conformity with the opinion of this court, and, the pleadings having been fully made up, the case proceeded to trial, and resulted in a judgment in favor of the plaintiff for the sum of \$5,618.25, being the difference between the price at which the stock had been sold to the defendant, Woodward, and the amount realized at the resale of it, after his refusal to complete the purchase, together with interest on such sum. The vital question is now, as it was on the first trial, whether in making the resale Tyng & Co. acted in good faith, and the sale was fairly made for the best price obtainable.

From the evidence in the former case it appeared that the stock of the Burroughs Adding Machine Company was what was known as an unlisted stock, and that the sale was made after the sending out by Tyng & Co. of a circular letter addressed to a number of brokers and others supposed to be interested in the purchase of the stock of the company, offering the 50 shares for sale. The objection made was to the manner of making the sale, in that it had not been made either upon a stock board or by auction, and it was held that a public sale in the sense of an auction sale was not necessary;

that it was only requisite to show that the property was sold for a fair price; that to have offered the stock at public auction under the circumstances might have resulted in a greater sacrifice than was made, and that, not being a listed stock, and hence not being sold on the exchange, the proper mode was that the stock should be sold as such stocks are customarily sold; and that the jury should have passed upon the facts under proper instruction from the court. Judge Boyd was careful in that opinion to say that:

"This court has not, however, decided that such a sale as we are now concerned with cannot be made at private sale."

The evidence which is now presented to us differs markedly in one respect from that presented at the first trial. It is now shown that there was a stock exchange in the city of Detroit where the home office of the Burroughs Adding Machine Company was located; that the stock of that company was listed upon the Exchange in Detroit, but that sales of it at such Exchange were infrequent, and that none at all took place between the 25th August and the 10th October, 1911. The evidence of Mr. Andrews to the effect that the stock was customarily bought and sold by mail, telegram, or long-distance telephone, with individual holders or brokers representing individual holders, remains the same.

[1] The measure of the duty of Tyng & Co. is aptly expressed in *Brownlee v. Bolton*, 44 Mich. 218, 6 N. W. 667, where it is said that:

"A vendor's right of resale must be exercised in good faith, and at such time, by such methods, and under such circumstances as are most likely to produce the fair value of the property; and he [the vendor] has the burden of showing it was so exercised."

See, also, *Pratt v. Freeman*, 115 Wis. 648, 92 N. W. 368.

[2] Prior to the making of the sale Tyng & Co. had apprised Woodward of their purpose to resell the stock, but they were not under any necessity of notifying him as to the time and place of sale; the notice of the intention being sufficient. *Mendel v. Miller*, 126 Ga. 834, 56 S. E. 88, 7 L. R. A. (N. S.) 1184.

[3] There is no testimony whatever given to contradict the testimony of Mr. Andrews to the effect that the customary method in buying and selling this stock was that pursued on this resale, and this brings the case directly in line with the rule laid down in *Regeester v. Regeester*, 104 Md. 1, 64 Atl. 286, that:

"Whether an unpaid seller has exercised reasonable diligence in the conduct of a resale upon default of the buyer is a question of law for the court on facts to be found by the jury."

The essential facts to call for the submission of the case to the jury had thus been established. It was impossible for the trial court to say as matter of law that due diligence had not been exercised by the plaintiff in the sale of this stock, assuming, of course, that no proper evidence had been excluded

or improper evidence admitted. This involves as the next step a consideration of the rulings of the trial court upon the questions of evidence.

[4] The second bill of exceptions was to permitting the plaintiff to prove by Mr. Andrews the fact and extent of the fluctuations in the market value of the stock, and the appellant claims that such evidence was improper because of the fact that the stock in question was listed on the Detroit Exchange. At a subsequent stage of the case Mr. Hamlin, the Secretary of the Detroit Exchange, was examined, and it appears from his testimony that while so listed the sales of it were infrequent, and, even if the records of the transactions upon that Exchange had been offered, in view of the usual manner pursued in dealing with the stock, those records were not likely to afford accurate evidence of the market prices, and that the variations thereof were well within the knowledge of brokers who, like Tyng & Co., made a specialty of dealing in stocks of this class, and particularly this stock. No error is therefore perceived in the ruling of the court upon this exception.

[5] The third and fourth exceptions are practically the same; the one being taken to a question and the other to the refusal of a motion to strike out the answer given to that question. The question was directed to the custom with regard to notifying vendees of the firm of Tyng & Co. of purchases made for their account. Its materiality in the present case depends solely upon whether the appellant had notified Tyng & Co. prior to the sending of the notice of a cancellation of the order for purchase. This Woodward claims to have done over the long-distance telephone, and with equal positiveness such cancellation is denied by Mr. Andrews; whether the cancellation was in fact made or not was an important question to be determined by the jury. The custom of Tyng & Co. or of brokers in general in Chicago was of minor importance. The offer was to prove, not what was done in this particular case, but the general practice which might or might not have been followed in this instance, and, even assuming that the court fell into error in this ruling, it is impossible to see how the appellant was in any way prejudiced thereby.

[6] The eighth and ninth exceptions also relate to but a single point. The appellant was under examination upon call of the appellee, and was asked whether there had ever been a quotation of \$400 for the stock since the end of 1911, to which he replied that he thought he had read in the newspapers a quotation as high as 419; asked to name the newspaper, in which such quotation had been given, he replied that he had a paper that could answer that question; which paper on request he produced and handed to the counsel for Tyng & Co. Upon cross-examination his own counsel endeavored to introduce the paper which had been so called

for, but not offered by the plaintiff, and upon objection the paper was excluded. The paper in question was a letter addressed to the appellee under date of October 2, 1912, by a Mr. Wenger, purporting to give certain offerings, or of bids for the Burroughs stock of September 6 and September 12 and 14, 1911. How, when, or where Mr. Wenger obtained the figures contained in his letter does not appear, nor does the letter purport to contain a record of an actual sale of a single share of the stock; in addition to which the question in response to which the paper first appeared was as to quotations since the end of the year 1911, while all of the figures contained in the letter were figures of bids or offerings made during the month of September, 1911, so that the paper, even if otherwise unobjectionable, was not germane to the question propounded. The action of the trial court, therefore, in excluding it from the consideration of the jury, was entirely correct.

[7] The tenth exception was to the offer in evidence of a letter purporting to be written on September 6, 1911, by George M. West, a dealer in securities, to Mr. Wenger, inquiring if the latter had stock of the Burroughs Company for sale, and purporting to give a bid of \$385 and an offer of \$400. The letter itself does not make a direct bid for the stock at a firm price, nor does it purport to record any sale, and no valid objection can be predicated upon the exclusion of this letter.

The eleventh exception was similar in all respects, and was with regard to the tender of a letter purporting to have been written by John C. Young.

[8] The twelfth and thirteenth exceptions likewise have to deal with but a single matter. Frederick E. Woodward, the defendant in the suit, had been called by the plaintiff for the purpose of proving certain facts. Evidence had been given on the part of the plaintiff of a long-distance telephone conversation between Andrews, on behalf of the plaintiff, and the defendant, and the counsel for Woodward, on cross-examination sought to elicit from him that in such conversation over the telephone the defendant had countermanded his order of purchase; that is, it was an endeavor to prove the defendant's case as a part of the evidence of the plaintiff out of the defendant's own mouth. It is to be borne in mind, first, that the defendant when called by the plaintiff had not been examined by him upon the full details of that conversation; that the plaintiff in calling the defendant had upon the stand an adverse witness, and not merely adverse, but the party whom the plaintiff was seeking to make liable for its demand. Under such conditions the rule restricting the cross-examination to subjects brought out by examination in chief is more rigidly enforced than under any other conditions. *Griffith v. Diffenderfer*, 50 Md. 466; *Lewis v. Clark*, 86 Md. 327, 37 Atl. 1035.

The plaintiff was entitled to present its view of the case to the jury unprejudiced by the claims of the defendant, in order that, after hearing the complete evidence, the jury might be in a position to pass fairly upon the facts. The lower court was therefore entirely right in sustaining the objection.

[9,10] The fourteenth and fifteenth exceptions relate to the exclusion of a deposition taken in the city of Chicago of a certain Joseph E. Harvey, and it is most earnestly contended in behalf of the appellant that the objection to this evidence came too late, not having been taken until a jury had been sworn. For this reliance is had on the case of *Cumberland Glass Co. v. De Witt*, 120 Md. 381, 87 Atl. 927, and upon the language used by Judge Burke in that case, with regard to the admissibility of the deposition of a witness: First, when he said he "filed no exceptions until after the jury was sworn and the plaintiff had been examined, and therefore under the rule quoted exceptions to the execution and return of the commission were waived"; the objection in that case was not to the substance of the evidence taken under the deposition, but to the execution and return of the commission, while in the present case no exception is taken as to either the execution or return, but to the substance of the deposition itself. The language of Judge Burke already quoted cannot therefore be regarded as authority for the proposition that, where testimony taken by way of deposition is objected to upon grounds other than those which have to do with the execution and return of the commission, an objection, to be available, must be made before the swearing of the jury.

The purpose of Harvey's deposition attempted to be introduced was to show that an attempt had been made to obtain the presence of Mrs. Dutton, the supposed vendee at the resale of the stock, at the taking of depositions in Chicago; the deposition tending to show that there was no power lodged in the notary by whom the deposition was taken to summon or compel the attendance of witnesses, a statute having that end in view having been held unconstitutional in *Puterbaugh v. Smith*, 131 Ill. 199, 23 N. E. 428, 19 Am. St. Rep. 30, and *McIntyre v. People*, 227 Ill. 26, 81 N. E. 33. But the evidence given by Harvey did not show even an attempt to summon Mrs. Dutton, or give her notice of the hearing before the notary. He went to her house on two or three separate occasions, but failed to find her, and when he did send a message through the maid, it was not that her presence was desired for the purpose of giving testimony at a certain time and place, but that he had some money for her. The case is therefore entirely different from that of *Weatherford Co. v. Duncan*, 68 Tex. 611, 32 S. W. 878, where it was held not to be error to allow the plaintiff to prove that he had had witnesses subpoenaed, and that the witnesses were in the employ of

the defendant; that there had been a regular summons issued for the witnesses desired, while in the case at bar not only was Mrs. Dutton not subpoenaed, but, so far as the evidence of Harvey discloses, she was not even notified that depositions were to be taken, or that her presence was desired upon the occasion of the taking; and the fact that Mr. Harvey endeavored to do an act which he had no legal right to do, and to do it by the sending of a misleading message, can form no basis for the admission of his evidence. Mrs. Dutton, who was the aunt of Andrews, an officer connected with Tyng & Co., may well have been an important witness for the plaintiff itself to have placed upon the stand; their failure to do so would have been a legitimate matter for comment before the jury, but that, also, is an entirely different proposition from the admissibility of the deposition of Harvey. This court concurs with the lower court in its rulings as set forth in these two bills of exception.

At the conclusion of the evidence the plaintiff offered 5 prayers and the defendant 27, and in addition the plaintiff offered a motion to strike out certain evidence. The court granted the plaintiff's third and fourth prayers, and refused the first, second, and fifth, and denied the motion. To the refusal of the three prayers of the plaintiff no objection seems to be made.

The defendant's first and second prayers sought to withdraw the case from the consideration of the jury; but, as already indicated, there were facts proper to be submitted to the jury, and these two prayers were properly refused. By the granting of the defendant's third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth prayers there were withdrawn from the consideration of the jury the first 10 counts of the declaration, and, these prayers being granted, the defendant's thirteenth, fourteenth, fifteenth, and sixteenth prayers were rendered unnecessary.

[11] The defendant's seventeenth and eighteenth prayers were alternative forms of stating defendant's contention, and, the seventeenth prayer having been granted, the eighteenth was properly refused.

The nineteenth, twentieth, twenty-first, twenty-second, twenty-third, and twenty-fourth prayers of the defendant all dealt with the manner of the sale of the stock, and all involved the question of the sufficiency of notice, and as drawn were properly refused.

The twenty-fifth and twenty-sixth prayers were alternative prayers upon the subject of the diligence exercised on the part of the plaintiff in the resale of the stock, and, the rule having been correctly stated in the defendant's twenty-fifth prayer, which was granted, it became unnecessary to grant the twenty-sixth.

The twenty-seventh prayer of the defendant related to the question of fraud in the

resale of the stock to Mrs. Dutton, and therefore placed the issue fairly before the jury to find that the resale was a proper sale, made in good faith in the exercise upon the part of the plaintiff of ordinary care, skill, and diligence.

[12] Objection has been made by the defendant to the granting of the third and fourth prayers of the plaintiff, because of the fact that these prayers did not embody the contention of the defendant as to the cancellation of the contract by use of the long-distance telephone; but that aspect of the case was fully covered by the seventeenth prayer of the defendant. Both parties were entitled to have their respective theories of the case presented to the jury by the instructions of the court; had the defendant offered no prayers there would be force in the contention of the defendant that the granting of the third and fourth prayers of the plaintiff was a segregation of their case to the prejudice of the defendant; but, inasmuch as the defendant had offered a prayer upon this very subject, the criticism now made of the plaintiff's prayer is unsound, because if such modification had been incorporated in either or both of these prayers the inevitable tendency of the granting of the defendant's seventeenth prayer would have been to obscure the issue and confuse the minds of the jury upon that which was one of the crucial points in the case.

Finding no reversible error in any of the several bills of exception contained in the record, the judgment of the Baltimore City Court appealed from will be affirmed.

Judgment affirmed, with costs to the appellee.

(123 Md. 183)

**MAYOR AND COUNCIL OF CITY OF HAGERSTOWN v. HAGERSTOWN RY. CO. OF WASHINGTON COUNTY. (No. 41.)**

(Court of Appeals of Maryland. March 31, 1914.)

**ELECTRICITY (§ 4\*)—USE OF STREETS—POWER OF MUNICIPALITIES—FRANCHISES.**

A municipality granted to an individual the right to use the streets for poles and wires to supply the city and the citizens with light. The contract provided for assignment, and in 1898 it was assigned to defendant, who, relying on the contract, extended its lines making large investments. Thereafter by Acts 1898, c. 381, the municipality was authorized to issue bonds to raise money to erect a plant to supply the town with light and power, and by Acts 1900, c. 75, provision was made for the establishment by the city of an electric light plant for that purpose. Held that, though the first franchise was invalid, yet the municipality having power under Acts 1898, c. 479, to consent to such use of the streets, is, after defendant has expended large sums of money in erection of poles, etc., estopped to deny defendant's rights; neither the act of 1898, nor the act of 1900, giving the municipality the exclusive right to furnish electric light and power to private consumers.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 1; Dec. Dig. § 4.\*]

Appeal from Circuit Court, Washington County, in Equity; Robert R. Henderson, Judge.

"To be officially reported."

Bill by the Mayor and Council of City of Hagerstown against the Hagerstown Railway Company of Washington County, Maryland. From a decree dismissing the bill, complainant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Alexander R. Hagner, of Hagerstown, and S. S. Field, of Baltimore, for appellant. James Piper and Francis K. Carey, both of Baltimore (Carey, Piper & Hall, of Baltimore, on the brief), for appellee.

THOMAS, J. The appeal in this case is from a decree of the circuit court for Washington county dismissing the bill of complaint of the mayor and council of Hagerstown to enjoin the Hagerstown Railway Company of Washington County, Md., from erecting or replacing poles in the streets, etc., of Hagerstown and stringing wires thereon for the purpose of supplying light and power to the citizens of that city, and from furnishing electric light and power therein. The case was heard upon bill, answer, and evidence, and while there is very little, if any, dispute as to the material facts, a statement of them is necessary for a clear and accurate presentation of the propositions involved.

The Charter of Hagerstown (sections 171 and 182 of article 22 of the Code of Public Local Laws of 1888) provided that the mayor and council should have power to pass all ordinances necessary for the good government of the town; to prevent, remove, and abate all nuisances or obstructions in or upon the streets, alleys, etc.; "to make and establish grades upon the streets and highways of the town;" to cause the sidewalks along the streets to be graded and paved and "curbs to be set and gutters laid"; to grant licenses to hawkers and peddlers, and regulate the sale of wares and merchandise on the streets; to regulate and tax carriages and other vehicles used in the town; and to provide for laying out, opening, closing, etc., any street, etc., in the town. Section 183 provides for the appointment of street commissioners, who are required to elect one of their number as president, to keep a full and accurate record of all their proceedings, and to report every three months to the mayor and council an itemized account of all money expended by them. The clerk of the mayor and council is required to serve as "clerk of the board of street commissioners," who have charge of the repairs and improvements of the streets, alleys, etc., and, by section 191 and the act of 1892, c. 65, are given control of the lighting of the town, with power to provide the material, employ the necessary

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

labor, and make all needed provisions therefor, and the further power "to contract with any person, corporation or association for such lighting," provided that the cost of lighting under any contract does not exceed \$5,000 per year, and the contract is not made for a longer period than ten years.

In 1893 the board of street commissioners entered into a contract with the Schuyler Electric Company for the lighting of the streets of the city. On the 10th of May, 1895, the mayor and council passed an ordinance authorizing Powell Evans, his heirs, and assigns, "for the purpose of supplying electric current for all purposes, to erect and maintain poles on all streets, alleys, and city properties within the city limits of Hagerstown, and to string and maintain electrical conductors and other wires, and to place and maintain all necessary apparatus on said poles for said purposes; \* \* \* to make connections with all buildings in the city limits, and erect and maintain in the city limits power plants for providing for the distribution of electric current;" to connect with any system or systems outside of the city limits for supplying electric current, and to sell, lease, or rent electric current and apparatus for making use of the same; "provided that electric current for motive power for machinery be supplied in the city of Hagerstown as a necessary condition of the use of the powers conferred in this ordinance." Section 2 of the ordinance provided that the location of the poles should be approved by a committee consisting of the mayor and two members of the city council, to be selected by the mayor, who were authorized to order the location of the poles to be changed. Section 3 required Evans, his heirs and assigns, to enter into a bond to remove the poles if they were not used "in one year after erection for supplying electric current," etc. By section 4 the mayor and city council reserved the right to string on said poles the wires connected with the fire alarm system of the city, and provided that the franchise granted by said ordinance was to be accepted upon that condition, and section 6 authorized Evans, his heirs and assigns, to purchase, etc., any system for supplying electric current then "constructed in the city limits," and authorizing the corporation owning any such system to sell the same to Evans, his heirs and assigns.

Powell Evans entered into a contract with the Schuyler Electric Company for the purchase of its plant, contracts, etc., and on the 11th day of November, 1895, the board of street commissioners passed an order in which, after referring to the contract made with the Schuyler Company, and reciting that said company had contracted to sell its plant, franchises, contracts, etc., to Evans, it was ordered that the following contract "take the place" of the contract which the board had entered into with the Schuyler Company. The contract referred to in the

order was executed on the 11th of November, 1895, by Evans and the street commissioners. It provided that Evans should "have the contract for lighting the streets \* \* \* with the Schuyler or any other equally as good system" for the term of five years, beginning on or before January 1, 1896, as set out in said order, provided Evans, in the meantime, purchased, by deed duly recorded, the "present electric plant complete in this city" and "has given" a bond to the commissioners, in the penalty of \$5,000, to secure the faithful performance of his contract. After specifying the kind of lights to be furnished, the amount to be paid by the city for each light, that the lights were to be located and maintained on good wooden poles, etc., satisfactory to the commissioners, at the points on the streets where they were then located, unless otherwise ordered by the commissioners, and that the commissioners should designate the places at which new lights were to be located, the contract further provided that Evans should also furnish and maintain in the city "an incandescent lighting system," satisfactory to the street commissioners, "of not less than 1,200 lights, for commercial and private purposes," and furnish lights to consumers in the city on terms not to exceed the rates therein stated, and that Evans should have the right to sell "his property and rights in Hagerstown," including his rights under that contract, and to have his bond released, provided his assignee gave a bond in the penalty of \$5,000 for the faithful performance of said contract.

The appellee, the Hagerstown Railway Company, was incorporated under the general incorporation law in 1896 for the purpose of constructing and operating a passenger railway in Hagerstown and Washington county. Its charter was amended by the Act of 1896, c. 419, which authorized the company to issue bonds and to acquire by purchase or condemnation land necessary for the construction of its railway. Section 111 of article 23 of the Code of 1888 was amended by the Act of 1894, c. 308 (Code of 1904, art. 23, § 143), so as to provide that any electric light company formed under that article should have the power to manufacture, furnish, and sell electric light and power in any city or town of Kent, Somerset, Carroll, Montgomery, or Washington counties for lighting the streets, roads, public or private buildings, or for motive power or other purposes, and authority to build its lines along and upon the streets, roads, etc., subject to such ordinances as might be passed by any city or town for filling up or restoring such streets or roads to their normal conditions, provided that "in the construction, maintenance, removal and repair of all such lines and appliances in Washington county, the same shall be done under such regulations as the mayor and city council of Hagerstown, or the county commissioners of said county, having jurisdiction, shall prescribe." On the 28th day of

February, 1898, the certificate of incorporation of the appellee was amended under the provisions of the general incorporation law, and the new certificate declared that the corporation was formed for the purpose of constructing and operating a railway, etc., and also "for the purpose of manufacturing, generating, selling and furnishing electricity for lighting, heating, power and other purposes, and to buy, purchase, construct, build, equip and operate such plants, works and machinery as may be necessary for such purposes." The railway company then acquired by assignment the electric plant, contracts, and franchises of Powell Evans in Hagerstown, and on the 1st day of March, 1898, executed its bond to the mayor and council of Hagerstown, in the penalty of \$5,000 for the faithful performance by it of the contract between Evans and the board of street commissioners. On the 29th of March, 1898, the board of street commissioners passed the following resolution:

"Whereas, Powell Evans has sold to the Hagerstown Railway Company of Washington County, Maryland, the electric light plant in Hagerstown and has requested the board of street commissioners to accept the bond of the said railway company in the penalty of five thousand dollars in lieu of a bond filed by him, the said Powell Evans. Now, therefore, be it resolved, that the board of street commissioners of Hagerstown, Maryland, do hereby accept the bond of the Hagerstown Railway Company of Washington County, Maryland, principal, and the Fidelity & Deposit Company of Baltimore, Maryland, as surety, in the penalty of five thousand dollars in lieu of the bond heretofore accepted by the said board of street commissioners from Powell Evans and now on file in the office of the mayor and council of Hagerstown, and that the contractual obligations now existing by and between Powell Evans and the board of street commissioners are hereby accepted by the board of street commissioners, to be performed and carried out by and on the part of the Hagerstown Railway Company of Washington County, Maryland, in lieu of the said Powell Evans and as referred to in the bond filed by the Hagerstown Railway Company of Washington County, Maryland, and being a part thereof."

By the Act of 1898, c. 479, approved April 9th, entitled "An act to amend the charter and to extend the powers of the Hagerstown Railway Company of Washington County, Maryland, so as to confer upon said company," powers, "in addition to the powers heretofore granted," the charter of the appellee was again amended, and it was provided:

"That the said company shall have the right to carry over its railway or any of its connections, for hire, express matter and merchandise, and shall also have power to manufacture, furnish and sell to persons or corporations electric light, electric heat and electric power, and to contract for, and to furnish electric light for lighting streets, roads, private or public buildings in said county and to furnish electricity for motive power and other purposes, to any and all persons and corporations; \* \* \* and by and with the consent of the municipal authorities or town officers, in any city or town in said county, to lay, purchase, construct, and build lines, conductors and conduits under, along, upon or over the streets or alleys in any town in said county, \* \* \* and to

connect said lines, conductors and conduits with any manufactory or private buildings, lamps, or other structures, objects, cars or conveyances in Washington county."

After the assignment by Powell Evans to the railway company of his plant, contracts, etc., the railway company operated that plant, lighting the streets and furnishing light and power to the citizens of Hagerstown, in accordance with the provisions of the ordinance and contract, until the fall of 1898, when it built a new and very much larger plant for that purpose. After the erection of the new plant the appellee continued to furnish electricity for lighting the streets of the city until the expiration of the contract referred to, and ever since it purchased the Evans plant it has been engaged in furnishing light and power to private consumers in the city and suburbs of Hagerstown. During that time, in addition to the establishment of the new plant, new poles have been erected, lines have been extended, and new contracts have been obtained for furnishing light and power to individuals and corporations. The poles erected or maintained by the railway company for supplying light and power were from time to time changed, replaced, and painted in accordance with resolutions passed by and an agreement with the mayor and council, and have been used by the city in connection with its fire alarm system.

By the Act of 1898, c. 381, the mayor and council of Hagerstown were authorized "to issue bonds to raise a sum of money to erect a plant for the purpose of supplying the town with electric light and power, or either, in the discretion of the mayor and council," and by the Act of 1900, c. 75, provision was made for the establishment by the city, with the approval of a majority of the voters of the city, of an electric light plant of sufficient capacity to light the streets and to supply the citizens with light. The plant was completed in 1902, and since then the mayor and council have been furnishing light to private consumers in the city. In 1910 and 1913 the mayor and council notified the railway company to cease furnishing light and power to the citizens of Hagerstown, and to remove all poles used by it for that purpose from the streets and alleys of the city, and upon the failure of the railway company to comply with said notices the mayor and council on the 17th of January, 1913, filed a bill of complaint in this case for an injunction as we have stated.

The contentions of the appellant are: (1) That the mayor and council had no power to pass the Powell Evans ordinance, and that the ordinance is void; (2) that the Act of 1894, c. 308, did not confer upon the mayor and council of Hagerstown any power to grant a franchise for furnishing light and power in the city, did not give any right to Powell Evans because he was not an "electric light company," and did not confer any pow-

er upon the railway company because at the time that act was passed the railway company was not an "electric light company formed under" that article; (3) that after the railway company became, by an amendment of its certificate of incorporation, an electric light company, it did not apply to the mayor and council for an ordinance prescribing the regulations under which it could exercise the rights granted by the act of 1894; (4) that after the passage of the Act of 1898, c. 479, the railway company could no longer exercise the right to furnish electric light and power in the city without the consent of the mayor and council, which could only be given by an ordinance regularly passed for that purpose; and (5) that the use of the streets by the railway company for the purposes stated is a trespass and a nuisance.

Even if we assume, without so deciding, that the Powell Evans ordinance is void as a grant of a franchise to use the streets for the purpose of furnishing electric light and power to private consumers, that the appellee, after the amendment of its certificate of incorporation, failed to avail itself of the powers granted to electric light companies by the act of 1894, and that after the amendment of its charter by the act of 1898 the rights and powers thereby granted could only be exercised "with the consent of the municipal authorities or town officers" of Hagerstown, the question remains whether the consent referred to in that act must, under the circumstances disclosed by the record, be evidenced by an ordinance of the mayor and council.

It is not necessary to determine in this case whether an electric light company, with such authority as was granted the appellee by the act of 1898, must secure from the mayor and council of Hagerstown an ordinance consenting to the exercise of its powers before attempting to do so, and the only question we need determine is whether, under all the circumstances, the city is estopped from denying that its consent was obtained by the appellee.

Learned counsel for the appellant insist that the erection and maintenance of the poles of the appellee in the streets of the city amount to a trespass and a nuisance which cannot ripen into a franchise, and they cite cases to the effect that an encroachment upon a highway cannot grow by prescription into a private right, that franchises must be obtained by legislative rights, and that a municipal corporation cannot be estopped from asserting that it had no power to grant the particular franchise. *Baldwin v. Trimble*, 85 Md. 396, 37 Atl. 176, 36 L. R. A. 489; *Purnell v. McLane*, 98 Md. 594, 56 Atl. 830; *Water Co. v. Baltimore Co.*, 105 Md. 159, 66 Atl. 34; *Mealey v. Hagerstown*, 92 Md. 753, 48 Atl. 746.

In the case of *Mealey v. Hagerstown*, supra, the court said:

"A municipal corporation may set up a plea of ultra vires or its own want of power under its charter or constituent statute, to enter into a given contract or to do a given act in excess of its corporate powers and authority,"

—and held that it could not be estopped from doing so because the other party to the contract expended money "on the faith of the agreement." The rule there stated has not been questioned and may be regarded as settled in this state. Here, however, there is no question as to the power and authority of the mayor and council of Hagerstown under the Act of 1898, c. 479, to consent to the exercise by the railway company of the rights therein granted, and the application of the doctrine of equitable estoppel to the facts of this case does not operate to confer upon the mayor and council powers not vested in the municipality by its charter or the statute, or to exact from it rights and privileges it had no power to grant. The act of 1898 expressly authorized the railway company to erect its poles and furnish light and power in the city with the consent of the "municipal authorities," and the authority of the mayor and council to give that consent cannot be, and is not, disputed.

The distinction between a case in which the municipality has the power to grant the franchise in question, and a case in which it has no such authority, is well recognized. It is said in 4 *McQuillin*, *Mun. Corp.* § 1687:

"That a municipality cannot be estopped to question the use of its streets without a franchise, or the validity of a franchise, where it had no power to grant such a franchise. \* \* \* On the other hand, if a municipality has power to grant a franchise, and a public service company uses the streets with the knowledge of the municipality, the latter may be estopped to question the right to use the streets without a franchise, or the validity of the franchise granted where it does not violate statutory or charter requirements. For instance, a municipality, which has acquiesced for years in the use of its streets by a public service company, which has spent thousands of dollars in connection with such use, and which has received the benefits of such use of the streets and has regulated the use and levied licenses and granted permission as to certain uses, cannot contest the right of the company to use the streets. Likewise acquiescence by a municipality in the use of streets by a railroad company pursuant to a grant of such right by the Legislature precludes the municipality from objecting thereto."

In 3 *Dillon*, *Mun. Corp.* (5th Ed.) § 1242, Judge Dillon says:

"And if the municipality has the power to grant such right or franchise, and a corporation, believing and assuming that it has the consent or grant of the municipality, has, with the knowledge of the proper municipal authorities, proceeded to exercise the right or franchise, and has constructed, maintained, and operated its works and appliances in the city streets, the municipality will, in a proper case, be estopped by the acts and conduct of its officers and representatives in knowingly permitting and acquiescing in the use and occupation of the streets, from asserting the invalidity of the grant of the franchise, so far, at least, as



concerns its own failure to pass an ordinance or take the steps necessary to effectuate the grant."

The same principle has been repeatedly recognized and applied by this court. *Baldwin v. Trimble*, supra; *Arey v. Baer*, 112 Md. 541, 76 Atl. 843; *Cushwa v. Williamsport*, 117 Md. 306, 83 Atl. 389; *Whittington v. Com'rs of Crisfield*, 121 Md. 387, 88 Atl. 232. In *Baldwin's Case*, Chief Judge McSherry, after stating that an encroachment upon a highway can never grow by prescription into a private right, said that that rule was in perfect harmony with the doctrine that an equitable estoppel may be asserted even against the public in favor of individuals where justice requires it, and quoted the statement of Judge Dillon (2 Dillon, Mun. Corp. [2d Ed.] § 433) that:

"There is no danger in recognizing the principle of an estoppel in pais as applicable to such cases, as this leaves the court to decide the question, not by the mere lapse of time, but by all the circumstances of the case, to hold the public estopped or not, as right and justice may require."

In *Arey's Case* Judge Burke said:

"The statute has long since become a complete bar to the assertion by any one against the appellees of rights in the alley, and, if it be conceded that it were a public alley, under the circumstances of the case an equitable estoppel would be created against the public to assert a right to the use of the highway."

In *Cushwa's Case*, Chief Judge Boyd refers with approval to the statement of the court in *Baldwin's Case*, and in *Whittington's Case* the court adopts Judge Dillon's statement of the principle in the fourth edition of his work (section 675). It is true that in *Baldwin's Case* there was evidence of an abandonment of the highway, but the principle announced is not founded upon an abandonment of a street or highway, and may be applied whenever under all the circumstances justice requires it. Nor does the doctrine conflict with the rule stated in *Purnell v. McLane*, supra, and *Water Co. v. Baltimore Co.*, supra, that the assertion of the existence of a franchise must be supported by a grant from the municipality or Legislature. It rests upon the principle that the municipality may, in obedience to the demands of justice, be estopped by its own conduct, or the conduct of its officers, from denying the existence or validity of such a grant.

Numerous cases from other jurisdictions support the rule, and many of them are cited in the briefs of counsel for the appellee; but the principle is so clearly approved in this state that only a few of them are referred to here. In the case of *People v. City of Rock Island*, 215 Ill. 488, 74 N. E. 437, 106 Am. St. Rep. 179, the Supreme Court of Illinois said:

"It has frequently been decided that the doctrine of estoppel in pais is applicable to municipal corporations, but that they will be estopped or not, as justice and right may require. There may be cases where, under all the circumstances, to assert a public right would be to en-

courage and promote a fraud. Where a party acting in good faith under affirmative acts of a city has made such expensive and permanent improvements that it would be highly inequitable and unjust to destroy the rights acquired, the doctrine of equitable estoppel will be applied. The hardships that would result from a contrary holding, and the necessity of raising an estoppel in particular cases to prevent fraud and injustice, have induced the establishment of the rule, and it has been several times said that there is neither danger to the public nor injustice in the application of the doctrine."

In the case of *Louisville v. Cumberland Tel. Co.*, 224 U. S. 649, 32 Sup. Ct. 572, 56 L. Ed. 934, the court, speaking through Mr. Justice Lamar, said:

"The company, in pursuance of the collateral contract contained in the ordinance, and of the requirements of the consolidation statute, carried the police and fire wires of the city free of charge. With the knowledge and acquiescence of the city, and in reliance on the statutory conveyance of the street rights, the Cumberland Company, at an expense of more than a million dollars, erected many new poles, laid additional conduits, and strung miles of wire in extending and improving the telephone system. This action of the council could not enlarge the charter grant, but did not operate to estop the city (*Boone County v. Burlington & M. R. R.*, 139 U. S. 684, 693 [11 Sup. Ct. 687, 35 L. Ed. 319]) from claiming that the ordinance was inoperative, and it also prevented the council from denying that the Cumberland Company had succeeded to every right and obligation of the Ohio Valley Company."

In *City of Bradford v. New York & P. Tel. & Tel. Co.*, 206 Pa. 582, 56 Atl. 41, the case is stated in the syllabus as follows:

"A city filed a bill to compel a telegraph and telephone company to remove its poles and wires from the streets which it had occupied for more than 21 years without objection, after an expenditure of about \$100,000. Many resolutions of the city council had given permission for the erection and use of the poles and cross-arms on the streets. In consideration of the privileges, the city had obtained a right to the use of the poles for the carrying of the fire-alarm system, and had also levied licenses and pole taxes, and had used telephones furnished by the company down to the date of the hearing, and had regulated by ordinance the manner in which the poles should be erected under the direction of the street committee of council or the city engineer."

There the Supreme Court of Pennsylvania, in dismissing the bill, said:

"In the present case the acquiescence and the laches of the appellant are clearly in the way of any equitable relief to it."

In the case at bar the mayor and council passed the ordinance authorizing Powell Evans and his assigns to erect and maintain poles in the streets of the city for the purpose of "supplying electric current for all purposes," and providing that the city should have the right to string the wires of its fire-alarm system on the poles. The board of street commissioners entered into the contract with Evans for the lighting of the streets; requiring him to establish an "incandescent lighting system," and to furnish light to the citizens of Hagerstown at the rates therein mentioned, and authorizing him to assign said contract upon the conditions therein stated. The railway company, with the



knowledge of the mayor and council and the street commissioners, became the assignee of the Evans Plant and his contract with the city, executed its bond to the mayor and council, as required by the contract, and, in order to provide for the existing and future needs of the city, erected a new and very much larger plant for the purposes stated in said agreement and ordinance. The appellee extended its lines, entered into new contracts for furnishing light and power to private consumers in the city and suburbs, and erected new poles with the knowledge of the mayor and council and street commissioners. The poles were replaced, changed, and painted when and as directed by the mayor and council, and the city has used the poles in maintaining its fire-alarm system. After the appellee has used the streets of the city, under the circumstances and for the purposes stated, for more than 14 years, it would be most inequitable to permit the city to assert that it did not give its consent to such use of the streets. To compel the appellee to remove its poles and to abandon the business which it has established at much cost, and which the city encouraged and regulated, would impose a great hardship upon the appellee. Such demands cannot appeal to a court of equity, and upon no principle of right and justice can the relief prayed in this case be granted.

While the Act of 1900, c. 75, provided that after the erection of the plant therein mentioned there should be "No lighting," at the expense of the city, of the streets and alleys of the city, "except" by the plant "owned and maintained by the mayor and council," there is nothing in that act or the Act of 1898, c. 381, to indicate any intention of the Legislature to give the city the exclusive right to furnish electric light and power to private consumers in the city, or to abridge the right of the appellee to do so.

For the reasons stated, we must hold that the appellant is estopped from asserting that it did not give the consent referred to in the Act of 1898, c. 479, and the decree of the court below dismissing its bill must therefore be affirmed.

Decree affirmed, with costs to the appellee.

(112 Me. 138)

# STATE v. INTOXICATING LIQUORS (EASTERN S. S. CO., Claimant).

(Supreme Judicial Court of Maine. July 9, 1914.)

## 1. INTOXICATING LIQUORS (§ 252\*) — FORFEITURE—FINDINGS OF FACT.

In a proceeding for the forfeiture of intoxicating liquors, libeled by the state and claimed by the carrier in whose possession they were found, specific findings of fact are unnecessary to support a judgment of forfeiture; such judgment being a finding for the state upon all the issues of fact necessary to support the libel.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 391; Dec. Dig. § 252.\*]

## 2. APPEAL AND ERROR (§ 1032\*)—HARMLESS ERROR—BURDEN OF SHOWING PREJUDICE.

Exceptions will not be sustained unless the excepting party shows affirmatively that he is aggrieved, and he cannot be aggrieved unless he has a legal interest in the subject-matter of the controversy.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4047-4051; Dec. Dig. § 1032.\*]

## 3. INTOXICATING LIQUORS (§ 250\*)—SEIZURE—FORFEITURE.

Under Rev. St. c. 29, § 51, providing that upon hearing of a claim for intoxicating liquors seized by the state, the magistrate, if satisfied that the liquors were not kept or deposited for unlawful sale, and that the claimant is entitled to custody thereof, shall give him an order for the return of the liquors, the claimant is bound to show, not only that the liquors were not kept or deposited for unlawful sale, but that he is entitled to their custody; the burden of proving that issue being on the claimant.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 386-388; Dec. Dig. § 250.\*]

## 4. INTOXICATING LIQUORS (§ 250\*)—SEIZURE—FORFEITURE—CLAIM—EVIDENCE.

In a proceeding for the forfeiture of intoxicating liquors seized by the state, evidence held insufficient to show that the claimant was entitled to a return of the liquors, or any part thereof.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 386-388; Dec. Dig. § 250.\*]

Exceptions from Supreme Judicial Court, Penobscot County, at Law.

Proceedings by the State for the forfeiture of certain intoxicating liquors, in which the Eastern Steamship Company filed a claim. There was a judgment denying the claim and forfeiting the liquors, and the claimant excepted. Exceptions overruled.

Argued before SAVAGE, C. J., and SPEAR, HALEY, HANSON, and PHILBROOK, JJ.

E. P. Murray and D. W. Nason, both of Bangor, for claimant. Donald F. Snow, of Bangor, for the State.

SAVAGE, C. J. The liquors in question were found by a deputy sheriff in the freight shed in Bangor, occupied in part, at least, by the Eastern Steamship Company, an interstate common carrier. They came to this shed from Bucksport on the cars of the Maine Central Railroad Company. There were many packages, and they were marked to 18 different people in all. When found by the officer, they had been taken from the cars, and assembled in four separate piles near the delivery doors of the shed, and on the top of each pile was a card of pasteboard, bearing the name of a man. On the top of the pile containing the liquors in question the card bore the name of one O'Reill, a truckman. The liquors were taken from the shed by the officer Sunday night, January 18th, and on the following Tuesday afternoon, January 20th, he made complaint in the municipal court under Revised Statutes, c. 29, § 48, and obtained a "seizure warrant," so-called, upon

which he seized and libeled the liquors. Later the Eastern Steamship Company appeared and filed its claim for them in the proper form. The case came by appeal to the Supreme Judicial Court, and a hearing was had before the court without a jury. At the conclusion of the hearing, the presiding justice ordered judgment to be entered for a forfeiture of the liquors, and the claimant excepted. No finding of specific facts was made. At the hearing the claimant offered no evidence, and the record does not show upon what grounds it claimed a right to the liquors, or the possession of them.

[1] The claimant argues, in the first place, that the justice below erred in not making a finding of facts, on which to base the judgment. If the complaint were well founded, the claimant can take no advantage of the failure to find facts, for it has taken no exceptions on that ground. But the complaint is not well founded. It was not necessary that the presiding justice should place on record specific findings of facts. His order of judgment of forfeiture meant, and it must be so assumed, that he found for the state upon all issues of fact necessary to sustain the libel. *Chabot & Richard Co. v. Chabot*, 109 Me. 403, 84 Atl. 892.

[2-4] The complainant further contends that the complaint and warrant were defective and void, and that, as the libel is based upon the warrant, proceedings for forfeiture cannot be maintained. The objections to the complaint and warrant are that the warrant was not obtained within a reasonable time after the original seizure; that instead of taking out 1 warrant for all the liquor seized, the officer took out 18, presumably 1 for each party to whom the parcels were severally marked; that the officer in his complaint alleged that the liquors were kept by persons unknown, which was not true, so it says, and, finally, that the officer, having made out and signed the formal complaint, and filled out the warrant for signature, made out the return and signed it before he swore to the complaint.

Whether any of these objections would be tenable if interposed by one who had an interest in the liquors, and a right to have them restored to him in case the seizure was found to be invalid, we think we have no need to consider. It is a fundamental rule that exceptions will not be sustained unless the excepting party shows affirmatively that he is aggrieved. And he cannot be aggrieved unless he has a legal interest in the subject-matter of the controversy. *Allen v. Lawrence*, 64 Me. 175; *Merrill v. Merrill*, 67 Me. 70; *Smith v. Smith*, 93 Me. 253, 44 Atl. 905. We think the claimant has failed to show that it has any valid claim to have the liquors restored to it, in any event.

The statute (R. S. c. 29, § 51) provides that if any person appears and claims intoxicating liquors seized, he shall file a claim in

writing and under oath. The claim must state specifically certain matters specified by statute, such as the nature of the right claimed and the foundation thereof. Having filed such a claim he is admitted as a party. Filing the claim does not prove the right. It merely entitles the claimant to be heard. Then the statute provides that:

"The magistrate shall proceed to determine the truth of the allegations in said claim and libel, and may hear any pertinent evidence offered by the libellant or claimant. If the magistrate is, upon the hearing, satisfied that said liquors were not so kept or deposited for unlawful sale, and that the claimant is entitled to the custody of any part thereof, he shall give him an order in writing," for a return of "the liquors to which he is found to be entitled. If the magistrate finds the claimant entitled to no part of said liquors, he shall render judgment against him for the libellant for costs, to be taxed as in civil cases before such magistrate, and issue execution thereon, and shall declare said liquors forfeited to the county where seized."

It will be noticed that in order to secure an order for the return of the liquors, two things must be found to be true, namely, that the liquors were not kept or deposited for unlawful sale, and that the claimant is entitled to their custody. *State v. Intoxicating Liquors*, 85 Me. 304, 27 Atl. 178. And, further, if it fails to appear that the claimant is entitled to their custody, judgment for costs against the claimant, and forfeiture of the liquors follow. The pivotal question in this case is, Has it been made to appear that the claimant is entitled to the custody of the liquors? If it has, the judgment for forfeiture was error, but otherwise it was not.

It is not enough under the statute to show that the seizure was invalid. It must be shown that the claimant is the party entitled to the custody. And the burden on this issue is on the claimant. *State v. Robinson*, 49 Me. 285. It might show that it was the owner, or that it was a carrier, still responsible for the liquors to the shipper or consignee, or it might show any other facts which would entitle it to the custody. But it must show them. No matter who else might be wronged by an invalid seizure, the wrongs of others cannot be redressed at the suit of the claimant, if it has no right to custody, on its own account. The injured party must seek his own redress.

The claimant has not sustained the burden of showing its right. The claimant's relation to the liquor does not clearly appear. It does appear that it came to the defendant's shed in Bangor, by way of the Maine Central Railroad from Bucksport, and one of the state's witnesses testified that he knew it came from the claimant's boat, which we presume was at Bucksport. And we may assume that the carriage from Bucksport to Bangor was part of a through transportation from some place in or out of the state to Bucksport by water, and thence to Bangor by rail, all controlled by the claimant. Now,

doubtless, there are cases where the situation of the liquor when seized may afford some legitimate inference as to whether a carrier still has it in transit, and, whether for that or other reasons, it is legally entitled to the custody, if the seizure is not sustainable.

But we think no inference either way is warranted by the evidence in this case. The liquors involved in this case were a part of a large lot brought by the claimant to its shed in Bangor Saturday night. Sunday night it was found that they had been unloaded, and had been assorted and piled in four piles close to the delivery doors of the shed, and each pile had been tagged with the name of some man, as if he were the owner, or a truckman for the owner. The pile containing the liquors in question was tagged with the name of a truckman. Who unloaded them? Who piled them up? Who tagged them? Had they been delivered by the claimant to the consignee? Was the steamship company still responsible for them? Or had they been received by the consignee, piled and tagged, and merely left where they were to be removed at his convenience? If the latter conjecture is the true one, it is manifest that the steamship company has no ground for claiming a return of the liquors. It had no special property in the liquors.

The trouble is that we have no means of telling which of several conjectures is the true one. The claimant might have made it clear by evidence, but it offered none. Its right to custody is not proved. Hence it has no interest in the determination of the question whether the seizure was valid. Others may have, but the claimant has not. And having no interest, it could not be aggrieved by a ruling thereon, and its exceptions cannot be maintained. So far as the claimant is concerned, the only flaw discoverable in the order of the presiding justice is that he did not order judgment against the claimant for costs.

Exceptions overruled.

(112 Me. 143)

## MAY v. CITY OF AUBURN.

(Supreme Judicial Court of Maine. July 9, 1914.)

**MUNICIPAL CORPORATIONS (§ 162\*)—OFFICERS—COMPENSATION—EXTRA SERVICES—"PROFESSIONAL ACTS."**

Under city ordinances providing that the city solicitor should be an attorney and counselor at law and should act as the legal adviser and solicitor of the city, except where the city council authorized or required him to secure the service of additional counsel, that no money should be paid from the city treasury for legal advice or services, except as expressly authorized thereby, and that the city solicitor should do all professional acts incident to the office or which might be required of him by the mayor, city council, or either branch thereof, the city solicitor was not entitled to compensation in addition to his stated salary for preparing a bill authorizing the city to acquire or control pri-

vate cemeteries by purchase or eminent domain and presenting the matter in behalf of the city before a committee of the Legislature pursuant to a vote of the city council, since such services were not such as a layman would ordinarily be employed to perform for others and were therefore "professional acts," which the city solicitor was required to perform, especially where the vote of the council designated him as city solicitor and not in his private capacity, and he at the time did not notify the council that such acts were not within his official duties.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 357-367, 369, 372, 374; Dec. Dig. § 162.\*]

Action by Seth May against the City of Auburn. Judgment for plaintiff for a part of the amount sued for.

Argued before SPEAR and CORNISH, KING, BIRD, HALEY, and HANSON, JJ.

Seth May, of Auburn, pro se. Tascus Atwood, of Auburn, for defendant.

CORNISH, J. The plaintiff was city solicitor of Auburn for the municipal year March, 1912, to March, 1913. At a legal meeting of the city council held on January 6, 1913, it was voted that "efforts be made to secure either a general law, which would apply to all cities and towns, or a special act which will authorize our city to acquire or control private cemeteries by purchase or eminent domain and that the city solicitor be directed to present the matter to the Legislature."

Pursuant to this vote, the plaintiff prepared a bill for the purpose and presented the matter in behalf of the city at a hearing before the judiciary committee of the Legislature. For this service he seeks to recover in this action the sum of \$35. The defendant raises no objection to the amount of the charge if legally collectible, but contends that the services rendered were embraced in his duties as city solicitor, for which he received a stated salary, and therefore no separate charge could be made therefor. That is the single issue involved. The other items in the account are for cash disbursements, and these are not disputed. A fair and reasonable construction of the city ordinances relating to the duties of the city solicitor sustains the contention of the defendant. Chapter 10, § 1, provides:

"The city solicitor shall be an attorney and counselor at law of the courts of the state. He shall act as the legal adviser and solicitor of the city, except in special cases in which the city council may authorize or require him to secure the advice or services of such additional counsel as may be deemed best."

### Section 2:

"No money shall be paid from the city treasury for any legal advice or services, except as expressly authorized by this ordinance."

Section 4, after reciting several duties in detail, concludes with this general and comprehensive clause:

"And do all professional acts incident to the office or which may be required of him by the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

mayor, city council or either branch thereof, or any committee thereof, or any administrative board or officers of the city."

The service under consideration clearly fell within these provisions. The drafting of a legislative act authorizing a city to acquire or control private cemeteries by purchase or eminent domain, and the presentation of the matter to the Legislature, must be regarded as coming peculiarly within the term "professional acts" such as the city solicitor is bound to perform under the ordinances. The drafting of such an act, embracing as it does, the element of eminent domain, is not to be expected of a layman, as the plaintiff would seem to argue, but is a matter for the trained lawyer; and its presentation to the Legislature or a legislative committee, is ordinarily committed, not to the layman, but to an attorney. While a layman often presents his own matters to such a committee, he is rarely employed to present those of another. The services rendered were plainly professional in their nature; they concerned the interests of the city and were required of him by the city council, as appears by the vote before recited. Those elements brought the work into the official sphere of the city solicitor, as prescribed by the ordinances, and therefore the person holding that office was not entitled to extra compensation therefor. *Calais v. Whidden*, 64 Me. 249, cited by the plaintiff, cannot be regarded as an authority for his claim because the services rendered were of a different nature, and the case fails to show the duties of the city solicitor, as prescribed by the city ordinances.

The vote itself, in the case at bar, emphasizes the soundness of our conclusion. The party designated to do the work was not the plaintiff in his private capacity, but the city solicitor. If the plaintiff did not care to perform it as city solicitor, or thought it did not come within his official duties, he might have notified the city council of the fact at the time. Instead he accepted the task and carried it out, without any objection, so far as the evidence discloses. Both parties at that time apparently contemplated that the duty was an official one.

The ordinance expressly prohibits the expenditure of money for extra legal services, unless specially provided for by the city council, by whom such legal assistance might be authorized or required in certain cases, if it were deemed best. No such authorization was had nor legal assistance contemplated in this case. The law officer of the city was requested to perform certain professional acts, and he and he alone was to perform them. The services so performed came within the line of his official duties, and no extra charge is allowable therefor. As the balance of the account, \$20.35, is conceded to be due, the entry must be:

Judgment for plaintiff for \$20.35.

(112 Me. 146)

# WALDRON v. MOORE.

(Supreme Judicial Court of Maine. July 13, 1914.)

## MORTGAGES (§§ 105, 119\*)—CONSTRUCTION IN CONNECTION WITH CONTEMPORANEOUS INSTRUMENT.

Where contemporaneously with the execution of a mortgage to secure a note for \$2,200, payable in two years and six months, the parties executed an agreement under seal, whereby the mortgagor agreed to support the mortgagee for two years and six months and give her the exclusive use of certain rooms in her house, in consideration whereof the mortgagee agreed to indorse upon the note \$1,000 each year until it was fully paid, the note and mortgage were connected by direct reference or necessary implication, and should be construed as one paper, and hence, where the mortgagor had performed the agreement, but the mortgagee had left the mortgagor's house without stating any reason, there could be no recovery under the mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 214, 215, 234; Dec. Dig. §§ 105, 119.\*]

Report from Supreme Judicial Court, Waldo County, at Law.

Writ of entry by Alice J. W. Waldron against Mima A. Moore. On report. Judgment for defendant.

Argued before SAVAGE, C. J., and SPEAR, CORNISH, KING, BIRD, and PHILBROOK, JJ.

Dunton & Morse, of Belfast, for plaintiff. Arthur Ritchie, of Belfast, for defendant.

BIRD, J. This is a writ of entry dated November 25, 1912, for the recovery of a lot of land and buildings in Belfast. The plaintiff's pleadings declare upon a mortgage, and at the second term after entry the plaintiff filed a motion for conditional judgment. The case is here upon report.

It appears of record that plaintiff loaned defendant the sum of \$2,200, wherewith the latter purchased the lot and buildings in question. After the conveyance to the defendant of the premises by deed of May 23, 1910, she on the same day conveyed them to plaintiff in mortgage as security for the payment of a note for the same sum on two years and six months, with interest at rate of 6 per cent., payable semiannually. Contemporaneously and as part of the same transaction, plaintiff and defendant entered into an agreement under seal, whereby the defendant undertook to support the plaintiff for the term of two years and six months from date (being same day as the date of the mortgage and note), or during her life, if she should die within said term, to give her exclusive use of certain rooms in the house upon the lot conveyed to defendant, and to make for her certain other provisions for the sum of \$1,000 a year, to be indorsed on the note already mentioned. The plaintiff upon her part agreed, in consideration of the undertaking of the defendant, to indorse upon the note the sum of \$1,000 per year until the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

note be fully paid, or as long as she lives if she die before the expiration of the note.

Under the agreement, the plaintiff entered into occupation of the rooms allotted her, and remained until March 14, 1911, when she left the premises without stating to defendant why she left, whether or not she would return, or anything as to a rescission of the contract. When the first semiannual payment of interest was due, it was indorsed upon the note in part payment of the sum due defendant under the agreement. Whether or not defendant performed the part of the agreement by her to be performed was disputed. The evidence is conflicting, but we think defendant shows a substantial compliance with its terms while plaintiff remained, and that defendant was thereafter ready and willing to continue in its performance.

Can the defendant avail herself of the terms of the written agreement of the parties in this action? Two contemporaneous writings between the same parties, upon the same subject-matter, may be read and construed as one paper; and this rule applies notwithstanding one of the writings is a promissory note, when the action is between the parties to it or their representatives. *American Gas, etc., Co. v. Wood*, 90 Me. 516, 520, 38 Atl. 548, 43 L. R. A. 449, and cases cited. Here, as in the case cited, the agreement and note are of the same date, and the former expressly refers to the note. They are "connected by direct reference or necessary implication," to use the language of *Davlin v. Hill*, 11 Me. 434, 438. See, also, *Hunt v. Livermore*, 5 Pick. (Mass.) 395.

Judgment may be entered for defendant as provided in R. S. c. 92, § 11. *Burnham v. Dorr*, 72 Me. 198, 202.

(77 N. H. 330)

# TYRRELL v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Grafton. June 2, 1914.)

## 1. RAILROADS (§ 338\*)—CROSSING ACCIDENTS—RECOVERY NOTWITHSTANDING CONTRIBUTORY NEGLIGENCE.

Where railroad employes, after a person was in a dangerous situation at a farm crossing, could have given warnings which they failed to give, and she might have escaped in safety had they been given, her negligence in driving upon the track when and as she did was immaterial.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1096-1099; Dec. Dig. § 338.\*]

## 2. NEGLIGENCE (§ 132\*)—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

Evidence that a person killed by a train at a farm crossing was in the habit of listening for trains at such crossing was admissible, where the only eyewitness to the accident who was near was occupied in closing a gate, with his back towards her, during the latter part of her approach to the crossing.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 257-266; Dec. Dig. § 132.\*]

Transferred from Superior Court, Grafton County; Young, Judge.

Action by Charles C. Tyrrell, administrator, against the Boston & Maine Railroad.

Case, for negligently causing the death of Amy A. Tyrrell, the plaintiff's intestate, at a farm crossing. Verdict for the plaintiff. Transferred from the superior court on the defendant's exceptions to the denial of motions for a nonsuit and the direction of a verdict in its favor, and to the admission of evidence that it was Mrs. Tyrrell's habit to listen for trains at the crossing where she was injured.

The plaintiff's evidence tended to prove that Mrs. Tyrrell was driving a quiet horse attached to a long-bodied farm wagon. The horse was walking. When Mrs. Tyrrell reached the gate at the crossing she stopped the horse and waited until a man who was following the wagon opened the gate. She then drove upon the track and was struck by a locomotive running backward. The rear end of the wagon was between the rails. The natural obstructions were such that she could not look up the track in the direction from which the locomotive came until she was within seven or eight feet of the nearest rail. The engineer saw the horse approaching the track when its head was from five to eight feet from the rail, and when the locomotive was 200 feet from the crossing. Although he applied the emergency brakes, he neither sounded the whistle nor rang the bell. The locomotive was running downgrade at a speed of about 25 or 30 miles an hour, and was not working steam. If it had been properly equipped, or if the engineer had sounded the whistle as he approached the crossing, or even when he first saw the horse's head, the accident would not have happened. Exceptions overruled.

Owen & Veazey and Charles B. Hibbard, all of Laconia, for plaintiff. Burleigh & Adams, of Plymouth, and Stephen S. Jewett, of Laconia, for defendant.

PEASLEE, J. [1] The defense relied upon is that there was no evidence of care on the part of Mrs. Tyrrell; but it appears in evidence that even after she got in a dangerous situation the defendant's servants could have given warnings which they failed to, and that, if these warnings had been given, she might have escaped in safety. If the jury took this view of the facts, there would be no occasion to consider whether she was negligent in driving upon the track when and as she did.

[2] Evidence of her habit of care is objected to upon the ground that her conduct is fully disclosed, and therefore the evidence is inadmissible. The evidence of what she did or did not do as she approached the crossing does not cover all the time. The only eyewitness to the accident who was near her was occupied in closing a gate during the latter part of her approach to the

crossing. He was then back to her, and, as he himself testified, she might have listened during this time. No other objection to the admission of the evidence was made, and, as the record shows that this one is not supported by the testimony in the case, the exception must be overruled. It is therefore unnecessary to consider the argument advanced by the plaintiff to the effect that the admissibility of evidence of habit to prove action upon a particular occasion is not limited to cases where there is not direct proof of what was done.

Exceptions overruled.

YOUNG, J., did not sit. PLUMMER, J., was absent. The others concurred.

(77 N. H. 297)

**PROULX v. GOODRICH.**

(Supreme Court of New Hampshire. Rockingham. June 2, 1914.)

**1. MASTER AND SERVANT (§ 265\*)—MASTER'S LIABILITY FOR INJURY TO SERVANT — NATURE OF DUTY.**

The mere fact of a servant's injury while in the master's employ does not establish a right of recovery, but there must be some breach of duty by the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

**2. MASTER AND SERVANT (§ 278\*) — ACTION FOR INJURY TO SERVANT—SUFFICIENCY OF EVIDENCE.**

In an action for an injury to a 15 year old boy caused by being caught in the wheels of a brick conveyor at a brickyard, evidence held not to show that defendant was negligent in employing a 15 year old boy to do the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

**3. MASTER AND SERVANT (§ 218\*)—ASSUMPTION OF RISK—INEXPERIENCED OR YOUTHFUL EMPLOYE.**

A boy, though only 15 years old, assumed the risks of the dangers of an occupation which he knew and understood.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 601-609; Dec. Dig. § 218.\*]

Exceptions from Superior Court, Rockingham County; Young, Judge.

Action by Aniedee Proulx against William S. Goodrich. Verdict for plaintiff, and defendant excepts. Exceptions sustained.

William H. Sleeper, of Exeter, for plaintiff. Eastman, Scammon & Gardner, of Exeter, and George T. Hughes and Robert Doe, both of Dover, for defendant.

PARSONS, C. J. [1] The plaintiff was 15 years of age. There is no evidence of incapacity of mind or body, and he must be assumed to have been of the average capacity of boys of that age. He entered the defendant's employ on May 1st, and continued doing the same work each day until injured on August 8th. The mere fact of injury does not establish the right of recovery. Such

ground must be found, if it exists, in some breach of duty owed the plaintiff by the defendant, as the legal cause of the injury.

The plaintiff tended a brick conveyor. This machine consisted of two endless cables stretched from the brick-molding machine along in front of sheds in which the brick were dried. At the further end the cables passed over large wheels, thence returning to the power end and passing four to eight inches above the level of a plank walk in front of the sheds. The green brick were placed on short pieces of board called "pallets." The pallets being placed upon the cables, were carried along by the motion of the cables in front of the drying sheds, where workmen called "truckers" removed them from the cables and wheeled the pallets and brick into the drying shed. Another workman collected the empty pallets and placed them on the walk in front of the sheds. The plaintiff was employed to place the empty pallets upon the lower cables so that they would be carried back to the molding machine. He had no work to perform on the upper cables, which passed about two feet above the lower in the opposite direction. When he went to work there was a cover of some sort over the large wheels at the end of the ropeway. After he had been at work about six weeks this cover was removed, as it interfered with the operation of the machine.

The only account of the accident which the plaintiff was able to give is that he suddenly found himself resting upon the upper cables and being borne into the wheels; that to save his head he put out his arm, which was caught and torn off. There was no other evidence as to the cause of the accident. There was no claim of any defect in the rope by which he was caught, or anything about the platform which caused him to slip and fall, if he did slip. The history starts with the plaintiff on the ropes being borne into the wheels. There was evidence that when he went to work the plaintiff was instructed to look out for the rope. He testified that he knew if he fell onto the cable he would be hurt, if he could not get off before the wheels were reached. In his work he stood 18 inches to 2 feet from the cables. His work did not require him to touch either cable, and had nothing to do with the upper ones.

[2, 3] Upon the evidence, the only claim of fault in the defendant must be that intrusting such work to the average boy of 15 years of age was of itself a breach of duty. It cannot be reasonably found upon this evidence that a man of average prudence would not employ such a person to do this work, and that the plaintiff, knowing the danger of injury if he fell upon the cables, did not appreciate the risk. If it was the practice in this business to employ only mature and skilled persons to do work of this character—if

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r. Indexes

to perform it with safety particular skill or experience was required—there was no evidence of that character presented to the jury. So far as the case goes, the work was usually performed by boys, and the plaintiff himself had done the work for 14 weeks without harm. The plaintiff, although only 15 years of age, assumed the risk of the dangers of the occupation which he knew and understood. *Cronin v. Company*, 75 N. H. 319, 74 Atl. 180, 29 L. R. A. (N. S.) 111. The jury cannot find material facts without evidence. *Reynolds v. Fiber Co.*, 73 N. H. 126, 131, 59 Atl. 615.

In the absence of evidence that the plaintiff got onto the ropes through some secret defect or danger of which the defendant knew and the plaintiff did not, or some evidence that the work was of a character prudent men would not employ boys to perform, the jury could not reasonably find the defendant in fault.

"The burden of proof was upon the plaintiff, and the absence of evidence in relation to these matters does not sustain that burden. The mere fact of injury does not establish the defendant's fault. If the absence of proof is due to mistake or misfortune, justice can hereafter be done upon proper proceedings in the superior court; but the possibility of evidence cannot sustain a verdict rendered without evidence upon an essential point." *Hicks v. Company*, 74 N. H. 154, 157, 158, 65 Atl. 1075, 1077; *Dame v. Car Works*, 71 N. H. 407, 52 Atl. 864.

Exceptions sustained; verdict set aside.

YOUNG and PLUMMER, JJ., did not sit. The others concurred.

(71 N. H. 290)

#### NAWN v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Merrimack. June 2, 1914.)

#### 1. EVIDENCE (§ 126\*) — RES GESTÆ — STATEMENTS OF INJURED PERSON.

In an action for death, there was no error of law in admitting a statement made by deceased as to the cause of the injury, where there was evidence that he was unconscious from the time he was struck until the declaration was made, since the declaration could be found to have resulted spontaneously from the injury, and not to have been the result of reflection and consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 372-376; Dec. Dig. § 126.\*]

#### 2. TRIAL (§ 138\*)—RECEPTION OF EVIDENCE—SUFFICIENCY OF PRELIMINARY PROOF—DETERMINATION.

Where, in an action for death, a declaration by deceased as to the cause of the injury was offered and there was evidence that it was made as soon as he regained consciousness after the injury, whether he was unconscious up to the time of making the declaration was a question of fact, to be decided by the court in ruling upon the admissibility of the evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 322; Dec. Dig. § 138.\*]

#### 3. APPEAL AND ERROR (§ 970\*)—REVIEW—DISCRETIONARY MATTERS — PRELIMINARY PROOF.

Where there was evidence that an injured person whose statement as to the cause

of his injury was offered in evidence was unconscious from the time of the injury to the time of making the declaration, the question of fact or of discretion as to the remoteness of the statement could not be reviewed by the Supreme Court, though the trial justice in admitting the evidence reserved the discretion of the court, whether the evidence warranted the finding that the declaration was near enough in time, considering the mental condition of the injured party, to be properly admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.\*]

#### 4. WORDS AND PHRASES—"JUDICIAL DISCRETION."

"Judicial discretion" in its technical legal sense is the name of the decision of certain questions of fact by the court.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 4, pp. 3855, 3856; vol. 8, p. 7697.]

#### 5. WITNESSES (§ 248\*) — EXAMINATION — RESPONSIVENESS OF ANSWER.

Where, in an action for the death of an employé killed while carrying boiler flues across railroad tracks, a witness was asked if he noticed whether deceased paid any attention to the tracks, his answer that he noticed that before he picked up a flue he looked up the track was responsive to the question.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 861-863; Dec. Dig. § 248.\*]

#### 6. MASTER AND SERVANT (§ 274\*)—ACTIONS FOR INJURIES—EVIDENCE — CONTRIBUTORY NEGLIGENCE.

In an action for the death of an employé engaged in carrying boiler flues across railroad tracks, and struck by a train about 20 minutes after he commenced work, evidence that on one or more occasions prior to the trip during which he was struck he looked up the track before picking up a flue for the purpose of carrying it across was properly admitted.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.\*]

#### 7. MASTER AND SERVANT (§§ 204, 265\*)—ACTIONS FOR INJURIES—BURDEN OF PROOF.

Under Laws 1911, c. 163, § 2, authorizing a recovery for personal injuries to an employé in the course of any of the employments specified in section 1, and providing that the workman shall not be held to have assumed the risk of any injury due to any cause therein specified, but that there shall be no liability under that section for any injury to which it shall be made to appear by a preponderance of evidence that the negligence of the plaintiff contributed, the defense of assumption of risk is wholly destroyed, and plaintiff is relieved of the burden of proving freedom from fault, and is entitled to recover if the case discloses no evidence upon the question of contributory negligence, or if the evidence is evenly balanced.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 544-546, 877-908, 955; Dec. Dig. §§ 204, 265.\*]

#### 8. MASTER AND SERVANT (§ 289\*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.

In an action for the death of an employé of a railroad company struck by a train while carrying boiler flues across railroad tracks about 20 minutes after he commenced work, evidence held to make a question for the jury as to his freedom from contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Transferred from Superior Court, Merrimack County; Chamberlin, Judge.

Case by Thomas Nawn, administrator, against the Boston & Maine Railroad, for negligence resulting in the death of William Powell, the plaintiff's intestate. Transferred from the superior court on defendant's exceptions to the denial of motions for a nonsuit and the direction of a verdict in its favor and to the admission of certain evidence. Exceptions overruled.

Powell was employed by the defendants. On the morning of his injury he was at work carrying boiler flues across the track at the defendants' storehouse in Concord, and was struck by a derrick car which backed down upon him. The plaintiff offered in evidence a declaration by Powell with respect to the cause of his injury. There was evidence that he was unconscious from the time he was struck until the declaration was made. The court admitted the declaration subject to the defendants' exception, and reserved the discretion of the court whether the evidence warranted the finding that the declaration was near enough in point of time, considering the mental condition of Powell, to be properly admitted. Subject to the defendants' exception, a witness who was not present at the time of the accident was permitted to testify that on one or more occasions before the last Powell looked up the track before picking up a flue for the purpose of carrying it across.

John M. Stark and Martin & Howe, all of Concord, for plaintiff. Streeter, Demond, Woodworth & Sulloway, of Concord, for defendants.

PARSONS, C. J. [1] 1. There was no error of law in the conclusion of the trial court that under the circumstances the declaration offered was so connected with the fact of injury as to be admissible. *Dorr v. Railway*, 76 N. H. 16A, 80 Atl. 336; *Robinson v. Stahl*, 74 N. H. 310, 67 Atl. 577.

"When a person receives a sudden injury, it is natural for him, if in the possession of his faculties, to state at once how it happened. \* \* \* This view of the common experience of mankind shows that, if the declaration has that character, it possesses an important element of reliability and significance which is foreign to narrative remarks made so long after the event as to derive directly no probative force from it." *Murray v. Railroad*, 72 N. H. 32, 37, 38, 54 Atl. 289, 292 (61 L. R. A. 495, 101 Am. St. Rep. 660).

Whether the declarations offered are spontaneous, the result of the transaction, or are made after an opportunity for reflection—whether their weight as evidence is found in the circumstances under which they were made, or in the credibility of the declarant—are considerations which govern the admissibility of evidence of this character. *Murray v. Railroad*, supra, and cases cited, 72 N. H. 37, 54 Atl. 289, 61 L. R. A. 495, 101 Am. St. Rep. 660; 3 Wig. Ev., §§ 1747, 1748. If,

as the evidence tended to show the declaration was made with the declarant's first consciousness after the accident, it could be found to result spontaneously from the injury, and to be a part of what took place so far as the declarant was concerned, and not to have been the result of reflection and consideration by him. So made the declaration was admissible.

[2, 3] Whether the declarant was or was not unconscious, as the evidence tended to prove, is a question of fact to be decided by the court in ruling upon the admissibility of the evidence.

"When the determination of the competency of a proposed piece of evidence involves a preliminary decision of any questions of fact by the presiding judge, his decision in such matters of fact is final, and not subject to exception." *Hurlburt v. Bellows*, 50 N. H. 105, 115, 116.

In this case, decided in 1870, comment is made upon the fact that the presiding judge reserved no question of fact, or of discretion for the consideration of the law court. In the present case, the justice of the superior court presiding at the trial reserved "the discretion of the court whether the evidence warranted the finding that the declaration was near enough in time, considering the mental condition of the deceased, to be properly admitted." If this reservation was intended merely to present the question whether the unconsciousness of the declarant from the time of the accident to the time of the declaration was a fact competent for consideration upon the question of remoteness, and whether upon the evidence it could be found the declaration was not too remote, the reservation presents questions of law which have been considered.

[4] "Judicial discretion, in its technical legal sense, is the name of the decision of certain questions of fact by the court." *Darling v. Westmoreland*, 52 N. H. 401, 408, 13 Am. Rep. 55; *Bundy v. Hyde*, 50 N. H. 116, 120; *Jagues v. Chandler*, 73 N. H. 376, 62 Atl. 713.

In *Glover v. Baker*, 76 N. H. 261, 81 Atl. 1081, it was held that the justices of the superior court might reserve and transfer to this court for determination questions of law arising before them, without prior decision in that court. The question now appears to be presented whether they may send to this court for revision their conclusions upon matters of fact which are questions of law only because passed upon by the court and not by the jury.

In the case (*Bundy v. Hyde*, cited above) in which the definition of "discretion" was formulated, it was said:

"It is quite proper at any time, and certainly expedient, in a case of considerable doubt and difficulty, for the presiding justice to reserve the question of discretion for the revision of the whole court."

Since that time very many cases have been decided in which it has been held that matters arising in the conduct of the trial term, in which the question is what ought to be



done, what does justice require in the particular instance, are questions of fact determinable at the trial term, not open to exception. The cases are very numerous. See *Jaques v. Chandler*, 73 N. H. 376, 381, 62 Atl. 713; 66 N. H. 683; 67 N. H. 616; 68 N. H. 625; 69 N. H. 688; 70 N. H. 660; 71 N. H. 638; 72 N. H. 626; 73 N. H. 645; 74 N. H. 621; 75 N. H. 643; 76 N. H. 632.

In many cases, in ruling that no question was presented by an exception to such findings, it has been remarked that no question of discretion has been reserved. These expressions tend to show an understanding that the finding of fact involved in determining a motion for a new trial, limiting costs, permitting leading questions, excluding evidence for remoteness, and the like, might be reserved and transferred to the law court, but the jurisdiction does not appear to have been recently examined with particular reference to this class of questions. In *Kent v. Hutchins*, 50 N. H. 92, 94, decided in July, 1870, it is said:

"In matters of discretion, no exception lies to the ruling as matter of right. But in this case the court reserved the question as to the proper exercise of the discretion, and our opinion is that the discretion was properly and wisely exercised."

In *Paul v. Reed*, 52 N. H. 136, 138, decided in June, 1872, the question was when the title passed upon a sale of chattels. The court say:

"This is a question of fact, but it is submitted to the court for decision. Ordinarily it should be passed upon at the trial term; but where the question is a mixed one of law and fact, as it is here, it may not be irregular, if the judge thinks it best, to reserve the entire question for the whole court."

The court then proceeds to dispose of the case upon the assumption that questions both of law and fact are reserved. If, as this case tends to show, it was understood, as the court was organized in 1872, that the court at the law terms had jurisdiction of questions of fact which might be pending at the trial terms, that view was entirely abandoned under the later acts, which declared the jurisdiction to be "of questions of law arising at a trial term, reserved or assigned for decision." P. S., c. 204, § 3.

In *Metcalf v. Weed*, 66 N. H. 176, 19 Atl. 1091, the question was whether a search warrant sufficiently described the place to be searched. It was said that a description which identifies with reasonable certainty the place or places to be searched was legally sufficient. All the facts were found, and it was plainly the intent of the reservation to transfer to the law term the determination of the sufficiency of the description. But it was said to be a question of fact whether the description in the warrant designated the place to be searched with reasonable certainty.

"A question of fact is not ordinarily determined at the law term, however, strong or

conclusive upon one side or the other: the evidence recited in the case may seem to be, and though all the evidence relating to it is reported. *Jones v. Aqueduct*, 62 N. H. 488. There the reserved case contained an express finding (omitted as immaterial in the reported case) that 'herein are stated all the facts and circumstances claimed by either party to have any bearing upon the question whether the use made by the defendants of their land and of the water is or not a reasonable use.'"

Either because of a change in the statute or in judicial interpretation, it is clear it was not understood in 1901 that the court at the law term had the jurisdiction to determine questions of fact, which was exercised in *Paul v. Reed*, supra. It is to be remembered that prior to 1901 the individual judges who held the trial terms sat together as the law court. While trial terms might generally be held by a single justice (P. S., c. 207, § 1), there was no limitation to that number. In capital cases two were required (P. S., c. 254, § 2), while in cases of great importance more, or all of the court, sat together as trial judges. *Attorney General v. Taggart*, a case in which all the judges sat, reported 66 N. H. 362, 29 Atl. 1027, 25 L. R. A. 613, was considered to be in the trial term for Hillsborough county. *Bingham v. Jewett*, 66 N. H. 382, 29 Atl. 694, and *Eastman v. Jewett*, 66 N. H. 623, 29 Atl. 695, were proceedings in the trial term. The present Supreme Court has the jurisdiction of all matters and things of which the court existing when the statute was passed had at the law term. Laws 1901, c. 78, § 2; *Glover v. Baker*, 76 N. H. 261, 269, 81 Atl. 1081. Whether all the judges sitting together who individually held the trial terms called their assembly a law or a trial term might seem mere verbiage; but the fact that the distinction was made is decisive of the jurisdiction of the present court over questions of fact in the trial term. Accordingly, following *Metcalf v. Weed*, supra, this court has refused to pass upon questions of fact, even when apparently referred to it by the superior court. *Ledoux v. Nashua*, 75 N. H. 481, 76 Atl. 249; *Crowley v. Crowley*, 72 N. H. 241, 243, 56 Atl. 190.

Although in 1870, in *Bundy v. Hyde*, the court recognized the propriety of the reservation of questions of discretion in difficult cases, in 1877, immediately after the reorganization of the court in 1876, it was said in *Fuller v. Bailey*, 58 N. H. 71, 72:

"The question whether a verdict is against the evidence is one which the court at the trial term would not ordinarily reserve, and which the court at the law term would generally refuse to consider if it were reserved."

The distinction between law and fact in the decisions of the court was not so clearly observed in the early judicial history of the state, when all the questions of law and fact were blended together upon the docket and heard by the same judges. *Glover v. Baker*, 76 N. H. 261, 268, 81 Atl. 1081, 1086. Since that time the tendency of statutory

change and judicial decision has been to mark with greater clearness the dividing line.

"The fundamental purpose of the act of 1901 was to disassociate the judges of law from the judges of fact." *Glover v. Baker*, 76 N. H. 261, 270, 81 Atl. 1081.

The judicial system as now established requires that questions of fact arising in the course of trials in the superior court shall be there decided, and the jurisdiction of the Supreme Court is thereby limited to the question of law, whether there was evidence upon which the decision could reasonably be made as it was. *Jaques v. Chandler*, 73 N. H. 376, 382, 62 Atl. 713. As there was evidence upon which the declaration objected to could be found not too remote to aid in the decision of the question on trial, the record presents no other question as to this evidence within the control of this court.

[5, 6] 2. The deceased was employed to carry boiler flues from piles upon the west side of a track in the railroad yard, across the track to a shop on the east side. He went to work at seven in the morning, and about 20 minutes later was injured by a derrick car backed down the track, which struck him just as he stepped upon the track to carry a flue across. A witness, who observed him at work, being asked, "Did you notice whether he paid any attention to the tracks?" answered, "I noticed that before he picked up a flue he looked up the track," whereupon the defendants excepted. The inquiry was competent, and the answer responsive. The question called for a part of the history of the transaction leading up to the accident, and tended to throw light on the question whether the deceased was acting without any regard to the dangers of his work place. Whether the answer tended to prove that just before he started on the fatal trip across the track he looked up, and whether, if he did, such act was evidence of care, are questions not raised by the general exception to the answer. No rule of law limits the evidence of the morning's events to the fraction of a minute while Powell was walking from the flue pile to the track upon his last trip. So much of what took place as the presiding judge found not too remote to aid the jury was competent.

3. The defendants' motions for a nonsuit and a verdict are based upon the claim that Powell's fault was part of the cause of his injury.

[7, 8] It is conceded that under the recent decision in *Boody v. Company*, 77 N. H. 208, 90 Atl. 859, the deceased's employment at the time of the injury was one of those described in section 1, chapter 163, Laws 1911. The defendants as employers not having accepted the provisions of the act as provided in section 3, the rule of liability in this case is prescribed by section 2, which provides:

"The workman shall not be held to have assumed the risk of any injury due to any cause specified in this section; but there shall be no liability under this section for any injury to which it shall be made to appear by a preponderance of evidence that the negligence of the plaintiff contributed."

By these provisions the defense of assumption of risk is wholly destroyed, and the plaintiff is relieved of the burden of proving the deceased's freedom from fault as a cause of the injury. If the case discloses no evidence upon the question, or the evidence is evenly balanced, the plaintiff may recover. It is only when the evidence balances in the defendant's favor that the defense of the contributory negligence of the injured employé may prevail. As the jury is the only tribunal authorized to weigh evidence, to determine upon which side the preponderance lies, the cases would seem to be few in which the judgment of that tribunal must not be invoked. If the plaintiff's evidence does not conclusively show the injured party's want of care, and evidence on that issue is presented by the defendant, it would ordinarily be for the jury to believe or disbelieve the defendant's witnesses. *Lally v. Insurance Co.*, 75 N. H. 188, 190, 72 Atl. 208; *Pillsbury v. Pillsbury*, 20 N. H. 90, 97. To justify a nonsuit it must conclusively appear that the evidence leads to but one conclusion. *Perham v. Lane*, 76 N. H. 580, 83 Atl. 805; *State v. Leary*, 75 N. H. 459, 462, 76 Atl. 192, 44 L. R. A. (N. S.) 457; *State v. Harrington*, 69 N. H. 496, 45 Atl. 404. In other words, concretely applying the principle, can a reasoning mind fail to reach the conclusion that Powell was in fault? This was his first employment; the accident occurred within 20 minutes after he went to work. If he had looked to the north immediately before he stepped upon the track, he probably would have escaped injury. Was his failure to look both ways at the moment of his entry upon the track so plainly careless, in view of his knowledge of the situation, that he must be held in fault? That he looked to the north before picking up a flue is evidence of his understanding of the extent of the danger, from that direction. Whether the profane warning the defendants' witness testified was given him to be careful of that switcher, "It is running back and forth all the time," was in fact given was for the jury to say. They might not believe such a witness; or, if they did, they might think from the way Powell was doing his work that he did not understand the switcher would be run at such a speed over his work place, that looking in that direction before he picked up a flue was not sufficient precaution. There was conflict as to the speed at which the derrick car train was run. On one view of the evidence, it may not have been in sight when Powell started to take up the flue. That running a train in such a way over a track where other employés were set at work is

evidence of negligence is not contested. Reasonable men might conclude that with Powell's inexperience in railroad work he was not careless because he failed to anticipate and guard himself against such recklessness in operation. As it might be found the train was not in sight just before Powell took up the flue for his last trip, the fact that he was struck does not conclusively prove that he did not then look. If, as the defendants contend, the evidence that he looked on two or three previous trips before picking up a flue is not legally competent to prove that he did look on the last trip, its incompetency might leave the case without evidence on the point, but would not establish "a preponderance of evidence" that he did not look.

Exceptions overruled.

PLUMMER, J., was absent. The others concurred.

(88 Conn. 265)

# KENURE v. BRAINERD & ARMSTRONG CO.

(Supreme Court of Errors of Connecticut, June 10, 1914.)

## 1. PARENT AND CHILD (§ 5\*)—SERVICES AND EARNINGS OF CHILD.

The time and services of a minor during minority belong to its father, unless it has been emancipated.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 70-73, 75, 76; Dec. Dig. § 5.\*]

## 2. PARENT AND CHILD (§ 16\*)—SERVICES AND EARNINGS—EMANCIPATION.

A father, by emancipating his minor child, could permit her to appropriate her time and services to herself, or might waive his right to payment for such services or to damages for being deprived of them.

[Ed. Note.—For other cases, see Parent and Child, Cent. Dig. §§ 165-175; Dec. Dig. § 16.\*]

## 3. ESTOPPEL (§ 68\*)—EQUITABLE ESTOPPEL—INCONSISTENT POSITION—ACTIONS FOR INJURIES TO CHILD.

A father, who, as next friend of his minor child, sues and recovers in her name damages to which the child, unless emancipated, is not entitled, thereby estops himself from thereafter, in an action in his own name, recovering for the same damages.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.\*]

## 4. ESTOPPEL (§ 68\*)—EQUITABLE ESTOPPEL—INCONSISTENT POSITION—ACTIONS FOR INJURIES TO CHILD.

Though, in an action by a father, as next friend of his minor child, for damages to such child, a recovery of damages for her permanent injuries and pain and suffering would be no bar to a recovery by the father for loss of her services, yet it would be inequitable to permit him to treat these in one action as belonging to her and afterwards in another action as belonging to him.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 165-169; Dec. Dig. § 68.\*]

## 5. APPEAL AND ERROR (§ 1067\*)—HARMLESS ERROR—INSTRUCTIONS.

In an action by a father, as next friend of his minor child, any error in refusing to charge that plaintiff could not recover for her loss of

time or impairment of earning capacity was harmless, as the father would be thereafter estopped from bringing an action therefor in his own name.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.\*]

## 6. DAMAGES (§ 208\*)—TRIAL (§ 139\*)—QUESTIONS OF FACT—WEIGHT OF EVIDENCE.

In a personal injury action, the weight of the evidence and also the amount of damages was for the jury in the trial court.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 54, 64, 68, 132, 144, 145, 205, 220, 533, 534; Dec. Dig. § 208;\* Trial, Cent. Dig. §§ 332, 333, 338-341, 365; Dec. Dig. § 139.\*]

Appeal from Superior Court, New London County; Milton A. Shumway, Judge.

Action by Margaret Kenure against the Brainerd & Armstrong Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Michael Kenealy, of Stamford, and Charles V. James, of Norwich, for appellant. Hadlai A. Hull, Charles Hadlai Hull, and Frank L. McGuire, all of New London, for appellee.

THAYER, J. The plaintiff is a minor and sues by her father, as next friend. The complaint alleges serious and permanent physical injuries caused by the defendant's negligence, resulting in great pain and suffering to her, in incapacitating her to pursue a course of study in stenography which she had been theretofore pursuing, and in causing her to expend a large sum of money in being cured. The finding shows that evidence was introduced in support of these claims, and also to prove that her earning capacity had, from the time of her injury, been seriously impaired and decreased, and that, for a period of about one year immediately following her injury, she was unable to work. It also states that there was no evidence showing, or tending to show, that she had at any time been emancipated by her parents or either of them, or that she was entitled to her own earnings.

The charge of the court is criticised because it failed to inform the jury that the plaintiff was not entitled to recover for her loss of time and services during her minority, because it failed to inform them that she was not entitled to recover for loss or impairment of earning capacity during her minority or for any pecuniary damage caused by her injuries during her minority, and because of the statement in the charge that "no claim is made before you that in this action she is entitled to recover anything for her loss of time up to the present."

[1-5] It is true, as claimed by the defendant, that the plaintiff's time and services during her minority belonged to her father, unless she had been emancipated by him. But the father, by emancipating her, could permit her to appropriate her time and services to herself, or might waive his right to payment for such services or to damages for

being deprived of them by the defendant's negligence. It does not appear that he had in fact emancipated her prior to her injuries complained of. But he brings this action as next friend of the plaintiff. Among the damages sought to be recovered are loss of earning capacity and inability to work for a year following her injury and moneys expended in being cured. The right to recover for these, the plaintiff being a minor, was in the father, and not in her. Unless she had been emancipated, he was liable for the expenses of her cure and was entitled to the damages if her injuries incapacitated her for work and lessened her earning capacity. His claiming in her action, in her behalf, a judgment for loss resulting from her inability to work and her lessened earning capacity and for expenses of being cured estopped him from hereafter claiming that he was entitled to them. Where a parent thus, as next friend of his minor child, sues and recovers in her name damages to which the child, unless emancipated, is not entitled, and the parent is entitled, he estops himself from thereafter, in an action in his own name, recovering for the same damages. He thus treats the child as emancipated, at least so far as the recovery for such injuries are concerned, and cannot thereafter be permitted to claim that he, and not the child, was entitled to recover for such items. 1 Joyce on Damages, § 301; Sedgwick on Damages (9th Ed.) § 486b; Baker v. Flint & Pere Marquette R. R. Co., 91 Mich. 298, 306, 51 N. W. 897, 16 L. R. A. 154, 30 Am. St. Rep. 471; Louisville Ry. Co. v. Esselman, 98 S. W. 50, 29 Ky. Law Rep. 333. The brief in this case instituted by the father, as next friend of the plaintiff, recognizes and claims this to be the law. While a recovery by the plaintiff of damages for her permanent injuries and pain and suffering would be no bar to a recovery by him for loss of her services in a suit brought in her name by her father (Wilton v. Middlesex Railroad, 125 Mass. 130, 133), it would be inequitable to permit him to treat these in one action as belonging to her and afterwards in another action as belonging to him. If, then, as claimed by the defendant, the plaintiff has recovered damages for these items which, if there was no emancipation, belonged to the father, the latter cannot hereafter recover for them in an action in his own name, and the defendant was not harmed by the court's failure to charge that the father, and not the plaintiff, was entitled to recover for them. The court was not requested to charge upon this point, and, from the facts appearing in the finding, we cannot say that it erred in neglecting to charge concerning the question.

The appellant's objection to the court's remark that no claim had been made that the plaintiff was entitled to recover for loss of time "up to the present" is that the last three words impliedly limited her disability

to recover to that portion of the period of her minority which preceded the trial and left the jury to give her damages for the portion subsequent to the trial. However that may be, as there can be no future recovery for the same items by the father in his own name, the defendant is in no condition to complain of the charge. It probably relieves it from the costs of another action.

[6] The assignment of error based upon the court's refusal to set aside the verdict has not been pursued in the brief or argument. We think there was evidence to support the verdict, and its weight was a question for the jury, as was also the amount of damages to which the plaintiff was entitled.

There is no error. The other Judges concur.

(88 Conn. 256)

### NAYLOR v. HAVILAND.

(Supreme Court of Errors of Connecticut.  
June 10, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§ 705\*)—HIGHWAYS—INJURIES—NEGLIGENCE.

A motorist going in the direction opposite to a street car, but on the same side of the street, who drives his machine at the rate of more than eight miles an hour within less than three feet of the car after it has stopped to allow passengers to alight, is guilty of negligence.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 706\*)—HIGHWAYS—INJURIES—NEGLIGENCE.

A passenger on a street car, though knowing that the other side of the street was blocked and that all traffic had to come on the single side, was not guilty of negligence as a matter of law because, before alighting from the street car, he did not look ahead and discover a negligently driven automobile which, before he had time to take a step, struck him while he was within three feet of the car.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

Appeal from Superior Court, Fairfield County; William L. Bennett, Judge.

Action by Edward J. Naylor, as administrator, against Winthrop A. Haviland. From a judgment for plaintiff, defendant appeals. Affirmed.

Action to recover damages for personal injuries inflicted on the plaintiff's decedent during his lifetime by the negligent driving of the defendant's automobile, brought to and tried before the superior court for Fairfield county. Judgment for the plaintiff. Defendant appeals. No error.

Edward W. Broder, of Hartford, and Sanford Stoddard, of Bridgeport, for appellant. Carl Foster, of Bridgeport, for appellee.

BEACH, J. [1] The plaintiff's decedent was getting off a trolley car at the intersection of Colorado avenue and State street,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which is a customary stopping place for trolley cars in the city of Bridgeport, when he was struck by the defendant's automobile coming from the opposite direction to that in which the trolley car had been moving. The defendant's automobile was traveling in an easterly direction on the north or left-hand side of the highway, because the south side of State street for some distance at and near the place of the accident was impassable for traffic on account of paving operations. The defendant in approaching the trolley car saw that it was about to stop to let off or take on passengers, and slackened his speed somewhat, but drove past the trolley car at a speed in excess of eight miles an hour, and so near as to leave a space of not more than three feet between the trolley car and the automobile. These facts clearly establish the defendant's negligence, and the sole claim on the part of the defendant is that on the facts found the trial court erred in not holding the plaintiff's decedent guilty of contributory negligence.

[2] The facts chiefly relied on in support of the claim of contributory negligence are that the plaintiff's decedent was a resident of Bridgeport and knew that the south side of State street was obstructed, and that all traffic in both directions must pass between the car from which he was alighting and the sidewalk; that the accident happened about 10:30 p. m., and the defendant's automobile being equipped with powerful headlights could be seen about 200 feet away; and that the plaintiff's decedent did not look to the west at any time before he was struck. The whole point of the appeal is that he was necessarily guilty of contributory negligence in not doing so. The defendant relies upon the rule of conduct that one who is about to attempt a dangerous crossing must make reasonable use of his senses, and claims that such a person is necessarily negligent if he omits to turn his head and look in a direction from which the danger may be expected. It is admitted that under ordinary conditions of traffic the plaintiff's decedent would have had occasion to expect danger only from the east; but it is claimed, and rightly so, that the special finding of his knowledge as to the condition of State street would require him to look in both directions, if the rule relied on were applicable at all. The rule, however, is predicated on the hypothesis that the party against whom it is applied has moved from a place of comparative safety into a place of danger without exercising an obvious precaution which he had a fair opportunity to use. It does not apply as a rule of law to the situation presented by the finding of the trial court in

this case, which shows that the plaintiff's decedent reached the ground just as the car came to a stop, and that he was struck by the defendant's automobile within the instant after he stood on the ground and took one step forward, and while within three feet of the trolley car. This condition of facts is very different from the case of one who, standing in a place of safety on the sidewalk, attempts to cross a street without looking. In *Wolfe v. Ives*, 83 Conn. 174, 76 Atl. 528, 19 Ann. Cas. 752, the plaintiff got off the trolley car and crossed nearly to the opposite sidewalk when he was run down by an automobile which was attempting to give the car a wide berth. In *Kauffman v. Nelson*, 225 Pa. 174, 73 Atl. 1105, the facts on which the case turned are not very definitely stated in the opinion; but it is said that the weight of the evidence tended to show that the automobile turned in towards the car to pass behind the plaintiff who had gotten off the car and started for the sidewalk without looking, and that the plaintiff then became confused and started back again and was struck.

We think it would be carrying the rule contended for by the defendant too far, to say that it was negligent in point of law for the plaintiff's decedent to get off the car and move only far enough to clear himself from it before looking to the west. It does not appear how much traffic there was on State street at that time of the evening; and, unless the street was crowded, a careful person might properly assume that, if any automobile did pass while he was getting off the car, it would give him a wide enough berth for standing room on the ground and to clear himself from the car. During the act of alighting from the car he might reasonably look where he was stepping and assume that the car itself in coming to a stop at a usual stopping place would warn an approaching vehicle not to pass close to the car. After he had reached the ground and cleared himself from the car and was standing in a place which under ordinary conditions of traffic might reasonably be regarded as a place of safety, the rule which the defendant contends for would properly begin to operate.

Until then, the question of whether he was guilty of contributory negligence or not from failing to look to the west was a conclusion of fact to be drawn from all the evidence in the case, and not an inference of law from the mere fact of not looking. We cannot say from the findings that the trial court erred in holding that the plaintiff's decedent was not guilty of contributory negligence.

There is no error. The other Judges concurred.

(88 Conn. 219)

**CHESEBRO v. LOCKWOOD et al.**(Supreme Court of Errors of Connecticut.  
June 10, 1914.)**1. PRINCIPAL AND AGENT (§ 123\*)—EVIDENCE OF AGENCY—SUFFICIENCY.**

In an action against an adjoining owner to recover half the cost of a division wall, evidence held to sustain a finding that defendant's son was not her agent in the care and management of her real estate.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 420-429; Dec. Dig. § 123.\*]

**2. PRINCIPAL AND AGENT (§ 123\*)—EVIDENCE OF AGENCY—ADMISSIBILITY.**

The existence of an agency for one purpose does not tend to establish its existence for an entirely different purpose, neither does the fact of a special agency tend to prove a general agency.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 420-429; Dec. Dig. § 123.\*]

**3. CONTRACTS (§ 28\*)—ACTION—EVIDENCE—SUFFICIENCY—EXISTENCE OF CONTRACT.**

In an action against an adjoining owner for half the cost of a division wall constructed by plaintiff, evidence held to sustain a finding that there was no express promise on defendant's part to pay for the wall.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 133-140, 1755, 1782-1784, 1785½, 1820, 1821; Dec. Dig. § 28.\*]

**4. CONTRACTS (§ 27\*)—IMPLIED PROMISE—DIVISION FENCE.**

No implied promise to pay for half a division wall would be implied against one who had no interest in the property benefited.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 121-132; Dec. Dig. § 27.\*]

**5. CONTRACTS (§ 27\*)—IMPLIED PROMISE—DIVISION FENCE.**

Where plaintiff inquired of an adjoining owner if he had any objections to him raising the division wall and if the workmen could enter his property to do the work, etc., the law would imply no promise on defendant's part to pay one-half the cost thereof.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 121-132; Dec. Dig. § 27.\*]

**6. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EVIDENCE.**

Where the issue was whether defendant's son was her agent for a certain purpose, error in excluding evidence which, if admitted, would not have established agency for such purpose, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

**7. APPEAL AND ERROR (§ 1057\*)—HARMLESS ERROR—EVIDENCE.**

Error in excluding evidence of a fact which was otherwise fully testified to, and unquestioned, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.\*]

Appeal from Town Court of Norwalk;  
Frank L. Wilder, Judge.

Action by Samuel Z. Chesebro against Frederick A. Lockwood and others. Judgment for defendants, and plaintiff appeals. Affirmed.

The plaintiff in this action against mother and son seeks to recover one-half the cost

of the construction of a division wall. The complaint is in two counts. Each alleges that the plaintiff and the defendant Carrie A. Lockwood were the owners respectively of adjoining properties, and that the division fence between them, about 800 feet in length, was insufficient. The first count relies upon an express promise made to one Keeney, the plaintiff's agent; the second upon an implied promise. The third paragraph of the first count recites the express promise relied upon and the circumstances attending it as follows:

"On said day the plaintiff, through his agent, Mr. Keeney, called upon the defendants in relation to the construction of a new fence along the said portion of 800 feet, and to find out which part of the same should be constructed by the plaintiff and which part by the defendants, and for the purpose of arranging to build a new fence along said boundary line, and was informed by the defendants that they did not know which portion of the same should be constructed by them or which by the plaintiff, but if the plaintiff would fix the fence up they would adjust the cost of the same later."

The plaintiff's evidence showed that the land between which and the plaintiff's the wall in question extends was owned for about one-third of the distance by the undivided estate of F. St. John Lockwood, deceased, and in charge of the defendant F. A. Lockwood, and for the remaining two-thirds by the defendant Carrie A. Lockwood. Carrie A. Lockwood is the widow of F. St. John Lockwood, and F. A. Lockwood one of his three surviving children. The only evidence admitted or offered tending to show any sort of agency on the part of F. A. Lockwood for his mother was confined to his having filed tax lists with the assessors for her, made deposits in the bank for her, left her bank book to be balanced, and upon occasions during her absence from town drew checks upon her account under a power of attorney authorizing him to do so.

The plaintiff's testimony was also to the following effect: In May, 1912, the plaintiff purchased his present property, then in a dilapidated condition, and thereupon made extensive improvements upon it including filling and grading. This work was under the direction of Keeney as the plaintiff's agent. As a part of the work, the plaintiff desired to replace a portion of the existing wall between his property and the adjacent Lockwood properties, which was an ordinary single stone wall broken down in places and insufficient as a division wall, with a new and better one, and repair the remaining portion. Keeney thereupon sought an interview with the defendant F. A. Lockwood, whereat, no third person being within hearing, there occurred, as he testified, what the third paragraph of the first count correctly and completely recites. There was no other conversation or communication between them upon the subject. Keeney forthwith caused the old wall to be removed along the land of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

St. John Lockwood estate and for substantially one-half the length of the Carrie A. Lockwood land, and replaced it with a new double stone wall and repaired the rest of the wall.

F. A. Lockwood was fully aware of this work as it progressed.

There was no evidence of any communication between any person and Carrie A. Lockwood with respect to the wall, or of any knowledge on her part of its reconstruction or repair.

Upon the conclusion of the plaintiff's testimony a judgment of nonsuit was entered in favor of Carrie A. Lockwood, and the case proceeded against F. A. Lockwood. He flatly contradicted Keeney's version of the interview with him and denied that he made any promise to share in the payment for a new or reconstructed wall. He testified that the new fill and grading of the plaintiff's property necessitated the construction of a new and different wall to serve as a bank wall, that Keeney's conversation with him consisted of the former's inquiry if there was any objection to the plaintiff raising the wall, indicating particularly the portion where it was necessary to do so by reason of the depth of the fill, and to the plaintiff's workmen going upon the Lockwood side to do the work, and of his response that he had no objection if the men would keep near the wall so as not to trample down the grass. He and other witnesses in his behalf testified that the old wall was a sufficient fence for farm purposes.

The appeal assigned as errors the refusal of the court to set aside the judgment of nonsuit as to the defendant Carrie A. Lockwood, its refusal to set aside the verdict in favor of F. A. Lockwood, as being against the evidence, one passage in the court's instructions to the jury, and two rulings upon the admission of testimony.

John J. Walsh, of Norwalk, and Edward J. Quinlan, of Norwalk, for appellant. Leo Davis, of Norwalk, for appellees.

PRENTICE, C. J. (after stating the facts as above). [1, 2] The nonsuit was properly granted. There was no evidence upon which liability on Mrs. Lockwood's part, whether by force of an express promise or of acts and circumstances raising an implied one, could be predicated in the absence of proof of F. A. Lockwood's agency. The evidence offered for the purpose of establishing such agency, including that which was excluded as well as that admitted, was wholly insufficient for that purpose. From it no conclusion could reasonably have been drawn that the son was either the general agent of his mother, or her special agent in the care and management of her real estate in question. The existence of an agency for one purpose does not tend to establish the existence of one for another and entirely different purpose. Nei-

ther does the fact of a special agency tend to prove a general agency.

[3] The verdict in favor of the defendant F. A. Lockwood could not properly have been set aside. The jury was amply justified in finding, as its verdict indicates that it did, that he did not promise as alleged; and without such promise recovery could not have been had upon the first count.

[4, 5] It is difficult to discover how he could have been held liable under the second count since he was not the owner of any of the property benefited, and had neither received or appropriated nor could receive or appropriate the benefit. *Day v. Caton*, 119 Mass. 513, 515, 20 Am. Rep. 347. Furthermore it is apparent that the jury found that Lockwood's and not Keeney's version of the sole interview between them touching the boundary wall was the correct one. That being so, all reasonable foundation for an implied promise was removed from the case. Lockwood's knowledge of the construction of the wall under the circumstances detailed by him did not call upon him to speak, and his silence as the work progressed was not conduct out of which the law would raise an obligation to pay for benefits resulting from the work. One may indeed be required to compensate another for benefits conferred by the other's labor and service either accepted by or necessarily accruing to the beneficiary when, having reasonable ground to believe that the labor is being done or service performed in the expectation of compensation, he stands silently by and permits the labor or service to continue. *Day v. Caton*, 119 Mass. 513, 515, 20 Am. Rep. 347; *Weinhouse v. Cronin*, 68 Conn. 250, 255, 38 Atl. 45. But this was not Lockwood's situation under the facts as found.

These considerations lead to the further conclusion that the plaintiff could not have been harmed by the single passage in the court's instructions complained of which under the circumstances of the case amounted to no more than that the plaintiff could not recover unless his version of what occurred at the interview as distinguished from Lockwood's radically different version was correct. Although the statement as thus made may not have been technically accurate as applied to all possible conditions, it was one sufficient and suitable for the guidance of the jury to a correct conclusion under the circumstances presented for its consideration.

[6, 7] The two rulings upon the admission of testimony were harmless. One excluded from the jury's consideration the testimony previously received of a bank officer who testified to the facts already recited concerning F. A. Lockwood's bank transactions for his mother. These facts, with no other support than was given them, could not, as we have seen, have helped the plaintiff in establishing an agency embracing the care or management of his mother's real estate, and that

was their only possible relevancy. The evidence excluded by the second ruling possessed no importance save as tending to establish the agency of Keeney, which was otherwise fully testified to, unquestioned and assumed by the court in its instructions, which gave the plaintiff the full benefit of all of Keeney's acts and conversations.

There is no error. The other Judges concurred.

(88 Conn. 211)

**HARTMANN BREWING CO. v.  
HARTMANN.**

In re HARTMANN.

(Supreme Court of Errors of Connecticut.  
June 10, 1914.)

**1. APPEAL AND ERROR (§ 659\*)—DEFECTS IN  
RECORD—AMENDMENT IN APPELLATE COURT.**

Though the Supreme Court can order the trial court to certify up portions of the transcript of the proceedings at the trial, it will not do so when no useful purpose will be served thereby.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2834-2843; Dec. Dig. § 659.\*]

**2. APPEAL AND ERROR (§ 660\*)—DEFECTS IN  
RECORD—EVIDENCE.**

Upon an application to the Supreme Court to compel the trial court to certify portions of the transcript, evidence *held* to show that a ruling by the trial court, "It is excluded," made after objection by and colloquy with counsel, applied to and excluded the evidence in question.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2829, 2844-2847; Dec. Dig. § 660.\*]

Action by the Hartmann Brewing Company against Fritz G. Hartmann. From the judgment, defendant appeals. On application by defendant to the Supreme Court for an order directing the trial judge to certify to the Supreme Court a portion of the transcript of the evidence. Application denied.

Spotswood D. Bowers, of Bridgeport, for applicant. Robert E. and Robert G. De Forest, both of Bridgeport, opposed.

PRENTICE, C. J. The issuance of this order is asked in aid of the defendant's pending appeal. The trial judge declined to find a fact as the defendant requested. The defendant excepted to this failure, and asked that certain claimed extracts from the testimony be made a part of the record for a correction of the finding, as provided in section 795 of the General Statutes. The judge refused to do so upon the ground that the evidence in question was not admitted, but excluded. We are now asked to direct him to certify up the transcript of proceedings upon the trial claimed to show that the evidence was admitted, and that the fact which the court refused to find was thereby established.

[1] The power to issue an order such as is asked for doubtless resides in this court in the exercise of its general appellate and

supervisory jurisdiction. *McNamara v. McDonald*, 69 Conn. 484, 489, 38 Atl. 54, 61 Am. St. Rep. 48; *High on Extraordinary Legal Remedies*, § 27. It will not, however, be exercised when it appears that no useful purpose will be served thereby.

[2] The application sets out fully the situation, the end desired, and the evidence and rulings sought to be brought into the record by the certification. It furnishes all the information necessary to an intelligent judgment as to the purpose which would be served, were the transcript incorporated into the record as desired. The situation arises out of a ruling made in the language "It is excluded" at the conclusion of an extended colloquy between court and counsel concerning the competency as evidence of matters occurring after the commencement of the action, which a witness was engaged in giving. He had proceeded without objection for a short time, when defendant's counsel, discovering the sequence of dates, objected generally to all such matters, and asked for the exclusion of all that class of testimony. The court ended the colloquy which followed with the language recited. It is now contended by counsel for the party in whose interest the objection was made that the pronoun "it," used to designate the evidence excluded, was not used to comprehend all the testimony within the objection, so that the particular testimony now in question, although covered by the objection, was not covered by the rule.

We cannot concur in this proposition. An examination of the contention of the parties, the colloquy which the ruling brought to a close, the disclosure made therein of the court's views, and the character of the evidence and of the objections, convinces us that the ruling was intended and understood to be intended to be as comprehensive as the objection, and that the intent and understood intent of the court was to exclude from the jury's consideration all the evidence which came within the objection and within the operation of the rule the court manifestly adopted. Upon any other theory it would be difficult to explain the objector's apparent satisfaction with the ruling, evidenced by his failure to press the matter further. The contention now made by defendant's counsel at once convicts the trial counsel of failure to pursue his advantage and the court of the inconsistency of in a single ruling dealing one way with one portion of a clearly defined class of testimony and another way with another portion palpably subject to the same rule. It is also significant that a reference to this ruling subsequently made by the court confirms the view we have taken of its scope.

The application is denied. The other Judges concurred.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



(88 Conn. 269)

## EATON v. EATON et al.

(Supreme Court of Errors of Connecticut.  
June 10, 1914.)

## 1. WILLS (§ 704\*)—CONSTRUCTION—JURISDICTION OF COURT.

The court, in a suit to determine the validity and construction of a will, need only consider the rights of the parties in interest as affected by events, as they have occurred, and questions suggested by the will, which may arise in contingencies which have not and may not happen, will not be determined.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1680, 1681; Dec. Dig. § 704.\*]

## 2. WILLS (§§ 555, 687\*)—CONSTRUCTION—SUBSTITUTIONARY GIFT—LIMITATIONS.

A will, which provides for a disposition of a share of testator's residuary estate at the death of each of his two daughters entitled to the income of a trust fund for life, whether the death of the daughters occurs before or after the death of testator, contemplates, in the event of the death of the daughters before the death of testator, substitutionary gifts over, while, in so far as the will contemplates the death of the daughters after testator's death, limitation over after a life estate is created.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1190-1202, 1204, 1638-1643; Dec. Dig. §§ 555, 687.\*]

## 3. WILLS (§ 687\*)—DIRECTION TO TRUSTEE TO PAY TO PERSONS SPECIFIED.

A direction in a will creating a trust to pay to persons named specified portions of the trust estate after the death of a life beneficiary imports a gift.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1638-1643; Dec. Dig. § 687.\*]

## 4. PERPETUITIES (§ 4\*)—FUTURE ESTATES.

A testamentary gift to descendants of children of testator's daughters, living at his death, is void as contrary to the statute against perpetuities.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.\*]

## 5. PERPETUITIES (§ 4\*)—FUTURE ESTATES.

A provision in a will creating a trust to pay the income to testator's children for life, which directs that the lineal descendants of any deceased child shall take the part of the share their parent would have taken if alive, is void as contrary to the statute against perpetuities.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.\*]

## 6. WILLS (§ 473\*)—INVALIDITY IN PART—EFFECT.

Where testator created a trust estate to pay the income to his four children, two sons and two daughters, equally for life, and provided that on the death of either of the daughters the trustees should pay to each of the children of the deceased daughter an equal portion of her share discharged of the trust, "the lineal descendants of any deceased child to take the part of such share as their parent would have taken if alive," the invalidity of the gifts to lineal descendants because contrary to the statute against perpetuities does not invalidate the other provisions of the will or any of the gifts prior to the gifts to descendants.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 992-995; Dec. Dig. § 473.\*]

## 7. WILLS (§§ 523, 687\*)—CONSTRUCTION—VESTED ESTATES—DEFEASIBLE INTEREST.

Where testator creating a trust estate directed the trustee to pay to his two daughters for life the income, and directed the trustee at

the death of either to pay to each of the children of the deceased daughter an equal part of her share, discharged of the trust, the gifts to the daughters were life estates, and the limitations over to the children were remainders which on the death of the testator vested in point of right in the children who were then alive as a class, opening to admit after-born children, who on their birth would take a vested interest all subject to be defeated by a further provision for the defeat of any interest vested in children of a child of testator in the contingency that all of the children should die before their parent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1115, 1638-1643; Dec. Dig. §§ 523, 687.\*]

## 8. WILLS (§ 629\*)—ESTATES—DEFEASANCE CONDITIONS.

Defeasance conditions in a will are not favored.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1461, 1462; Dec. Dig. § 629.\*]

## 9. WILLS (§ 601\*)—CONSTRUCTION—CUTTING DOWN GIFT IN FEE.

An express and positive testamentary gift in fee will not be cut down by subsequent provisions less express and positive.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1340-1350, 1608; Dec. Dig. § 601.\*]

## 10. BASTARDS (§§ 102, 104\*)—RELATION BETWEEN MOTHER AND CHILD.

The relation of parent and child exists between a mother and her illegitimate offspring, and the child may inherit from her and she from him.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 251, 254, 255, 257-262; Dec. Dig. §§ 102, 104.\*]

## 11. BASTARDS (§ 102\*)—INHERITANCE—STATUTES—MEANING OF WORDS—"CHILDREN."

The word "children" in the statute of distribution embraces a mother's illegitimate as well as legitimate children.

[Ed. Note.—For other cases, see Bastards, Cent. Dig. §§ 254, 255; Dec. Dig. § 102.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1115-1141; vol. 8, p. 7601.]

## 12. WILLS (§ 497\*)—CONSTRUCTION—MEANING OF WORDS—"CHILDREN."

The word "children" in a will is not limited to legitimate children, but includes illegitimate children, in the absence of anything to show an intent otherwise.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1080-1086; Dec. Dig. § 497.\*]

## 13. WILLS (§ 497\*)—CONSTRUCTION—CHILDREN—ILLEGITIMATE CHILDREN.

Where testator created a trust to pay the income to his daughters for life, directing the trustee at the death of either to pay to each of her children an equal portion of her share discharged of the trust, and knew when executing the will of the existence of an illegitimate child of a daughter, the illegitimate child was included in the absence of anything to show that the word "children" was limited to legitimate children.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1080-1086; Dec. Dig. § 497.\*]

Wheeler, J., dissenting.

Case Reserved from Superior Court, Litchfield County; William S. Case, Judge.

Suit by Charles A. Eaton, administrator and trustee of Reuben Eaton, deceased, against Lucy J. Eaton and others, to determine the validity and construction of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

will of the deceased. Cause reserved on facts alleged in the complaint for the advice of the Supreme Court of Errors. Decree advised.

Reuben Eaton died in 1889 leaving a will with two codicils duly probated, and also a widow and the four children named in the will, who were his only heirs at law. By his will he left the residue and remainder of his estate in trust to three trustees of whom the plaintiff is the sole survivor. By the terms of the trust the trustees were directed to pay to the widow and the children the income of certain specified sums during their natural life. The will then proceeded as follows:

"Sixth. Said trustees are directed to divide the rest and remainder of my estate including said sum of six thousand dollars, after the death of my wife and said sum of two thousand dollars, if my wife dies before me, into four equal portions, and after paying themselves a reasonable sum annually for the care of the whole trust fund, said trustees are directed to pay annually to each of my said children aforesaid the use of, and income from said each one quarter portion of my said remaining estate, during the natural life of each, which said remaining estate I give to said trustees as aforesaid for such purpose. In using the word share or shares hereinafter in this will I mean the whole sum held in trust by said trustees for the benefit of each of my said children severally.

"Seventh. At and after the death of either of my said sons, respectively, whether they die before or after my decease, said trustees are directed to pay annually to the widow of such deceased son, if any there should be during her widowhood the use of, and the income from one-third of the share of her said deceased husband, and said trustees are directed to pay, to each of the children of such deceased son an equal portion of his said share including that the use of which is to be paid to such widow until her decease or marriage discharged of said trust; the lineal descendants of any deceased child to take the part of such share as their parent would have taken if alive, and I hereby give, devise and bequeath the same to, such children and descendants share and share alike, to each and their heirs, but if any such children or descendants, at the death of such son, are under the age of twenty-one years, my said trustees shall have the care and management of such estate and the same shall be in trust until such children and descendants arrive respectively at the age of twenty-one years, and this provision shall apply to each of the shares of my said sons.

"Eighth. At and after the death of either of my said daughters, respectively whether they die before or after my decease, the said trustees are directed to pay to each of the children of such deceased daughter an equal portion of her share, discharged of said trust; the lineal descendants of any deceased child to take the part of such share as their parent would have taken if alive; and I hereby give devise and bequeath the same to such children and descendants, share and share alike to each and their heirs, but of any such children or descendants at the death of such daughter are under the age of twenty-one years, my said trustees shall have the care and management of such estate and the same shall be in trust until such children or descendants arrive respectively at the age of twenty-one years and this provision shall apply to each of the shares of my said daughters.

"Ninth. If any of my said children shall die without any lineal descendants living at the time of his or her death, whether he or she dies before or after me, then his or her share

mentioned herein shall go to his or her surviving brothers and sisters in equal portions, the lineal descendants of any deceased brother or sister taking the portion of their parent but the same is to be held in trust by my said trustees, proceeded with and finally disposed of, discharged of said trust in the same manner and as part of the shares given for the use of and to each of my said children.

"Tenth. If all of my said children should die without any lineal descendants living at the time of the death of each, then I direct my trustees to pay all my said estate to those persons who would be my heirs at law if I died without leaving lineal descendants living at the time of my death, discharged of said trust and in such case I hereby give, devise and bequeath all my said estate to such persons to them and their heirs."

All of the testator's children are still living except Ann Jane Stuart, who died March 2, 1913, intestate, and leaving surviving her a legitimate daughter, Gertrude Stuart Benson, who was born in 1892, and also a grandson, Louis Eaton Sterry, born in 1893, the illegitimate child of Nora Estelle Eaton, who was the illegitimate daughter of said Ann Jane Stuart. Nora was born in 1877 and died in 1896. The administrator upon her estate is included among the parties to the action, as is also the administrator upon the estate of Ann Jane Stuart.

The estate in the hands of the trustee consists of personalty only. Neither of the codicils has any bearing upon the questions at issue. The following are the questions upon which the superior court is asked to give its advice:

"(1) Whether, upon the death of said Ann Jane Stuart, the entire share of said trust estate held for her benefit during her life should be paid to her said daughter Gertrude Stuart Benson.

"(2) Whether, upon the death of said Ann Jane Stuart, the entire share of said trust estate held for her benefit during her life should be paid to her said daughter Gertrude Stuart Benson and her said grandson Louis Eaton Sterry, share and share alike.

"(3) Whether, upon the death of said Ann Jane Stuart, any of said share of said trust estate held for her benefit during her life is intestate estate, and, if so, what proportion thereof, and to whom the same should now be paid and distributed.

"(4) Whether any of the provisions, and, if so, which provisions, of the said eighth paragraph of the residuary clause violate the statute against perpetuities in force at the time said will and codicils were made and said Reuben Eaton died.

"(5) Whether the provision in said eighth paragraph of said residuary clause, viz., 'the lineal descendants of any deceased child to take the part of such share as their parent would have taken if alive; and I hereby give, devise and bequeath the same to such children and descendants share and share alike to each and their heirs'—is invalid because of such statute against perpetuities.

"(6) Whether, in case the provision quoted in the preceding paragraph is invalid because of said statute against perpetuities, the property which would otherwise pass thereby is intestate estate or belongs and passes to said Gertrude Stuart Benson, daughter of said Ann Jane Stuart.

"(7) To whom and in what proportion the share of said trust estate held for the benefit of said Ann Jane Stuart during her life goes and of right belongs."

Howard F. Landon, of Salisbury, for plaintiff. John F. Addis, of New Milford, for defendant Sterry. Leonard J. Nickerson, of Cornwall, for defendant Munn and another. Thomas F. Ryan, of Litchfield, for defendant Eaton.

PRENTICE, C. J. (after stating the facts as above). [1] The questions upon which the superior court is called to give its advice arise out of the provisions of paragraph 8 of the will, as affected by the death after the testator of his daughter Ann Jane Stuart leaving a daughter born in lawful wedlock and a grandson, the illegitimate son of an illegitimate daughter of Mrs. Stuart, who died before her mother. In view of the situation thus created, the trustee under the will desires to be informed, and is entitled to be informed, as to the legal rights of parties in interest brought into active conflict by events as they have occurred. Other questions suggested by the provisions of the will, which might by possibility arise in contingencies which have not arisen and may not arise, although perhaps within the comprehensive language of the questions propounded, are prematurely presented for determination. *Smith v. Jordan*, 77 Conn. 470, 59 Atl. 507. Furthermore, adequate foundation for their determination is not laid in the facts appearing of record. We shall confine our consideration to the field of present interest indicated.

[2] The paragraph in question provides for a disposition of a share of the testator's residuary estate "at or after" the death of each of his two daughters, whether that event should occur before or after his own death. In so far as this disposition contemplated the former contingency, the gifts over were substitutionary; in so far as they contemplated the latter, they created limitations over after a life estate. As all of the testator's four children named in the will survived him, the paragraph in question has only to be considered in the latter aspect.

[3] The direction to the trustees which the paragraph contains "to pay to" sundry persons specified portions of the trust estate after the death of a daughter imports a gift. *White v. Smith*, 87 Conn. 663, 667, 89 Atl. 272; *Allen v. Almy*, 87 Conn. 517, 523, 89 Atl. 205.

[4-6] An attempted gift to "descendants" of children of the testator's daughters living at his death would be void as being contrary to the statute against perpetuities. *Tingler v. Chamberlain*, 71 Conn. 466, 469, 42 Atl. 718. The provision by which it is directed that the lineal descendants of any deceased child should take "the part of such share as their parent would have taken if alive," and the words a line or two later "and descendants," whereby such descendants are linked with children as donees in remainder, amount to precisely that, and must therefore remain without operative effect. The elimination of

this provision does not result in such a destruction of the testator's testamentary scheme and purpose that its associated provisions may not stand. The legal can be readily separated from the illegal without doing injustice or defeating the testator's main purpose, and his intent be thus effectuated in so far as the law will permit. *White v. Allen*, 76 Conn. 185, 189, 56 Atl. 519. Neither does the failure of the gift over "to descendants" invalidate any of the gifts prior in the order of donation. *Farnam v. Farnam*, 83 Conn. 370, 385, 77 Atl. 70; *Cody v. Staples*, 80 Conn. 82, 85, 67 Atl. 1; *Johnson v. Webber*, 65 Conn. 501, 514, 83 Atl. 506.

[7] The eighth paragraph as it presents itself for our further consideration, disregarding the unimportant trust provision in the case of minors, thus becomes one in which the testator gave over to the children of each of his two daughters respectively after life estates to the latter the one-quarter share of the trust estate of which such daughter was entitled to receive the income during her life discharged of the trust; the children of each daughter to share and share alike between them, and the property so bestowed to be to the recipients and their heirs. The gifts to the daughters were life estates; the limitations over to their children, remainders which, upon the decease of the testator, vested in point of right in the child or children of each group who were then alive as a class, such class opening to admit after-born children who, upon their birth, would take a vested interest. *Norton v. Mortensen*, 88 Conn. 28, 89 Atl. 882; *Bartram v. Powell*, 88 Conn. 86, 89 Atl. 885.

The estates which thus vested are expressly made estates of inheritance. Are they, however, indefeasible, or are they such as would be defeated by the happening of a condition subsequent? If so, the remainder is none the less a vested one. *Gray on Perpetuities*, § 109.

[8, 9] The ninth paragraph of the will provides for the defeat of any interest already vested in children of a child of the testator in the contingency that all of the children of such child of the testator should die before their parent. Doubtless also the provisions of the eighth paragraph in favor of descendants of children, if they had been valid, would have subjected to defeat any interest which had already become vested in point of right in any child of the testator's daughters in the event of its death before the period of distribution arrived. *Johnson v. Webber*, 65 Conn. 501, 514, 83 Atl. 506; *Mitchell v. Mitchell*, 73 Conn. 303, 308, 47 Atl. 825. That provision, however, being void, we fail to discover any sufficient reason for holding the vested interest in a child of a daughter of the testator a defeasible one save under the conditions described in the ninth paragraph. Defeasance conditions are not favored. *Scovill v. McMahon*, 62 Conn. 378, 388, 26 Atl. 479, 21 L. R. A. 58, 36 Am. St. Rep. 850.

Neither is an express and positive gift in fee to be cut down by subsequent provisions less express and positive. *Fanning v. Main*, 77 Conn. 94, 99, 58 Atl. 472.

[10] We are thus brought by the illegitimacy of Nora Estelle Eaton to the question whether or not she, as an illegitimate child of Ann Jane Stuart, is to be regarded as the latter's child under the provisions of the will, and as such entitled to be admitted into membership of the class of Ann Jane Stuart's children.

At English common law an illegitimate was the child of nobody. This proposition was tenaciously adhered to, and its logical corollaries adopted into the law. Among these corollaries was one that the word "child" or "children," when used in a statute, will, or deed was to be interpreted as including legitimate children only. Another corollary was that out of the relation of an illegitimate to his mother or putative father there could arise no right, duty or obligation.

"A bastard was the child of nobody; he was not entitled even to a name. It is, however, gravely asserted by the text-writers that he might gain one by reputation. He did not take his mother's place of settlement, but was settled wherever he chanced to be born. As he was related to nobody, he could have no heirs except of his own body, and so he left no descendants and his property escheated and now by law escheats to the crown." *Dickinson's Appeal from Probate*, 42 Conn. 491, 500, 19 Am. Rep. 553.

He could not inherit even from his mother. This harsh and inhumane doctrine of the English common law was taken over into the common law of practically all American jurisdictions. Its rigors, however, are such that an appeal has very generally been made to statutes to mitigate some of them. These statutes, being in derogation of the common law, have been strictly construed so that no greater relaxation of the strict common-law rules has been permitted than the statutes plainly authorized. *Dickinson's Appeal*, 42 Conn. 491, 509, 19 Am. Rep. 553.

In most, if not all, of the jurisdictions adopting the common-law rules, statutes have been enacted entitling illegitimates to inherit from the mother. This right of inheritance, however, is founded entirely upon the statute, and does not arise from a recognition of the relation of parent and child between the mother and her offspring. The statutes have not changed or undertaken to change the general attitude of the law upon the subject of the relations of the parties.

This state is unique in that neither the fundamental principle of the common law that an illegitimate was the child of nobody nor any of its natural corollaries has ever been ingrafted upon our common law. From the earliest times the proposition that a bastard is the child of nobody has been repudiated, and our law has proceeded upon the directly opposite principle which recognized an illegitimate as the child of his mother.

Our numerous cases touching the various aspects of the question have consistently held to the doctrine stated and its logical consequences with the result that a full recognition has been given to the general rule, distinctly contrary to that prevailing elsewhere, that the relation of mother and child whether legitimate or illegitimate is one from which those rights, obligations, and status arise which ordinarily grow out of the relation of parent and child.

A review of our decisions touching the question of both settlement and inheritance, as given in *Dickinson's Appeal*, supra, need not be here repeated. The strong and emphatic language which our court has repeatedly used upon the subject of a bastard's status is, however, worthy of notice.

"The common law of England, which has been urged in this case, is not to be mentioned as an authority in opposition to the positive laws of our own state; and nothing can be more unjust than that the innocent offspring should be punished for the crimes of their parents, by being deprived of their right of inheriting by the mother, when there does not exist amongst men a relation so near and so certain as that of mother and child." *Brown v. Dye*, 2 Root, 280, 281.

"By the common law, a bastard is nullius filius, and derives nothing from his parents; for he has no parents, and is settled where born. \* \* \* But it has been discovered in this state that a bastard is the child of his mother, and capable of inheriting estate, and deriving a settlement from her." *Woodstock v. Hooker*, 6 Conn. 35, 36.

"Upon this subject, our whole system differs entirely from that adopted in Great Britain. The fundamental maxim of the common law, that a bastard is filius nullius, is entirely rejected here; and such a child is here recognized by law as a child of its mother, with the rights and duties of a child." *New Haven v. Newtown*, 12 Conn. 164, 169.

It is by reason of our recognition of the relation of parent and child between a mother and her illegitimate offspring that no statute has been needed in this state to accomplish results which humanity and natural justice dictated, and which could be arrived at elsewhere only through statutory intervention. Our recognition of the relation of child to mother has rendered legislation unnecessary, for instance, to entitle an illegitimate to inherit from his mother, his mother from him, brothers and sisters from each other although one or both are illegitimate offspring and collateral inheritance to proceed through illegitimate lines.

The case of *Heath v. White*, 5 Conn. 228, is particularly instructive in this connection, especially for the reason assigned in it for sustaining the right of inheritance. The question presented was as to the right of an illegitimate to share in the distribution of his mother's real estate. The right of the illegitimate rested solely upon the statute governing the descent of intestate estate and that provision of it which made the property descend to and among "the children and such as legally represent them" of the deceased owner. The question therefore was whether

the illegitimate was to be regarded as a child of its mother. In commenting upon the common-law situation, Chief Justice Hosmer said that it was not the meaning of the word "child" or "children" that at English common law prevented a bastard from inheriting his mother's estate, but that persons of that description were not by that law permitted to succeed to their parent. He further said that undoubtedly in England and in those states which have adopted the English rule the term "child" in reference to succession by inheritance must be understood to mean a legitimate child, but added that "the subject-matter abridged the customary meaning of the word." He then went on to say that the position to be established by the defendant was therefore not relative to the proper meaning of the word "children," "for as to that there existed no possible controversy"; but whether the English law relative to succession by illegitimates is to be recognized as the law of this state and the term "child" and "children" thereby limited in its application to legitimates. The conclusion reached, after a repudiation of the common-law rule, was in favor of adopting the plain meaning of the words of the statute, and giving to them their ordinary signification, comprehending the illegitimate as well as the legitimate offspring of mothers.

The same subject had an even fuller consideration in the later case of Dickinson's Appeal, 42 Conn. 491, 19 Am. Rep. 553, where the question was whether the legitimate child of an illegitimate daughter of a sister of the testatrix, who died leaving no nearer blood relative than a cousin, were parties in interest as heirs at law of the testatrix. The general subject of the status of illegitimates was there given exhaustive consideration, the peculiar attitude of our law affirmed and emphasized, and a conclusion in favor of the appellants reached.

The significant feature of our cases is that the right of an illegitimate to inherit, his status in the matter of settlement, and the obligations which are recognized as upon him as respects his mother, are derived solely from a recognition of the existence of the relation of parent and child between the mother and her offspring, "agreeably," as our first reported case says, "to the law of nature and reason." *Canaan v. Salisbury*, 1 Root, 155, 156.

[11, 12] The word "children" in our statute of distributions is interpreted to embrace a mother's illegitimate as well as legitimate children for the simple reason that the law regards the former as well as the latter as her children. In a word, the natural corollary of the English rule that the word "child" or "children," when used in a statute, is to be restrained to signify legitimates only, is done away with as it logically must be. That corollary is the logical consequence of the proposition that the illegitimate is the

child of nobody. When that proposition is transposed into ours that an illegitimate is the child of its mother, then all logical foundation for the corollary that the word "child" or "children" in statute, will, or deed is to be interpreted as limited to legitimates disappears, and the logical corollary becomes the reverse, so that presumptively the word "child" or "children" in a will embraces offspring legitimate and illegitimate. That is the principle to be applied in the present case, so that, when the testator made his limitation over to the children of his daughters, he will be held to have included all their children unless a different intent is to be gathered from the will read in the light of the surrounding circumstances.

[13] We are unable to discover in this will so read any intent upon the part of the testator to thus restrict the natural meaning of the words he employed. On the contrary, he, at the time his will was executed, presumably had full knowledge of the existence of the illegitimate child, then seven years of age, of his daughter, and of its illegitimacy. His daughter at that time had no other offspring. The provisions of his will were therefore presumably made in contemplation of this situation. Had he not intended that the illegitimate child should share in the fruits of his bounty as a child of his daughter, it is scarcely conceivable that he would have been satisfied to use the unrestricted language that he did, and language which in ordinary speech knows no distinction between legitimates and illegitimates.

The superior court is advised that no part of the trust estate in the plaintiff's hands heretofore held by him for the benefit of Ann Jane Stuart during her life is intestate estate of the testator; that Louis Eaton Sterry is not entitled to receive from the plaintiff any part of said trust estate so held; and that Gertrude Stuart Benson and John F. Addis, as administrators of the estate of Nora Estelle Eaton, deceased, are entitled to receive the whole amount of the trust estate so held in equal shares between them. No costs in this court will be taxed in favor of any of the parties. In this opinion the other Judges concurred, except WHEELER, J., who dissented.

WHEELER, J. (dissenting). I am unable to concur in that part of the opinion which holds that the illegitimate son of the illegitimate daughter of Mrs. Stuart was intended by the testator to be included in the devise under the eighth clause of the will of Reuben Eaton, the father of Mrs. Stuart. By the will the testator gave the greater part of his estate to trustees, and, after directing them to pay certain portions of the income to his wife and children, directed the trustees to divide the income of the remainder of

his estate into four portions and pay to each of his children one-fourth part of the income during the life of each. Two of these children were daughters, of whom Mrs. Stuart was one.

Under the eighth clause, at the death of either of his said daughters, the trustees are directed:

"To pay to each of the children of such deceased daughter an equal portion of her share, discharged of said trust; the lineal descendants of any deceased child to take the part of such share as their parent would have taken if alive."

Mrs. Stuart died leaving an illegitimate son of her illegitimate daughter and a legitimate daughter.

The sole question on this part of the case is: Did the testator intend by the devise to the children of his deceased daughter to include illegitimate as well as legitimate children?

The opinion asserts that in ordinary speech by the use of the word "children" we mean illegitimate as well as legitimate children. This seems to me at variance with common usage.

Again, the opinion assumes that our failure to accept the common-law doctrine that a bastard is nullius filius led to the corollary that the word "children" in a will embraces illegitimate as well as legitimate offspring unless a different intent is to be gathered from the will read in the light of surrounding circumstances. It assumes, too, that a different interpretation follows from that prevailing in those jurisdictions which by statute have legislated upon this subject. These statutes recognize the illegitimate offspring as the child of his mother and permit him to inherit from and through her. They give by statute what our court declared to be the law of this jurisdiction. And, of necessity, the same results should follow in each case. From the fact that the law recognizes the illegitimate as the child of his mother and permits him to inherit by and through his mother to the position that any testator, when he makes a devise to the children of a woman, intends to include her illegitimate as well as her legitimate children seems to me a rather long jump. This construction does not follow as a corollary from our doctrine any more logically than it follows from the statutes of other jurisdictions which have placed their law upon a parity with ours. In most of these states where by statute they have changed the common law, the word "children," when used in a will, deed, or contract, means legitimate children unless the will as read in the light of the surrounding circumstances shows a plain contrary intent. This we believe to be the almost universally accepted construction.

"The natural and legal import of the term children is legitimate children." *Heater v. Van Auken et al.*, 14 N. J. Eq. 159, 164.

In order to avoid the consequences of this opinion, it will be necessary hereafter for

each testator to write the word legitimate, or its equivalent, before each devise to children, heirs, or issue of a woman. We venture the view that the profession of the state have never so defined and used these terms in making such devises. Nor do we believe that the ordinary testator so intends when he makes use of these terms in a devise to a woman.

If Mr. Eaton had devised the life use of the residue of his estate to his children with remainder over to their children or issue, and one daughter and one son died each leaving an illegitimate child, as we understand the opinion the illegitimate child of the deceased daughter of the testator would take, while the illegitimate child of the son would not. In one case children includes illegitimates; in the other, the same word has a different meaning and excludes the illegitimate from the devise. This inconsistency must result, else it must be held that in every will the word children embraces illegitimates as well as legitimates whether applied to a devise to the children or issue of a mother or a father.

It would be a strange and prideless grandfather who intended to perpetuate in his will his own daughter's misfortune by intending to include among her children the offspring of her frailty. Men and women as a rule do not expose their family secrets in that fashion. And Reuben Eaton, so far as the record before us shows, did not in my opinion intend otherwise than his fellows would have intended. He did not intend to provide for a line of illegitimates.

By the Public Acts of 1876, p. 91, c. 14, an addition to our statute of distributions was made. This act was passed immediately following Dickinson's Appeal, 42 Conn. 491, 19 Am. Rep. 553, and in its present form (G. S. 1902, § 396) reads as follows:

"Children born before marriage whose parents afterwards intermarry shall be deemed legitimate and inherit equally with other children."

This clearly expressed the legislative intent, and it would seem that the further legitimization of illegitimates should be expressed by legislative enactment rather than by judicial decision.

I am of the opinion that the entire share of the testator's estate held in trust and devised to the children of Mrs. Stuart should be paid to her legitimate child.

(88 Conn. 286)

EATON v. EATON et al.

(Supreme Court of Errors of Connecticut.  
June 10, 1914.)

1. PERPETUITIES (§ 3\*)—RULE AGAINST PERPETUITIES—OPERATION OF STATUTE.

A will executed in 1891, which was confirmed and re-established by a codicil executed by testator in 1897, who died in 1899, is not within the statute against perpetuities repealed by Pub. Acts 1895, c. 249.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 3; Dec. Dig. § 3.\*]

**2. WILLS (§ 614\*) — CONSTRUCTION — ESTATES ACQUIRED.**

Where testator bequeathed a specific sum in trust to pay the income to the four children of a deceased brother for their lives, and directed that if any of the children should die leaving issue the part of the trust fund of which the child was entitled to the income should go absolutely to such issue, and gave a half of his residuary estate in trust in the same manner, a child took only a life estate, and on his death leaving issue surviving the remainder over of the part of the trust fund of which the child was entitled to receive the income vested in such issue absolutely.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393-1416; Dec. Dig. § 614.\*]

**3. WILLS (§ 498\*)—CONSTRUCTION—"ISSUE OF HIS OR HER BODY."**

The words "issue of his or her body," in a will creating a trust to pay the income to children for their lives, and if any of the children die leaving issue of his or her body a portion of the trust fund of which the child was entitled to the income should belong to the issue, mean issue in any degree and includes illegitimate issue, in the absence of anything to indicate the use of the words in any other than their prima facie signification.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1087-1089; Dec. Dig. § 498.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3794.]

**4. WILLS (§ 704\*)—CONSTRUCTION—JURISDICTION OF COURT.**

The court, in a suit to determine the validity and construction of a will, will not determine questions unrelated to contingencies which have arisen or to existing conditions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1680, 1681; Dec. Dig. § 704.\*]

Wheeler, J., dissenting.

Case Reserved from Superior Court, Litchfield County; William S. Case, Judge.

Suit by Charles A. Eaton, executor and trustee of the will of Russell Eaton, deceased, against Ruth Ann Eaton and others to determine the validity and construction of the will of the deceased. Cause reserved on the facts alleged in the complaint for the advice of the Supreme Court of Errors. Questions answered.

Russell Eaton died March 23, 1899, leaving a will of which the plaintiff is executor, executed November 18, 1891, and a codicil thereto executed March 1, 1897, both duly probated. In the codicil the original will was confirmed and established in all respects not affected by the codicil. He left surviving him a widow, the defendant Ruth Ann Eaton, a brother Luther, his sole heir at law, and certain nephews and nieces. Luther Eaton died leaving a will of which Charles A. Eaton is executor. In that capacity he is made a party. Edward L. Eaton, Burritt Eaton, and Sophia J. Eaton, named in the seventh paragraph of the will, are still living. They and the administrator upon the estate of Ann Jane Stuart, who died March 2, 1913, are included among the defendants.

Ann Jane Stuart left surviving her a legitimate daughter, the defendant Gertrude Stuart Benson, who was born in 1892, and

also a grandson, the defendant Louis Eaton Sterry, born in 1893, and the illegitimate son of Nora Estelle Eaton, who was the illegitimate daughter of said Ann Jane Stuart born in 1877 and died in 1896. The will contained the following provisions:

"(7) I give and bequeath to my said executors the sum of four thousand dollars to be held by them in trust for the following purposes, viz., to hold, invest and reinvest the same as trust funds by law may be held and invested, and annually or oftener in their discretion, to pay over the income thereof equally to Edward L. Eaton of Warren, Conn., Ann J. Stuart, Burritt Eaton and Sophia J. Eaton all of Kent, children of my deceased brother, Reuben Eaton, during their lives. But if any of said children die leaving issue of his or her body, then the portion of said trust fund of which said child or children are entitled to the income shall go and belong absolutely to such issue; and if the survivor of such children die leaving no issue, then the remainder of said trust funds shall go and belong absolutely to the issue of the other children, in such manner, as all of such issue shall receive an equal portion of said four thousand dollars.

"(8) All the rest, residue and remainder of my estate I give, devise and bequeath unto my brother Luther Eaton and said children of my deceased brother Reuben, as follows, viz., one-half thereof absolutely to my said brother Luther, and the remaining one-half to said children of Reuben, to be held in trust in the same way and manner, as is provided in the preceding section (7) of this my last will and testament."

The superior court is asked to give its advice in answer to the following questions:

"(1) Whether the provisions of the seventh section of said will, or any of them, and, if so, which, are invalid because of the statute against perpetuities in force at the time said will was made.

"(2) Whether the provisions in the eighth section of said will giving 'the remaining one-half to said children of Reuben, to be held in trust in the same way and manner, as is provided in the preceding section (7) of this my last will and testament,' give said children only the life use of said one-half of the residue, and directs the distribution of the principal thereof upon the death of any of said children in the same way and manner as is directed in regard to the \$4,000 bequeathed in the seventh section of said will.

"(3) If the second question is answered in the affirmative, then whether the provisions of the eighth section of said will, or any of them, and, if so, which, are invalid, because of the statute against perpetuities in force at the time said will was made.

"(4) If the second question is answered in the negative, then to whom, and in what proportion, said one-half of the residue of said estate goes, of what right belongs, and should be distributed.

"(5) Whether that portion of the trust fund held by the plaintiff of which said Ann J. Stuart was entitled to the income during her life shall now be paid over and distributed.

"(6) If said portion shall now be paid over and distributed to whom, and in what proportions the same goes, of right belongs, and should be distributed.

"(7) Whether, in the phrase in said seventh section of said will, 'But if any of said children die leaving issue of his or her body' the testator intended by the words 'issue of his or her body' children or descendants generally.

"(8) Whether by said words 'issue of his or her body' the testator intended legitimate issue only."

Edward F. Landon, of Salisbury, for plaintiff. Leonard J. Nickerson, of Cornwall, and Frank B. Munn, of Winsted, for Gertrude Stuart Benson and another. Thomas F. Ryan, of Litchfield, for Edward L. Eaton. John F. Addis, of New Milford, for Louis Eaton Sterry.

**PRENTICE, C. J.** (after stating the facts as above). [1] This will, which was confirmed and re-established by its codicil in 1897 and did not speak until the decease of the testator in 1899, does not come under the operation of the statute against perpetuities repealed in 1895. P. A. 1895, c. 249, p. 590.

[2] The gift of one-half of the rest, residue, and remainder to the children of Reuben contained in the eighth paragraph was a gift in trust to be held and disposed of, principal and income, in precisely the same way as was provided in paragraph 7 for the management and disposition of the \$4,000 fund, principal and income, which was the subject-matter of the provisions of paragraph 7. Ann Jane Stuart, having died leaving issue surviving, took only a life use. The remainder over of that portion of the trust fund of which she was entitled to receive the income vested in her issue and upon her death became an absolute estate in them.

[3] By the words "issue of his or her body," as used in paragraph 7, was meant issue in any degree. That is the primary and usual meaning of those words, and there is nothing to indicate their use here in any more limited sense. *Bartlett v. Sears*, 81 Conn. 34, 39, 70 Atl. 33; *Perry v. Bulkley*, 82 Conn. 158, 164, 72 Atl. 1014.

The words "issue of his or her body" include illegitimate as well as legitimate issue. There is nothing in the will to indicate the use of these words in any other than their prima facie signification. *Eaton v. Eaton*, 88 Conn. —, 91 Atl. 191.

That part of the trust fund held by the plaintiff, of which Ann Jane Stuart was entitled to the income during her life, is now payable to her daughter Gertrude Stuart Benson and her grandson Louis Eaton Sterry, one-half thereof to each.

[4] Advice is not given, and should not be given by the superior court, upon questions unrelated to contingencies which have arisen or to conditions that exist.

The superior court is advised to render its judgment in conformity with the above conclusions. No costs in this court will be taxed in favor of any of the parties. In this opinion the other Judges concurred, except **WHEELER, J.**, who dissented.

**WHEELER, J.** (dissenting). The testator gave to trustees a fund the income from which was to be paid equally to the children of his brother during their lives. He then provided:

"But if any of said children die leaving issue of his or her body, then the portion of said trust fund of which said child or children are entitled to the income shall go and belong absolutely to such issue."

One of the children, Mrs. Stuart, had an illegitimate daughter born March 26, 1877, who died September 14, 1896. This daughter had an illegitimate son born December 5, 1893, and now living. The testator's will was published November 18, 1891, and the codicil thereto March 1, 1897, which recited, "I hereby confirm and establish my will in other respects." At the death of Mrs. Stuart and at the making of the codicil Gertrude was the only living child of Mrs. Stuart. The "issue of her body" in this clause of the will meant the legitimate issue of her body. If it could be held to include illegitimate issue of her body, there was none such at the republication of the will and the testator could not then have so intended.

We need not renew or repeat our discussion had in the case of the will of Reuben Eaton.

The uncle of Mrs. Stuart (Russell Eaton) did not, in my judgment, by the devise to the issue of her body intend to include therein the illegitimate son of the illegitimate daughter of Mrs. Stuart, but did intend to include only the legitimate children of Mrs. Stuart.

(88 Conn. 292)

#### RUDKIN v. RAND.

(Supreme Court of Errors of Connecticut  
June 10, 1914.)

#### 1. PERPETUITIES (§ 4\*)—CREATION OF FUTURE ESTATE.

Where testatrix made successive conditional devises to four nephews, with limitations over upon failure of surviving descendants, and then to certain heirs, the limitation to the heirs was in contravention of the statute against perpetuities.

[Ed. Note.—For other cases, see *Perpetuities*, Cent. Dig. §§ 4-44; Dec. Dig. § 4.\*]

#### 2. ESTATES (§ 7\*)—CONDITIONAL FEE—STATUTE DE DONIS CONDITIONALIBUS.

The conditional fee of the common law or the statute de donis conditionalibus have never been recognized or adopted in Connecticut.

[Ed. Note.—For other cases, see *Estates*, Cent. Dig. § 7; Dec. Dig. § 7.\*]

#### 3. ESTATES TAIL (§ 3\*)—STATUTORY MODIFICATION.

Words appropriate to the creation of an estate tail vest a fee simple in the issue of the first donee in tail; such issue taking no interest in the land during the life of the donee, and the donee having no alienable interest beyond a life interest.

[Ed. Note.—For other cases, see *Estates Tail*, Cent. Dig. § 3; Dec. Dig. § 3.\*]

#### 4. ESTATES TAIL (§ 1\*)—CREATION—LANGUAGE.

Language which would create estates tail at common law will create them in Connecticut.

[Ed. Note.—For other cases, see *Estates Tail*, Cent. Dig. § 1; Dec. Dig. § 1.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**5. DEEDS (§ 127\*) — WILLS (§ 605\*) — CREATION OF ESTATE TAIL—LANGUAGE NECESSARY—DEED AND WILL.**

An estate tail cannot be created by deed unless the word "heirs" is used, and no synonyms, such as "issue," "descendants," "seed," or "offspring," will suffice, but, as applied to devises, the rule is not so strict, no formal words being necessary, but any language disclosing an intention to create such an estate is sufficient.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 358, 359; Dec. Dig. § 127;\* Wills, Cent. Dig. §§ 1360-1365; Dec. Dig. § 605.\*]

**6. DESCENT AND DISTRIBUTION (§ 12\*)—ESTATES TAIL—NATURE AND INCIDENT.**

The heirs or issue of a donee in tail take by inheritance only and not by purchase.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. § 50; Dec. Dig. § 12.\*]

**7. WILLS (§§ 605, 614\*)—CONSTRUCTION—ESTATES TAIL—ESTATE AND INTEREST OF DEVISEES.**

Testatrix devised realty to her nephew, the first son of her brother, upon condition that he make his home thereon, "but if he fails to do so, or if he dies leaving no descent or descendants," then the property to go to the second son of her brother upon the same condition, "but if he fails to meet the requirements, or if he dies leaving no descendant, or descendants," then it was to go to the third and fourth sons of her brother successively upon the same conditions. *Held*, that the intention was that the nephews would take a life estate, and their surviving descendants a remainder over by purchase, and hence did not create an estate tail; the gift being direct and in absolute terms to persons described and not a provision for the transmission of title in unending sequence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1360-1365, 1393-1416; Dec. Dig. §§ 605, 614.\*]

Case Reserved from Superior Court, Middlesex County; William S. Case, Judge.

Action by Carrie E. Rudkin against Philip C. Rand, for breach of a covenant of seisin in fee simple. On reserved questions. Judgment for defendant.

Lucia A. Rand died in 1892 seised and possessed in fee simple of the real estate described in the complaint. This property is included in that which she disposed of by the thirteenth paragraph of her will duly probated, which reads as follows:

"All the rest and residue of my estate, bank stock, railroad stock, notes and mortgages (if any) all the real estate on Mount Vernon, and Washington streets, all the real estate I own at Rockfall, Connecticut, with the mill, machinery and capital invested there, I give, devise and bequeath to my nephew Philip C. Rand with the proviso and on condition that he makes his home in Middletown aforesaid, or at Rockfall, aforesaid, to care for the property; but if he fails to do so or if he dies leaving no descendant or descendants, then all the property by this article of my will given to him shall be given to C. M. W. Rand, second son of my brother upon the same proviso and condition; but if he fails to meet the above requirements, or if he dies leaving no descendant or descendants, then it shall be given to Samuel the third son, but if he fails to meet the above requirements or dies leaving no descendant or descendants then it shall be given to Robert the fourth son; but if he fails to meet the above requirements or dies leaving no descendant or descendants the said property shall be divided

among the heirs of my brother D. C. Rand, the heirs of Jane S. Smith and the heirs of Catherine H. Carnahan: Provided always that if any son leaves a descendant, the said property shall be given to such descendant or descendants."

The five lines of the original draft immediately following were erased before execution, to wit:

"Upon the same proviso and condition, and if such descendant fail to meet the said requirements, and shall die without any descendant, the next son as herein before provided shall take, and so on."

Upon Mrs. Rand's death the defendant, being the first of her nephews named in said paragraph, for the purpose of fulfilling the condition therein as to home, and thereby vesting in himself such title to said property as might thereby vest in him under said paragraph, came to Middletown to care for the property and to make his home there. He thereafter continued a resident of Middletown, living upon real estate included in said thirteenth paragraph, and was thereafter continuously in possession and control of such real estate, including that in question in this action, until October 31, 1905, when he conveyed the same to the plaintiff by warranty deed. He has ever since continued in possession of all of the balance of said real estate.

Prior to the execution and delivery of his deed to the plaintiff, the defendant received from his three brothers named in said paragraph, all the heirs at law of Mrs. Rand, all the heirs at law of her brother D. C. Rand and of Jane S. Smith, both then deceased, and from Catherine H. Carnahan, then living, but since deceased, and all of her children, who proved to be her heirs at law at her death, a quitclaim deed purporting to convey to him all the right, title, and interest in said premises which each of said persons respectively had, ought to have, or might thereafter have. At the time of the execution of this quitclaim deed, none of the grantors therein resided in either Middletown or Rockfall, and no one of them has ever resided in either of those places, or made any claim of a present or prospective interest in said property.

Bertrand E. Spencer, of Middletown, for plaintiff. Wesley U. Pearne, of Middletown, for defendant.

PRENTICE, C. J. (after stating the facts as above). The defendant is the first named of the four nephews of Lucia A. Rand who were made beneficiaries under the thirteenth paragraph of her will. At the time he gave to the plaintiff the deed in question, he had acquired all the right, title, and interest which his three brothers, the heirs at law of the testatrix, the heirs at law of D. C. Rand and Jane S. Smith, both deceased, and Catherine H. Carnahan, now deceased, and her heirs at law had, or ought to have, or might thereafter have in or to the land conveyed.

If his conveyance failed to give a good title to the plaintiff, it must have been for the reason that some outstanding interest or possible future interest was not gathered up in the quitclaim to him. Those conveyed covered the entire field of possible interest, as well as some impossible, save that which is occupied by the surviving descendants of the four nephews. These nephews are still living. Their surviving descendants cannot therefore be known, and there has been no attempt to acquire any interest that their prospective surviving issue might have. If the terms of Mrs. Rand's will are such that the surviving descendants of her nephews, as they shall prove to be or some of them, may thereunder have an interest in the property in question then the plaintiff's title is not the good indefeasible title in fee simple which the defendant warranted that he gave.

[1] In so far as the testatrix attempted to make a devise in favor of these surviving descendants, the provisions of her will to that end are nugatory as being in contravention of the statute against perpetuities in force when the testatrix died. In the capacity of heirs there could have been no present interest or future possibility of interest in these descendants not subject to alienation by the ancestor except through the operation of an entail. Counsel for the plaintiff concedes that this is so. His fundamental contention is that the testatrix intended to and did create a fee tail in one of the four nephews. Upon this proposition followed by the unquestionable secondary one that the issue of a tenant in tail has no strict legal right in the entailed estate until after his death and nothing which they can convey, his entire argument is founded, as it needs must be. *Comstock v. Gay*, 51 Conn. 45, 62; *St. John v. Dann*, 68 Conn. 401, 408, 34 Atl. 110.

[2, 3] In this state we have never recognized the conditional fee of the English common law, nor adopted into our law the statute *de donis conditionalibus*. From the earliest times it has been held in this jurisdiction that words appropriate to the creation of an estate tail vest a fee simple in the issue of the first donee in tail; such issue taking no interest in the land during the life of the donee, and the donee having no alienable interest beyond a life interest. *Swift's Digest*, I, 79; *Hamilton v. Hempsted*, 3 Day, 332, 333; *St. John v. Dann*, 68 Conn. 401, 407, 34 Atl. 110; *Comstock v. Comstock*, 23 Conn. 349, 351. This principle was in 1784 enacted into our statute, now section 4027 of the Revised Statutes.

[4, 5] Estates tail may indeed be created in this state, and language which would create them at common law will do so here. Our ancient rule and confirming statute simply defined the legal character of such estates. They are estates of inheritance. For their creation by deed it is held that the word "heirs" is indispensable and that no syno-

nym such as "issue," "descendants," "seed," or "offspring," can supply its place. This strict rule is relaxed as applied to devises, so that a devise to A. and his "issue," or "descendants," or "seed," or "offspring" may suffice to create an estate tail, and one may be created even where words of inheritance are absent, if the testator's intent to that end is apparent.

"The testator's intention may be shown by necessary implication, as well as by the express language of the will, so that the essential words of inheritance, though entirely absent, may often be implied if the testator's manifest intent makes it necessary." *Minor & Wurts on Real Property*, § 171.

This relaxation, in the case of devises, of the strict rule applicable to conveyances results from a recognition that in a matter of testamentary disposition the testator's intent should be effectuated. Application of this principle has been made by us upon several occasions when estates tail by implication have been recognized. *Dart v. Dart*, 7 Conn. 250, 253; *Hudson v. Wadsworth*, 8 Conn. 348, 357; *Williams v. McCall*, 12 Conn. 328, 329; *Comstock v. Comstock*, 23 Conn. 349, 351; *Turrill v. Northrop*, 51 Conn. 33, 36; *Horton v. Upham*, 72 Conn. 29, 31, 43 Atl. 492.

[6, 7] In the present instance the word "heirs" does not appear in the thirteenth paragraph of the will until the final limitation over after the provisions in favor of the four nephews and their descendants. That fact, however, is not one, as we have seen, of controlling importance. The controlling fact is the testatrix's intent as to the estate attempted to be created by her as ascertained from the language of her will and the surrounding circumstances. *Turrill v. Northrop*, 51 Conn. 33, 39; *Bullock v. Seymour*, 33 Conn. 289, 294. Did she intend that her nephews should take as donees in tail and their descendants by inheritance from their ancestor, or that the nephews should take estates for life and their surviving descendants a remainder over by purchase? If the latter, there was no estate tail. The heirs or issue of a donee in tail take by inheritance only.

The answer to this test question is plainly indicated by the language of the will. The successive conditional devises are made to several nephews, with limitations over upon failure of surviving descendants. Had the will stopped there with a devise of an estate of inheritance absolute, cut down by a later provision for a gift over upon failure of issue, there would be substantial ground for the contention that an estate tail general was created. Of this character are the Connecticut cases already referred to. But the will did not stop there. It did not leave the inheritable estate in the donee to operate in so far as it was not restrained. The testatrix went on to expressly and directly provide for the contingency of descendants surviving, as she also did for the alternative contingency of nonsurvival. She directed that, if any

son left a descendant, the property should be given to such descendant or descendants. Here is language of direct gift in fee simple. The surviving descendants are designated as the beneficiaries of the testatrix's bounty. The indication is plain that she conceived that she was giving to them directly in the same way that she was giving to other persons named or described in the paragraph and not making a mere provision for a succession in perpetuity by inheritance to that which had been given to an ancestor. The gift is direct and in absolute terms to persons described, and not a provision for a transmission of title to descendants in unending sequence which the law arbitrarily converts into a fee simple in the issue of the first donee. In other words, the testatrix attempted to make the designated descendants her beneficiaries by her own act and not to provide for a beneficiary succession to which the law operating contrary to her will would, for reasons of public policy, give the same effect. The erasure at the end of the thirteenth paragraph, whether it was occasioned by a wish to vest in the descendants an absolute estate or a desire to avoid a perpetuity, or other reason, emphasizes the fact that the testatrix had in mind a gift direct.

As the final gift over to the heirs of D. C. Rand, Jane S. Smith, and Catherine H. Carnahan is void as being in contravention of the statute against perpetuities, we have no occasion to inquire as to the effect of the quitclaim of Catherine H. Carnahan and her children, who proved to be her heirs, as accomplishing a release of all interest of her heirs, had the terms of the will been effective to create one in them. They could take nothing by the will, and there could therefore be no interest in them to release.

The superior court is advised that the defendant, at the time of his said conveyance to the plaintiff, was seised and possessed of the land therein described as of a good, indefeasible estate in fee simple, and that judgment be rendered for the defendant. The other Judges concur.

(23 Conn. 260)

# ROSS v. CITY OF STAMFORD.

(Supreme Court of Errors of Connecticut.  
June 10, 1914.)

## 1. MUNICIPAL CORPORATIONS (§ 818\*)—INJURIES TO PERSONS ON SIDEWALK—ACTIONS—EVIDENCE.

As the duty of a municipality with respect to snow and ice on sidewalks is limited, and as those conditions are not at all permanent, evidence, in an action for injuries due to a fall on an accumulation of ice on the sidewalk, that the sidewalk was icy and slippery at a time not shown to be the same as that of the accident was improperly received, not tending to show negligence, and tending to mislead the jury.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1726-1738; Dec. Dig. § 818.\*]

## 2. NEGLIGENCE (§ 125\*)—EVIDENCE—SIMILAR ACTS.

In general, a person's negligence on one occasion cannot be shown by proving his negligence on other occasions.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 239-244; Dec. Dig. § 125.\*]

## 3. DAMAGES (§ 62\*)—PERSONAL INJURIES—DEFENSES.

Where plaintiff, who suffered personal injuries, consulted a reputable physician, recovery could not be diminished on the theory that his treatment was not the most expert.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 119-131; Dec. Dig. § 62.\*]

## 4. APPEAL AND ERROR (§ 1071\*)—ASSIGNMENTS OF ERROR—FINDINGS OF FACT.

An omission from the finding of facts which, if included, would not affect the correctness of the rulings made is not a ground of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.\*]

## 5. TRIAL (§ 395\*)—FINDINGS—SUFFICIENCY.

Where evidence, the admission of which was assigned as error, was in each instance by the same witness and as to the same subject-matter, it was unnecessary, under the direct provisions of Practice Book 1908, p. 267, § 5, to include it twice in the finding.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 927-934, 939; Dec. Dig. § 395.\*]

## 6. COSTS (§ 256\*)—APPEAL—RECORD—UNNECESSARY EXPENSE.

An appellant is not entitled to have costs taxed for the printing of the evidence, where, on his motion, it was all made part of the record, though much of it was unnecessary.

[Ed. Note.—For other cases, see Costs, Cent. Dig. §§ 968-971; Dec. Dig. § 256.\*]

Appeal from Court of Common Pleas, Fairfield County; Frank L. Wilder, Acting Judge.

Action by Isabel M. Ross against the City of Stamford. From a judgment for plaintiff for \$2,000, defendant appeals. Reversed and remanded.

Adelbert A. Skeel, of Stamford, for appellant. George P. Rowell, of Stamford, for appellee.

RORABACK, J. Three assignments of error relate to rulings upon evidence and another that the trial court failed to find as requested.

It is alleged in the plaintiff's complaint that on January 7, 1912, the plaintiff, when in the exercise of due care, stepped on an accumulation of snow and ice upon the sidewalk of the city of Stamford, and was greatly damaged and injured. This allegation was denied, so that one of the controlling questions in issue was whether the sidewalk in question was slippery and icy at the time and place alleged in the complaint.

[1, 2] Two witnesses called by the plaintiff upon her direct examination were allowed, against the objection of the defendant, to testify that the sidewalk in question was icy and slippery, without specifying any time. This was error.

This court has said that:

"It is conceded that in this rigorous climate the duty of cities and towns in respect to snow and ice is and must be very limited." *Congdon v. City of Norwich*, 37 Conn. 414, 419.

Snow and ice do not create a continuous and permanent obstruction to a sidewalk in this section of the country. They disappear many times suddenly, and a defect of this character of to-day may be removed before to-morrow by the action of the weather.

The plaintiff had the right to show all the facts and circumstances surrounding and connected with the accident in question. But she had no right to show facts and circumstances which may have been connected with the condition of this walk at a remote or uncertain time or occasion. Such evidence had a tendency to raise collateral issues to the inevitable prolongation of the trial and the probable confusion of the jury. That which these witnesses saw at such times cannot properly be said to be facts connected with the accident which happened to the plaintiff.

As a general rule, one's negligence on a particular occasion cannot be proved by showing his negligence on other occasions, nor can his freedom from negligence on one occasion be shown by proof of his due care on other occasions. Our reports furnish numerous illustrations of the application of this principle. *Morris v. East Haven*, 41 Conn. 252, 254; *State v. Goetz*, 83 Conn. 437, 440, 76 Atl. 1000, 30 L. R. A. (N. S.) 458; *Budd v. Meriden Electric R. Co.*, 69 Conn. 272, 286, 37 Atl. 683; *Tiesler v. Norwich*, 73 Conn. 199, 203, 47 Atl. 161; *Gilmore v. American Tube & Stamping Co.*, 79 Conn. 498, 504, 66 Atl. 4. These are instances where an act of negligence, or the reverse, was sought to be inferred from other acts of negligence or nonnegligence. *Moffitt v. Connecticut Co.*, 86 Conn. 527, 529, 86 Atl. 16.

[3] The plaintiff offered evidence tending to prove that shortly after she was injured she consulted Dr. E. Rowell, her family physician, a doctor of extensive experience, who, on account of the serious nature of the injury, referred her to Dr. Biggs, an expert surgeon. Evidence was also offered by the plaintiff as to the nature, extent, and permanency of her injuries.

The defendant offered in chief the testimony of a physician and surgeon who was conceded to be an expert. This doctor testified that he had made a physical examination of the plaintiff on behalf of the defendant, and he then described the condition of her injuries. He was then asked the following questions:

"Q. What was the usual custom among physicians in Stamford in January, 1912, as to using anæsthesia and X-ray examinations for fractures of this character? Q. I will ask you, Doctor, what the proper treatment for such an injury as this would have been, in your opinion?"

On objection these questions were excluded. These objections were well taken, and the evidence properly excluded.

This evidence was not offered for the purpose of showing that the plaintiff had not used due diligence to obtain proper medical treatment, but it was claimed as tending to diminish the damages, and therefore not admissible.

It would seem to be well settled that, where one is injured by the negligence of another, if his damage has not been increased by his own subsequent want of ordinary care, he will be entitled to recover of the wrongdoer to the full extent of the damage, although the physician whom he employed omitted to apply the remedy most approved in similar cases, and by reason thereof the damage of the injured party was not diminished as much as it otherwise would have been. *Loeser v. Humphrey*, 41 Ohio St. 378, 52 Am. Rep. 86; *Eastman v. Sanborn*, 3 Allen (Mass.) 594, 81 Am. Dec. 677; *McGarrahan v. N. Y., N. H. & H. R.*, 171 Mass. 211; 50 N. E. 610.

In *Lyons v. Erie R. Co.*, 57 N. Y. 489, it was held, in an action to recover damages for injuries alleged to have been sustained by defendant's negligence, where the defendant had given evidence tending to show the exercise taken by plaintiff might have tended to retard recovery, and that quiet would have been better, that evidence that plaintiff was advised by his physician that it was right and beneficial to exercise was proper. The court said:

"He is bound to use ordinary care to cure and restore himself. He cannot recklessly enhance his injury and charge it to another. If his arm be broken he cannot omit to have it set, and charge the loss of the arm to the wrongdoer. He is not obliged to employ the most skilled surgeon that can be found, or resort to the greatest expense to ward off the consequence of an injury which another has inflicted upon him. He is bound to act in good faith and to resort to such means and adopt such methods reasonably within his reach as will make his damage as small as he can."

[4] The defendant assigns as error that the trial court failed to find as requested in paragraph 2 of the draft finding. If the finding had been corrected by the trial court, as the defendant claimed, it would have given no better understanding of the character of the testimony which we have found was improperly admitted. The omission from the finding of certain facts which, if included, would not affect the correctness of the rulings made is not a ground of error. *Hoadley v. Savings Bank of Danbury*, 71 Conn. 600, 611, 612, 42 Atl. 667, 44 L. R. A. 321.

[5] Two errors assigned are that the court erred in admitting the testimony of two certain witnesses over the objection of the defendant as set forth in certain paragraphs and subdivisions of the finding.

An examination of the finding discloses that in each instance the testimony was by the same witness and as to the same subject-matter. In substance they were the same rulings made at different times.

"When the same ruling is made at different times, either with respect to the same or dif-

ferent witnesses, the finding should contain only a single ruling, unless the other rulings may be important as further illustrating the rule which determined the action of the court, or as establishing the materiality of the error claimed." Practice Book, p. 267, § 5.

[6] All the evidence and rulings of the court, comprising about 130 pages, have been printed and made a part of the record upon the defendant's motion.

As we have already indicated, there was no good excuse for burdening the record with all the evidence which is now before us.

Therefore no costs in favor of the defendant will be taxed for the printing of the evidence.

There is error, and a new trial is ordered. The other Judges concur.

(5 Boyce, 140)

### BAKER v. SPRUANOE

(Superior Court of Delaware. Kent. April 30, 1914.)

#### 1. TROVER AND CONVERSION (§ 13\*)—NATURE OF ACTION—"TROVER."

"Trover," in substance, is a remedy to recover personal chattels wrongfully converted by another to his own use.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 103-116; Dec. Dig. § 13.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7111-7113, 7821.]

#### 2. TROVER AND CONVERSION (§ 16\*) — ELEMENTS OF ACTION.

In order to entitle plaintiff to recover in trover, he must prove property in himself and a right of possession at the time of conversion and conversion of the property by defendant to his own use.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. §§ 119-147; Dec. Dig. § 16.\*]

#### 3. TROVER AND CONVERSION (§ 46\*) — DAMAGES.

The measure of damages in an action for trover and conversion is the value of the property at the time of the taking and conversion.

[Ed. Note.—For other cases, see Trover and Conversion, Cent. Dig. § 263; Dec. Dig. § 46.\*]

#### 4. EVIDENCE (§ 588\*)—CONFLICTING EVIDENCE—DUTY TO RECONCILE.

Where evidence is conflicting, it is the jury's duty to reconcile it if possible; otherwise to give credit to that which in the jury's opinion is entitled to the most credit, considering the bias, prejudice, or interest that the witnesses may have in the outcome of the case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.\*]

Action by William J. Baker against Edgar Spruanoe. Verdict for plaintiff.

Argued before BOYCE and CONRAD, JJ.

Charles H. Le Fevre, of Dover, for plaintiff. James M. Satterfield, of Dover, for defendant.

CONRAD, J., charging the jury:

Gentlemen of the jury:—This is an action of trover, brought by the plaintiff William J. Baker against the defendant, Edgar Spruanoe, wherein the plaintiff claims the value of certain personal property which he alleges

was wrongfully taken from him by the defendant.

[1] Trover, in substance, is a remedy to recover the value of personal chattels wrongfully converted by another to his own use.

It is admitted in this case that the plaintiff was the tenant of the defendant of a certain farm in Blackbird Hundred in New Castle county in this state for one year from March 1, 1913, and plaintiff claims that in addition to the farm rented to him under a verbal agreement, that the defendant left on the farm certain live stock, consisting in part of four cows, thirty-two ewes and one ram—that the number of ewes was increased by the addition of twelve ewes during the tenancy, that the plaintiff was to receive the milk from the cows, and the defendant was to receive the increase from the cows, that plaintiff was to receive one-half of the lambs that were dropped by the ewes.

On the part of defendant the above recited facts are admitted with the exception that defendant contends, that the plaintiff was to receive one-half of the lambs, if the lambs were dropped during the tenancy but if the lambs were not dropped until after the tenancy expired, then only one-quarter of the lambs. Further, defendant claims that he was to be at liberty to remove the above stock from the farm if disagreements arose between him and the plaintiff, or if he failed to properly care for the stock; and still further the defendant claims that he was notified by the plaintiff to remove his stock from the farm. The plaintiff denies that he so notified the defendant, either in person or by another, and plaintiff claims that he properly cared for the stock while in his possession.

[2] To entitle the plaintiff to recover in an action of trover he must prove (1) property in himself and a right of possession at the time of the conversion, and (2) a conversion of the property by the defendant to his own use. The matter of the taking and conversion of the property in this case is admitted by the defendant, so that the one question left for your determination is whether the defendant at the time of taking the property had the right of possession under the agreement of lease with the plaintiff, or was requested to remove the stock from the premises.

If you are satisfied from the evidence that defendant reserved to himself the right to take back or remove the stock if disagreements arose between him and the plaintiff in the course of the tenancy, or if, as defendant claims, the plaintiff failed to properly care for the stock and if that fact has been established by the evidence, or if the witnesses have convinced you that plaintiff notified defendant to remove his stock from the premises, then defendant would be entitled to a verdict.

[3] If on the other hand the evidence pro-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

duced on the part of the plaintiff satisfies your minds that he was in the rightful control and possession of the stock under the agreement of lease, and thereby entitled to possess and enjoy them during the continuance of the tenancy; and that plaintiff did not consent to or direct their removal, then plaintiff should be given a verdict, and the measure of damages is the value of the property at the time of the taking and conversion, not exceeding the sum of one hundred and forty-seven dollars and fifty cents, the amount claimed by him.

The real matter for your consideration is the scope and meaning of the verbal agreement between the parties, and this you must determine from the preponderance of the evidence in the case.

[4] Where evidence is conflicting, as in this case, it is your duty to reconcile it, if you can, but if you cannot do that, you should give credit to that evidence which in your opinion is entitled to the most credit, taking into consideration the bias, prejudice, or interest that the parties and witnesses may have in the outcome of the case.

Verdict for plaintiff.

(10 Del. Ch. 503)

#### In re LECARPENTIER'S WILL

(Orphans' Court of Delaware. New Castle.  
May 7, 1914.)

#### 1. WILLS (§ 116\*)—ATTESTATION—COMPETENCY OF WITNESSES.

The register of wills is competent to testify as an attesting witness to the execution of a will, for the Constitution provides that in case the register is interested the Orphans' Court shall take jurisdiction of the proceedings for probate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 284-298; Dec. Dig. § 116.\*]

#### 2. WILLS (§ 116\*)—ATTESTATION—COMPETENCY OF WITNESSES—"CREDIBLE"—"COMPETENT."

Under Act Gen. Assem. April 6, 1881 (16 Del. Laws, c. 537 [Rev. Code 1893, p. 798]), which made persons interested in the event of the suit competent to testify, a shareholder in a corporation appointed executor of a testator's last will is "competent" to testify as an attesting witness to the will; the statute requiring two "credible witnesses" to a will, and "credible" being synonymous with "competent."

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 284-298; Dec. Dig. § 116.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1709; vol. 8, p. 7622; vol. 2, pp. 1358, 1359.]

In the matter of the probate of the paper writing purporting to be the last will and testament of Alfred D. Lecarpentier, deceased. Will admitted to probate.

The register of wills being disqualified to probate the paper writing purporting to be the last will and testament of Alfred D. Lecarpentier, deceased, a petition was presented on behalf of those named therein as executors asking the Orphans' Court to take jurisdiction thereof and to probate the will.

An order was made directing that citations issue to the persons interested therein, and at the return thereof a caveat was filed on behalf of two of the persons so interested.

Robert H. Richards, of Wilmington, for propounders. Edward G. Cooke and Charles W. Bush, both of Wilmington, for caveators.

CURTIS, P. J. Alfred D. Lecarpentier died March 1, 1914, leaving a will dated July 10, 1912, the two attesting witnesses to which were Francis M. Walker, Esq., and George A. Elliott, Esq. Mr. Walker was at the time of the execution of the will, and at the death of the testator and still is, register of wills for New Castle county. Being disqualified to probate the will, a petition was presented to the Orphans' Court by those named in the will as executors, setting forth the disqualification of Mr. Walker and asking that the Orphans' Court take jurisdiction, as provided in the Constitution of the state. Thereupon this court made an order taking cognizance of the cause, and directing that citations be issued to all the parties interested and notice given by publication in the usual way according to the practice in the register's court. All the parties were cited, or notified, or appeared. A caveat in general form was filed by two of the parties interested, and on motion of the attorney for the proponent of the will, the caveators were required to set out the grounds on which the caveat was based. Objections were made to the competency of both of the attesting witnesses; to Mr. Walker because he was register of wills, and to Mr. Elliott because he was a stockholder and director of the Equitable Guarantee & Trust Company, which was one of the executors and was also appointed trustee of the estate.

[1] The first ground of objection was not further urged and was distinctly abandoned. Inasmuch as by the Constitution in case a register of wills is interested in questions concerning the probate of wills, the cognizance thereof belongs to another tribunal, the Orphans' Court, there is, of course, no basis for an objection to the competency of the register of wills to testify as an attesting witness at the probate of the will in the Orphans' Court.

Against the sufficiency of this objection the attorney for the will cited authorities to show that a person is not disqualified to act as subscribing witness to a will because at the time of the execution of the will he was a judge of a court for the probate of wills, Schouler on Wills, 172; Patten v. Tallman, 27 Me. 19; Panaud v. Jones, 1 Cal. 488; McLean v. Barnard, 1 Root (Conn.) 462; Ford's Case, 2 Root (Conn.) 232. He would, of course, be disqualified to probate the will.

[2] The other ground of objection related to the competency of Mr. Elliott. Testimony was heard before the Orphans' Court which

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

showed that Mr. Elliott was a stockholder and director of the Equitable Guarantee & Trust Company, and that the number of shares of the stock of the company held by him were 50. There was no evidence of any other interest which he had in the estate of the decedent in any way.

The statute of this state requires that there be two, or more, "credible" witnesses to a will. It seems to be settled by uniform decisions that "credible" is synonymous with "competent." Page on Wills, § 191; 40 Cyc. 1109. The case of *Sutton v. Sutton*, 5 Har. 459, seems to have a different definition and to make it synonymous with "creditable," but it was not so there said respecting the testimony of an attesting witness. There are two cases which were decided before 1881, when the act removing the disability of interest of witnesses was passed. They were *Sutton v. Sutton*, 5 Har. 459, and *Davis v. Rogers*, 1 Houst. 44. But neither of them decided that a person named as executor in a will was disqualified as an attesting witness to the will. In each of the cases the court considered whether persons named as executors were competent to testify, not as attesting witnesses, but as general witnesses. In the former case (*Sutton v. Sutton*), there were two executors called to prove the circumstances under which the will was found after the death of the testator. One of them was interested in a codicil and was excluded, just as all persons interested in a suit were at that time excluded, but the other executor not being so interested was admitted. In the later case, *Davis v. Rogers*, William H. Rogers, the executor named in the will, but not an attesting witness, was also a trustee under the will, which expressly provided that he should be paid fair and liberal compensation as such trustee. It was held that he was incompetent by reason of his interest. Chief Justice Harrington, however, intimated that there would have been a difference if he had been an attesting witness, and the only disqualification urged was based on his being such.

Whatever may have been the decisions before 1881, one decision has been rendered in Delaware since that time which is decisive of this case, and binding on this court. The act of April 6, 1881 (chapter 537, vol. 10, p. 798, of Revised Code), removed the disability of interest in a witness and made a person interested in the event of the suit or matter to be determined competent as a witness, except in proceedings by or against executors, in which a judgment or decree may be rendered for or against them.

In the case of *In re Spiegelhalter's Will*, 1 Pennewill, 5, 39 Atl. 465 (1897), the executor was one of the attesting witnesses, and it was held he was not disqualified to prove the execution of the will. The court relied on the act of 1881, above referred to, as making the executor competent as

an attesting witness. It was also there held that the proviso of the act did affect the result. This decision is binding on this court. It was by the Superior Court on an issue from the register of wills, and by the Constitution made final, and it is, therefore, final so far as the Orphans' Court is concerned when it takes cognizance of the probate of a will in cases where the register of wills is disqualified.

The case of *In re Spiegelhalter's Will* also decides that a trustee under a will is not disqualified to be an attesting witness, for interest in the event is no longer a disqualification. If Mr. Elliott had been executor and trustee under this will, he would not have been incompetent as an attesting witness, much less would he be here since he is not executor or trustee, but an officer and holder of a small number of shares of stock of a corporation named as executor and trustee.

Counsel for the will in his brief cites authorities of other courts which sustain the decision of the Superior Court, but it is not necessary to advert to them.

The argument for the caveators is based largely on the decisions of a Pennsylvania statute respecting gifts by will to or in trust for charities. This statute expressly requires that in such cases the witnesses to the will shall not only be credible, but "at the time disinterested." Of course, decisions respecting this statute are not helpful in interpreting or applying our own statute.

There is no ground to sustain the caveat, and an order will be made admitting the will to probate.

(10 Del. Ch. 308)

GREIF et al. v. JAMES H. WRIGHT CO.

(Court of Chancery of Delaware. June 15, 1914.)

1. CORPORATIONS (§ 567\*) — RECEIVERSHIPS — SET-OFFS OF OR AGAINST CLAIMANTS.

The right to set off mutual debts due to and from a corporation, under Rev. Code 1852, amended to 1893, p. 793, c. 106, § 21, providing that mutual debts between parties to an action, due at the time of action brought in the same right, may be the subject of set-off, was not defeated by the appointment of a receiver for the corporation under a statute authorizing the appointment of a receiver for insolvent corporations on the application and for the benefit of any creditor or stockholder, since such receiver takes the assets as a trustee and as a representative of the insolvent, and acquires no greater interest in the estate than the corporation had, and the assets are subject to such set-offs, liens, and incumbrances as exist at the time of the appointment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2287; Dec. Dig. § 567.\*]

2. CORPORATIONS (§ 567\*) — RECEIVERSHIPS — SET-OFFS OF OR AGAINST CLAIMANTS.

A debt due to the receiver of an insolvent corporation, as distinguished from a debt due to the corporation, cannot be set off against a debt due from the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2287; Dec. Dig. § 567.\*]

Action by Simon Greif and others, trading under the firm name and style of L. Greif & Bro., against the James H. Wright Company. A receiver having been appointed for the defendant company, claims of various creditors were filed, and exceptions were taken to the claim filed by Elmer E. McDaniel. The matter was heard on said claim and exceptions. Order entered, instructing the receiver to allow a set-off by the claimant.

Marvel, Marvel & Wolcott, of Wilmington, for receiver. William S. Hilles, of Wilmington, for claimant.

The CHANCELLOR. Elmer E. McDaniel for several years bought goods of James H. Wright Company on credit, and the company owed McDaniel for board and care of a horse and wagon. These two running accounts were occasionally settled by allowing one against the other. On February 12, 1912, such a settlement was made and mutually discharged, and each continued to become indebted to the other. Afterwards a receiver was appointed for the company on the ground of its insolvency. At that time McDaniel owed to the company \$419.36 and the company owed McDaniel \$472.67. McDaniel claims the right to offset the amount the company owes him against the amount he owes the company, and the receiver, by petition setting forth the above facts, asks for instructions. The counsel for McDaniel voluntarily appeared to the petition, and the question was argued by him and by counsel for the receiver.

[1] Before the appointment of the receiver the mutual debts could have been set off under the statutes of this state. Revised Code, c. 106, § 21, p. 793. Did the appointment by the court of a receiver of the corporation, based on its insolvency, change this right? The statute authorizes the Court of Chancery to appoint a receiver for an insolvent corporation "on the application and for the benefit of any creditor or stockholder thereof." A receiver so appointed is not a purchaser for value without notice, but takes the assets of the company as a trustee and as a representative of the insolvent. The receiver acquires no greater interest in the estate than the corporation had. Its assets are subject to set-offs, liens and incumbrances as they exist at the time of the appointment. 5 Pomeroy's Equitable Remedies, § 187; High on Receivers, § 247; Van Wagoner v. Paterson Gas Co., 23 N. J. Law, 283; Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059; Davis v. Industrial, etc., Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322 (1894); Steelman v. Atchley, 98 Ark. 294, 135 S. W. 702, 32 L. R. A. (N. S.) 1060.

[2] Of course a debt due to the receiver, as distinguished from a debt due to the company, cannot be set off as against a debt due from the company. The reason is the same

as that applicable where one becomes indebted to an executor or administrator of an insolvent estate. Such a debt cannot be set off against a debt which he owed the deceased, for he owes the administrator or executor, while the estate owes him. Davis v. Industrial, etc., Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322 (1894).

Set-off is inadmissible, it is said, where the receiver represents the creditors in suits to recover unpaid subscriptions to capital stock, which constitute a trust fund (Davis v. Industrial, etc., Co., supra), or in suits to recover dividends illegally paid (Osgood v. Ogden, \*43 N. Y. 70).

But the case under consideration is a plain one of mutual debts arising in the usual course of business, and the two claims are subject to legal as well as equitable set-off.

An order will be entered instructing the receiver according to this opinion.

(5 Boyce, 143)

#### DRAPER v. DELAWARE STATE GRANGE MUT. FIRE INS. CO.

(Superior Court of Delaware. Sussex. June 29, 1914.)

#### 1. INSURANCE (§ 646\*)—ACTIONS—BURDEN OF PROOF.

For a party to recover on a contract of insurance, the existence of a valid contract and the occasion that fixes liability thereunder must be proved.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.\*]

#### 2. INSURANCE (§ 124\*)—NATURE OF "CONTRACT OF INSURANCE."

A "contract of insurance" against loss or damage to property is a contract of indemnity, and is an undertaking on the part of the insurer, based upon sufficient consideration, to pay the insured a certain sum of money upon the happening of a certain contingency.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 172, 178; Dec. Dig. § 124.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3674-3677.]

#### 3. INSURANCE (§ 124\*)—LIABILITY OF INSURER—NECESSITY OF LOSS.

A fire insurance contract is essentially a personal contract, and is not a contract to insure the property against fire, but one to insure the owner of the property against loss by fire; and hence a destruction of the property by fire does not render the insurer liable, unless insured has thereby sustained a loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 172, 178; Dec. Dig. § 124.\*]

#### 4. INSURANCE (§ 680\*)—ACTIONS ON POLICIES—PLEADING—INSURABLE INTEREST.

In an action on a fire insurance policy, plaintiff must allege and prove an insurable interest in the property existing at the inception of the policy, or subsisting during the risk and existing at the time of the loss; and hence a declaration failing to allege such interest at the date of the contract and at the time of the loss was demurrable.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1582, 1583; Dec. Dig. § 630.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



# 5. INSURANCE (§ 119\*) — VALIDITY OF CONTRACT—NECESSITY OF INSURABLE INTEREST.

An insurance policy against loss of property in which the insured has no interest amounts to a wager, and is void, as contrary to public policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 165; Dec. Dig. § 119.\*]

Action by Annie Y. Draper against the Delaware State Grange Mutual Fire Insurance Company. On demurrer to the declaration. Demurrer sustained.

Demurrer to declaration (No. 45, February term, 1914).

The averments of the first and third counts of the declaration are to the effect that the defendant made a contract of insurance with the plaintiff whereby it undertook and promised to "insure the plaintiff against loss or damage" resulting from destruction by fire or lightning of "certain property in the said agreement or policy named and described," and that thereafter "the property in said policy insured was damaged or destroyed by fire," without stating that at the time of the fire as well as at the time of the making of the contract, the plaintiff had an insurable interest in the property insured and destroyed.

In the second count there is an averment that the plaintiff "was interested in the insured premises," but the relation of this averment to the context makes it apparent that the interest averred was an interest of the plaintiff at the time of the inception of the contract; this count like the other two being silent as to an interest of the plaintiff in the property at the time of its destruction by fire.

The ground of demurrer is that while the plaintiff has stated a contract of insurance between herself and the defendant and has alleged the destruction by fire of the property described in the policy, she has failed to show a right of recovery because she has failed to disclose that she had an insurable interest in the property described therein, either at the inception of the contract or at the time the property was destroyed.

Argued before WOOLLEY and RICE, JJ.

Robert G. Houston and Robert C. White, both of Georgetown, for plaintiff. John B. Hutton, of Dover, and Andrew J. Lynch, of Georgetown, for defendant.

WOOLLEY, J., after making the above statement, delivered the opinion of the court.

(1, 2) In order for a party to recover on a contract of insurance, two things are necessary to be proven: First, the existence of a valid contract; and, second, the occasion that fixes liability thereunder. A contract of insurance against loss or damage to property is a contract of indemnity. It is an undertaking on the part of the insurer, based upon sufficient consideration to pay the in-

sured a certain sum of money upon the happening of a certain contingency. The contingency, in the contract here sued upon, is loss occasioned the plaintiff by fire to the property described in the contract.

[3] A contract of insurance is essentially a personal contract. *Traders' Ins. Co. v. Newman*, 120 Ind. 554, 22 N. E. 428. It is not a contract to insure property against fire, but is one to insure the owner of property against loss by fire. Destruction by fire of the property described in the contract of insurance is not the contingency upon which the insurer promises to indemnify the insured. It is only when by fire the insured has sustained a loss that the insurer may be called upon to perform its contract of indemnity.

[4] As it is quite impossible for the insured to sustain a loss to property by fire unless he has an interest in the property, and as he may recover only when he has sustained a loss, it is now recognized that in actions upon contracts of fire insurance, excepting in certain classes, as in marine insurance, the existence of an insurable interest on the part of and the consequent loss sustained by the insured, must be shown and proved before he can recover.

The insurable interest in property of one claiming indemnity for its loss by fire must first be shown to have existed at the inception of the policy, or to have legally subsisted during the risk (*Hooper v. Robinson*, 98 U. S. 528, 25 L. Ed. 219), and then to have existed at the time of the loss.

[5] If no insurable interest of the insured in the property can be shown at the time of its destruction, he, of course, can show no loss, and if he shows no insurable interest at the inception of the contract or during the risk, he fails to disclose a valid contract of insurance. A contract of insurance is a contract of indemnity, and its object is to avert a loss rather than to allow a gain. A policy of insurance against loss of property in which the insured has no interest, therefore, amounts to a wager, and wager policies are void upon the ground that they are contrary to public policy.

It becomes necessary, therefore, in an action upon a contract of fire insurance, for the insured to prove as facts, that he had an insurable interest in the property injured or destroyed, at a time when under the terms of the contract, the insurer was legally bound to indemnify the insured for loss when it happened, and that he also had an insurable interest in the property at the time of the loss. As these facts must be proved before recovery may be had, they must be averred before proof of them is allowed. *Cooley's Briefs on the Law of Insurance*, 85, 87, 135, 137, 138, 139, 141, 143; 19 Cyc. 583, 591, 920; *Freeman v. Fulton, etc., Co.*, 38 Barb. (N. Y.) 247; *Harness v. National Fire Ins. Co.*, 62 Mo.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

App. 245; *Quarrier v. Peabody Insurance Co.*, 10 W. Va. 507, 27 Am. Rep. 582; *Scott v. Phoenix Ins. Co.*, 65 Mo. App. 75; *German Ins. Co. v. Everett* (Tex. Civ. App.) 36 S. W. 125; *Davis v. New England Ins. Co.*, 70 Vt. 217, 39 Atl. 1095; *Vernon Ins. Co. v. Bank*, 29 Ind. App. 878, 65 N. E. 23; *Hardwick v. State Ins. Co.*, 20 Or. 547, 26 Pac. 840; *Chrisman v. State Ins. Co.*, 16 Or. 283, 18 Pac. 466; *Prussian National Ins. Co. v. Peterson*, 30 Ind. App. 289, 64 N. E. 102; *Bryan v. Farmers' Mutual Ins. Ass'n*, 81 App. Div. 542, 81 N. Y. Supp. 145.

The demurrer is sustained to all counts of the declaration.

(10 Del. Ch. 311)

MAHONEY et al. v. HEALY et al.

Court of Chancery of Delaware. June 23, 1914.)

1. WITNESSES (§ 198\*)—PRIVILEGED COMMUNICATIONS—ATTORNEY AND CLIENT.

Upon a bill brought by the grandchildren of a decedent to set aside certain transfers of property made by her in her lifetime, on the ground of undue influence and mental incapacity, an attorney was competent to testify whether he had visited deceased as to the making of her will, as bearing upon her mental condition, since the rule of privilege does not apply in litigation instituted after the death of the client, and where all the parties claim under the client.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 747, 748, 753; Dec. Dig. § 198.\*]

2. WITNESSES (§ 202\*)—PRIVILEGED COMMUNICATIONS—TESTAMENTARY INSTRUCTIONS TO ATTORNEY.

Instructions to an attorney as to drawing a will are not privileged communications, in a contest to establish the will.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 756, 757; Dec. Dig. § 202.\*]

Bill by Teresa C. Mahoney and others against Margaret A. Healy and others. Petition for rule requiring a witness to appear and show cause why he should not be ordered to answer certain questions. Rule made absolute.

See, also, 9 Del. Ch. 273, 81 Atl. 583.

During the taking of testimony before the examiner appointed in this cause, John Biggs, Esq., an attorney at law, was produced as a witness and declined to answer certain questions because his knowledge of the matter inquired about was obtained while acting in a professional capacity. Upon certification by the examiner to the Chancellor of the testimony of the witness, the solicitor for the complainants presented a petition for a rule of this Court requiring the witness to appear and show cause why he should not be ordered to answer the questions. The witness appeared gratis and assigned the above stated reason for declining to answer the questions and stated that he desired to be instructed as to how far his testimony should go.

Charles W. Bush, of Wilmington, for complainants. Hugh M. Morris, of Wilmington, for defendants.

THE CHANCELLOR. The bill was brought to set aside certain transfers of property made by Winifred Cottingham in her lifetime, it being claimed that the transfers were made through fraudulent influences and that Winifred Cottingham was then mentally incompetent to make the transfer. The suit was by grandchildren of Winifred Cottingham after her death. See *Mahoney v. Healy*, 9 Del. Ch. 273, 81 Atl. 583.

[1] As the mental capacity of Winifred Cottingham was in question, Mr. Biggs was asked whether he had visited Winifred Cottingham respecting the making of a will by her, and he declined to answer because his knowledge was gained while acting as her legal adviser. No objection seems to have been made by counsel for the defendant to the questions, or to their being answered. It was apparent that the purpose of the questions was to elicit evidence as to the mental condition of Winifred Cottingham. At the hearing of the rule the question was argued as one of privileged communication between attorney and client. It seems to be well settled, however, that the rule of privilege does not apply in litigation instituted after the death of the client where all the parties claim under the client. *Russell v. Jackson*, 9 Hare, 387, 392, 68 Eng. Reprint, 558; *Glover v. Patten*, 165 U. S. 394, 17 Sup. Ct. 411, 41 L. Ed. 760; *Kern v. Kern*, 154 Ind. 29, 55 N. E. 1004; *Downing's Will*, 118 Wis. 581, 95 N. W. 876; *Norton v. Clark*, 253 Ill. 557, 565, 97 N. E. 1079; *Coates v. Semper*, 82 Minn. 460, 85 N. W. 217; *Layman's Will*, 40 Minn. 371, 42 N. W. 286; *Phillips v. Chase*, 201 Mass. 444, 87 N. E. 755, 131 Am. St. Rep. 406; *Doherty v. O'Callaghan*, 157 Mass. 90, 31 N. E. 726, 17 L. R. A. 188, and note, 34 Am. St. Rep. 258; *Wilkinson v. Service*, 249 Ill. 146, 94 N. E. 50, Ann. Cas. 1912A, 41.

In the case of *Glover v. Patten*, 165 U. S. 394, 406, 17 Sup. Ct. 411, 41 L. Ed. 760, the court said:

"In a suit between devisees under a will, statements made by the deceased to counsel respecting the execution of the will, or other similar document, are not privileged. While such communications might be privileged, if offered by third persons to establish claims against an estate, they are not within the reason of the rule requiring their exclusion, when the contest is between the heirs or next of kin."

This was an action by children to establish their rights as creditors of the estate of their deceased mother.

In *Russell v. Jackson*, 9 Hare, 387, 68 Eng. Reprint, 558, the court held that in testamentary dispositions the very foundations on which the rule protecting confidential disclosures proceeds, seems to be wanting, where the contest is between parties, all of whom claim under the testator.

In *Phillips v. Chase*, 201 Mass. 444, 449, 87 N. E. 755, 131 Am. St. Rep. 406 (1909), it was said:

"Where the controversy is not between an estate and persons claiming against it, but is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to determine who shall take by succession the property of a deceased person, and both parties claim under him, the reason for the privilege [of a communication made to an attorney] does not exist, and neither can set up a claim of privilege against the other."

[2] Instructions to an attorney as to drawing a will are not privileged communications in a contest to establish the will. *Wilkinson v. Service*, 249 Ill. 146, 150, 94 N. E. 50, Ann. Cas. 1912A, 41; *Norton v. Clark*, 253 Ill. 564, 97 N. E. 1079; *In re Downing's Will*, 118 Wis. 531, 95 N. W. 876; *Coates v. Semper*, 82 Minn. 460, 85 N. W. 217.

There are no cases in Delaware which have a real bearing on the question here raised. In this case the rule of privilege does not apply. All the complainants are grandchildren of Winifred Cottingham and claim under her, and are seeking to set aside transfers made by her. Margaret A. Healy, the real defendant, is a daughter of Winifred Cottingham. If the transfer is set aside the parties complainant and defendant will get their shares of the property transferred. Testimony as to statements and conduct of Winifred Cottingham, if otherwise admissible in evidence, are not to be excluded because the person to prove them is the one who received his knowledge as her attorney, and in the course of his professional transactions with her. No sufficient reason has been shown why the questions should not have been answered by the witness. The complainants are entitled to have the rule made absolute.

Let an order be entered accordingly.

(5 Boyce, 146)

**BOWDEN et al. v. PHILADELPHIA, B. & W. R. CO.**

(Superior Court of Delaware. Sussex. June 29, 1914.)

**1. CARRIERS (§ 76\*)—CARRIAGE OF GOODS—ACTIONS FOR LOSS—PERSONS ENTITLED TO SUE.**

In an action by a shipper to recover for loss of goods under Interstate Commerce Act Feb. 4, 1887, c. 104, § 20, 24 Stat. 386 (U. S. Comp. St. 1901, p. 3169), as amended by Act June 29, 1906, c. 3591, § 7, par. 11, 34 Stat. 593 (U. S. Comp. St. Supp. 1911, p. 1307), requiring any interstate carrier to issue a bill of lading, and making it and any other carrier to which it may be delivered liable "to the lawful holder thereof" for any loss, the holding of the bill of lading is not a prerequisite to such right or action; but the statute extends its remedy directly against the carrier to whom goods are delivered for shipment in behalf of such shipper, or one who has succeeded to his rights.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 256-271, 363; Dec. Dig. § 76.\*]

**2. CARRIERS (§ 53\*)—BILL OF LADING.**

A bill of lading is not a contract of shipment, but evidence thereof.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 131, 165-167; Dec. Dig. § 53.\*]

Action by James E. Bowden and others, trading in the firm name of J. E. Bowden & Co., against the Philadelphia, Baltimore &

Washington Railroad Company. Demurrer to declaration overruled.

Summons case (No. 18, June term, 1913). Demurrer to declaration upon the grounds appearing in the opinion of the court. Demurrer overruled.

Argued before WOOLLEY and RICE, JJ.

Andrew J. Lynch and Albert F. Polk, both of Georgetown, for plaintiffs. Whiley & Jones, of Georgetown, for defendant.

WOOLLEY, J. (delivering the opinion of the court). This is an action upon several contracts of carriage, with respect to which the plaintiffs declare that they delivered to the defendant and the defendant accepted from the plaintiffs certain of the plaintiffs' property to be by it promptly and safely carried and transported in several parts from the town of Seaford in the state of Delaware to the city of Philadelphia in the state of Pennsylvania, and from the town of Seaford in the state of Delaware to the town of Cumberland in the state of Maryland, and in breach of which the plaintiffs charge that the defendant neglected to promptly and safely carry the same to the points of destination as promised, to their damage in the amount they seek to recover by this action.

The defendant demurs to the several counts of the declaration, and for grounds of demurrer contends that the transactions declared upon are interstate commercial transactions, that to recover upon such transactions the plaintiffs must aver that they are the *lawful holders of the bills of lading* issued by the defendant for the receipt and carriage of the property, that as the counts contain no such averments they are insufficient in law, and for authority for this contention cites a part of the amendment of section 20 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 386 [U. S. Comp. St. 1901, p. 3169], as amended by Act June 29, 1906, c. 3591, § 7, 34 Stat. 593 [U. S. Comp. St. Supp. 1911, p. 1307]), which is as follows:

"That any common carrier, railroad or transportation company receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage or injury to such property caused by it or by any common carrier, railroad or transportation company to which such property may be delivered or over whose line or lines such property may pass, and no contract, receipt, rule, or regulation shall exempt such common carrier, railroad or transportation company from the liability hereby imposed: Provided, that nothing in this section shall deprive any holder of such receipt or bill of lading of any remedy or right of action which he has under existing law."

If there is any doubt about the purpose and meaning of this provision of the act it is dispelled by the remainder of the provision, which is:

"That the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover from the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.  
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common carrier, railroad or transportation company on whose line the loss, damage or injury shall have been sustained, the amount of such loss, damage or injury as it may be required to pay to the owners of such property, as may be evidenced by any receipt, judgment or transcript thereof."

[1] The manifest object of this provision of the statute is to enable one who contracts with a common carrier for the carriage of goods to a point in a distant state over its lines and over the connecting lines of several common carriers, to recover damages for injury thereto directly from the carrier to which the goods were delivered and by which the bill of lading therefor was issued, without being compelled to seek out and sue the particular carrier that occasioned the injury. The legal effect of the provision, so far as it relates to a carrier, is to impose upon it a legal liability to perform and complete by delivery at destination every contract of interstate carriage into which it may enter for itself and for its connecting lines from which escape can be made neither by rules nor regulations of its own or by the contract or consent of the shipper. The legal effect of the provision, so far as it relates to a shipper, is not to confer upon him a right to a new kind of contract, but to extend to him rather a new and an additional remedy upon the kinds of contracts he may theretofore have been able to make, by affording him an opportunity to sue and recover from the carrier to which the property was delivered for shipment, under the liability imposed upon the carrier by the statute.

[2] Although the statute says "that any common carrier \* \* \* receiving property for transportation from a point in one state to a point in another state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss," we conceive that by that language the statute does not attempt to create a class of shippers who alone may resort to the liability imposed, either by giving to the holder of a bill of lading a right of action when otherwise he has no cause of action, or by making the mere holding of a bill of lading a prerequisite to a right of action when otherwise the owner of the property shipped has a legal cause of action. In other words, we construe the statute to extend its remedy directly against the carrier to whom goods are delivered for shipment, and in behalf of the shipper who delivered the same for shipment, or in behalf of one who, by some lawful transaction, has succeeded to the shipper's rights. Such a person may or may not hold the bill of lading, and his failure to hold a bill of lading, upon proof of his right otherwise to recover, will no more defeat that right than will the mere possession of a bill of lading confer a right of recovery upon one otherwise without a right to recover. In fact goods may be and frequently are delivered and received for shipment without a bill of

lading being issued therefor. Certainly, if a bill of lading was never issued to a shipper, the carrier's failure to evidence its contract in this form would neither withdraw from the shipper his right to recover, nor relieve the carrier from its liability to pay for loss of goods delivered and received for shipment, under the right conferred and the liability fixed by the statute. The shipper's right to recover, in any event, depends upon his right of action, and his right of action primarily depends upon his contract of shipment. A bill of lading is not a contract of shipment. It is the evidence of such a contract, and probably the best evidence of it. We decline to say that it is the only evidence of it. It is, however, evidence, and being evidence, we are of opinion that it is not required to be pleaded, though admissible at trial in proof of the contract pleaded.

The demurrer is overruled.

(245 Pa. 97)

### CONNORS v. OLD FORGE DISCOUNT & DEPOSIT BANK.

(Supreme Court of Pennsylvania. April 20, 1914.)

#### BANKS AND BANKING (§ 148\*)—PAYMENT OF CHECK—FORGED INDORSEMENT—NONSUIT.

Where, in an action by the drawer of a check against the drawee bank which had paid the check on a forged indorsement of the payee's name and had charged the amount to plaintiff, it appeared that plaintiff did not notify the bank of the forgery until 43 days after he must have learned of same, the court properly refused to take off a compulsory nonsuit.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 438-446, 451, 452; Dec. Dig. § 148.\*]

Appeal from Court of Common Pleas, Lackawanna County.

Assumpsit by Henry Connors against the Old Forge Discount & Deposit Bank and another, to recover the amount of a check paid by defendant on a forged indorsement. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and MOSCHZIS-KER, JJ.

W. L. Houck and Morgan Kaufman, both of Scranton, for appellant. R. L. Levy and C. H. Welles, both of Scranton, for appellee.

BROWN, J. Plaintiff's cause of action, as set forth in his statement of claim, is that, as one of the depositors of the defendant, a banking institution, he drew a check on it which it paid and charged to his account on the forged indorsement of the payee; and he seeks to recover on the averment that, when he discovered that the payee's indorsement was forged, he immediately notified the bank of the forgery. If the material averment that notice had been given to the bank by the appellant promptly upon his discovery of the forgery had been supported by proof, the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

case would have been for the jury. The nonsuit, which the court in banc refused to take off, was evidently directed by the trial judge because that averment was not so supported. While no reason was given for entering the nonsuit, and none for refusing to take it off, it ought, under the material facts in the case, as developed by the plaintiff himself, to have been entered for his delay in notifying the bank of the forgery; and it is to be assumed it was entered for that reason. The vindication of the judgment of the court below is to be found in a brief recital of those facts.

On January 24, 1910, M. Morris Moskovitz, a member of the bar of Lackawanna county, applied to the appellant for a mortgage loan to one of his clients, Alexander Szeghi. In company with Moskovitz the appellant viewed the property which the former told him belonged to Szeghi, and, having been assured by Moskovitz that the title was good, he accepted and left for record a mortgage, apparently signed and acknowledged by Szeghi. The mortgage was delivered to the appellant by Moskovitz, who stated that Szeghi was not able to be present on account of business engagements. Upon receipt of the mortgage, the appellant handed Moskovitz his check for \$1,450, the amount of the loan, drawn on the appellee to the order of Szeghi. Moskovitz deposited this check, bearing the forged indorsement, "Alexander Szeghi," to his own credit in a bank, which forwarded it to the defendant bank, where it was paid and charged to the appellant's account. Early in May, 1910, he went to Europe, and returned to Scranton on the 18th of the following month, when he learned that Moskovitz was a defaulter and had absconded. He then went to look at the property described in the mortgage and learned that Szeghi was not the owner of it. Having learned that a fraud had been practiced upon him, he immediately consulted a lawyer, and on or about June 20th went to the Union National Bank of Scranton to consult Mr. Wollerton, the cashier, about the situation. His testimony as to this is as follows:

"Q. Why did you go to Mr. Wollerton? A. I went there for information, to find something out, if the check was forged or not, if the right party got the money or didn't get the money. I didn't know how to make out. I wasn't in any doubt that the party didn't get the money."

Two or three days later (on the 23d of June) he employed counsel, to whom he said according to his own testimony, "The check was misindorsed, and the bank had no business to cash the check." On July 2d, without having given the bank any notice of what he then knew had been a mispayment by it, he went to Oklahoma, returning to Scranton on the 26th or 27th of the same month. On August 1st he got from Mr. Wollerton, the cashier of the Union National Bank, the check which he had left with him, and handed it to his attorney, with instructions to

notify the bank of the mispayment. This notice was given August 5th, or 42 days after June 23d, when the appellant must have known that the indorsement of the payee was forged. It is idle for him to now contend, as he does, that he did not then know that the forgery had been perpetrated. Out of his own mouth there is an admission that on or about June 20th he started an investigation to ascertain whether the indorsement of the payee was forged, and two days later he informed his own attorney that the check had been misindorsed and that the bank had no business to cash it. It was his duty to then promptly notify the bank of its mispayment, on what he avers in his statement of claim was the forged indorsement of Szeghi's name. In the face of all this it is urged that the jury ought to have been allowed to pass upon the question of the appellant's prompt notice to the bank. To have submitted that question to them would have been such manifest error that the trial judge may be excused for not giving his reason for entering the nonsuit. Among the authorities that compelled him to declare that the plaintiff could not recover reference need be made only to *McNeeley v. Bank of North America*, 221 Pa. 588, 70 Atl. 891, 20 L. R. A. (N. S.) 79.

Judgment affirmed.

(245 Pa. 94)

MILES et al. v. PENNSYLVANIA COAL CO.  
(Supreme Court of Pennsylvania. April 20, 1914.)

1. ADVERSE POSSESSION (§ 66\*)—EXTENSION TO BOUNDARIES—FENCES.

Where adjoining landowners occupied up to a fence for more than 21 years, each claiming the land on his side, this gives to each party a right up to the fence, whether it is on the line established by the original survey or not.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. §§ 371-383; Dec. Dig. § 66.\*]

2. BOUNDARIES (§ 48\*)—ACQUIESCENCE—ADVERSE POSSESSION.

Where, in ejectment to recover land occupied by defendant and separated from plaintiff's land by a fence, both parties claimed under the commonwealth, and there was evidence by defendant that for more than 21 years the existing boundary had been marked by fences, acquiesced in by adjoining landowners, judgment for defendant was justified by the evidence.

[Ed. Note.—For other cases, see Boundaries, Cent. Dig. §§ 232-242; Dec. Dig. § 48.\*]

Appeal from Court of Common Pleas, Lackawanna County.

Action by William Miles and others against the Pennsylvania Coal Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and MOSCHZIS-KER, JJ.

S. B. Price, C. B. Price, and J. H. Price, all of Scranton, for appellants. H. A. Knapp and John P. Kelly, both of Scranton, for appellee.

ELKIN, J. The numerous assignments of error in this case raise many interesting questions of law, but, as we view the record, a discussion of a very few of the legal positions pressed upon us by learned counsel will suffice to dispose of the present controversy. We will not therefore undertake to follow the printed argument by discussing the specifications of error separately.

[1] It must be conceded on all sides, indeed it is conceded, that if a consentable line marked on the ground was recognized and acquiesced in by the adjoining landowners since 1868, a permanent boundary was established, and with that boundary line thus fixed there is no basis for the contention made by appellants here. In the light of our own cases no one can seriously question this settled rule of law. As far back as *Brown v. McKinney*, 9 Watts, 565, 567 (36 Am. Dec. 139), this court said:

"It cannot be disputed that an occupation up to a fence on each side by a party or two parties for more than 21 years, each party claiming the land on his side as his own, gives to each an incontestable right up to the fence, and equally whether the fence is precisely on the right line or not."

Our courts have always favored the settlement of disputes of this character by recognizing consentable lines established by the parties themselves, and this without regard to whether the line agreed upon conforms to the exact courses, distances, and bounds of the original surveys. This rule applies with convincing force to the facts of the case at bar.

[2] In the original surveys there was a large amount of surplus land, most of which was included within the boundaries of the tract held by appellants, when the consentable line was marked on the ground. They are not in position to say that they were overreached in the division of the surplus land when the line between the two tracts was marked on the ground in 1868. So far as the division of the surplus land between the two adjoining tracts is concerned, the equities are with the appellee, but aside from this, and without reference to the division of the surplus land, the fact is that a line was marked on the ground at that time, and the evidence shows that it has been maintained, to some extent at least, and acquiesced in by the interested parties from that time to the present. Appellants undertook to discredit the line established in 1868, and to show that it had not been marked and recognized in such a way as to make it binding on the parties. The convincing weight of the evidence is against the contention of appellants, but the most favorable view that could be taken of the facts as dis-

closed by the record is that the marking of the line in 1868, the maintenance of fences, and the acquiescence of the adjoining landowners in the line thus established were questions for the jury, and they were so submitted. In our opinion, the evidence is absolutely convincing that this consentable line was established in 1868, and that it has been recognized and acquiesced in by all interested parties until within a very recent period, when appellants undertook to disregard it. The jury must have so found, because to have done otherwise would have been to ignore the established facts.

Then, again, the case is just as clearly against appellants on the questions of adverse possession. It has long been settled in Pennsylvania that a person in possession by a fence as his line for more than 21 years, establishes his right to claim title to the line thus marked. *Brown v. McKinney*, 9 Watts, 565, 567; *Reiter v. McJunkin*, 173 Pa. 82, 33 Atl. 1012.

It is not disputed that the appellee holds the title to the Hooker Smith tract, and the only question that could arise is the location of the line in controversy. No matter what doubt may have existed as to the original location of this line, the adjoining landowners consented to the line marked on the ground in 1868, and have acquiesced in that consentable line ever since. Most of the questions raised by this appeal relate to other matters, and the rulings of the court about which complaint is made have no direct bearing upon the controlling issues in the case.

No benefit would result to any one by elaborating the discussion of questions which for the purposes of the present can only be considered academic. The consentable line marked on the ground in 1868, and the adverse possession which followed for a period of 43 years, are sufficient to establish the title of appellee to the land in dispute, and all other matters which appellants sought to have considered at the trial may be disregarded as immaterial and irrelevant to the issue under the facts.

Judgment affirmed.

(245 Pa. 15)

#### TURNER v. BOROUGH OF TOWANDA.

(Supreme Court of Pennsylvania. March 30, 1914.)

#### MUNICIPAL CORPORATIONS (§ 819\*) — ICE ON SIDEWALK — INJURY TO PEDESTRIAN — EVIDENCE.

In an action for personal injuries by falling on ice on a sidewalk, verdict for plaintiff held sustained by the evidence.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1739-1743; Dec. Dig. § 819.\*]

Appeal from Court of Common Pleas, Bradford County.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Jennie D. Turner against the Borough of Towanda. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and STEWART, JJ.

Rodney A. Mercur, of Towanda, for appellant. J. Roy Lilley, William P. Wilson, and Mial E. Lilley, all of Towanda, for appellee.

**PER CURIAM.** The plaintiff was seriously injured by falling on a ridge or mound of ice on the sidewalk of a main street of a borough. The flagstones with which the street was paved were not of uniform height, and on the lower of them pools of water some two inches deep collected, which by freezing and thawing formed slush and accumulated snow, that became worn into ridges that extended across the walk. The walk had been out of repair for several years, and the ridges of ice had been on it a number of weeks.

The main question at the trial was whether the plaintiff's contributory negligence barred a recovery. She was familiar with the condition of the walk, and knew of the ridges of ice, but not of their exact location, and was carefully trying to avoid them. It was dark, and a slight fall of snow obscured the ridges, and the shadows of poles, tree branches, and wires across the pavement increased her difficulty. The sidewalk on the opposite side of the street was in the same condition, and it did not appear that there was a safer way open to her. She was not unnecessarily or heedlessly testing a known danger, but attempting to guard against one that she could not avoid. Whether she exercised proper care was a question for the jury, and we find no error in the manner in which it was submitted that calls for a reversal.

The judgment is affirmed.

(245 Pa. 71)

**MALTUS et al. v. DELAWARE, L. & W. R. CO.**

(Supreme Court of Pennsylvania. April 13, 1914.)

**CARRIERS (§ 94\*) — MISDELIVERY OF GOODS — DIRECTING VERDICT.**

In an action against a carrier for failure to deliver goods to a consignee, the verdict was properly directed for defendant, where plaintiff failed to show misdelivery, and defendant showed proper delivery made.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 367-395, 456; Dec. Dig. § 94.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by William A. Maltus and Heber J. Ware, trading as Maltus & Ware, against the Delaware, Lackawanna & Western Railroad Company. Judgment for defendant, and plaintiffs appeal. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

E. Spencer Miller, of Philadelphia, for appellants. Paul Freeman, of Philadelphia, and J. Hayden Oliver and Daniel R. Reese, both of Scranton, for appellee.

**PER CURIAM.** In this action against the defendant, a common carrier, for alleged failure to deliver goods to a consignee, the plaintiffs failed to sustain their averment of misdeliveries, while, on the other hand, the defendant showed that proper deliveries had been made. In his charge to the jury, directing them to find for the defendant, the learned trial judge concisely, clearly, and correctly presented the situation, and, as we have discovered no error in any of the assignments, the judgment is affirmed.

(245 Pa. 28)

**ALEXANDER v. WILKES-BARRE ANTHRACITE COAL CO. et al.**

(Supreme Court of Pennsylvania. March 30, 1914.)

**NUISANCE (§ 25\*) — WORKING OF COLLIERY — PRELIMINARY INJUNCTION.**

Where an owner of a dwelling house sued for an injunction to restrain defendant coal company from working its colliery near his residence, a preliminary injunction was properly denied, where the injuries to plaintiff were not of a pressing character, and an injunction would stop the mining operations of defendant, throw a large number of employes out of work, and cause a large loss to defendant, and the injuries complained of had been endured for some time.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 5, 60-63; Dec. Dig. § 25.\*]

Appeal from Court of Common Pleas, Luzerne County.

Bill of Robert B. Alexander against the Wilkes-Barre Anthracite Coal Company and another. From an order refusing a preliminary injunction, plaintiff appeals. Affirmed.

Woodward, J., filed the following opinion in the court of common pleas:

This case comes before the court on bill and answer; the bill praying for an injunction and other relief, and the answer denying the material allegations in the bill.

The first three prayers of the bill must be denied for the following reasons: The first prayer is for a temporary or preliminary injunction to restrain the defendant, the Wilkes-Barre Anthracite Coal Company, its officers, agents and employes, from working its colliery in violation of the law, as is alleged in the bill and denied in the answer. This must be refused, because the inconvenience and injury that the plaintiff alleges he has sustained and still sustains are not of such a pressing character as to warrant a preliminary injunction, the result of which would be to stop the mining operations of the defendant and throw a large number of employes out of employment, and also result in large loss of business to the defendant company. The injuries complained of have been endured for some time, and various other efforts to relieve the situation have been resorted to by the plaintiff, so that it seems clear that this is not a case for a preliminary injunction. The second prayer is for a mandatory injunction to compel the Wilkes-Barre Anthracite Coal Company to remove its washery and boilers to some

place where they will not cause the alleged injuries to the plaintiff; and the third prayer is for a mandatory injunction to compel the removal of the coal breaker of the defendant company to some other location. This relief, of course, could not be granted by preliminary injunction, especially under the pleadings in this case.

The fourth prayer is for an order on the Wilkes-Barre Anthracite Coal Company to allow the plaintiff's engineer access to the coal breaker and other structures of the defendant company for the purpose of inspecting the appliances used in the preparation of coal, and for the purpose of ascertaining if persons are employed contrary to law in the preparation of coal in said structures. As one complaint in the bill is that the breaker of defendant company emits larger quantities of dust than it would if equipped with approved appliances for controlling dust, and that the dust thus produced enters the dwelling house of the plaintiff in large quantities, and that the said breaker on this account is a nuisance from which the plaintiff suffers peculiar damage, and also that the smokestacks, through which the smoke from the fires under the boilers is carried, throw out dust of different colors which enters the plaintiff's residence, causing peculiar damage to the plaintiff, we feel disposed to grant this prayer of the bill, provided that the examination is made in such a way as not to interfere with the defendant company in the operation of its colliery, and therefore order and decree that the defendant the Wilkes-Barre Anthracite Coal Company permit the plaintiff by his engineer, to inspect its breaker and other outside structures at such time as may be convenient and reasonable, and accompanied by a representative of defendant company, if it so chooses, to ascertain whether the defendant company has in use such apparatus for the prevention of dust as is ordinarily in use in like collieries in these regions.

The fifth prayer is "for such other and further relief as the circumstances of the case may require, and to the court may seem meet." With the order and decree just made, the court has granted all the relief that can be given at this stage of the case.

Robert B. Alexander and John McGahren, both of Wilkes-Barre, for appellant. Benjamin R. Jones, of Wilkes-Barre, for appellee.

PER CURIAM. The decree appealed from is affirmed on the opinion of Judge Woodward refusing a preliminary injunction.

(245 Pa. 26)

#### KING v. LEHIGH VALLEY R. CO.

(Supreme Court of Pennsylvania. March 30, 1914.)

#### 1. NEGLIGENCE (§ 82\*)—CONTRIBUTORY NEGLIGENCE—PERSONAL INJURIES—RIGHT OF RECOVERY.

The manager of a coal yard having switching connections with railroad tracks was injured from a fall due to a giving way of a footwalk, the support of which had been weakened by a freight car being pushed against it by trainmen about a week before. He had, or by looking while working about the yard during the week would have had, full knowledge of the exact extent of the clearly apparent damage done by the car, and yet without taking any precaution went upon the walk. *Held*, that his own negligence, and not that of the trainmen a week before, was the proximate cause of his injury.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 112-114; Dec. Dig. § 82.\*]

#### 2. NEGLIGENCE (§ 56\*)—"PROXIMATE CAUSE."

The test of "proximate cause" is whether the facts constitute a continuous succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result is not the natural and probable consequence of the primary cause.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

Appeal from Court of Common Pleas, Bradford County.

Trespass by Jay King against the Lehigh Valley Railroad Company for personal injuries. From judgment for defendant non obstante verdicto, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and STEWART, JJ.

D. C. De Witt, of Towanda, for appellant. J. Roy Lilley, William P. Wilson, and Mial E. Lilley, all of Towanda, for appellee.

PER CURIAM. [1] This appeal is from a judgment entered for the defendant by direction of the court non obstante verdicto on a question of law reserved at the trial. The plaintiff was one of the lessees and the manager of a coal yard that had a switch connection with the defendant's tracks. Within the yard the track of the switch was on trestle work, and under it there were a number of bins, and at one side a narrow footwalk of planks supported on the trestles and extending over the bins. The track and bins were covered by a frame shed. Loaded coal cars were delivered by the defendant on the switch at the west end of the yard from which place they were removed by the plaintiff and to which empty cars were returned by him. A loaded car that was pushed onto the switch ran into the building with such force as to injure the trestle work, to break down the bumper at the end of the track, to injure the studding of the shed, and to move from its support the end of a plank of the footwalk. A week after the occurrence, the defendant's carpenters went to the shed to make repairs. While they were at work, the plaintiff in walking towards them from the end of the shed opposite that at which they had commenced work stepped on the end of the plank that was without support and fell into one of the bins. The carpenters had done nothing to the walk and it was then in the condition caused by the impact of the car a week before. During the week the plaintiff had carried on his business in the yard as usual, and the nature and extent of the injury to the shed and walk were apparent.

[2] At the trial there was no dispute as to any material fact. Judgment non obstante verdicto was entered on the ground that the plaintiff's negligence was the proximate cause of his injury. We concur in the conclusion reached by the learned trial judge.



The plaintiff had, or by looking would have had, full knowledge of the exact extent of the damage done, and without taking any precaution he went where he had reason to apprehend danger. His injury cannot be said to be the natural and probable result of a negligent act of the defendant's trainmen a week before.

"The test of proximate cause is whether the facts constitute a continuous succession of events so linked together that they become a natural whole, or whether the chain of events is so broken that they become independent, and the final result cannot be said to be the natural and probable consequence of the primary cause, the negligence of the defendants." *Thomas v. Railroad Co.*, 194 Pa. 511, 45 Atl. 345.

The judgment is affirmed.

(345 Pa. 7)

**HITZ v. PITTSBURGH & B. ST. RY. CO.**

(Supreme Court of Pennsylvania. March 30, 1914.)

**1. APPEAL AND ERROR (§ 1004\*) — REVIEW — EXCESSIVE DAMAGES.**

The power given by Act May 20, 1891 (P. L. 101), to the Supreme Court to reverse a judgment on the ground that the damages are excessive, will be exercised only where the injustice is so manifest as to show clear abuse of discretion below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3944-3947; Dec. Dig. § 1004.\*]

**2. DAMAGES (§ 132\*)—PERSONAL INJURIES—EXCESSIVE DAMAGES.**

Verdict for \$4,000 for personal injuries was not excessive, where plaintiff's head and back were injured, and he was unconscious for nearly an hour after the accident, had suffered constant headaches and insomnia, and the sight of one eye was impaired, and its removal might be necessary, and his back was so injured that he was unable to do more than half the work he did before.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 372-385, 396; Dec. Dig. § 132.\*]

Appeal from Court of Common Pleas, Allegheny County.

Action by Jacob Hitz against the Pittsburgh & Butler Street Railway Company. Judgment for plaintiff for \$4,000, and defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

William A. Challener and Clarence Burleigh, both of Pittsburgh, for appellant. Thomas M. Marshall and Thomas M. Marshall, Jr., both of Pittsburgh, for appellee.

**PER CURIAM.** In a collision of the defendant's car with a wagon on which the plaintiff was riding, his head and back were injured. He was unconscious for nearly an hour, and has since suffered from constant headaches and insomnia. The injury to his head seriously impaired the sight of one eye, and the testimony tended to show that it may be necessary either to remove the eye or to wear a patch over it to exclude the

light. The injury to his back has so weakened it that he is unable to do more than half the work he before did, or to do heavy work of any kind. He had not incurred expenses for medical attendance, and he had lost nothing in wages. He had been employed as a farm laborer by the same person for 18 years before his injury, and has since continued to receive the same wages, although his service was worth only half as much. The amount of wages received was not, however, shown.

[1, 2] It is conceded that the case was for the jury, and no exception was taken to the rulings of the court on the evidence, or to the charge. The only question presented by the assignment of error is whether a new trial should have been granted because the verdict of \$4,000 was excessive. While there was no proof of expenses incurred, or of the amount of wages paid, by which the loss in earning power could be determined, there remained, as elements to be considered and allowed for, pain, suffering, and inconvenience endured and likely to be endured in the future. These were the elements of damage submitted to the jury, and we are not persuaded that its verdict was excessive. It was certainly not so excessive that the court can be charged with error in allowing it to stand, and there is no ground for our interference with it. The power conferred by act May 20, 1891 (P. L. 101), has been exercised but once (*Smith v. Times Publishing Co.*, 178 Pa. 481, 36 Atl. 296, 35 L. R. A. 819), and it has been repeatedly said that it will not be exercised, except in extreme cases, where the injustice of allowing an excessive verdict to stand is so manifest as to show a clear abuse of discretion by the trial court (*Harrisburg, Carlisle & Chambersburg Turnpike Road Co. v. Cumberland County*, 225 Pa. 467, 74 Atl. 340).

The judgment is affirmed.

(345 Pa. 12)

**GOSS v. SPENCER.**

(Supreme Court of Pennsylvania. March 30, 1914.)

**1. EQUITY (§ 182\*)—PLEADING—DECISION IN LIMINE.**

Where an answer to a bill in equity avers that the bill is a mere ejectment bill raising only the question of right of possession, and not setting forth any equitable jurisdiction, and that the court has no jurisdiction, it sufficiently complies with the requirements of Act June 7, 1907 (P. L. 440), that if an "answer be filed averring that the suit should have been brought at law, that issue shall be determined in limine."

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 413, 418-421; Dec. Dig. § 182.\*]

**2. QUIETING TITLE (§ 12\*)—JURISDICTION.**

A bill to remove cloud from title to land will not lie where plaintiff is out of possession and claiming a title passed on the nullity of a certain deed, and defendant claims on the validity of the same deed, and the bill prays that defendant, who is in possession, be restrained

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from asserting such possession; the dispute being one concerning legal title and possession, for which an action of ejectment affords a complete remedy at law.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 44, 45; Dec. Dig. § 12.\*]

Appeal from Court of Common Pleas, Bradford County.

Bill by Helen L. Goss against Nelson D. Spencer to remove cloud from title to land. From decree for defendant, plaintiff appeals. Affirmed.

Fuller, P. J., specially presiding, filed the following opinion:

[1, 2] The answer is prefaced by the averment "that the said bill of complaint is a mere ejectment bill, raising only the question of the naked title to the right of possession of the land described in said bill, that it does not set forth any equitable jurisdiction of this case, and this court has not jurisdiction." This does not explicitly aver "that the suit should have been brought at law," as provided in the *in limine* act of June 7, 1907 (P. L. 440), but it does so aver in substance, and the plaintiff interposes no objection on this point.

If the bill were based entirely upon the proposition that the deed from husband and wife to the husband was a nullity, with recognition, however, of defendant's right to have present possession as tenant by the curtesy, and with a prayer only for cancellation, we would be inclined to find jurisdiction as in case of an ordinary bill *quia timet*.

But the bill goes farther, by averring in the fifth paragraph "that by the defendant's acts and perverse and unlawful conduct he should justly forfeit and be estopped from claiming even his life use of said lands by the curtesy of England, and your orator contends all the defendant's rights have been so defeated," and by including the prayer: "(c) That the said Nelson D. Spencer be decreed by his acts and conduct to have forfeited his rights as tenant by the curtesy of England in the said premises, and that he be estopped from asserting any title or ownership not only in the title of said lands, but to all use and possession of the same."

The situation then is this: Plaintiff claims legal title to the property, basing the claim upon the alleged nullity of a certain deed; defendant also claims legal title, basing the claim upon the alleged validity of the said deed; plaintiff is out of possession, asserting right to have possession, and praying that defendant, who is in possession, be restrained from asserting such possession. The case resolves itself, therefore, into a plain dispute concerning the legal title and possession, in which an action of ejectment affords a complete remedy at law, to be first invoked before coming into equity for incidental relief.

(b) Deciding, therefore, that the suit should have been brought at law, we certify the cause to the law side of the court as an action of ejectment, at the cost of the plaintiff.

The court certified the case to the law side of the court as an action of ejectment.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and STEWART, JJ.

J. Roy Lilley, of Towanda, for appellant. Charles M. Culver and J. C. Ingham, both of Towanda, for appellee.

PER CURIAM. The decree appealed from is affirmed, for the reason stated in the opinion of Judge Fuller, specially presiding.

(245 Pa. 60)

SLATER et al. v. MOYER et al.

(Supreme Court of Pennsylvania. April 13, 1914.)

1. EJECTMENT (§ 108\*)—NONSUIT—WILLS.

Testator devised his entire estate to his executor in trust for paying his debts and funeral expenses, paying to each of his two children \$5, paying to his widow while she remained unmarried an annuity of \$1,500 out of the net income, erecting a church window as a memorial, and establishing with his unsold realty and any accumulated income a certain charity upon the death or remarriage of his widow. The widow elected to take under the will, but the two children renounced the bequest given them, and brought ejectment for the realty, some portions of which were in the possession of testator's executor and other portions in that of tenants, on the ground that his will establishing a charity was void, because not attested by two disinterested witnesses, as required by Act April 26, 1855 (P. L. 328), and hence that he died intestate, and they were entitled as his heirs. Held, that a nonsuit was properly entered.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 316; Dec. Dig. § 108.\*]

2. WILLS (§ 81\*)—VALIDITY—RELIGIOUS OR CHARITABLE BEQUEST.

A will, containing among other provisions one for religious or charitable uses, is not void under Act April 26, 1855 (P. L. 328), though not attested as the act requires, but it is merely the religious or charitable bequest that fails.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 201, 202; Dec. Dig. § 81.\*]

3. EJECTMENT (§ 39\*)—RIGHT OF ACTION—WILLS.

Where testator devised his entire estate to his executor in trust for certain purposes, including a small bequest to each of his children, the payment of an annual income to his widow, and gifts for certain charitable uses, his children could not renounce the bequest to them and maintain ejectment to recover the realty left by their father, during the time which he had directed his executor to hold it to provide an annual income for his widow, regardless of whether the charitable bequests were invalid.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. § 131; Dec. Dig. § 39.\*]

Appeal from Court of Common Pleas, Schuylkill County.

Ejectment by George W. Slater and another against Joseph W. Moyer, sole executor under the last will and testament of Henry P. Slater, deceased, and others. From a judgment refusing to take off compulsory nonsuit, plaintiffs appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

George M. Roads and Carl H. Wagner, both of Pottsville, for appellants. John G. Johnson, of Philadelphia, Daniel W. Kaercher, of Pottsville, and Enterline & Enterline, for appellees.

BROWN, J. Henry P. Slater died testate December 23, 1912, leaving to survive him a widow and two children by a former marriage, to each of whom he left but \$5. By his will, executed March 6, 1911, and admitted to probate December 30, 1912, he gave his entire estate to Joseph W. Moyer, his executor, in trust for the purpose of: (1) Pay-

ing his debts and funeral expenses; (2) paying to each of his two children \$5; (3) paying to his widow, as long as she remained unmarried, an annuity of \$1,500 out of the net income of his estate, consisting chiefly of real property, some of which was needed to pay his debts; (4) erecting a church window as a memorial to his father and mother; (5) establishing with his unsold real estate and any accumulated income a charity, to be called the "Anna S. Slater Second Presbyterian Church Home for Indigent Old Ladies." The widow elected to take under the will. On February 14, 1913, the appellants renounced the bequests given to them, and, on the 3d of the following month, brought this ejectment to recover possession of all the real estate of which their father had died seised, some portions of which were in the possession of his executor and others in that of tenants under leases from him or his executor. Appellants base their right to recover, as heirs of their father, on the ground that, as the execution of his will, establishing a charity, was not attested by two disinterested witnesses, he died intestate. One of the two attesting witnesses was J. W. Moyer, the executor and trustee named in the will, and it is contended that, as he was not a disinterested witness under the act of April 26, 1855 (P. L. 328), the charity is void, and, as it must fail, the will falls with it.

[1] The first piece of evidence offered by the plaintiffs was the will of their father, and when they closed their case a nonsuit was asked for on the ground that they had themselves shown title or right of possession in the defendants. This was clearly so, and the nonsuit should have been granted solely on the ground that, under the will of the testator, probate of which could not have been denied, the title to his real estate at the time this action was brought was in his executor and testamentary trustee, and the right to the possession of it in the defendants. Instead of entering the nonsuit on this plain and well-understood legal proposition, the trial judge, in passing upon the motion to enter it, said plaintiffs were entitled to go to the jury if J. W. Moyer was an interested witness to the execution of the testator's will within the meaning of the act of 1855, but, after proceeding to give his reasons why he regarded Moyer as a disinterested witness, he held that the will had been validly executed, and that the plaintiffs could not therefore recover. The question which the trial judge undertook to decide in passing upon the motion for a nonsuit was not in the case, and his misconception of the situation seems to have been followed by the court in banc in refusing to take off the nonsuit. The will had been executed by the testator in the presence of two witnesses, had been duly admitted to probate, and was a valid disposition of his estate for the purpose of paying his debts and funeral expenses and the annuity to his

widow. Whether its provision creating the charity must fall by reason of his disregard of the statutory requirement as to the execution of a will bequeathing or devising an estate in trust for religious or charitable uses is an entirely different question, to be passed upon when it arises.

[2] A will containing, among other provisions, one for religious or charitable uses is not void, under the act of 1855, if it is not attested as that act requires; it is only the religious or charitable bequest or devise that fails. *Baxter's Appeal*, 1 Brewst. 451; *Hegarty's Appeal*, 75 Pa. 503; *Broe v. Boyle*, 108 Pa. 76; *Irvine's Estate*, 206 Pa. 1, 55 Atl. 795; *Stout v. Young*, 217 Pa. 427, 66 Atl. 659; *Carson's Estate*, 241 Pa. 117, 88 Atl. 311.

[3] The question of the right of the appellants to the possession of the real estate left by their late father cannot arise during the time he has directed his executor to hold it for the purpose of providing an annual income for his widow. The net income from it may or may not be at all times sufficient to pay her the annuity of \$1,500, but, without regard to this, until she remarries or dies, the title to all of her husband's real estate, and the right of possession of the same, subject to the leases made by him, will be in his executor. Upon the remarriage or death of the widow, appellants may, in a proper proceeding, raise the question of their right to take the real estate of which their father died seised, on the ground that his disposition of it to a charity is void under the statute. If the charity be then declared void, they will be entitled, as heirs of their father, to take the land intended for it.

As the nonsuit ought to have been granted for the reason stated, the appeal from the refusal to take it off is dismissed, and the judgment is affirmed.

(245 Pa. 57)

BRANDON v. GEORGE et al.

(Supreme Court of Pennsylvania. April 13, 1914.)

INJUNCTION (§ 44\*)—RIGHT OF ACTION—FRAUDULENT CONVEYANCE—EJECTMENT.

Where a mother conveyed her property to her son, who gave a judgment bond in part payment therefor, and the son subsequently reconveyed the property to his mother, after which judgment was entered on the bond and assigned to plaintiff, who thereafter purchased the son's interest at a sheriff's sale, plaintiff could not enjoin the mother from disposing of the property, on the ground that the son's conveyance to her was fraudulent, or secure a decree that she was holding the property in trust for her son, so that plaintiff's judgment might be a lien thereon; the remedy in such case being by an action of ejectment.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 92, 94; Dec. Dig. § 44.\*]

Appeal from Court of Common Pleas, Schuylkill County.

Injunction by Lloyd T. Brandon, to the use of James J. Dull, now to the use of Nel-

He F. Brandon, against William P. George and another. From decree for plaintiff, defendants appeal. Reversed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Otto E. Farquhar, of Pottsville, and George W. Ryon, of Shamoken, for appellants. W. L. Kramer, of Pottsville, for appellee.

BROWN, J. The complainant, at some time not stated in her bill, became the assignee of a bond given by William P. George, one of the defendants, on March 6, 1895, to secure the payment of \$2,000. There was a confession of judgment in this obligation, but judgment was not entered on it until November 1, 1898, on which date, as we learn from the testimony, the judgment was assigned to the complainant. On March 6, 1896, George conveyed to his mother, Mary P. George, the real estate, in part payment of which he had given the said bond. As judgment had not been entered on it at the time of this conveyance, it was not then a lien upon the said real estate. On April 23, 1906, nearly seven years after the entry of the judgment, this bill was filed by the appellee, averring that the conveyance by George to his mother had been for the purpose of defrauding her, that she was without adequate remedy at law for the wrong done her, and her prayer was that the said Mary P. George be restrained from selling, transferring, assigning, or in any way disposing of or incumbering or mortgaging the premises described in the bill, and be decreed to hold title to the same as trustee for the said William P. George. There was no prayer that the deed be declared void. After a demurrer to the bill had been overruled, an answer was filed by each of the defendants, denying that the conveyance was fraudulent, and averring that it was bona fide, for a full consideration paid by the grantee. The case went on to a hearing on bill, answer, and replication on November 5, 1906; the last testimony was taken December 16, 1907, and nearly three years later, on September 5, 1910, the court found that the averment of the bill as to the fraudulent conveyance of the property had been sustained by the testimony, and a decree nisi was made, as prayed for, with a proviso that it would be vacated upon the payment of \$2,000 to the complainant. Exceptions to the court's findings and decree nisi were dismissed December 8, 1913, more than three years after they had been filed, and from the final decree we have this appeal.

Whether the evidence justified the finding that the conveyance from William P. George to his mother was fraudulently made, for the purpose of defrauding the complainant, is a question we need not decide, for the bill ought to have been dismissed for the reason that the complainant had a plain, adequate,

and complete remedy at law for the redress of the wrong which she alleged had been perpetrated upon her. This question was raised by the demurrer. The answer averred that execution had been issued on the appellee's judgment against William P. George, and that, at a sheriff's sale on the same, she had become the purchaser of the defendant's interest in the property involved in this proceeding. Counsel for appellee admit this to be true. She was, therefore, at the very time she was praying for a decree in the court below that the title was still in William P. George, and that his mother be declared a trustee of the same for him, the absolute owner of whatever interest he had in the property. If, at the time of the sheriff's sale, the title to it was still in him, and not in his fraudulent grantee, the appellee acquired that title, under which she could have recovered possession of the premises on the common-law side of the court in an action of ejectment. This was the remedy to which she should have resorted. Whether her title is paramount to that of Mary P. George must, under the circumstances, be settled in such an action. *Hunter's Appeal*, 40 Pa. 194. To sustain the decree in favor of the appellee would leave the title still in William P. George, and she would be compelled to again buy at sheriff's sale what she now has, if the conveyance of which she complains was fraudulent. This anomalous situation seems not to have occurred to her, court, or counsel.

The thirteenth assignment of error is sustained, the decree is reversed, and the bill dismissed at the costs of the appellee, without prejudice to her right to bring ejectment.

(244 Pa. 606)

#### FOLKMAN v. LAUER.

(Supreme Court of Pennsylvania. March 30, 1914.)

#### 1. EVIDENCE (§ 508\*) — OPINION EVIDENCE — SUBJECT-MATTER.

The extent of the life of wood used for supports of a pavilion at a baseball park, not being within the range of ordinary experience or observation, is a proper subject for opinion evidence.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 2311; Dec. Dig. § 508.\*]

#### 2. LANDLORD AND TENANT (§ 167\*) — NEGLIGENCE—BASEBALL PARK—FALL OF GRAND-STAND.

Where, in an action against the owner of a baseball park for injuries from the fall of the grandstand in the park, which was leased by defendant with knowledge that it was to be used for the entertainment of the public, it appeared that some of the timbers of the stand had become decayed, and that defendant knew this, or should have known it by the exercise of reasonable diligence, when he executed the lease, defendant was liable though the lease obligated the tenant to maintain the premises in good repair.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 668-674, 676-679; Dec. Dig. § 167.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Court of Common Pleas, Berks County.

Trespass by Herman Folkman against Frank D. Lauer, for personal injuries. From a judgment for plaintiff, defendant appeals. Affirmed.

The opinion of the Superior Court, by Henderson, J., in *Kane v. Lauer*, 52 Pa. Super. Ct. 467, was as follows:

The plaintiff was injured by the collapse of a grandstand at a baseball park owned by the defendant. The evidence offered in support of the action tended to show that some of the upright timbers supporting the structure had become decayed and unfit for the purpose, and that the stand fell because of that condition. The defendant, while denying that the accident occurred because of the rotten condition of the upright supports, contends that he is not liable for the consequences of the accident because of the fact that the park was leased by him to an amusement company, and that the latter is alone responsible if there be liability anywhere. The defendant leased the premises to George Cockill and others on May 22, 1911, for a term of two years. The lease contained a covenant that the lessees would maintain in good repair the grandstand, bleachers, and building and fences on the premises. The position taken by the appellant is that the grandstand was properly constructed by a former tenant; that it came to the appellant on a reversion of the property to him at the termination of the lease; that he never used it himself, and that when he again leased he bound the tenants to assume responsibility for the condition of the structure by placing on them an obligation to repair; that the defect was curable by ordinary repair, and that the landlord neither assumed, nor was chargeable with liability for injuries resulting from the neglect of the tenants to make the necessary repairs and put the structure in fit condition for the use for which it was intended. He concedes that if the defect were one of original construction of which the landlord knew, or of which he should have known, his liability would continue after the lease because the correction of such a defect could not be said to be repair, but reconstruction rather, and that there is no implication that a tenant should reconstruct nor would a covenant on his part to repair include reconstruction. It is also conceded that where the buildings, though properly constructed, had become a nuisance, and therefore dangerous to others, the landlord could not divest himself of liability by leasing to a tenant. This much must be admitted, for the law is well settled that where an owner leases premises which are a nuisance and receives rent, then, whether in or out of possession, he is liable if he knew or with the exercise of reasonable diligence could have known of its condition. This is the doctrine of the common law as held in *Rich v. Basterfield*, 56 E. C. L. 784. The same principle is announced in *House v. Metcalf*, 27 Conn. 631; *Lusk v. Peck*, 132 App. Div. 426, 116 N. Y. Supp. 1051; *Swords v. Edgar*, 59 N. Y. 23, 17 Am. Rep. 295; *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503. In this state *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 731; *Knauss v. Brua*, 107 Pa. 85; *Wunder v. McLean*, 134 Pa. 334, 19 Atl. 749, 19 Am. St. Rep. 702; and *Cunningham v. Rogers*, 225 Pa. 132, 73 Atl. 1094, establish the same rule. In the case last cited it is said: "The general principle is undisputed that, when a landlord lets premises in a dangerous condition, he is liable for the consequences which may result from the condition he permitted to exist." He is not relieved from responsibility merely by the fact that the tenant is in exclusive possession of the premises. If the defect in the building existed when the lease was made, and he knew it or could have known it

in the exercise of due care, it was his duty to make necessary reconstruction to render the place safe for the people who were to occupy it, and this could have been done before the tenants went into possession. It is contended further, that the action cannot be maintained because of the clause in the lease obligating the tenants to maintain in good repair the buildings and fences on the premises. This is an agreement establishing a relation between the parties to the contract, but does not operate to relieve the lessor from a duty resting on him when the contract was executed. Whatever may be the rights or liabilities of the parties to the lease between themselves, the responsibility of the landlord for a dangerous condition of the demised premises at the time the tenants took possession is not shifted by the undertaking of the tenants to make repairs so far as the rights of a stranger to the contract are concerned who was rightfully on the premises, and was injured because of the failure to remove such dangerous condition. Numerous authorities support this view of the case as does also the logic of the facts. *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Lusk v. Peck*, 132 App. Div. 426, 116 N. Y. Supp. 1051; *Swords v. Edgar*, 59 N. Y. 23, 17 Am. Rep. 295; *Godley v. Hagerty*, 20 Pa. 387, 59 Am. Dec. 731; *Sherman & Redfield on Negligence*, § 709a. Assuming that the defect was known or could have been known by the exercise of ordinary diligence and care, it was in the power of the landlord to put the property in condition for the uses for which it was intended, and his failure so to do would render him responsible to strangers to the contract who are injured as the result of such neglect. What was the condition of the grandstand at the time the tenants took possession was, of course, a question of fact. The defendant knew what use was to be made of the property, and, indeed, had bound the tenants to use it in a particular way. The rent provided for was to be derived from the patronage which the public gave to the exhibitions to be held there, and the landlord was directly responsible, therefore, for the use to which the building was applied, and is presumed to have anticipated that it would be filled from time to time by spectators of the games. If, with this knowledge he let the premises in a dangerous condition, he was maintaining a nuisance for which he was liable. Responsibility exists as well for a condition existing at the time of the lease as for a defect in original construction even though the condition complained of had its beginning after the structure was completed. *Knauss v. Brua*, 107 Pa. 85; *Fow v. Roberts*, 108 Pa. 489; *Kirchner v. Smith*, 207 Pa. 431, 56 Atl. 947.

It is urged that the grandstand was not a nuisance at the time it was leased, because it was located at a distance from the public highway, that it was not then in use, and no one was invited to enter it; that it could only become a nuisance or a menace when people entered it by invitation, and that as this use was only to be made by the tenants in the prosecution of their business the liability was on them and not on the landlord. But the responsibility of the landlord relates, not only to a condition which is a nuisance when the lease is granted but to conditions which must, in the nature of things, become dangerous when the thing is used. *Rich v. Basterfield*, 56 E. C. L. 784; *Knauss v. Brua*, 107 Pa. 85; *Fow v. Roberts*, 108 Pa. 489. If a landlord rent a building which is in a condition dangerous for occupancy, with the intention that it be occupied, and its use is in conformity with that intention, he becomes responsible for injuries resulting from that condition. As the tenants were required by the lease to use the property for the entertainment of the public, the landlord participated in inviting the spectators to witness the games, and it was his duty to exercise reason-

able care to the end that those who occupied his building should not be subjected to peril from a condition existing at the time the tenants were put in possession. The court charged the jury, in language not to be misunderstood, that if the decayed condition of the beams or upright supports alleged to have been the cause of the accident did not exist at the time the lease was made, but came into existence between that date and the time when the grandstand collapsed, the defendant would not be liable in the action, but that if the defects were there when the term was granted to the tenants, and continued to the time of the accident and were the cause thereof, and if they were such as could have been discovered and remedied by a man of ordinary prudence in the exercise of due care, then the defendant was responsible, and that the fact of the occupancy of the premises by the tenant under the lease did not relieve the defendant from such liability. This instruction was in accordance with the law, as will appear by reference to the authorities cited and others on the same subject. The case, therefore, turned on the question of fact as to the condition of the grandstand before the lease was made and the knowledge, or means of knowledge, which the owner had with reference to its condition. The evidence was somewhat conflicting on this subject, but the jury accepted the statements of the plaintiff's witnesses; and with that conclusion we have nothing to do, for there was evidence which necessarily carried the case to the jury. The lease was executed on May 22, 1911, and the accident occurred on July 4th following. The jury alone could say whether the rotten condition of the posts shown by some of the plaintiff's witnesses had developed after the tenants took possession. The learned counsel for the appellant has presented an able argument in support of the position taken, but we are not convinced that the court erred in the instructions complained of.

The judgment is affirmed.

Verdict for plaintiff for \$5,622, and judgment thereof.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Joseph R. Dickinson and Henry P. Kelsner, both of Reading, for appellant. C. H. Ruhl, of Reading, for appellee.

**PER CURIAM.** The plaintiff was injured by the breaking of the wooden supports of a pavilion in an amusement park owned by the defendant and leased by him six weeks before the accident to a tenant to be used for public entertainments. The pavilion was erected four years before the time of the accident, by a former tenant of the defendant, and it came into the defendant's possession two years before on the expiration of the lease. The main question of fact at the trial was whether the defects in the wooden supports which caused the pavilion to break down were the result of decay which existed when the lease was made, and would have been discovered by the exercise of due care.

[1] In order to show constructive notice witnesses who had special knowledge of the subject, and who had built the pavilion, were allowed to testify as to the life of wood used in the situation in which the supports in question were placed. The admission of this testimony is the subject of the first two assign-

ments of error. The subject-matter of the inquiry is not within the range of ordinary experience or observation, and it was competent to receive the opinion of witnesses having a particular knowledge of it.

[2] The remaining assignments are to the refusal of the court to direct a verdict for the defendant and to enter judgment in his favor non obstante veredicto. In *Kane v. Lauer*, 52 Pa. Super. Ct. 467, an appeal by the same defendant, in an action that arose from the same occurrence and in which the testimony was substantially the same as in this case, the questions raised by these assignments were considered and decided, and it is needless to discuss them. We are in entire accord with the decision of the Superior Court in that case, and with the reasons in support of it stated in the opinion of Judge Henderson. On his opinion we overrule the assignments which relate to the liability of the owner of a building to a third person, injured by its defects while in the possession of a tenant. The judgment is affirmed.

(244 Pa. 574)

#### In re BRENNAN'S ESTATE.

(Supreme Court of Pennsylvania. March 30, 1914.)

#### 1. WILLS (§ 111\*)—EXECUTION—VALIDITY.

Where decedent died, leaving a paper testamentary in character and in his own handwriting, but unsigned except with the words "your miserable father," which paper was found in a drawer in his house in a sealed envelope by his daughter, whom he had told to get it there and give it to her brother, probate of the paper was properly refused, since it was not executed in compliance with the requirements of Act April 8, 1833 (P. L. 249), requiring that testator's signature be placed at the end of a will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 267-275; Dec. Dig. § 111.\*]

#### 2. WILLS (§ 111\*)—EXECUTION—VALIDITY.

Act April 8, 1833 (P. L. 249), requiring that testator's signature appear at the end of his will, though permitting a signature by initials or by a part only of the name, requires that a present, actual, and completed intent to execute the will be apparent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 267-275; Dec. Dig. § 111.\*]

#### 3. WILLS (§ 324\*)—EXECUTION—QUESTIONS OF LAW AND FACT.

The question as to what formalities are essential under Act April 8, 1833 (P. L. 249), § 6, to the execution of a will, is one of law, while the question whether the formalities have been actually complied with is one of fact.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 225, 767-770; Dec. Dig. § 324.\*]

#### 4. WILLS (§ 111\*)—EXECUTION—"SIGNED."

As used in Act April 8, 1833 (P. L. 249) § 6, requiring that a will be signed at the end by testator, or, if he is unable to do so, by some person in his presence and by his express direction, the word "signed" is used in the usual acceptance of the word, and means that testator's signature shall be affixed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 267-275; Dec. Dig. § 111.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6508-6512.]

### Appeal from Orphans' Court, Lackawanna County.

In the matter of the estate of James Brennan, deceased. From a decree dismissing an appeal from a decision of the register of wills refusing to admit a paper to probate as the last will and testament of James Brennan, Michael Brennan appeals. Affirmed.

Appeal from the register of wills. The following paper was offered for probate:

"Carbondale

"Michael iam owen afew dollars Hear to different persons and ihope that you will pay it for me as there is no one else that I could dependon

John Williams

\$8.00

Cosby

7.75

ther is afew dollars owen to Andred Watt idonot know how Muchit is there is a few dollars to tommy Voyle iam owen A man from binghamton \$6 dollars for abarrel of beer His nameis white if i cannot pay this before i die those two little bys will healp you to pay it there is afew Dollars owen t aman that cept in Clarks coal office—his name is goodridge pay this for me and god will Bless you, the you can have this house when those little girl is doing for them Selves it is apoor legacy that ihave to lave after me

"Your misserable father."

The register of wills refused to admit it to probate. Upon appeal to the orphans' court, Sando, P. J., filed the following opinion:

This is a proceeding on an appeal from the refusal of the register of wills to admit to probate a paper in writing as the last will of James Brennan, deceased. James Brennan died on or about the 9th day of April, 1873, leaving to survive him eight children. At the time of his death he was the owner of a piece of real estate in the city of Carbondale.

In September, 1910, a paper was produced to the register for probate. It was in part as follows:

"C C Carbondale.

"Michael I am owen a few dollars here to different persons and i hope that you will pay it for me as there is no one else that I could depend on \* \* \* pay this for me and God will bless you \* \* \* you can have this house \* \* \* it is a poor legacy that i have to leave after me. Your misserable father."

When this paper was offered before the register as a will, it was refused probate by him, and we are now asked to sustain an appeal from his decision.

At the hearing on the appeal Elizabeth Brennan, a daughter of the decedent, and a sister of the appellant, testified, in substance, when shown the paper: I showed that paper to my brother Michael and gave it to him; my father told me where I could get it in a dresser drawer in the house, and if anything should happen to him that I should hand it to my brother; that this was about a month before her father's death; that it was sealed in an envelope; that it is all in her father's handwriting; that after her father's death she gave it to her brother; that she was about 25 or 26 years of age at the time of her father's death; and, that the paper was in the dresser drawer "not longer than a month" before her father died.

Michael Brennan testified in part: That after h's father was buried his sister gave him the paper, "It might be a week after," and that it is all in his father's handwriting.

A nephew who had been associated in business with him, and an old friend of the decedent, both testified that the paper was in the handwriting of the decedent.

[1] It being undisputed that the paper is in

the handwriting of the decedent, and being testamentary in character, the only question left upon its validity as a will is the sufficiency of the statutory requirements in the matter of its execution. The form of the instrument is immaterial if its substance is testamentary. But a letter, as in this case, like any other instrument, to take effect as a will, must be executed in compliance with the requirements of the statute.

[2] The act of April 8, 1833 (P. L. 249) § 6, relating to wills, requires, among other things, "that every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall be of no effect."

Prior to the passage of this act, a will in writing proved by two or more witnesses, although unsigned by the testator, was sufficient to pass real or personal estate. The act of 1833 changed this rule so far as to make the signature necessary unless the testator was prevented by the extremity of last sickness from signing. *Butler's Estate*, 223 Pa. 252, 72 Atl. 508.

[3] As the act requires signing, the courts have no power to dispense with it, or to substitute something else for it, which they might regard as analogous, or very nearly the same thing. The requirements must be fully met; otherwise the instrument cannot be probated as a will. *Wall v. Wall*, 123 Pa. 545, 18 Atl. 598, 10 Am. St. Rep. 549. The question as to what formalities are essential to the execution of the will is one of law. The question whether these formalities have been actually complied with is one of fact.

[4] As to what amounts to a signing by a testator, in *Gardner on Wills*, at page 205, we find this rule stated: "Any completed mark or design made by the testator upon the material on which the will is written, with the intention that it shall, as a symbol, stand for or represent the testator as the written name would do, is as sufficient a signing as is the writing of the signature in full."

It is necessary, however, to understand the meaning of our act of 1833 in order to comprehend the import of the question we have under consideration. A testator need not sign with his own hand; he may, if he choose, direct another to do so for him in his presence, and the signing is sufficient, and that, too, although the testator is able to write his name. *Main v. Ryder*, 84 Pa. 217. In the absence of any reason for signing his name, it would be better that he should do so. If his handwriting is well known, there could be less difficulty in proving his will; and there may be other reasons. The provision which permits another person to sign for him is manifestly of most value to those who cannot sign for themselves. But the wording of the act applies equally to all persons, whether they can sign their names or not.

The statute also requires that the will should be signed at the end of it. The object of requiring a signature at the end is to denote that the instrument is completed; that the mind of the testator is fully made up to dispose of his property in the manner expressed. It is to fix upon and set an unfailing mark, whereupon it shall be known that the paper contains the settled purposes of the testator. From the mere fact of a man's signing a testamentary paper at the end we may conclude that it is his will.

The purpose of the act in requiring wills to be signed at the end is not to abridge rights over property, or to hamper by unreasonable formalities the disposal of it, but to provide a



means by which courts may safely decide what a man's will certainly is. It is founded upon a reasonable presumption, and it does not allow the presumption to be disproved except in one way, namely, by proving that the testator was prevented from signing it, or having it signed, by the extremity of his last sickness. The law likewise presumes that every man can sign his will, or cause it to be signed if he is not prevented from doing so by the extremity of his last sickness.

The act of 1833 requires that the *animus testandi* should be manifested by the signature of the testator at the end of the paper, unless prevented by an absolute inability on his part to comply with its requirements. When signed at the end, the usual and familiar mode in transactions to show assent to a written contract, the will is complete, and all doubt as to intention is removed. In these indispensable particulars the paper in question is defective. It is written as testified to by witnesses, in the handwriting of the decedent. It is without date, and it is not signed by him, nor by another in his presence. It is not only incomplete in its form, but it is unexecuted, and only entitled to probate when it is clearly shown that the decedent was prevented from observing the prescribed directions by the extremity of his last sickness.

We have a right to infer, inasmuch as the decedent lived for a time after the paper was written, that he had changed his mind, and that he neither wished nor intended that the paper should be regarded as his will. The impossibility of his compliance with the act does not appear. The paper has not the necessary characteristics of a will in this: That it must be actually signed, unless the signature be prevented by the state of the health and condition of the testator. It is not enough that the omission arose from misapprehension, mistake, or want of knowledge of the law.

A writing that does not meet the requirements of the act of 1833 is not a will, and the register cannot make a will out of it. The paper here produced was not signed, nor was the failure to sign accounted for as the statute required, to entitle it to probate.

In passing upon the paper which is the subject of this appeal, we are constrained to hold that it was not executed in accordance with the statutory requirements of the act of assembly, and that the register was right in refusing to admit it to probate.

The court dismissed the appeal from the decision of the register of wills. Michael Brennan appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

James B. Murrin, of Carbondale, and O'Brien & Kelly, of Scranton, for appellant.

**PER CURIAM.** We concur in the conclusion stated in the opinion of the learned judge of the orphans' court. Prior to the Wills Act of April 8, 1833 (P. L. 249), it was not essential to the validity of a will that it should be signed by the testator if written by him or by his special direction. Section 6 of the act requires that:

"Every will shall be in writing and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof or by some person in his presence and by his express direction."

The manifest intention of the Legislature was to remedy the mischief that arose from

admitting to probate memoranda, letters, and notes which were inchoate expressions of intentions. *Strickler v. Groves*, 5 Whart. 386; *Heise v. Heise*, 31 Pa. 246; *Knox's Est.*, 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798. The act of January 27, 1848, (P. L. 16), permits the execution of a will by a mark or cross. In *Plate's Est.*, 148 Pa. 55, 23 Atl. 1038, 33 Am. St. Rep. 805, it was said that the statute in authorizing the execution of a will by a mark can only mean a mark made with the intent to execute the will thereby. In *Knox's Est.*, 131 Pa. 220, 18 Atl. 1021, 6 L. R. A. 353, 17 Am. St. Rep. 798, in which the subject is fully considered by Mitchell, J., it is said that one of the purposes of the act of 1833 was to attain certainty as to the testator's completed testamentary purpose by the placing of his signature at the end of the instrument, and that while a signature by initials or by a part only of the name may be a valid execution of a will, the present, actual, and completed intent to execute must be apparent. The act of assembly defined the manner by which this intent is to be manifested—by signing at the end thereof. Signing in the usual acceptance of the word and in the sense in which, presumably, it is used in the act, is the writing of a name or the affixing of what is meant as a signature. It may be that the writing in question is a clear expression of the decedent's intent to make a testamentary disposition of his estate, but it is not evidenced by the formality required by the act of assembly.

The order dismissing the appeal from the register is affirmed on the opinion of the learned judge of the orphans' court.

(245 Pa. 81)

# **FREGA v. PHILADELPHIA RAPID TRANSIT CO.**

(Supreme Court of Pennsylvania. April 6, 1914.)

## **1. CARRIERS (§ 344\*)—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE.**

The burden of proof is on a passenger on a trolley car injured in consequence of riding on a platform to show that the car was so crowded that he could not be accommodated within.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. § 1399; Dec. Dig. § 844.\*]

## **2. CARRIERS (§ 326\*)—INJURIES TO PASSENGER—CONTRIBUTORY NEGLIGENCE.**

Physical infirmity of a passenger on a trolley car does not excuse his contributory negligence, where he voluntarily places himself in a place of known danger whereby he is injured.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1349-1351, 1364; Dec. Dig. § 326.\*]

## **3. CARRIERS (§ 281\*)—INJURIES TO PASSENGER—DUTY OF CARRIER.**

Where a passenger riding on the front platform of a car was injured by the explosion of the controller, and he was riding on the platform because of a stiff knee which rendered it dangerous for him to occupy a seat, judgment of nonsuit was not error; defendant being un-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



der no obligation to provide special accommodations for persons afflicted as was plaintiff.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1093-1097, 1241; Dec. Dig. § 281.\*]

Appeal from Court of Common Pleas, Delaware County.

Action by Gulseppe Frega against the Philadelphia Rapid Transit Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHIZIS-KER, JJ.

Franklin Spencer Edmonds and Howard Schell Baker, both of Philadelphia, and John M. Broomall, of Media, for appellant. William I. Schaffer, of Chester, for appellee.

STEWART, J. The plaintiff, while a passenger on a car of the defendant company, was injured by the explosion of the controller. He was standing at the time on the front platform, to the left and rear of the motorman, leaning against the front of the car. He had boarded the car at Tenth and Chestnut streets, in the city of Philadelphia, and was proceeding south. The car had moved a distance of several squares, having passed Walnut, Locust, and Spruce streets, before the explosion occurred.

[1,2] The plaintiff received his injuries because of his position on the platform; this is not disputed. No passenger within the car was in anywise hurt. On the trial of the case the court directed a nonsuit on the ground of contributory negligence on the part of plaintiff in occupying a place of known danger without justifying excuse. Two explanations were advanced in excuse, wholly incompatible with each other, nevertheless each calling for consideration. The first was that plaintiff occupied a position on the platform because the car was so crowded that he could not be accommodated within; the second was that he had a permanently stiff knee joint in one of his legs which prevented his sitting except as the crippled leg was stretched out its full length; that while he could have so sat in this particular car, had he been supplied with a seat, since the benches or seats run longitudinally with the car, yet his leg thrust out in that position would have been exposed to injury from those entering or passing out of the car; and further that he was not strong enough to stand within the car when it was in motion without other support than the usual strap. As to the first, the evidence is conflicting as to the position on the car the plaintiff first occupied. He says that at no time did he enter the car; one of his daughters testified that she saw him enter. Accepting his own statement as correct, upon boarding the car he at once occupied the

position on the platform which he retained until the accident. If he was occupying it, not from choice, but for the reason that he could not be accommodated within, he was justified in so doing. The burden of proof was upon him. His own testimony admits of no other inference than that he chose the platform for reasons of his own, his comfort or pleasure, uninfluenced by conditions within. While he repeatedly said that the car was full, yet he nowhere says that he could not have been accommodated within; nor does he assign the condition within as the reason for his standing outside. He testified that he saw people standing in the car, but, replying to a question from his own counsel as to the number, he distinctly said that he gave the matter no thought. Furthermore, he admits that he saw a number of people enter the car when he boarded it, and saw others enter it when it stopped at the several cross streets, yet at no time did he make any attempt to enter. His daughters who boarded the car at the time and place plaintiff boarded it passed within the car and there remained. They speak of the car being full, and yet they both testify, as did the father, that at the intermediate points passengers were discharged and others admitted who found accommodations. The fact that some were standing was in itself nothing unusual, and would not justify the plaintiff in remaining outside. The second excuse offered is quite as unavailing as the first. If the plaintiff's physical infirmity was such as is described, it was quite sufficient to commend him to the helpful and considerate sympathy of the conductor and his fellow passengers had he made the fact of his disability known. Unwilling to rely upon this he voluntarily took a position of known danger. The defendant company was under no duty to provide special accommodations for people afflicted as was the plaintiff. When he boarded the car he knew that he could be accommodated only as he would sit or stand. Provision was made within the car for passengers occupying either position, while no provision was made of any kind for passengers outside. The fact that if he occupied a seat his stiffened leg would so protrude between the open space between the seats as to be exposed to injury from those passing in and out, and the further fact that he could not stand securely supported only by the usual strap, were circumstances which called for his consideration in determining whether he would or would not become a passenger. Having determined that question for himself, in becoming a passenger he must be held to have accepted the accommodations provided, taking his chance as to their adequacy for one in his condition. His physical infirmity gave him no exemption from the rule that imputes contributory negligence to a passenger who voluntarily

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

places himself in a position of known danger and is injured in consequence.

[3] Furthermore, the accommodations provided within the car on which plaintiff was riding were not shown to have been different from those provided in the car in which he had traveled the same evening from Thirty-Fourth and Chestnut streets to Tenth street, where he boarded the car on which he was injured. For that entire distance, 24 squares, he traveled standing up within the car. With this fact appearing in plaintiff's own testimony, an acceptance of his explanation offered as an excuse that he could not stand within the car except as supported in some other way than by the strap would be impossible. The evidence has impressed us as it did the learned trial judge. It discloses no conditions that justified the plaintiff in occupying the place he did when he was injured.

The assignments of error are overruled, and the judgment is affirmed.

(244 Pa. 559)

**BAUSBACH v. REIFF et al.**

(Supreme Court of Pennsylvania. March 30, 1914.)

**1. "CONSPIRACY" (§ 1\*)—DEFINITION.**

A "conspiracy" is a combination of two or more persons by some concerted action to accomplish an unlawful purpose.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 1-5; Dec. Dig. § 1.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1454-1461; vol. 8, p. 7613.]

**2. CONSPIRACY (§ 8\*)—WHAT CONSTITUTES—COMBINATION AGAINST FELLOW EMPLOYÉ.**

A combination between workmen to deprive a fellow employé of work by force, threats, or intimidation is an unlawful conspiracy, such as may create a liability for damages, though it is not made criminal by statute.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 7-11; Dec. Dig. § 8.\*]

**3. CONSPIRACY (§ 21\*)—ACTION FOR DAMAGES—COMBINATION AGAINST FELLOW EMPLOYÉ—INSTRUCTIONS.**

In a workman's action against fellow workmen for damages due to their combining, and by threats of a strike, forcing their employer to discharge plaintiff, instructions that, if one defendant had the right to threaten to stop work if plaintiff was not discharged, all of them might lawfully combine to do the same thing, were erroneous.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 28, 29; Dec. Dig. § 21.\*]

**4. CONSPIRACY (§ 21\*)—ACTION FOR DAMAGES—COMBINATION AGAINST FELLOW EMPLOYÉ—INSTRUCTIONS.**

In a workman's action against fellow workmen for damages due to their combining and forcing their common employer to discharge plaintiff, it was error to instruct that, if plaintiff had worked on the nerves of his coemployés and made himself objectionable, obnoxious, unpleasant, or distasteful to them, defendants had a right to unite to procure his discharge by threatening to strike.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 28, 29; Dec. Dig. § 21.\*]

**5. CONSPIRACY (§ 8\*)—ACTION FOR DAMAGES—COMBINATION AGAINST FELLOW EMPLOYÉ—INSTRUCTIONS.**

Where a workmen's habits, character, or conduct toward his fellow workmen while at work renders him an unfit associate for ordinary workmen of good character, his fellow workmen may combine to advance their own interests by threatening to strike and thus procure his discharge.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 7-11; Dec. Dig. § 8.\*]

**6. EVIDENCE (§ 121\*)—DOCUMENTARY EVIDENCE—RES GESTÆ.**

In an action against plaintiff's fellow workmen for damages from loss of employment resulting from a conspiracy by defendants, a letter given to plaintiff by the manager at the time of his discharge, and stating that he had been discharged through no fault of his own, but at the demand of his fellow employés, because he had reported the dishonesty of one of them, was admissible as part of the *res gestæ*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. § 121.\*]

**7. EVIDENCE (§ 121\*)—RES GESTÆ.**

Declarations or actions which accompany a fact in controversy and tend to illustrate or explain it are admissible as part of the *res gestæ*.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 303, 307-338, 1117, 1119; Dec. Dig. § 121.\*]

Moschzisker, J., dissenting.

Appeal from Court of Common Pleas, Schuylkill County.

Trespass for conspiracy by George Bausbach against Frank G. Reiff and others. From judgment for defendants, plaintiff appeals. Reversed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

William Wilhelm, of Pottsville, for appellant. Charles A. Snyder, of Pottsville, for appellees.

POTTER, J. The plaintiff in this case brought this action of trespass against the defendants to recover from them damages which he claims to have suffered by reason of a conspiracy entered into by defendants to have him discharged from his employment as chief engineer of the Rettig Brewing Company of Pottsville, Pa. He had held that position for more than five years, when, on July 18, 1910, a committee of employés presented to the manager of the brewery a paper which was signed by all the defendants, which was as follows:

"Pottsville, Pa., July 17, 1910.

"We, the undersigned, do hereby declare that we refuse to work after twenty-four hours' notice to the employers of the Rettig Brewing Company as long as George Bausbach is employed at same plant."

Upon the trial, plaintiff offered testimony showing that he was discharged by the brewing company in consequence of the threats contained in the paper and repeated orally by the committee, and that the reason the

defendants, the signers of the paper, demanded his discharge was that he had a short time before reported to the manager of the brewing company the conduct of a night watchman, whom he had detected in stealing goods from the brewery, and who was discharged in consequence of the report made by plaintiff. The defendants admitted having presented the paper in question to the management of the brewery, but contended that their reason for so doing was not the action of plaintiff in reporting the theft, but because of a general dislike for him.

The trial resulted in a verdict for defendants. Plaintiff has appealed, and his counsel have filed 21 assignments of error, chiefly to the charge of the court below, and to its answers to points, and to rulings on offers of evidence. The third assignment is to the following language in the charge to the jury:

"If you find, of course, that these men were justified in requesting the dismissal of this man Bausbach, the plaintiff, on account of his making it so unpleasant for them that they did not care to work with him, that is the end of this case; your verdict should be in favor of the defendants."

The first, second, twelfth, and thirteenth assignments are to language used in the charge and in answering points with respect to which substantially the same question is raised, and that is whether employes, to whom a fellow workman is for any reason disagreeable, may lawfully combine for the purpose of procuring his discharge by notifying the employer that they will refuse to work if the workman to whom they object is retained.

[1, 2] In *Erdman v. Mitchell*, 207 Pa. 79, 91, 56 Atl. 327, 331 (63 L. R. A. 534, 99 Am. St. Rep. 783), this court said, speaking by Mr. Justice Dean:

"A conspiracy is the combination of two or more persons by some concerted action to accomplish an unlawful purpose. It is unlawful to deprive a mechanic or workman of work by force, threats, or intimidation of any kind; a combination of two or more to do the same thing by the same means is a conspiracy. That by the legislation referred to such conspiracy is no longer criminal does not render it lawful. At common law the courts held that such combination was so prejudicial to the public interests and so opposed to public policy as rendered it punishable criminally; but the Legislature, which generally determines what is and what is not public policy, has declared that it is no longer a crime or misdemeanor. But this is as far as it has gone; it is as far as it could go without abolishing the Declaration of Rights."

And Mr. Justice Dean quotes with approval (207 Pa. 94, 56 Atl. 332, 63 L. R. A. 534, 99 Am. St. Rep. 783) from 1 *Eddy on Combinations*, 416, as follows:

"The courts recognize the right of workmen to combine together for the purpose of bettering their condition, and in endeavoring to attain their object they may inflict more or less inconvenience and damages upon the employer; but a threat to strike unless their wages are advanced is something very different from a threat to strike unless workmen who are not members of the combination are discharged. In either case the inconvenience and damage in-

flicted upon the employer is the same; but in the one case the means used are to obtain a legitimate purpose, namely, the advancement of their own wages, and the injury inflicted is no more than is lawfully incidental to the enjoyment of their own legal rights. In the other case the object sought is the injury of a third party."

In *Pickett v. Walsh*, 192 Mass. 572, 582, 78 N. E. 753, 757 (6 L. R. A. [N. S.] 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638), Loring, J., said:

"A single individual may well be left to take his chances in a struggle with another individual. But in a struggle with a number of persons combined together to fight an individual, the individual's chance is small, if it exists at all. It is plain that a strike by a combination of persons has a power of coercion which an individual does not have. The result of this greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals; or, to state it in another way, there are things which it is lawful for an individual to do which it is not lawful for a combination of individuals to do. \* \* \* We have no doubt that it is within the legal rights of a single person to refuse to work with another for the reason that the other person is distasteful to him, or for any other reason, however arbitrary. But \* \* \* what is lawful for an individual is not necessarily lawful for a combination of individuals."

In *De Minico v. Craig*, 207 Mass. 593, 594, 599, 94 N. E. 317, 320 (42 L. R. A. [N. S.] 1048), it is said in the syllabus:

"A labor strike to get rid of a foreman because some of the workmen under him have a dislike for him is not a strike for a legal purpose."

Loring, J., said:

"The plaintiff had a right to work, and that right of his could not be taken away from him or interfered with by the defendants, unless it came into conflict with an equal or superior right of theirs. The defendants' right to better their condition is such an equal right. But to humor their personal objections, their likes and dislikes, or to escape from what 'is distasteful' to some of them, is not in our opinion a superior or an equal right. \* \* \* One who better his condition only by escaping from what he merely dislikes, and by securing what he likes, does not better his condition within the meaning of those words in the rule that employes can strike to better their condition."

[4, 5] In the light of these authorities, which point out a sound distinction between what a single individual may lawfully do and that which a combination of individuals may do, the instructions of the trial judge which are the subject of the first three assignments of error were inadequate and erroneous. The united action of the defendants was put upon the same basis as that of any single one of them; the trial judge using by way of illustration a supposed act by Reiff, the first defendant named. It does not appear that the jury were instructed that an act which might be lawful if done by one person might become unlawful if a number of persons combined to do it. The only fair interpretation which could be placed upon the instructions given was that, "if Frank G. Reiff or any other one of these defendants" had the right to threaten to stop

work if plaintiff was not discharged, the entire 28 men who signed the paper might lawfully combine to do the same thing. This was not a sound statement of the law. Again, it appears that the jury were instructed that, if plaintiff "worked on the nerves" of his coemployees, if he made himself "objectionable," "obnoxious," "unpleasant," or "distasteful" to them, they had the right to unite to procure his discharge by threatening to strike. This was going too far. The jury might very well have been instructed that, if plaintiff's habits, or his character, or his conduct while at work towards his fellow workmen was such as to render him an unfit associate for ordinary workmen of good character, it would have been sufficient reason for interference by his fellow workmen with his employment. They had the right to combine to advance their own interests in any proper way, but not for the purpose merely of inflicting injury upon another. It appears from the evidence that some of the defendants had disagreements with plaintiff, and gave some reasons for disliking him. But none of them testified that these difficulties caused them to sign the paper. Eighteen of the defendants gave no testimony whatever, and there was nothing to show that plaintiff had in any way made himself obnoxious or distasteful to them, nor was there anything in the evidence to show that they signed the paper for any other reason than that alleged by plaintiff, which was that he had reported to the company a theft by the night watchman. The first, second, third, twelfth, and thirteenth assignments are sustained.

[8] In the sixteenth assignment it is alleged that the trial judge erred in striking out of the testimony a paper which had been previously offered in evidence by plaintiff, and had been admitted by the court. W. B. Shugars testified that on July 18, 1910, the committee handed him the written notification from the defendants, which was dated the previous day. That night another man was put to work by the brewery in the place of plaintiff. The plaintiff had already testified that Shugars had said to him that it would be best to let him go for the benefit of both sides, and had added:

"I will give you a recommendation for the time you worked here and tell you why we had to leave you go."

Shugars gave plaintiff the recommendation the same day, and when he was on the stand identified the letter of recommendation given to plaintiff, and signed by him. This letter of recommendation stated in substance that he had been discharged through no fault of his own, but at the demand of employees, because he had reported the dishonesty of one of them. The trial judge admitted the letter in evidence, and it was read to the jury; but on the following day the trial judge, having decided that the letter was inadmissible, directed that it be stricken from

the testimony, and instructed the jury to disregard its contents. Counsel for appellant contends that the letter was admissible as a part of the *res gestæ*.

[7] In 1 Elliott on Evidence, § 537, it is said:

"Declarations which accompany or are a part of the fact or transaction in controversy and tend to illustrate or explain it, such transaction itself being admissible, are also admissible as being so connected as to be a part of the same act or transaction."

In *Shannon v. Castner*, 21 Pa. Super. Ct. 294, 321, Rice, P. J., said:

"Where declarations or acts accompany the fact in controversy and tend to illustrate or explain it, they are treated, not as hearsay, but as original evidence, in other words, as part of the *res gestæ*."

In *Coll v. Transit Co.*, 180 Pa. 618, 626, 37 Atl. 89, 90, the present Chief Justice quotes from Wharton on Evidence (2d Ed.) § 259, as follows:

"The *res gestæ* may therefore be defined as those circumstances which are the undesigned incidents of a particular litigated act, and which are admissible when illustrative of such act. These incidents may be separated from the act by a lapse of time more or less appreciable. They may consist of speeches of any one concerned, whether participant or bystander. They may comprise things left undone as well as things done. Their sole distinguishing feature is that they should be necessary incidents of the litigated act; necessary in this sense, that they are part of the immediate preparations for or emanations of such act, and are not promoted by the calculated policy of the actors."

In *Shadowski v. Railways Co.*, 226 Pa. 537, 539, 75 Atl. 730 (29 L. R. A. [N. S.] 302), our Brother Elkin said:

"Under the doctrine of *res gestæ*, those circumstances which are the undesigned incidents of the occurrence upon which the suit is based may be proven when illustrative of the act about which complaint is made. It is true, also, that these incidents may be separated from the act by a lapse of time more or less appreciable; but they must grow out of and be in a legal sense immediately connected with the litigated act. They may consist of remarks made at the time by an actor, participant, and perhaps under exceptional circumstances by a bystander, if the party making the remark has to do with or is concerned about the occurrence. It is imperatively required, however, that they should be the necessary incidents of the litigated act in order to make such remarks admissible as testimony."

Under the rule as stated and illustrated in these cases, we think the letter of recommendation was admissible in evidence, at least for the purpose of showing the fact of plaintiff's discharge, and showing that the only reason for it, as stated by his employer, was the demand and the threat made by defendants. The letter was given to plaintiff upon the same day of his discharge, and was a part of the transaction tending to illustrate and explain it. The discharge and the giving of the letter were practically parts of the same event. In so far as the plaintiff was concerned, the letter was an undesigned incident, showing the cause of his discharge, given to him by his employer in explanation

of an unjustified action which was forced upon the employer. We think, therefore, that the trial judge erred in striking out the letter, and in instructing the jury to disregard it. If the letter contained certain statements which were deemed to be irrelevant, the trial judge could have refused to admit such parts of the letter, or could have instructed the jury to disregard them; but, instead of doing this, he struck out the entire letter. If it had appeared from the testimony that Shugars had said to plaintiff:

"We are obliged to discharge you because these 28 men have threatened to strike if we continue to employ you, and we have no other reason than this for discharging you"

—it would hardly be contended that evidence of such a statement was not properly admissible as part of the *res gestæ*. What difference does it make that Shugars made substantially this statement in writing, and handed it to plaintiff? The sixteenth assignment is sustained.

We do not deem it necessary to consider in detail the remaining assignments of error. For the reasons which we have indicated, the judgment is reversed, with a *venire facias de novo*.

MOSCHZISKER, J., dissents from so much of the above opinion as deals with the subject of *res gestæ*, under the sixteenth assignment of error.

(244 Pa. 535)

**COMMONWEALTH ex rel. STRATTON,  
Mayor, et al. v. ELBERT et al.**

(Supreme Court of Pennsylvania. March 23, 1914.)

**1. STATUTES (§ 93\*)—SPECIAL AND LOCAL LEGISLATION—LAWS RELATING TO CITIES.**

Act June 27, 1913 (P. L. 584, 589, art. 5, § 3, cls. 13, 43), providing for the incorporation, regulation, and government of cities of the third class and election of officers therein, is not unconstitutional, as special or local legislation, because of the express provision that it shall not apply to "any city wherein the title to the waterworks therein located is in the name of the commissioners of waterworks."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 102; Dec. Dig. § 93.\*]

**2. MUNICIPAL CORPORATIONS (§ 205\*)—WATERWORKS—OPERATION OF STATUTE.**

Act June 27, 1913 (P. L. 568), providing for the incorporation, regulation, and government of cities of the third class and election of officers therein, but excepting any city wherein the title to the waterworks is in the name of the commissioners of waterworks, empowers the council of any third-class city, where the title to the waterworks is not in the name of such commissioners, by ordinance to supersede the commissioners and take into its own hands the administration of affairs previously committed to the commissioners.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 557-561; Dec. Dig. § 205.\*]

**3. MUNICIPAL CORPORATIONS (§ 176\*)—WATERWORKS—OPERATION OF STATUTE.**

Act June 27, 1913 (P. L. 568), if not directly repealing Act March 21, 1865 (P. L.

455), establishing a board of water commissioners for the city of Reading, empowers the council of that city by ordinance to supersede such board and take into its own hands the administration of affairs previously committed to that body; and hence, where the council passed an ordinance to that effect, the office of the board of water commissioners terminated.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 427-440; Dec. Dig. § 176.\*]

Appeal from Court of Common Pleas, Berks County.

Quo warranto by the Commonwealth, on the relation of Ira W. Stratton, Mayor, and others, against Edward Elbert and others, to determine title to office. From a judgment ousting defendants from the office of Commissioners of Water for the City of Reading, they appeal. Affirmed.

Endlich, P. J., filed the following opinion in the common pleas:

A careful study of all the questions raised in this important litigation, and of the various authorities bearing upon them, in the light of the very helpful arguments, both oral and printed, submitted by counsel, has led to the conclusion that *Commonwealth v. Heller*, 219 Pa. 65, 67 Atl. 925, furnishes a complete guide to the decision here to be made, and that that decision cannot, consistently with the doctrine of the case cited, be other than adverse to the defendants.

The city of Reading has the title to its waterworks by conveyance to it in its corporate name. The relators here compose the council of the city under Act June 27, 1913 (P. L. 568). The defendants are the water commissioners elected, and holding office under Local Act March 21, 1865 (P. L. 455), a supplement to the city charter (Act April 26, 1864 (P. L. 583)), and under the city ordinance of March 28, 1865 (City Dig. p. 389), passed in pursuance of the act of 1865, creating and prescribing the functions, etc., of the "Department of Water" in charge of the water commissioners. In 1874 the city accepted Act May 23, 1874 (P. L. 230), and became a city of the third class. It is now, therefore, subject to the act of 1913. On December 6, 1913, the city council passed an ordinance, effective (see article 20, § 1, p. 627) December 17, 1913, assigning the waterworks system of the city to the department of parks and public property, prescribing the payment of bills contracted in the operation and maintenance of the same, providing for the appointment of a chief engineer of waterworks and an assistant engineer, and fixing their salaries, in which ordinance that of March 28, 1865, is expressly repealed.

It is contended on the part of the commonwealth that the existence of the board of water commissioners under the act and ordinance of 1865 is thus terminated; on the part of the defendants, that it remains unaffected.

[1] The pertinent provisions of the act of 1913 are the following:

Article 4, § 1 (p. 575): "The legislative power of every city of the third class shall be vested in a council, composed of the mayor and four councilmen. Said council shall have and possess all powers heretofore conferred upon or vested in the select or common councils, or both thereof, as heretofore constituted, unless otherwise provided."

Article 5, § 3, cl. 13 (p. 584): "Every city of the third class \* \* \* is authorized and empowered, \* \* \* in addition to other powers granted by this and other acts, to create

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

any office, public board or department which they may deem necessary, \* \* \* to prescribe the powers thereof, and to regulate and prescribe the terms, duties and compensation of officers: \* \* \* Provided that the provisions of this section as to the creation of any public board or department \* \* \* shall not apply to the creation of any board of commissioners of waterworks in any city wherein the title to the waterworks therein located is in the name of the commissioners of waterworks."

Article 5, § 3, cl. 43 (p. 589): "To have the exclusive right, at all times, to supply the city with water \* \* \* at such prices as may be agreed upon; and for that purpose to have, at all times, the unrestricted right, subject to the provisions of existing laws, to make, erect and maintain \* \* \* works, machinery, buildings, cisterns, reservoirs, pipes, conduits: \* \* \* Provided, that the provisions of this section shall not apply to any city wherein the title to the waterworks therein located is in the name of the commissioners of waterworks."

Article 7, § 1 (p. 595): "The council shall determine the powers and duties to be performed by, and assign them to the appropriate department."

Article 21, § 4 (p. 631): "All acts \* \* \* or parts of acts relative to cities of the third class, not inconsistent with the provisions of this act, shall be and remain in full force; and all acts and parts of acts, general, special or local, appertaining to the subject-matter covered by this act, so far as they are inconsistent with the provisions thereof, be, and the same are hereby repealed" (excepting Act April 22, 1905 [P. L. 260] for the preservation of the purity of water of the state).

Concerning article 5, § 3, cls. 13 and 43, it is urged on the part of the defendants that the provisos, alleged and admitted, and indeed well understood, to import an exception of the city of Erie from the operation of these clauses, render them unconstitutional and void, as local and special legislation. Under the decision in *Commonwealth v. Heller*, supra, however, this result cannot be conceded. Act May 23, 1889 (P. L. 277), in article 12, § 2 (page 309), gave certain powers relative to waterworks, etc., to "any city which \* \* \* has the title to any water \* \* \* works, by conveyance to the same in its corporate name." It was insisted that by this restriction, which excluded the city of Erie, the enactment was rendered special and local, and therefore unconstitutional. But the Supreme Court declined so to hold.

There seems to be no room for safe distinction between the question as there arising under the act of 1889 and the question as here arising under the act of 1913. In the former the exclusion of the city of Erie resulted from the description of the cities to which the statute was declared in terms to apply, upon the principle "*Expressio unius est exclusio alterius*." In the act of 1913 the description of the cities subjected to the enactment is general, and the exclusion of cities wherein the title to the waterworks is in the commissioners and not in the city is added by way of proviso. If that exclusion were violative of any constitutional prohibition, it might be that, analogously to the rule applied in *Sewickley Borough v. Sholes*, 118 Pa. 165, 12 Atl. 302, the proviso would have to fall, leaving the enactment to stand as applicable to all the cities its language, without the proviso, would comprehend.

If, however, that be not the correct view, then the effect of the act of 1889 and that of the act of 1913 to create the exclusion must be accepted as practically the same. Whether the exclusion of one city of the third class is found in a restricted description of the cities to be comprehended, or in a superadded exception to a general description, cannot be material. By the one method as by the other, the present operation of the statute is confined to cities

of the third class holding title, etc., and forbidden as to those not so holding. That is to say, special enactments obtaining in the latter are preserved from repeal by the act of 1913, just as by the act of 1889. Under either, their continuance in force is not a ground for declaring the enactment void.

[2, 3] The decision in *Commonwealth v. Heller*, 219 Pa. 65, 67 Atl. 925, also disposes of the contention that Act June 4, 1901, (P. L. 364), can be invoked as repealing that of 1865. It further settles that a direction such as found in the act of 1913 (article 21, § 3, p. 631), making it the duty of the council forthwith to enact ordinances needful to effectuate the provisions of the statute, does not itself make mandatory provisions couched in permissive phrase. But the decision settles still more. It settles that, whilst the act of 1889 did not repeal *ipso facto* the local act of 1865, and at once put an end to the office and authority under it of the Reading water commissioners, yet it clothed the council with power to establish a new water department, and that, if and when they did so, the office and authority of the water commissioners under the act of 1865 would be superseded and terminated. Obviously this ruling has an important bearing upon the effect of the act of 1913. If it were indispensable to a disposition of the present case to declare whether or not the latter act repeals the act of 1865, and without any action on the part of the city council extinguishes the board of water commissioners, and wipes out the water department organized under the enactment and the ordinance of 1865, it might perhaps be possible to differentiate the act of 1913 from that of 1889 with respect to an apparent legislative intent upon this question, and to indicate a variety of features peculiar to the act of 1913 looking towards such repeal. Thus it might be in point to refer to the repealing clause as expressive of a distinct design to do away with local and special enactments inconsistent with the act of 1913, and to instance as one of the patent inconsistencies between it and the act of 1865 the right given by the act of 1913 to the city council to fix the water rates, a right under the act of 1865 resting with the water commissioners; the city councils having the power only to approve or disapprove what the commissioners proposed. Act 1865, § 5.

It might be further noted that the act of 1913, in article 8, § 1, p. 594, establishes five departments, with an option to the city council to create a board of health, governed by existing laws as to such, and possibly having a status outside of the enumerated departments (article 11, p. 605); that the act of 1913 very closely follows that of 1889 in respect to the topics covered, their arrangement, and the detailed provisions concerning them; but that, whilst the act of 1889 contained a separate article on the "water and lighting department" which cities were authorized to establish, and lengthy and minute provisions as to its organization, regulations, and operation, the act of 1913 omits all of this, and among the departments named does not mention a department of water. The conclusion would appear to lie on the surface that the Legislature did not intend to continue such a department, as a department, but to bring the management of the waterworks under the control of the city council, to be assigned by it to one of the five specified departments. If so, its continuance as a separate department under the act of 1865 and the preservation of that statute would necessarily have to be regarded as inconsistent with the provisions of the act of 1913.

Again, it might be suggested that the manifest intent of the latter enactment is to furnish for the creation and government of cities of the third class generally a complete system by way of substitute for the one previously existing, at least to the extent of its divergence from the

same, and incidentally thereto to concentrate in the hands of the city council the direct and responsible control of all the agencies of the municipal government. Such an agency, and nothing more, has been the water department of the city of Reading as constituted under the act of 1865. *Commonwealth v. Sewickley Boro.*, 159 Pa. 194, 198, 28 Atl. 169; *Frame v. Felix*, 167 Pa. 47, 52, 31 Atl. 375, 27 L. R. A. 802. Its further existence and operation under that statute would therefore appear incongruous with the very scheme and purpose of the act of 1913. But whilst all these and possibly still other considerations might tend to the conclusion that the act of 1865 was repealed by that of 1913, it is needless for the requirements of this case to give to the latter statute any effect greater or more peremptory than that given by the Supreme Court to the act of 1889 in *Commonwealth v. Heller*, supra, the most conservative and restricted that can possibly be given to the act of 1913, viz., treating its directions as facultative rather than imperative, the effect not of directly and immediately repealing the act of 1865, but of empowering the city council by ordinance to supersede the board of water commissioners and take into its own hands the functions and the administration of the affairs previously committed to that body. That power having been exercised by the council, there seems to be no ground for doubting that the existence of the board of water commissioners under the act and ordinance of 1865, and with it the office of the defendants, have come to an end, and that therefore the decision must be, as above indicated, in favor of the commonwealth in this case and against the defendants.

The court entered judgment of ouster. Defendants appealed. Error assigned was the judgment of the court.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

William J. Rourke, of Reading, for appellants. Henry P. Kelsner, of Reading, for appellees.

PER CURIAM. The judgment is affirmed, on the opinion of the learned president judge of the Common Pleas.

(244 Pa. 417)

TONGE et al. v. ITEM PUB. CO. et al.  
(Supreme Court of Pennsylvania. March 16, 1914.)

1. CORPORATIONS (§ 548\*)—STOCK SUBSCRIPTIONS—BILL TO ENFORCE—DISMISSAL.

A bill in equity by judgment creditors of a corporation to enforce payment of stock subscriptions will be dismissed, where it appears that the organization of the corporation has not been perfected, that all the subscriptions have been canceled, and that the charter has never been recorded, pursuant to Act April 29, 1874 (P. L. 73), in the county where the business was to have been carried on.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2182-2186; Dec. Dig. § 548.\*]

2. CORPORATIONS (§ 22\*)—CORPORATE EXISTENCE—CONDITION PRECEDENT—RECORDING OF CERTIFICATE.

Act April 29, 1874 (P. L. 76) § 8, makes the recording of a certificate of incorporation "in the office for the recording of deeds in and for the county wherein the chief operations are to be carried on" a condition precedent to corporate existence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 61-64; Dec. Dig. § 22.\*]

3. CORPORATIONS (§ 29\*)—ACTION ON STOCK SUBSCRIPTION—ESTOPPEL.

Where corporate business is conducted, without the certificate of incorporation having been recorded, as required by Act April 29, 1874 (P. L. 73), the subscribers conducting the business are not estopped, until such certificate is filed, from denying existence of the corporation in a suit on the subscription.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 77-79, 2504; Dec. Dig. § 29.\*]

4. ESTOPPEL (§ 52\*)—IN PAIS—REQUISITES.

The doctrine of estoppel by matter in pais precludes a party, whose conduct has induced action by another, from afterwards asserting to the prejudice of that other the contrary of that in which his conduct has induced belief.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121-125, 127; Dec. Dig. § 52.\*]

5. ESTOPPEL (§ 52\*)—IN PAIS—REQUISITES—FRAUD.

To the existence of estoppel by matter in pais, the element of fraud is essential, either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up; there being no estoppel where the truth is known to both parties, or where they have equal means of knowledge.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121-125, 127; Dec. Dig. § 52.\*]

6. JUDGMENT (§ 700\*)—PERSONS CONCLUDED—PARTNERS.

While a suit against a partnership in the firm name only, without naming the individual partners, will support a judgment and execution against the partnership property, the judgment in such case will not bind individually a partner not served with process, or authorize the issuance of an execution against him.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1225; Dec. Dig. § 700.\*]

7. LIMITATION OF ACTIONS (§ 127\*)—PLEADING—AMENDMENTS ALLOWABLE.

Amendments introducing a new cause of action bringing in a new party, or changing the capacity in which a party is sued, cannot be allowed after the statute of limitations has run.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

8. LIMITATION OF ACTIONS (§ 127\*)—PLEADING—AMENDMENTS ALLOWABLE—CREDITOR'S BILL.

The plaintiffs, in a suit by judgment creditors against subscribers to the stock of a corporation, cannot, after the statute of limitations has run, amend to convert their creditor's bill into a bill to subject individual property to execution under a judgment against the corporation.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 543-547; Dec. Dig. § 127.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity by Henry Tonge and another, suing as well for themselves as for all other creditors of the Item Publishing Company, against the Item Publishing Company and others. From decree requiring defendants to pay stock subscriptions, they appeal. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, STEWART, and MOSCHZISKER, JJ.



John G. Johnson and F. F. Brightly, both of Philadelphia, for appellant Harrington Fitzgerald. G. W. Pepper and A. S. Weill, both of Philadelphia, for appellant Frances L. Fitzgerald. Joseph R. Embery, of Philadelphia, for appellees.

POTTER, J. From the history of this case it appears that in October, 1906, Henry Tonge and Rae Tonge, his wife, brought suit against the "Item Publishing Company" for damages previously sustained, by reason of injuries to the wife through the negligence of the driver of a wagon, who was engaged in delivering the newspaper known as the "Philadelphia Item." The suit resulted in verdicts for plaintiffs. Judgments were entered thereon, and no appeal was taken therefrom. Execution issued against the corporate property of the Item Publishing Company was returned "nulla bona."

[1, 2] The present bill in equity was filed by the judgment creditors against certain subscribers and against the legal representatives of certain subscribers to the capital stock of a corporation which it was proposed to organize in the year 1903 to be known as the "Item Publishing Company," and payment of the stock subscriptions then made was sought to be enforced. It appeared, however, that no organization of the proposed corporation was ever actually effected under the charter, and that all the subscriptions were canceled, and that the charter was never recorded in the recorder's office of the county of Philadelphia, where the business was to have been carried on. In *Guckert v. Hacke*, 159 Pa. 303, 28 Atl. 249, this court said:

"It is plain, even from a cursory reading of the act of April 29, 1874 (P. L. 76), that recording of the certificate 'in the office for the recording of deeds, in and for the county where the chief operations are to be carried on,' was intended to be made one of the conditions precedent to corporate existence. That was the last of successive steps required to be taken, and the right to begin the transaction of corporate business was made to depend upon the taking of that step. 'From thenceforth,' the act expressly declares, the subscribers and their associates and successors 'shall be a corporation for the purposes and upon the terms named in the said charter.' One of the purposes of the act being exemption from personal liability in the transaction of business, it is obviously material that the public should have notice, and notice by record was accordingly prescribed. Failure to record was failure to comply with one of the express conditions of incorporation, and consequently of exemption from liability."

In *N. Y. Nat. Exch. Bank v. Crowell*, 177 Pa. 313, 323, 35 Atl. 613, *Guckert v. Hacke* was expressly reaffirmed and followed. It is apparent, therefore, that the business of the Item Publishing Company was not carried on as a corporation, but as a partnership. Appellees would, without doubt, have had a right of action against appellants as partners; but they chose rather to sue the Item Publishing Company as a corporation. The judgment which they obtained may be con-

sidered as establishing it as a corporation *de facto*; but that is not sufficient to sustain a bill in equity against the subscribers to the capital stock of the proposed corporation, to compel payment of the subscriptions. In *Hahn's Appeal*, 3 Sadler, 10, 12, 7 Atl. 482, 484, which was a bill in equity by creditors of a corporation to enforce stock subscriptions, Mr. Justice Trunkey said:

"There is no reason for holding that the creditors have any better rights in equity against the subscribers of the new shares than belonged to the company itself."

[3] Until the statutory requirements for the formation of a new corporation have been complied with, a subscriber to the stock is not estopped from denying the existence of the corporation. In *Cook on Corporations* (7th Ed. 1913) § 186, it is said:

"There is one class of cases in which a subscriber for stock is always allowed to make the defense (to an action to collect the subscription for the benefit of corporate creditors) that the corporation has not been regularly and legally incorporated. Where the subscriber made his contract of subscription previous to and in anticipation of the incorporation, and does not by his subsequent acts acquiesce in the mode of incorporation, he may set up that the corporation has not been incorporated, and that he is not liable. The rule that a person contracting with a corporation recognizes thereby its capacity to contract, and cannot afterwards deny it in that transaction, does not apply to one who subscribes before incorporation. He may insist upon the organization of a regular and legal corporation."

In 1 *Morawetz on Private Corporations* (2d Ed. 1886) § 67, it is said:

"Every subscription by implication refers to and incorporates the terms of the charter or general law under which the corporation is to be formed, and every subscriber agrees to become associated with the others only upon condition that the formalities prescribed by the charter shall be observed in making the mutual contract. Thus, if certain preliminaries, such as the filing of a certificate, are required to be performed after the articles of association have been subscribed, but before the corporation shall be in existence, the contract of membership does not go into effect until these formalities are complied with; and a subscriber to the articles cannot until then be made to contribute the amount of his subscription."

In 4 *Thompson on Private Corporations* (2d Ed. 1909) § 3854, it is said:

"The rule is that a subscription to preliminary articles of association, not purporting to be a contract with an existing corporation, does not estop the subscriber from afterwards denying the legal existence of the corporation in a suit upon the subscription."

The trial judge, however, reached the conclusion that "the defendants are estopped from denying the corporate existence of the Item Publishing Company." He evidently based this conclusion on two findings of fact: First, that from 1903 until 1908 the Item newspaper contained a notice that all communications should be addressed to the Item Publishing Company; secondly, that upon the various trials of the suit at law for damages, the company appeared, was represented by counsel, and made defense to the claims of plaintiffs. Reference to the first finding of



fact shows that in the published notice there is no statement that the Item Publishing Company is a corporation. The mere fact that it is called a company is not conclusive, as it was quite possible for a partnership to do business under the name company. Then in his twelfth finding of fact the trial judge uses this expression:

"Led by the above-quoted announcement to believe that the publishers of the paper and owners of the wagon were incorporated."

The announcement to which reference is made, however, contains no mention of the existence of a corporation, and we are at a loss to see how any one could have been led by it to believe that the Item Publishing Company was necessarily a corporation. Referring to the evidence, it appears that at the time of the trials Hildebrand Fitzgerald was dead. Harrington Fitzgerald was present at the trials, and apparently was active in the defense. He testified that no such corporation as was in question was in existence, and he cannot now, therefore, be held to be estopped by anything which he said in this respect at the trials; the result of those trials can only be regarded as establishing the existence of a corporation de facto. It would appear, therefore, that the court below erred in concluding upon any ground that defendants were estopped from denying liability for their stock subscriptions.

[4, 5] It is argued on behalf of the appellant, Frances L. Fitzgerald, executrix, that defendants were estopped, not from denying liability on their stock subscriptions, but from denying liability as executors, or individuals, and partners. This argument seems to be based on the assumption that plaintiffs were "misled into the belief" that defendants were incorporated. No testimony is pointed out which indicates that they were so misled, and we do not find any such evidence in the record, unless it be in the fact, which is conceded, that the defendants printed in their newspaper a notice that all communications should be addressed to the Item Publishing Company; but, as we have said, there was no statement in this notice that the company was a corporation, and the notice was not in itself inconsistent with the fact that the concern was conducted as a partnership. The plain requirement of the act of 1874 is that the certificate of incorporation shall be recorded in the recorder's office in the county where the business is to be carried on. If the record in that office had been examined in behalf of plaintiffs before commencing suit, it would have readily appeared whether or not such a corporation as the "Item Publishing Company" was in existence. Such an examination would have shown that an essential statutory requisite to the existence of such a corporation had been omitted, in that no certificate of its incorporation had been recorded, and it would follow that the subscribers to the stock were not liable on their subscriptions. If they

were carrying on the business as a corporation de facto, they would be liable as partners (*Guckert v. Hacke*, 159 Pa. 303, 28 Atl. 249); but they were not sued as such, and no service of process was made upon them individually. In *Hill v. Epley*, 31 Pa. 331, 333, a leading case on the subject of estoppel, Mr. Justice Strong said:

"The doctrine of equitable estoppel by matter in pais has doubtless been greatly extended by the courts in modern times; yet it is not entirely without limits, and it professes to be founded upon the principles of natural justice. The general principle \* \* \* is that, where the conduct of the party has been such as to induce action by another, he shall be precluded from afterwards asserting, to the prejudice of that other, the contrary [fact] of that of which his conduct has induced the belief. The primary ground of the doctrine is that it would be a fraud in a party to assert what his previous conduct had denied, when on the faith of that denial others have acted. The element of fraud is essential, either in the intention of the party estopped, or in the effect of the evidence which he attempts to set up. \* \* \* If, therefore, the truth be known to both parties, or if they have equal means of knowledge, there can be no estoppel. Accordingly it has been held that one is not relieved who had the means of becoming acquainted with the extent of his rights. *Crest v. Jack*, 3 Watts, 238 [27 Am. Dec. 353]; *Hepburn v. McDowell*, 17 Serg. & R. 383 [17 Am. Dec. 677]. And in *Knouff v. Thompson*, 16 Pa. 357, it was ruled that silence does not estop when the party's deed is on record. It should never be forgotten that there is a wide difference between silence and encouragement."

In *Brandmeier v. Coal Co.*, 219 Pa. 19, 22, 67 Atl. 951, 952, our Brother Brown said:

"If the real truth had been known to both [parties], or if their means of knowledge had been equal, there would be no estoppel."

In the present case there is no evidence that defendants actively induced the plaintiffs to believe that they were incorporated, and it is apparent that the plaintiffs had the means of ascertaining the truth of the matter by consulting the record, and for their own protection it was clearly their duty to do so. The opportunity for ascertaining whether or not the certificate of incorporation had been recorded was open. Therefore under the authority of these decisions there can be no estoppel upon the ground suggested.

[6] Reference is made by counsel to "a judgment recovered against several in a common name." We do not, however, find any such judgment in the damage suit. The judgment which was recovered by plaintiffs was against the corporation. No individuals were named as defendants, and none were served with process. We find nothing in the record to justify the statement that the judgment obtained was "against several in a common name." A suit against a partnership in the firm name only, without naming the individual partners, will support a verdict, and judgment, and execution against partnership property. *Seitz v. Buffum*, 14 Pa. 69; *McDonald v. Simcox*, 98 Pa. 619; *Moore v. Moore*, 153 Pa. 495, 25 Atl. 763. But such a judgment will not bind individually a

partner not served with process in the action against the firm, nor can execution be issued against him. See 2 Troubat & Haly's Practice, § 2145, and cases there cited. In 30 Cyc. L. & Pr. 560, the rule is thus stated:

"Except where it is otherwise provided by statute, a suit cannot be brought by or against a partnership in the firm name alone; but it is necessary that the name of each member of the firm should be set forth."

And in 1 Black on Judgments (2d Ed. 1902) § 237, the same rule appears. It is there said:

"At the common law, where a partnership is sued, each member of the firm must be brought within the jurisdiction of the court by due citation. Hence, where an action is instituted against several persons constituting a partnership, and one partner is not served with process, and judgment is rendered against them all, such judgment will be voidable so far as concerns the partner who was not served."

[7] Another suggestion which does credit to the sense of fairness of counsel for appellant Frances L. Fitzgerald, executrix, is that a liberal right of amendment might enable plaintiffs to convert their creditors' bill into a bill to subject individual property to execution under the judgment against the corporation. No authority is, however, cited in support of the right of the court below to decree "an equitable execution" against the property of the individual defendants. In *Girardi v. Lumber Co.*, 232 Pa. 1, 81 Atl. 63, it was said, per curiam:

"This appeal is from an order discharging a rule to amend the record by making new parties defendants after the statute of limitations had become a bar to a new action. The action was brought against the Laquin Lumber Company, a corporation. The amendment proposed was to name as defendants a partnership, composed of six persons, trading as the Laquin Lumber Company. The allowance of the amendment would have brought new parties on the record. Under the rule established by our cases this cannot be done. Where the statute of limitations has run, amendments will not be allowed which introduce a new cause of action, or bring in a new party, or change the capacity in which he is sued. If the effect of the amendment is to correct the name under which the right party is sued, it will be allowed; if it is to bring in a new party, it will be refused. *Wright v. Copper Co.*, 206 Pa. 274 [55 Atl. 978]."

[8] The cases cited related to pending actions, in which no judgment had been entered. The principle applies more forcibly to a case like the present, where judgment had been entered against the alleged corporation. The effect of the amendment suggested would be to change the judgment which has been entered against the corporation to a judgment against individuals trading under the firm name. As such an amendment could not have been allowed in the original suit before verdict and judgment, the same result cannot be reached after judgment by amending the present bill. According to the contention of appellants, the business of publishing the Item was carried on solely by the estate of Thomas Fitzgerald, deceased; and,

if so, it was to that estate that appellees should have looked for damages, instead of to any corporation or partnership. If such was the case, it is possible that the appellees may be able to obtain relief by the presentation of their judgment in the orphans' court, which has jurisdiction of the accounts of the executors of that estate. Our decision here is without prejudice to any right that appellees may have to appeal to that tribunal, to substantiate their claim, if it be possible for them to do so. But in the present case, however much we may regret the fact, we are unable to discover any ground upon which the court below, sitting in equity, can grant the relief for which complainants have prayed in this bill.

The decree of the court below is reversed, and the bill is dismissed. The costs of this appeal to be borne by appellants.

(246 Pa. 232)

# STEVENSON v. COMMONWEALTH TITLE INS. & TRUST CO.

(Supreme Court of Pennsylvania. May 4, 1914.)

## APPEAL AND ERROR (§ 1022\*)—JUDGMENT ON REPORT OF REFEREE—EVIDENCE.

A judgment entered on a referee's report, sustained by competent evidence, will not be disturbed on appeal in the absence of error at law.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit on an express contract by James L. Stevenson against the Commonwealth Title Insurance & Trust Company. From a judgment for defendant entered on report of referee, plaintiff appeals. Affirmed.

From the record it appeared that plaintiff sought to recover \$158,905.71, with interest, upon an express agreement alleged to have been entered into between plaintiff and defendant, whereby plaintiff was to convey certain properties and mortgages to defendant, in consideration of which defendant was to pay all mortgage indebtedness on the premises and the cost of finishing and selling certain houses, and to pay plaintiff a salary of \$100 a week during construction and sale, to release plaintiff from all indebtedness, and to do other things, all of which were specifically set out in the statement. Defendant denied the existence of the alleged agreement, and alleged a loss in the transaction of \$71,431.04. The referee found, upon competent evidence, that there was no agreement between the plaintiff and defendant, such as was alleged in the plaintiff's statement of claim, and reported that judgment should be entered for defendant. Exceptions to the referee's report were dismissed by the court, and judgment was entered for defendant.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Ormond Rambo, Robert Mair, Wayne P. Rambo, and J. Quincy Hunsicker, all of Philadelphia, for appellant. E. Cooper Shapley, of Philadelphia, for appellee.

PER CURIAM. Plaintiff below based his right to recover on an alleged contract or agreement on the part of the defendant. A learned and painstaking referee found there was none. This material finding was confirmed by the court, and we have found nothing in the 77 assignments of error calling for a reversal of the judgment. It is therefore affirmed.

(246 Pa. 181)

CUNNINGHAM et al. v. CITY OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. April 27, 1914.)

1. MANDAMUS (§ 173\*)—HEARING—QUESTION FOR JURY.

Where, in mandamus to compel the execution of a warrant for a payment directed by the city council to be made to contractors for extra work, it appeared that, by reason of defective plans, unforeseen difficulties arose, making it necessary to change the method of doing the work, and to make numerous departures from the contract, imposing additional work and expense on plaintiffs, and that the extent of the extra work could not be determined by construction of the specifications, the question as to what part of the work constituted extra work was for the jury.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 378-380, 388-390; Dec. Dig. § 173.\*]

2. MUNICIPAL CORPORATIONS (§ 374\*)—CONTRACTS—DETENTION OF MONEY—RIGHT TO DAMAGES.

Where city officers detained money after being directed by a city ordinance in the manner provided by law to pay same to contractors for extra work, the contractors were entitled to damages for such detention, though there were legal objections to their claim.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. § 374.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Mandamus by Thomas E. Cunningham and others against Fred C. Dunlap, Chief of the Bureau of Water of the City of Philadelphia, and others. From judgment for plaintiffs, defendants appeal. Affirmed.

Petition for writ of alternative mandamus to compel defendant to draw and execute a warrant in favor of the plaintiffs for the payment of \$56,077.96 in accordance with ordinance of councils of Philadelphia of November 10, 1911. The facts are stated in the opinion of the Supreme Court, and in *Cunningham v. Dunlap*, 242 Pa. 341. Verdict for the plaintiffs for \$43,351.37, plus damages for delay to the amount of \$7,133.96, and judgment thereon.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

Edgar W. Lank, Asst. City Sol., and Michael J. Ryan, City Sol., both of Philadelphia, for appellants. Francis Shunk Brown and William Findlay Brown, both of Philadelphia, for appellees.

PER CURIAM. The issue was raised by the traverse of the return to a writ of alternative mandamus, and the question to be decided by the trial in the common pleas was whether a payment directed by councils to be made to contractors for extra work included items which the contractors were required to furnish under the contract with the city for the consideration therein named. See *Cunningham v. Dunlap*, 242 Pa. 341, 89 Atl. 129. It was admitted that the labor for which a claim was made was furnished, and that the price charged was reasonable; but it was contended that the trial judge should have decided as matter of law, in view of the specifications, that the work came under the terms of the contract, and was not extra work.

[1] Generally it is the duty of the court to determine the meaning of a written contract, and, if the question had been that of construction merely of an unambiguous written contract, the judge should have decided it. But it was not. The work undertaken by the city comprised the furnishing of pipe, the digging of trenches, and laying of pipe for its filtration system. There were 188 specifications including the whole work, and they were prepared, in the words of the written notice to bidders, "mainly to fit case of the entire work of furnishing and laying the pipe being awarded to one contractor." A part only of this work, the digging of trenches and laying of pipe, was awarded to the plaintiffs; but they were required to do much work clearly outside of their contract, and they did it by direction of the engineer of the department with the expectation on their part and on his that they would be paid for it as additional work. An instance is the work of testing pipe, the cost of which is the largest item of their claim. This was clearly the duty of the person who furnished the pipe, and the cost thereof was expressly included in his bid. Because of defective plans, unforeseen difficulties arose, and during the progress of the work it became necessary to change the method of doing it, and to make numerous departures from the contract by which additional work and expense were imposed on the plaintiffs. To what extent the work done because of these departures was extra work cannot be determined by construction of specifications which applied only in part to the plaintiffs. It was a question for the jury, and it was submitted with clear and adequate instructions.

[2] The second contention of the appellant is that the jury should not have been permitted to make an allowance in the nature of damages for the detention of the money appropriated and directed to be paid the plaintiffs by ordinance of councils approved by the mayor. While there were legal objections to the plaintiffs' claim for payment for extra work not covered by the written contract, there was a moral obligation on the part of the city to pay it which became a legal obligation when its payment was assumed and directed in the manner provided by law, and for its unjustifiable detention after that time the plaintiffs were entitled to compensation.

The judgment is affirmed.

(245 Pa. 178)

**CITY OF PHILADELPHIA v. VARE.**

(Supreme Court of Pennsylvania. April 27, 1914.)

**INDEMNITY (§ 15\*)—AFFIDAVIT OF DEFENSE—SUFFICIENCY.**

Where, in a city's action for the amount of a judgment obtained against it for negligently permitting inflammable materials to be used in filling and grading a street, whereby fire was communicated to adjoining property, the statement of claim set forth a street grading contract wherein defendant agreed to be responsible for damages arising from the prosecution of the work during its progress, an affidavit of defense was sufficient which alleged that the fire did not occur because of work done by defendant under his contract and was not caused by defendant's negligence, that the street was not in defendant's exclusive possession at the time of the fire, but that plaintiff had permitted its use as a public dump, that inflammable matter had been placed thereon by others, and that the ground of the recovery against plaintiff was permitting inflammable material to be placed on the street in close proximity to the property burned.

[Ed. Note.—For other cases, see Indemnity, Cent. Dig. §§ 38-40, 42-47; Dec. Dig. § 15.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by the City of Philadelphia against Edwin H. Vare to recover damages for breach of contract. From an order discharging rule for judgment for want of a sufficient affidavit of defense, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

Paul Reilly, Asst. City Sol., and Michael J. Ryan, City Sol., both of Philadelphia, for appellant. Francis Shunk Brown, of Philadelphia, for appellee.

**PER CURIAM.** This appeal is from an order discharging a rule for judgment for want of a sufficient affidavit of defense in an action to recover from the defendant the amount of a judgment obtained against the city for negligence in permitting inflammable materials to be used in filling and grading a street by

reason of which fire was communicated to an adjoining property. The allegations in the statement of claim on which a right of action is based are that the defendant under a contract with the city graded the street in which the fire originated and did not protect the property destroyed which was in close proximity to the work of grading; that the fire originated during the progress of the work of grading the street and was communicated to the property destroyed; that the defendant was notified of the time of trial of the action against the city and allowed permission to come in and defend and was informed that in the event of a recovery against the city an action would be brought against him for the amount the city was required to pay; and that he attended the trial and was called as a witness for the city. Reference is made to the record of the trial of the action against the city as a public record in another court, but it is not alleged that it discloses negligence by the defendant in this action or that negligence by him was charged. Appended to the statement was a copy of the contract between the city and the defendant by which he agreed properly to inclose the work and to place signal lights therein at night, when and where necessary, and "to be responsible for and pay all loss or damage to either person or property which may in any manner arise by reason of the prosecution of the said work during the progress of the same." It is provided by one of the specifications that the contractor shall be skilled in the kind of work bid for, shall employ skilled men, and give daily supervision to the work, that he shall maintain necessary barriers and danger signals and "be responsible for any accident that may occur during the progress of or by reason of the work."

The affidavit of defense sets up a number of distinct grounds of defense, but in deciding the question raised it is unnecessary to consider but one of them. It is averred that the fire did not occur because of work done by the defendant under his contract, and that it was in no manner caused by his negligence or that of his employees or in the prosecution of the work or by any failure to comply with his contract; that the street at the time was not in his exclusive possession or control; and that the city had permitted its use as a public dump and that inflammable matter had been placed thereon by other persons; that the ground of the action in which a recovery had been had against the city was its negligence in permitting inflammable rubbish to be placed on the street in close proximity to the property burned; and that the judgment against it was based on the finding of its negligence. The averments of the affidavit were to be taken as correct, and they were ample to prevent judgment against the defendant.

The judgment is affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(245 Pa. 126)

**DEVEREUX v. PHILADELPHIA & R. RY. CO.**

(Supreme Court of Pennsylvania. April 20, 1914.)

**1. RAILROADS (§ 405\*)—TRESPASSING ANIMALS—LIABILITY OF RAILROAD.**

Owner of animals trespassing on the right of way cannot recover for injuries sustained by them unless he shows gross negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1393-1398; Dec. Dig. § 405.\*]

**2. RAILROADS (§ 446\*)—TRESPASSING ANIMALS—NONSUIT.**

In an action to recover for death of horses trespassing on the right of way, a judgment of nonsuit *held* properly entered.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1627-1641; Dec. Dig. § 446.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by A. J. Antelo Devereux against the Philadelphia & Reading Railway Company. Judgment of nonsuit, and plaintiff appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKEER, JJ.

Stevens Heckscher, of Philadelphia, for appellant. Wm. Clarke Mason, of Philadelphia, for appellee.

ELKIN, J. [1, 2] We have read with interest and care the very able argument of learned counsel for appellant, but cannot agree that what has been considered the settled rule of our cases should be disregarded in order to meet the exigencies of the case at bar. It is frankly conceded that, if the doctrine of our earlier cases is still the law in Pennsylvania, appellant can only recover on the ground of gross and wanton negligence. If a trespasser upon the right of way of a railroad company, not at or near a public crossing, can only recover damages for injuries sustained on the ground of willful, wanton, or gross negligence, it is clear appellant has no case under the facts disclosed by this record. The argument of appellant is intended to suggest that this rule has become obsolete and should no longer be adhered to in determining the liability of a railroad company. The horses, the value of which this suit was brought to recover, were killed while trespassing upon the right of way of the defendant company, and this is conceded, but it is contended that under all the facts disclosed by the testimony it was for the jury to say whether the railroad company exercised proper and reasonable care under the circumstances. We see nothing in the case to take it out of the rule which has been recognized and followed in our state for more than half a century. For a general discussion of the doctrine upon which the rule was based, see *Railroad Co. v. Skinner*, 19 Pa. 298, 57 Am. Dec. 654; *No. Penna. Railroad Co. v. Rehman*, 49 Pa. 101, 88 Am. Dec. 491.

Counsel have called our attention to numerous cases in other jurisdictions in which a different rule has been adopted, but in most of these jurisdictions the question was controlled by statutory requirements. In many of the states railroad companies are required by statute to fence their rights of way, and, this being an imperative duty intended primarily as a protection to trespassing animals, the courts very properly held that the law was intended as a protection to the owners of such animals as happened to stray upon the railroad tracks, and that a higher degree of care was required on the part of railroad companies by reason thereof. But aside from these considerations we see nothing in the present case to justify a departure from the rule of our own cases which for a long period of years has been considered settled law in this state. Our rule has always been that a trespasser upon the right of way of a railroad company, or the owner of trespassing animals, cannot recover damages for injuries sustained, unless he shows gross or wanton negligence on the part of the railroad employes. It is better to adhere to the settled rule than to attempt the doubtful expedient of establishing a new and uncertain one.

This is a case in which a whole volume might be written without aiding in the solution of the question involved, and we will therefore refrain from further discussing the merits of the rule which we consider decisive of this controversy.

Judgment affirmed.

(245 Pa. 123)

**SULGER v. PHILADELPHIA & R. RY. CO.**

(Supreme Court of Pennsylvania. April 20, 1914.)

**CARRIERS (§ 320\*)—INJURY TO PASSENGER—QUESTION FOR JURY.**

Where, in an excursion train there was a baggage car in the center fixed up with a place for refreshments, and an excursionist who was passing from a passenger car to the baggage car was thrown from the car and killed, the question of negligence of the railroad company was for the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Virginia Grace Sulger against the Philadelphia & Reading Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKEER, JJ.

Wm. Clarke Mason, of Philadelphia, for appellant. Thomas A. Fahy, Walter T. Fahy, and Lawrence F. McOwen, all of Philadelphia, for appellee.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ELKIN, J. After a careful review of this record we have concluded that the case was for the jury both as to the negligence of the defendant company and as to the contributory negligence of the deceased husband. The excursion train upon which the accident occurred was made up of nine passenger coaches and a baggage car, the latter having been fitted up by appellant for the use of excursionists as a place to get drinks and secure refreshments. The baggage car thus fitted up was placed in the center of the train for the more convenient access of passengers entering it from either end. This was a plain invitation to the passengers to make use of the baggage car as a proper place to secure refreshments. That the excursionists did make use of it for the purpose intended was known to the conductor, brakeman, and other employés in charge of the train. When the defendant company thus equipped the baggage car, and provided accommodations for securing refreshments in that car, and the employés in charge of the train recognized without objection the use made of the car by the excursionists, it cannot now be heard to say that no duty rested upon it to provide a safe passageway to and from the car for passengers who availed themselves of the privileges which the defendant company evidently intended them to enjoy. In *Robinson v. Railroad Co.*, 135 Mich. 254, 97 N. W. 689, the rule applicable to such a case is stated as follows: That the "railroad company, having placed its dining car at the rear of the train and invited its passengers to go to and from it," and failing "to provide them a safe passage from one car to another," it "cannot escape liability for its failure so to do." Many other cases might be cited to the same effect. This rule which is founded upon common sense and human experience is, as it ought to be, of almost universal application in this country. In the present case there was abundant evidence to carry the case to the jury on the question of the failure of the railroad company to properly guard the approaches to the baggage car and to provide a safe passageway for passengers who entered it upon what must be deemed an invitation to make use of it as a place for securing refreshments.

As to the contributory negligence of the deceased husband the case is not so clear. It is very ably argued for appellant that the danger of passing from the coaches to the baggage car was open and obvious, and that excursionists who availed themselves of the privileges afforded took the risk which must have been apparent to them. Upon this ground the trial judge was requested to direct a verdict for the defendant, and the court in banc was subsequently asked to enter judgment non obstante veredicto upon the whole record. This argument is plausible but not convincing. It is only in clear

cases where the facts are undisputed, and but one inference can be drawn from them, that the injured party can be declared guilty of contributory negligence as a matter of law. This is not such a case. The passengers had the right to assume that the railroad company had done its duty in providing a safe passageway to the baggage car, and could rely on this assumption in the absence of notice of the defects about which complaint is here made. There is no evidence of notice to the deceased husband that the platform of and approaches to the baggage car were not properly guarded, or that the place was not safe for the use of passengers, and what knowledge he had of existing conditions is a matter of conjecture. Under all the circumstances disclosed by the testimony the case is not so clear as to warrant the court in declaring as a matter of law that the deceased husband was guilty of contributory negligence. The most favorable view that can be taken of the contention of appellant is that the contributory negligence of the deceased husband was for the jury. This question was left to the jury with instructions by the trial judge as to which the defendant company cannot justly complain. Our conclusion is that the case was for the jury upon all questions involving the liability of the railroad company, and that there was no reversible error in the submission.

Judgment affirmed.

(245 Pa. 114)

**BOROUGH OF BELLEVUE et al. v. OHIO VALLEY WATER CO.**

(Supreme Court of Pennsylvania. April 20, 1914.)

**1. WATERS AND WATER COURSES (§ 182\*) — WATER COMPANIES — REASONABLENESS OF WATER RATES—RIGHT TO DETERMINE.**

So much of the act of April 29, 1874 (P. L. 95) § 34, cl. 7, as empowered the courts to determine the reasonableness of water rates, was repealed by the act of July 26, 1913 (P. L. 1374), which conferred this power on the Public Service Commission.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 267; Dec. Dig. § 182.\*]

**2. WATERS AND WATER COURSES (§ 203\*) — WATER COMPANIES—CONTRACT INDEFINITE AS TO TIME—RIGHT TO INCREASE RATES.**

A contract between a borough and a water company, granting the water company the right to lay pipes and mains with a stipulation that certain rates shall be charged for water, will not preclude the company from raising its rates as its necessities require, where it is unlimited by its terms as to time.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 289, 290-299; Dec. Dig. § 203.\*]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by the Bellevue Borough, a municipal corporation, and others to enjoin the Ohio Valley Water Company from increasing its rates. From a decree refusing a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

preliminary injunction, plaintiffs appeal. Affirmed.

From the record it appeared that a contract had been entered into between the borough of Bellevue and the water company which fixed the rates to be charged for the use of water. Subsequently the water company increased its rates, and the borough and certain citizens filed a bill restraining the water company from enforcing its new rates.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Leonard K. Guller and David L. Starr, both of Pittsburgh, for appellants. Wm. Watson Smith, of Pittsburgh, for appellee.

ELKIN, J. [1] We fully agree with the general conclusions reached by the learned court below, and nothing contained in this record, or said in the argument, would warrant us in disturbing the decree refusing the motion for a preliminary injunction. If the case in any of its aspects involves the reasonableness or unreasonableness of water rates, it is a sufficient answer to say that the section of the act of April 29, 1874 (P. L. 73), which gave courts the power to determine questions of this character, was repealed by the Public Service Company Law, approved July 26, 1913 (P. L. 1374). In other words, the Legislature took this power away from the courts and conferred it upon the Public Service Commission. Hereafter, so long as the act of 1913 remains in force, the question of the reasonableness of rates established by public service corporations must, in the first instance, be submitted to the Public Service Commission when challenged. This is now the declared statutory policy of the law, and it is binding not only upon the interested parties, but upon the courts as well. We do not know that this position is seriously controverted by learned counsel for either side of the present controversy.

[2] It is argued, however, and with much force, that there is an existing contract between the borough and the water company fixing the rates to be charged, and that the courts are always open to protect the contractual rights of the parties on one side, and to enforce their obligations on the other. This is true, and if there was a valid binding contract in the present case, it would be necessary to sustain the contention of appellants. The case therefore turns upon the continuance and validity of the contract relied on. The contract in question was made in 1896, and by its terms the water company was granted the right to lay pipes and mains in the streets of the borough with a stipulation that certain specified rates should be charged the borough and the inhabitants thereof for water furnished. The contract as to water rates is unlimited in time, being co-

extensive with the grant. Is such a contract binding in the face of the declared statutory policy of the law that the Public Service Commission shall have the power to inquire into and determine the reasonableness of rates in all such cases? This question was answered adversely to the contention of appellants in *Turtle Creek Boro. v. Penna. Water Co.*, 243 Pa. 415, 90 Atl. 199. We did not then decide whether a contract between a borough and a water company, for a definite term of years and for specified rates during the limited term, would be enforced as between the parties, because that question was not then raised; and it is not raised now, so that this will be left as an open question until it is presented in concrete form upon facts calling for a decision of the point. We did decide in that case that a contract of this kind, unlimited by its terms, and hence indeterminate as to time, could not be enforced indefinitely, and must give way to the general policy of the law under which the Legislature created a special tribunal to pass upon and determine questions relating to the reasonableness of rates charged by public service corporations. The learned court below in the present case very properly followed the decision in that case and held that the borough of Bellevue could not enforce through the courts a compliance with the rates thus established. It is not a continuing binding contract enforceable through a court of equity. This is so, not because the courts have any desire to avoid the performance of duties cast upon them by the law, but because the people, speaking through the Legislature, have declared that these duties shall be performed by a special tribunal created for the purpose. The disposition everywhere is to commit questions relating to the regulation, and to the rates of public service corporations, to the supervisory powers of special tribunals, and concededly matters of this character are within the domain of legislative action.

We agree with the learned court below that the Public Service Commission is the only tribunal that has the power, as the law now stands, to give the complainants the relief prayed for in the present bill, if such relief be deemed proper.

Decree affirmed, at the cost of the appellants.

(245 Pa. 101)

McANDREW v. BOROUGH OF DUNMORE  
et al.

(Supreme Court of Pennsylvania. April 20, 1914.)

1. MUNICIPAL CORPORATIONS (§ 907\*)—STREET IMPROVEMENTS—VALIDITY OF ORDINANCE—BONDS.

Under Act May 12, 1911 (P. L. 288), and Act June 15, 1911 (P. L. 971), requiring that bonds issued for payment of street improvements shall be payable in five years, an ordinance authorizing the issuance of such bonds

payable "at any time within six years from their respective dates" was void.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1895; Dec. Dig. § 907.\*]

**2. MUNICIPAL CORPORATIONS (§ 266\*)—MUNICIPAL IMPROVEMENTS—STATUTE—CONSTRUCTION.**

Municipal improvements are regulated entirely by statute, to which the rule of strict construction applies.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 712; Dec. Dig. § 266.\*]

**3. MUNICIPAL CORPORATIONS (§ 323\*)—STREET IMPROVEMENTS—INJUNCTION.**

A taxpayer against whom a street improvement assessment has been made may sue to enjoin the municipality from making such improvement under a void ordinance authorizing the issuance of bonds payable beyond the period prescribed by statute, though the change in the time of payment of the bonds is not prejudicial to his interests.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 965-972; Dec. Dig. § 323.\*]

**4. MUNICIPAL CORPORATIONS (§ 303\*)—STREET IMPROVEMENTS—VALIDITY OF ORDINANCE.**

Under the constitutional requirement that an ordinance authorizing street improvements provide lawful means of payment for same, the whole of such an ordinance is void where the provisions for payment are unlawful.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 808-810, 821; Dec. Dig. § 303.\*]

Appeal from Court of Common Pleas, Lackawanna County.

Bill by P. A. McAndrew to enjoin the Borough of Dunmore and others from improving certain streets. From decree awarding an injunction, defendants appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and MOSCHZIS-KER, JJ.

C. P. O'Malley, R. A. Zimmerman, and A. A. Vosburg, all of Scranton, for appellants. Cornelius Comegys and William W. Lathrope, both of Scranton, for appellee.

MESTREZAT, J. [1] We agree with the learned court below that the ordinance in question authorizing the improvement of certain streets in the defendant borough is void, and that a taxpayer against whom an assessment was made for the improvement can attack its validity in a court of equity. The validity of the ordinance depends upon the authority conferred by the Acts of May 12, 1911 (P. L. 288), and June 15, 1911 (P. L. 471). The later act authorizes the council by ordinance to provide for the payment of the expenses and costs of a municipal improvement by assessments on the properties fronting thereon payable in semiannual or annual installments, and also to provide for the payment of the costs and expenses of the improvement as it progresses by issuing bonds which shall rest alone for their security and payment on the assessments and shall be payable at periods not exceeding

five years from the date of their issue, to be provided in the ordinance directing the improvement. The moneys received by the municipality from the assessments are to be applied to the payment of the bonds exclusively.

The ordinance authorizing the improvement in this case provides that two-thirds of the cost of the improvement shall be paid by assessments against the abutting property, payable in seven equal annual payments, the first thereof 30 days after work shall commence, and that the bonds shall be issued payable "at any time within six years from their respective dates." It is clear therefore that the ordinance fails to meet the statutory requirement that the bonds be payable in five years and, necessarily, the assessments within a like period, as the bonds are payable exclusively out of the proceeds of the assessments.

[2] Municipal improvements are regulated entirely by statute to which the rule of strict construction applies. This principle is so well settled that it does not need the citation of authorities to support it. There was therefore no authority in the councils in the case in hand either to issue the bonds payable at a longer period than five years from the date of issue or to make the assessments payable in installments extending beyond that period. These requirements of the statute under which the improvement was to be made were entirely disregarded in the ordinance. They were a substantial and material part of the ordinance, and, being disregarded, the ordinance necessarily was invalid. If a time of payment of the bonds fixed by the statute may be enlarged by one year by the ordinance authorizing the improvement, it may be extended any number of years, in the discretion of the council. It is immaterial what the legislative purpose may have been in fixing five years as the time within which the bonds issued for the payment of municipal improvements should be paid; it is sufficient to know that such is the statutory requirement and the council has no authority to disregard it.

[3] It is contended, however, by the defendant borough, that the variance of one year between the statutory provision and the ordinance is immaterial and that no one is prejudiced by the fact that the time of payment is enlarged. It is therefore claimed that the plaintiff, a taxpayer against whom an assessment had been laid, has no standing to complain, and hence cannot maintain this bill. This contention overlooks the fact that this is a proceeding to impose a burden upon the plaintiff and to compel him, willingly or unwillingly, to contribute to the public improvement, and that it is only sustainable by virtue of statutory authority. The right of the plaintiff to maintain this bill does not depend upon whether a change in the time of the payment of the bonds injuriously affects him or not. The test of his standing

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



to invoke the aid of a chancellor in resisting payment of the assessments laid upon his property is whether the municipality has legally exercised the authority imposing the burden upon him. Whether therefore the time fixed by the ordinance for the payment of the bonds beyond the statutory period is or is not prejudicial to the plaintiff's interests is not the test of his right to successfully resist the enforcement of the ordinance which compels him to pay for the improvement. He sustains his right to maintain the bill when he shows that the improvement is not made in pursuance of an ordinance passed in conformity with the statute authorizing it.

[4] There is nothing in the contention that the part of the ordinance providing that the improvement bonds shall be redeemable in six years may be invalid and the balance of the ordinance be legal and enforceable. It may be conceded that an ordinance, like a legislative statute, may be good in part and upheld, while another part may be illegal and void. A section or a part of an ordinance or statute may be so disconnected in purpose and effect that its illegality will not necessarily avoid the ordinance or legislative act in toto. But that principle cannot be invoked here to sustain any part of the ordinance authorizing the improvement in question. The ordinance provides for a contract for the grading and paving of certain streets of the municipality, and it is a constitutional requisite of such ordinance that it provide at the same time the lawful means of payment for the improvement. It is therefore manifest that the means and method for payment of the obligations contemplated in the contract are essential features of the ordinance and, if illegal, invalidate the entire ordinance.

A further consideration of the questions involved is unnecessary in view of the very thorough discussion of them by the learned trial judge.

Decree affirmed.

(245 Pa. 196)

DREIFUS et al. v. LOGAN IRON & STEEL CO.

(Supreme Court of Pennsylvania. April 27, 1914.)

**1. PLEADING (§ 160\*)—JUDGMENT FOR WANT OF SUFFICIENT AFFIDAVIT OF DEFENSE.**

Under rule 42 of the common pleas of Philadelphia county, providing that in actions on contract the statement of claim shall have indorsed on it notice to defendant that he is required to file a plea and an affidavit of defense within 15 days of service thereof, the fact that, pursuant to such notice, defendant files a plea and an affidavit of defense at the same time does not preclude plaintiff from taking a judgment for want of a sufficient affidavit of defense; plaintiff's demand for a plea and an affidavit of defense not being voluntary so as to constitute a waiver of his rights, and defendant, in view of rule 60, providing that the entire defense shall be set out in the affidavit,

suffering no harm through the judgment being entered for want of a sufficient affidavit, though his plea be also of record.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 319; Dec. Dig. § 160.\*]

**2. PLEADING (§ 155\*)—AFFIDAVIT OF DEFENSE—SUFFICIENCY.**

In an action on an express contract which cannot be established by copies of entries in books of original entry, an affidavit of defense, not denying the contract is insufficient, though it denies "that the copies of charges and credits" as set out in the statement of claim, and "averred to be copies of the original entries thereof, are incorrect and improperly stated."

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 309-311, 313, 314; Dec. Dig. § 155.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by Emanuel Dreifus and others, trading as Emanuel Dreifus & Co., to the use of W. Vernon Phillips and another, trustees, against the Logan Iron & Steel Company, a corporation. From a judgment for plaintiff for want of a sufficient affidavit of defense, defendant appeals. Affirmed.

The facts appear in the following opinion of Willson, P. J., in the common pleas:

We are informed by the counsel in the case that the Supreme Court, to which an appeal from the judgment entered therein has been taken, has requested this court to state the reasons upon which the judgment in the case was entered. We will do so briefly.

[1] The first question to be considered relates to the effect and force of rule 42 of the courts of common pleas of this county in providing, as the rule does, that in actions on contracts the statement of claim should have indorsed upon it notice to the defendant that he is required to file a plea and an affidavit of defense to the statement within 15 days of the service thereof, and that otherwise judgment may be entered against him. In the case in hand such notice was given upon the filing of the statement, and the defendant filed both a plea and an affidavit of defense. Subsequently a rule was entered asking that judgment should be rendered for want of a sufficient affidavit of defense. Such a judgment was entered, notwithstanding the contention on the part of defendant's counsel that in consequence of a plea having been filed the right of the plaintiff to ask for judgment for want of a sufficient affidavit of defense had lapsed.

There is no question but that, previous to the recent adoption of rule 42, and other rules, the ordinary effect of a plaintiff ruling the defendant to plead would have been a waiver on the plaintiff's part of his right to ask for judgment for want of a sufficient affidavit of defense. We concede freely that such is the fair interpretation of the cases which were decided previous to the adoption of the rule in question. The said rule, however, and various others were recently adopted by the courts of common pleas after long consideration and conference with many attorneys of high standing within the county. They were adopted for the purpose of arriving at a prompt and definite statement of the issues involved in any case, so that as soon as possible litigation might be brought to a finality. By rule 60 it was provided as follows: "Neither party shall be permitted at the trial to make any defense except that set forth in the affidavit of defense, or plaintiff's reply, as the case may be. New mat-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ter may be added only by amendment by leave of court, and a copy of the amendment shall be served on the adverse party, or his attorney, at least ten days before the day set for trial."

It was thus provided that the entire and exclusive defense in any case of contract must be set out in the affidavit of defense. This being so, and there appearing to be no doubt that under the act of June 16, 1836, section 21 (P. L. 792), the court has statutory authority to make suitable rules for the regulation of its practice, we regard the making of rule 42 as entirely within the powers of the court. We do not think it can be said with any propriety that the rule violates the Constitution or any law of this commonwealth. Nor do we think that it can be said with any propriety that by the entry by a plaintiff of a notice requiring, under the rule referred to, that a plea and an affidavit of defense shall be filed at the same time, the plaintiff has waived his right to ask for judgment for want of a sufficient affidavit of defense. Under the previous state of affairs, before the rule in question was adopted, any such course on a plaintiff's part would have been a voluntary step which might, for reasons given in various decisions, well have been regarded as a waiver of his right to ask for judgment. As the case stands, however, there is nothing voluntary in the act of the plaintiff in such a case. He is compelled by the requirements of the rule to demand both a plea and an affidavit of defense.

We see no reason why, in the interest of a prompt and efficient administration of justice, the court cannot properly require the two forms of defense to be made at the same time, and to enter a final judgment, as was done in the case in hand. Inasmuch as rule 60, before quoted, requires a defendant to set out his whole defense in his affidavit, he can suffer no harm by reason of judgment being entered for want of a sufficient affidavit of defense, notwithstanding his plea is also on the record.

[2] The only other point in the case which needs to be referred to relates to the propriety of the judgment entered, so far as the merits of the case are concerned. The defendant seems to rely largely upon its averment "that copies of the charges and credits, as the same appear in the plaintiff's statement of claim, and averred to be copies of the original entries thereof, are incorrect and improperly stated." The averment was probably intended to comply with the requirements of rule 72 of the Rules of the Courts of Common Pleas, but we do not think that the language adopted comes up to the demands of that rule, which has uniformly been interpreted as making alleged copies of original entries in plaintiff's books prima facie evidence of plaintiff's claim in an action of assumpsit, unless the defendant takes upon himself the responsibility of asserting in his affidavit of defense that the alleged copies are not true copies of the entries in the books. They may be incorrect, not because they are untrue copies, but because they do not correctly set forth the facts of a transaction. However, we do not think the case rests upon such a narrow or technical point. The case of the plaintiff, as appears from the large number of exhibits attached to the statement of claim, rests upon what may be regarded as an express contract, and one which could not be established by the production of copies of entries in books of original entries. The contract and dealings, as evidenced by the writings and exhibits just referred to, are nowhere denied by the defendant in its affidavit of defense. All the items of credit claimed by the defendant and all the items of charge denied by him were deducted from the total amount of the plaintiff's claim in the entry of judgment, and these disputed items remain for final determination in a trial before a jury.

The court entered the following judgment:

And now, to wit, December 15, 1913, the plaintiffs' rule for judgment in the above case for such portions of their claims as to which the affidavit of defense filed is insufficient with leave to proceed for the balance of said claim coming on to be heard, the said rule is made absolute for the first reason therein specified, and judgment is entered in favor of the use plaintiffs and against the defendant for \$5,263.95, being the amount of so much of plaintiffs' claim as to which the defendant's affidavit is insufficient as set forth in the third paragraph of the affidavit of defense filed, viz. . . . \$10,809 80 Less the amount of defendant's set-off as set forth in the statement of set-off forming part of the affidavit of defense filed, viz. . . . 6,033 25

\$4,776 55

Interest from April 1, 1912, to December 13, 1913. . . . . 487 40

Total amount for which judgment is now entered. . . . . \$5,263 95

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and MOSCHZISKER, JJ.

Wm. Clarke Mason and William Maul Measey, both of Philadelphia, for appellant. Lewis Lawrence Smith, of Philadelphia, for appellees.

PER CURIAM. The judgment is affirmed on the opinion of the learned president judge of the common pleas.

(245 Pa. 171)

FRITZ v. SAX & ABBOTT CONST. CO.

(Supreme Court of Pennsylvania. April 27, 1914.)

JUDGMENT (§ 190\*)—NOTWITHSTANDING VERDICT—INJURY TO SERVANT—NEGLIGENCE OF MASTER.

In an action for the death of an employe of defendant occasioned by collapse of part of a building alleged to be due to improper shoring, judgment is properly entered for defendant notwithstanding the verdict, where deceased was the superintendent in charge, and had opportunity to remedy defects in the shoring, and the evidence failed to justify the opinion that the fall of the building was due to such defects.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Harriet Fritz, widow of Peter Fritz, against the Sax & Abbott Construction Company. Judgment for defendant notwithstanding the verdict, and plaintiff appeals. Affirmed.

The defendant company in the year 1909, under a contract with the United Gas Improvement Company, was engaged in alteration and reconstruction of two buildings at the northeast corner of Eleventh and Market streets in this city. Plans had been prepared by a firm of architects for the work to be done, and the defendant company, by the terms of the written contract, undertook to do the work in accordance with the plans re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

ferred to and under the supervision and direction of the architects. The plans referred to called for the removal of the lower stories of the brick wall on Eleventh street and Market street in the prosecution of the alterations, and such removal necessitated the placing of shoring in and outside of the building for the purpose of holding in place such portions of the upper part of the wall and of the upper portion of the building as remained in place while the changes were being made in the lower portions. This work of shoring, as well as that of erecting the steel structure that was called for within the building, was intrusted by the defendant to the hands of an independent contractor. Fritz, who was the husband of the plaintiff, was employed by the defendant company as their superintendent to supervise and have charge of all the work which was to be done on the contract of the defendant with the United Gas Improvement Company. We think that there is no ground for question as to the correctness of that statement. Mr. Abbott, the president of the defendant company, was called as a witness on behalf of the plaintiff as under cross-examination, and he testified distinctly that Fritz was employed as superintendent, and that, after full explanations were given to him in regard to the plans and what the contract called for, the whole matter of supervision was placed in his (Fritz's) hands. It is true that a witness spoke of Fritz as a foreman carpenter, and that another witness testified that he believed that one or two other employes of the defendant company who frequently visited the place where the work was going on were the superiors of Fritz. Nobody, however, testified that any person other than Fritz gave any orders or directions in regard to the work which was being done, or that Mr. Abbott or the other persons just referred to as possible superiors to Fritz ever interfered with the work or undertook to give directions in regard to how it should be done. We regard it as entirely proper to consider Fritz as the active superintendent in charge of the whole work.

The contract between the defendant and the United Gas Improvement Company was made on the 6th of May, 1900, and the subcontract between the defendant and the contractor for the shoring was entered into on the 15th of May of the same year. The removal of the wall which was to be removed, as before stated, was begun about the time when the second of these two contracts was entered into, and the shoring which was intended to support the upper part of the building was put in place as the work of removal progressed. From time to time heavy material, such as steel beams and steel columns, were drawn into the building for the purpose of enabling the steel structure to be erected. While such work was in progress, on the 15th of July, shortly after noon, without warning

other than a shaking or tremor of the floor just before the catastrophe, the southern part of the building collapsed, the material which fell falling principally inside of the limits of the building, and not into the street. Fritz was engaged immediately prior to the accident upon the second floor of the building, superintending the operations at that point, but at the moment of the catastrophe had gone to the third floor. Unfortunately, in the falling of the structure, he was caught and killed.

It is claimed on behalf of the plaintiff that the death of her husband was due to negligence on the part of the defendant company, in that Fritz was not furnished with a safe place to perform his duties, and because the work of shoring up the building while the alterations were in progress was improperly and negligently done. Various witnesses were called, some of whom were engineers and others were builders, who testified in regard to the shoring. Some of these witnesses said that the usual method of constructing shoring in such a case was to have cross braces between the upright supports. Others said that the use of jacks at the lower end of the shoring timbers was not customary in this locality, and that in their opinion the use of jacks weakened the character of the supports. Still others said that the supporting timbers of the shoring were spliced improperly, and that the wood at the bottom of the timbers was cracked and split and obviously imperfect and unsafe. It appeared also in the evidence that the buildings referred to were old structures, and that the old joists at the eastern end rested for only about an inch in the holes made in the party wall for the joists.

There were two systems of shoring, one upon the outside, in which the upright timbers slanted from the ground upward towards the part of the building which was to be supported, where they were intercepted by other timbers called "needles," which entered the building and rested upon an inside system of shores. It is contended by plaintiff's counsel that the collapse of the building before described resulted from failure to construct the shoring properly. As we look at the case, in view of the evidence, it seems to us that there is no other ground upon which the plaintiff's case can be rested with any show of reason than that just stated, and, indeed, if the testimony offered at the trial is read, it will appear that that was practically the only phase of the case presented. We see no reason for holding that the defendant was guilty of any negligence in not providing a safe place for his employes to work. There is no evidence which would justify the conclusion that the defendant had any knowledge or reason to believe that the place was not safe, unless it can be correctly stated that there was knowledge of insecure shoring supports for the building.

Now, upon the motion for judgment *n. o. v.*, we have this to say: We have two reasons for concluding that such a judgment should be entered: First, we are of the opinion that the evidence in the case was insufficient to justify the conclusion that the fall of the building was owing to defects in the shoring. Assuming, as we must, that there was some evidence that the shoring was improperly constructed, that improper construction would have no relevancy in the present treatment of the case, unless there was some substantial reason to believe that the fall of the building was owing to the bad character of the shoring. It is true that some of the witnesses, who had evidently formed rather positive theories in regard to the cause of the calamity, endeavored to interject in their testimony opinions to the effect that the cause of the building's falling was the bad character of the shoring. But such opinions were volunteered, and they ought to have no bearing upon the disposition of the present question. We think it quite clear that no reasonable theory or explanation in regard to the cause of the calamity appears from the evidence. It may have been bad shoring, but, if so, it would only be a guess which would reach that conclusion. It may have been the original construction of the old building which had joists that extended only a very short distance into the wall. It may have been a weakening of the floors previous to, or at the moment of, the collapse, from the amount of heavy material put upon them, or by reason of previous hoisting and moving of such materials. Sad as the calamity was to the plaintiff, it seems to us that in all this uncertainty there can be found no reasonable basis upon which it can be said that the defendants have been shown to have been guilty of negligence which caused the death of the plaintiff's husband.

The second reason which we have for arriving at the same result is that Fritz was in charge of the whole work which was being prosecuted. As has been previously stated, he was the general superintendent of the whole affair. It was his duty to see that the contracts for the work that had been entered into by the defendant with the United Gas Improvement Company and with the shoring company were carried out properly; that materials which were used by the subcontractors were of a suitable character; and that the shoring was done in a proper manner. He was placed in his position for that express purpose. He had previously had experience in similar work in the construction of large buildings. Nobody questions his competency. So far as the evidence shows, there was no interference from superiors connected with the defendant company with the manner in which he performed his work. He had equal opportunities of knowledge and information with them, and the fact, if it be a fact, that

superior officers of the company must have observed defects in the character of the shoring, or any other defects or sources of danger to the place, could not relieve him of the responsibility which he assumed when he became the superintendent of the work. Doubtless it may be said that the foundation for the opinion that Fritz could not recover under such circumstances, if he were alive, is to be found in the principle that one who voluntarily assumes a risk of an employment cannot recover if he is hurt while running such a risk. That principle would seem to us beyond all question to be particularly applicable to the case of a man who was not merely an ordinary workman, but was in charge of an entire operation.

No doubt there are cases in which it has been held that the question of assumption of risk is oftentimes one for a jury to pass upon. At the same time there are other cases of equal importance in which it has been held, as a matter of law, that the voluntary taking of a risk relieves an employer from responsibility. We do not think it necessary to refer to such cases in detail. Each case must stand by itself.

We have been referred by plaintiff's counsel to the case of *Ott v. General Fire Extinguisher Company*, 226 Pa. 337, 75 Atl. 591, as an authority opposed to the views which we have expressed in this opinion. The report of the case is very meager and unsatisfactory, but we think the case in question is readily distinguishable from that now in hand. It is true that the husband of the plaintiff in that case is described as having been employed to superintend the installing of a fire-extinguishing system, but the court, in holding that it was a case for a jury to pass upon, when it appeared that he had been killed by the falling of a tank filled with water which a subcontractor had constructed on the roof of a building, said "that the design" of the substructure "was an unusual one, and had been selected and approved by the defendant." The selection and approval of the design by the defendant was a critical circumstance in the case, and it seems to us that it entirely distinguishes the authority cited from the case which we have now before us.

Verdict for plaintiff for \$4,000. The court subsequently entered judgment for defendant *n. o. v.* Plaintiff appealed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZIS-KER, JJ.

G. Von Phul Jones and Archibald T. Johnson, both of Philadelphia, for appellant. Owen J. Roberts, of Philadelphia, for appellee.

PER CURIAM. The majority of the court are of opinion that the judgment should be affirmed, for the reasons stated by the learned president judge of the common pleas.

(245 Pa. 239)

## In re LIVEZEY'S ESTATE.

## Appeal of COMMONWEALTH TITLE INS. &amp; TRUST CO.

(Supreme Court of Pennsylvania. May 4, 1914.)

## WILLS (§ 683\*)—CONSTRUCTION.

Under a will bequeathing to testator's wife the interest on \$10,000, to be paid her semi-annually during her life by trustees, and providing that on her death the said sum should be equally divided among his children, and further providing that his residuary estate should be equally divided among his children, and that a certain daughter's share be held in trust for life, such daughter was entitled on the widow's death to her share of the \$10,000 free from the trust; the provision that the daughter's share should be held in trust applying only to her share of the residuary estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1803-1806; Dec. Dig. § 683.\*]

## Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Miers P. Livezey, deceased. From a decree dismissing exceptions to the adjudication, the Commonwealth Title Insurance & Trust Company, substituted trustee for Emma Eckert under the will of Miers P. Livezey, deceased, appeals. Affirmed.

Argued before BROWN, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCH-ZISKER, JJ.,

Theodore F. Jenkins, of Philadelphia, for appellant.

**PER CURIAM.** The testator made the following provisions for his wife, in addition to a bequest of \$2,500:

"I also give and bequeath to my said wife the interest at six per cent. on the sum of ten thousand dollars to be paid to her half yearly by the trustees hereinafter named during the term of her natural life, the first payment of interest to be made in six months after my decease. Upon the death of my said wife the said sum of ten thousand dollars to be equally divided among my children, the issue of a deceased child receiving their parent's share."

He then divided his residuary estate equally among his children, directing that the share of his daughter Emma Eckert be held in trust for her. The widow is dead, and the fund for distribution before the court below was the above-mentioned sum of \$10,000. The appellant, substituted trustee for the daughter Emma, asked that one-sixth of the same be awarded to it, to be held in trust for her as a part of her share of her father's estate. The court below awarded one-sixth to her directly, on the ground that the testator had given her and his other children an absolute estate in remainder in the said fund, payable on the death of his widow. In this construction of the will we concur. The share of the daughter which the father directed should be held in trust for her was her share in the residuary estate. The will is not to be read otherwise. In Small v.

Small, 242 Pa. 235, 88 Atl. 1014, relied upon by learned counsel for appellant, the testator, after providing for his daughter, directed in a codicil to his will that the principal of her share in his estate should be held in trust for her, and this, of course, included all that she took under the will. In the case now before us the testator was speaking only of his residuary estate when he directed that the daughter's share should be held in trust. Decree affirmed, at appellant's costs.

(245 Pa. 162)

## ROACH v. IRVIN.

(Supreme Court of Pennsylvania. April 27, 1914.)

## 1. SPECIFIC PERFORMANCE (§ 13\*)—IMPOSSIBILITY OF PERFORMANCE.

Specific performance of a contract to exchange real estate will not be decreed where the conveyance by defendant would be impossible, where prior to the filing of the bill the land had been sold at foreclosure.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 30-32; Dec. Dig. § 13.\*]

## 2. SPECIFIC PERFORMANCE (§ 128\*)—IMPOSSIBILITY OF PERFORMANCE—DAMAGES.

Where a contract to exchange land could not be specifically performed, and the hand money paid plaintiff was more than sufficient to cover all damages suffered, he was not entitled to a decree for money damages.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 412-419; Dec. Dig. § 128.\*]

## Appeal from Court of Common Pleas, Philadelphia County.

Bill by George B. Roach against Harold C. Irvin for specific performance. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Ralston, J., filed the following opinion in the common pleas:

By a formal agreement in writing dated October 7, 1912, Van Cleave agreed to convey the property at the northwest corner of Thirty-Fifth and Spring Garden streets to Bailey, and Bailey agreed to convey No. 3307 Race street to Van Cleave, both properties to be subject to mortgages then existing. Van Cleave subsequently conveyed the property at Thirty-Fifth and Spring Garden streets to the plaintiff subject to the agreement of sale. Bailey was acting in the transaction for the defendant.

In order to facilitate the exchange a mortgage of \$10,000 was placed upon the property at Thirty-Fifth and Spring Garden streets. The money advanced on this mortgage was used to pay taxes, water rent, and principal and interest of the old mortgage, and the balance was paid to the plaintiff. The expenses incidental to the negotiation and placing of the mortgage amounted to \$378.25.

[1, 2] On July 7, 1913, No. 3307 Race street was sold by the sheriff under a mortgage, and deed was made to the purchaser on August 11, 1913, recorded on August 18, 1913. The present bill was filed on July 26, 1913. The court cannot decree specific performance, as it would be impossible for the defendant to convey to the plaintiff the premises No. 3307 Race street. The plaintiff, however, is entitled to recover the damages that he has suffered by the defendant's failure to perform his contract. The measure

of his damages is the expense which he has incurred. So far as appears, the only expense is that incidental to the placing of the \$10,000 mortgage on Thirty-Fifth and Spring Garden streets, amounting to \$378.25. This he would be entitled to recover from the defendant; but it appears further that at the time the contract was signed the defendant paid \$1,000 down money to Van Cleave. The plaintiff purchased from Van Cleave subject to the contract of sale, and consequently must give credit to the defendant for the money paid by him to Van Cleave. It therefore appears that the plaintiff has already received from the defendant more than the amount of the expense to which he has been put in carrying out the contract. There is therefore nothing further due him.

The court dismissed the bill. Plaintiff appealed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Paul Reilly, of Philadelphia, for appellant. Robert Mair, of Philadelphia, for appellee.

PER CURIAM. The decree appealed from is affirmed on the opinion of Judge Ralston.

(245 Pa. 132)

# EPSTEIN v. INSURANCE CO. OF NORTH AMERICA.

(Supreme Court of Pennsylvania. April 20, 1914.)

## CONTINUANCE (§ 12\*)—GROUNDS—ABUSE OF DISCRETION.

Where counsel had mutually agreed that a case should go over for a day in view of the fact that it was not likely to be reached and defendant had not sent for a number of important witnesses who had agreed to be present on summons by telegraph, and counsel for defendant was unfit to take part in the trial, it was an abuse of discretion to refuse to postpone the trial for one day.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 40, 42, 49, 50, 52; Dec. Dig. § 12.\*]

Moschzisker, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Action by Samuel Epstein, trading as the Progressive Neckwear Company, and Epstein Bros., against the Insurance Company of North America. Verdict for plaintiff, and defendant appeals. Reversed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Frank R. Shattuck, of Philadelphia, for appellant. Alfred Aarons and Henry N. Wessel, both of Philadelphia, for appellee.

MESTREZAT, J. The plaintiff's property in the city of Philadelphia was insured in 70 companies, under 76 policies, aggregating \$133,000. The property was destroyed by fire on October 9, 1912. Payment was resisted on all the policies on the ground that the claims were excessive and fraudulent, and suits were brought by the insured on the

policies. The present action being on the list for trial in common pleas No. 2, of Philadelphia county was called for trial on the morning of December 3, 1913. The defendant's counsel moved for a postponement of the trial until the following morning, assigning therefor orally the following reasons: (1) That two days prior thereto the counsel for the parties met, and it was mutually agreed that the position of the case on the list was such that there was but little chance of the same being reached on the first day it was called, and that counsel should meet on the morning of the day it was to be called, more with a view to making arrangements for the trial on the following day than on the day it was called and in consequence thereof the defendant did not subpoena its important witnesses to be present on the day the case was called for trial; (2) that a number of important witnesses of the defendant did not reside in or are not in the jurisdiction of the court, but have agreed to be present on the following day if summoned by telephone or telegraph, that the witnesses had possession of books, papers, and other documents which were of prime and essential importance to the defense in the case, and which could not be obtained by the defendant on the day the case was called for trial; (3) that counsel of record for the defendant was physically unfit to take part in the trial of the case. The court refused the application for a postponement of the trial, and thereupon counsel for defendant requested that his reasons in support of his motion might be put upon the record of the proceedings which was also denied by the court. The court stated that counsel might reduce his reasons to writing, and subsequently present them to the court for consideration, but refused to permit counsel to dictate the reasons to the official stenographer. A jury was drawn and sworn to try the case. The counsel for the defendant left the courtroom for the purpose of reducing his reasons to writing, which he did, and, having had a typewritten copy duly verified by an affidavit returned to the courtroom which he found closed, the court having adjourned. The case was tried in the absence of counsel and a verdict rendered for the plaintiff on which judgment was subsequently entered. The defendant company moved for a new trial and its counsel filed an affidavit setting forth the facts relative to the application and the denial of the motion for postponement of the trial. The plaintiff filed an affidavit denying some of the allegations in the affidavit of the defendant's counsel, but we do not regard these denials as affecting any of the material facts, the subject of the defendant's complaint here.

We are of opinion that under the circumstances the motion of the defendant's counsel to postpone the trial of the cause should

not have been refused. We must assume, in the absence of the denial of record by the plaintiff's counsel, that the counsel of the parties did not, for the reasons stated, anticipate that the cause would be reached for trial on the day the list was first called, and that they expected that it would go over until the next day. Of course, this of itself would not be a sufficient reason for the postponement of the trial because it is the duty of counsel to be ready when his case is called, but in view of the condition of the trial list and the understanding of counsel it was a matter for the learned court to take into consideration with the other reasons assigned for the postponement in passing upon the defendant's application. A number of the important witnesses for the defendant who had possession of books and documents essential to the defense resided out of the jurisdiction of the court, but were ready and willing to appear when summoned by telephone or telegraph. By reason of the uncertainty of the case being reached on the 3d of December these witnesses had not been notified to appear until the following day, when it was thought, apparently by the counsel of both parties, that the case would be tried. These witnesses had agreed to be present on the 4th of December. In addition to these reasons, and one we think which should have appealed to the court, was the fact that the defendant's counsel of record was physically unable to take part in the trial of the cause. This is not denied so far as the record discloses. The postponement of the trial for one day would not, so far as appears, have been injurious to the interests of the plaintiff. The case would then have been tried, possibly not by the counsel of record for the defendant, but by other counsel who could have protected his client's interests. The case was tried while the defendant's counsel was absent reducing to writing the reasons in support of his motion for the postponement of the trial. His absence was due to the refusal of the court to permit the official stenographer to take the counsel's reasons in support of his motion for a postponement. The judgment against the defendant was in effect a judgment by default. It was most important, not only to the defendant in the present action, but to the numerous other insurance companies against which the plaintiff had claims arising out of the same fire that the cause be tried on its merits, and that the defendant have an opportunity to be heard on its averment that the plaintiff's claim was false and fraudulent. We think the circumstances of the case, brought to the court's attention orally by the defendant's counsel, required it to grant the motion and postpone the trial of the cause.

The judgment is reversed and a venire facias de novo is awarded.

MOSCHZISKER, J. (dissenting). While, on the day the case was reached in its regular turn, one attorney for the defendant was "physically unable to take part in the trial," yet it appears he had a colleague who was well and able to try; it further appears that counsel for plaintiff did not agree to a continuance. Under the circumstances, I cannot concur in the conclusion that there was an abuse of discretion; therefore I note my dissent.

(245 Pa. 166)

### MOTT v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. April 27, 1914.)

CARRIERS (§ 347\*)—INJURY TO PASSENGERS—  
NEGLECT—EVIDENCE—QUESTION FOR  
JURY.

In an action for injury to a servant by a fall from a train, where the only ground of negligence alleged was failure of the conductor to stop the train after notice that the passenger was missing, and where the train could not be stopped with safety to the passengers, and it was within a minute or two of the next station, where an investigation was started, there was nothing to submit to the jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1346, 1350-1386, 1388-1397, 1402; Dec. Dig. § 347.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Anna Mott against the Pennsylvania Railroad Company. From an order refusing to take off a nonsuit, plaintiff appeals. Affirmed.

Carr, J., in the court below, filed the following opinion *sur* plaintiff's motion to take off nonsuit.

The plaintiff is the widow of Emil Mott, deceased, who upon Sunday evening, August 6, 1911, was a passenger in a train of the defendant company, and who came to his death under distressing circumstances, between the North Philadelphia Station and Twentieth street in this city. Upon the morning of that day he was one of a party which had journeyed in an automobile to the Delaware Water Gap, and he fell ill after his arrival and vomited, the effect of traveling upon rough roads. He thereupon decided to return home by rail, and boarded a train at Stroudsburg at 5:20 p. m. It was made up of eight or nine coaches, some of which had enclosed platforms and others without. Mott sat toward the front on the left side of the smoking car, which was next but one to the engine. McCarthy, a witness called for the plaintiff, but to whom the deceased was a stranger, noticed that between Stroudsburg and the North Philadelphia Station, Mott had made use of the water-closet several times, and from the sounds heard it appears that the disturbed condition of his stomach had not abated. The train arrived at the North Philadelphia Station at 8:56, being a few minutes late on its schedule time, and just as it pulled out, McCarthy saw the deceased leave his seat and step upon the platform, which was not inclosed. McCarthy saw Mott standing upon the platform holding the handrails and facing north. McCarthy left his seat and went toward the door, and did not see Mott; and, becoming alarmed for his safety, sought the conductor, and after passing through several coaches, found him in the next to the



last car, taking tickets. McCarthy testified that he "told him that that fellow up in front was gone. He wanted to know who. I said the fellow that sat opposite me." By this time the train was at a signal tower known as N. G., which is on the hill over the tunnel on the east drive of Fairmount Park at the east end of the bridge crossing the Schuylkill river. In order to inform himself as to what had happened, the conductor immediately returned to the smoking car, and searched for baggage or other belongings of the deceased, and inquired of other passengers whether they had seen him. He did not succeed, however, in learning what had become of Mott, and whether he had stepped from the train as it was leaving the North Philadelphia Station or had fallen off. By this time the train was at Signal Tower No. 3, which is near the Zoological Garden or the tunnel on the west side of the Schuylkill river, approaching the main line tracks, and the conductor said to McCarthy, "There is nothing I can do now, and I will report it at the West Philadelphia Station." Within a few seconds this station was reached, and the conductor immediately informed an usher that there was a report that a passenger had fallen off at the North Philadelphia Station. This was at 9:06 p. m., and at 9:10 the train reached Broad Street Station, and the conductor notified the station master to the same effect within two or three minutes after arrival.

About 9:45 p. m. several boys were at Twenty-Second street and Sedgely avenue on a vacant lot on the north side of the railroad tracks near Fite & Arbelo's lumber yard, which is on the south side of the tracks. The boys were about a quarter of a square from the tracks, and while they were playing on or about a log on the lot, they heard cries or moans coming from the east, from the direction of Fite & Arbelo Company's yard. They walked toward the tracks and saw a man about half a square from the sawmill walking on the tracks from the west, and, becoming frightened, they returned to the lot. Opposite Fite & Arbelo's lumber yard, are four tracks, the southernmost being known as No. 1 and the northernmost No. 4, and two are for passenger travel and two for freight. A freight train passed eastward on track No. 2, and the boys returned to the track towards the place from which the cries or moans came, and by the light from the windows of a passenger train also passing east, they saw Mott's dismembered body. It was on the second rail as the tracks are approached from the south. The boys then sought a policeman, and found two at Marjie street and Sedgely avenue, one of whom fixed the time at 9:35. One went with the boys to where the body lay, while the other called the patrol, which shortly arrived. The officer in charge of it states that he received the patrol call at 10:30. Before the patrol wagon arrived, a track walker of the defendant company appeared, and assisted in the removal of the body. It was shown that at this point between 9 p. m. and 10:50 p. m., on the night of the accident, 16 trains passed on all four tracks. From the signal tower known as G. D. at the North Philadelphia Station, to the place opposite Fite & Arbelo's lumber yard, where Mott's body was found, the distance is 3,000 feet, and one mile and 2,280 feet east of N. R. From the signal tower G. D. to the signal tower at the east end of the bridge known as N. R., the distance is two miles.

The record shows that this section of the defendant's road is protected by the automatic block signal system, and that the presence of the train automatically sets an absolute stop signal for the block in back of the train and a caution signal for the second block back of the train. At the point where Mott was last seen by McCarthy as the train was about pulling out

from the North Philadelphia Station, a siding is the northernmost track, and the track upon which the train was proceeding toward Philadelphia is the next track to the south.

The contention of the plaintiff is that the defendant is liable for Mott's death, if after knowledge or reason to believe that he was in a place of peril on their tracks, they failed to exercise reasonable care to save him from death or further injury. It does not appear however, that it was the duty of the conductor under the circumstances of the case, to stop the train. Nor does it appear that Mott's rescue could have been made without peril to the other passengers. It is not shown that other trains could have been prevented from passing until Mott was safely off the tracks. The conductor did not have notice that Mott had fallen from the moving train in a dangerous place. Moreover, it is plain that the decedent was guilty of contributory negligence, for it is negligence to stand on the platform steps of a moving train, and it was not shown that the water-closet opposite Mott's seat was locked. No evidence of negligence on the part of the defendant was shown. It is a question of careful railroad management, and it was not shown that the movement of the trains between West Philadelphia and North Philadelphia Stations could have been suspended from the time the reported disappearance of Mott was announced to the conductor. No evidence was produced by the plaintiff to show that it was improper railroad management not to have suspended the passage of all trains in that section. Nor is a connection proved of the defendant's negligence with Mott's death. It was not shown that Mott could have been found in time to save his life, and the plaintiff's contention of alleged negligence cannot be sustained without the use of many inferences.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Thomas F. Gain and Alfred L. Cameron, both of Philadelphia, for appellant. John Hampton Barnes, of Philadelphia, for appellee.

PER OURIAM. A clear and concise statement of the facts developed at the trial appears in the opinion of the learned judge of the common pleas dismissing the motion to take off the nonsuit. The only ground on which the defendant could be held liable was that the conductor was negligent in not stopping the train after he had investigated the report that a passenger who had gone on the platform after the train had started from the station, was missing. His investigation which was made promptly and intelligently disclosed nothing as to the actual occurrence. When it was completed the train was at a place where it could not be stopped with due regard to the safety of the passengers, and it was within a minute or two of the next station at which he gave notice that would start an investigation. In the absence of evidence that the defendant in any way caused the fall of the deceased from the train or omitted to do anything which it could reasonably be required to do under the circumstances, there was nothing to submit to the jury.

The judgment is affirmed.



(245 Pa. 124)

## DETTRA v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. April 20, 1914.)

1. MUNICIPAL CORPORATIONS (§ 399\*)—  
CHANGE OF GRADE—RIGHT TO DAMAGES—  
WAIVER.

Under Act May 26, 1891 (P. L. 117), providing that the damages assessed for the opening of any street shall include all damages due to the grade at which the street is to be opened, and that the plan attached to the viewers' report shall show the existing grade, where a public street was opened by ordinance in 1894, and proceedings were duly instituted for the assessment of damages and a road jury was appointed, which, after hearing evidence, filed its report during the same year, and where the owner of a lot abutting on the street, though having notice of the proceedings, failed to present any claim for compensation for damages sustained, she was not entitled to have damages assessed and compensation allowed her for a lowering of her sidewalk necessitated by an ordinance adopted in 1911.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 958-961; Dec. Dig. § 399.\*]

2. MUNICIPAL CORPORATIONS (§ 402\*)—  
CHANGE OF GRADE—ASSESSMENT OF DAM-  
AGES.

Act May 26, 1891 (P. L. 117), providing that the damages assessed for the opening of any street shall include all damages due to the grade at which the street is to be opened, and that the plan attached to the viewers' report shall show the existing grade, contemplates that all damages to abutting land consequent upon the improvement of a street shall be assessed in a single proceeding.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 959-961; Dec. Dig. § 402.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Petition by Mary B. Dettra against the City of Philadelphia for the appointment of viewers. From a judgment quashing the petition, plaintiff appeals. Dismissed.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZIS-  
KER, JJ.

Henry B. Hodge, of Philadelphia, for appellant. Glenn C. Mead and Edwin O. Lewis, Asst. City Sol., and Michael J. Ryan, City Sol., all of Philadelphia, for appellee.

STEWART, J. [1] Willow Grove avenue, a public street in the city of Philadelphia upon which appellant's lot abuts, was opened by ordinance under date of 6th April, 1894. Under this opening ordinance proceedings were instituted in the court of quarter sessions in 1894 for the assessment of damages, and a road jury was appointed, which, after hearing evidence, filed its report November 15, 1894. By ordinance adopted 28th July, 1911, the setting of curb and the paving of sidewalks on that section of Willow Grove avenue which included the frontage of appellant's lot was directed. Agreeably to this later ordinance appellant proceeded to curb and pave. The natural surface of her side-

walk was several feet above the established grade of the street, and she was therefore obliged to grade it off so as to make the grade conform. On 27th March, 1913, she presented her petition asking that viewers be appointed to assess the damages she had sustained in consequence of having been required to lower her sidewalk in order to curb and pave. Viewers were accordingly appointed; but subsequently, on motion of the city, the order appointing them was revoked, and the original petition was quashed, for the reason that, if petitioner had sustained any damages, her claim for compensation should have been presented in the proceedings before the road jury in 1894, of which she admittedly had notice. The act of May 26, 1891 (P. L. 117), provides:

"That in all cases of assessment of damages for the opening or widening of any street or highway \* \* \* the award of damages, if any, shall include all damages due to the grade at which said street or highway is to be opened or widened, and the plan attached to the report of the viewers awarding the damages shall have therein a profile plan showing the existing grade."

The contention of appellant is that this act applies only in cases where land has been actually taken and appropriated, and that, inasmuch as the claim she here presents is not for land appropriated, but simply for expense she was put to in order to bring her pavement to conformity with the established grade of the street, she could have had no standing to assert her right before the jury appointed in 1894, and that no injury was sustained by her until required by ordinance of 1911 to pave and curb. As to the latter contention, it is only necessary to say that whatever damages or loss resulted to appellant was in consequence of the ordinance of 6th April, 1894. That ordinance opening Willow Grove avenue at a fixed grade made a lowering of the grade of appellant's sidewalk at some time inevitable, and the damage and loss that would result to the property owner in consequence was a matter of easy computation as well before as after the change was actually made. The first contention finds its answer in several of our recent cases. In *Deer v. Sheraden Borough*, 220 Pa. 307, 69 Atl. 814, speaking of the act of 1891, we said:

"It provides comprehensively for proceedings intended to be instituted by municipalities in all cases of laying out, opening, widening, and extending streets, alleys, and lanes, and for the building of bridges, piers, abutments, sewers, and other works, and for ascertaining in one proceeding all the damages suffered by all abutting owners affected thereby."

[2] Following this, in *Ogontz Avenue*, 225 Pa. 126, 73 Atl. 1096, we said:

"As to abutting owners, the act of 1891 clearly contemplates that all damages shall be assessed in a single proceeding, and shall accrue to those persons entitled thereto at the time of the assessment."

The case last cited distinguishes between the rights of abutting owners and the rights

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of owners of property adjoining property that is abutting, but this distinction in no wise affects the present case. This is the case of an abutting owner, and, in the opinion of the court in the case last cited, it is distinctly declared that, as to abutting owners:

"There is an actual taking within the meaning of the law when the street is ordered to be opened and proper notice has been served upon the property owners affected thereby."

When in 1894 the city by ordinance opened Willow Grove avenue, it appropriated the entire street including sidewalks (*McDevitt v. Gas Company*, 160 Pa. 367, 28 Atl. 948), and it was then the injury was done of which appellant complains. It follows that her only remedy was under the act of 1891.

The appeal is dismissed at the cost of appellant.

(245 Pa. 35)

**GREEN et al. v. BALTIMORE & O. R. CO.**  
(Supreme Court of Pennsylvania. April 6, 1914.)

**1. RAILROADS (§ 102\*)—PRIVATE CROSSINGS—VESTED RIGHTS.**

A property owner's right to a private crossing over a railroad track, where the right of way has been acquired by condemnation, is a vested right as sacred as any other property right.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 306-314, 769; Dec. Dig. § 102.\*]

**2. RAILROADS (§ 102\*)—RESTORATION OF PRIVATE CROSSINGS—MANDATORY INJUNCTION.**

A court of equity has jurisdiction by mandatory injunction to compel a railroad company to restore a private crossing which it has wrongfully demolished; the remedy prescribed by Act Feb. 19, 1849 (P. L. 84) § 12, providing for the recovery of damages for failure to maintain such crossing, not being exclusive, and being inadequate in such case.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 306-314, 769; Dec. Dig. § 102.\*]

Appeal from Superior Court.

Bill for mandatory injunction by Robert M. Green and another against the Baltimore & Ohio Railroad Company. From a decree for plaintiffs, defendant appeals. Affirmed.

The facts appear in the opinion of the Supreme Court, and in the opinion of the Superior Court by Oriady, J., in *Green v. Baltimore & Ohio Railroad Co.*, 52 Pa. Super. Ct. 524.

Argued before FELL, O. J., and BROWN, MESTREZAT, STEWART, and MOSCHZISKER, JJ.

W. B. Linn, G. H. Stein, and H. B. Gill, all of Philadelphia, for appellant. J. B. Hanum, of Chester, for appellees.

**STEWART, J.** The Baltimore & Philadelphia Railroad Company, to whose rights the Baltimore & Ohio Railroad Company, the defendant in this proceeding, has succeeded, acquired its right of way upon and over the lands of Peter W. Green in 1885 by condemnation proceeding, and, as required by law, constructed a farm crossing over its said railroad for

the use and accommodation of the owner of said land. This crossing was used by the then owner of the land and his successors in title until 1902, when the defendant company for purposes of its own removed it, leaving the owners of the land without means of access to that portion which had been separated therefrom by the railroad. The defendant company having persistently refused to replace the crossing, the plaintiffs, present owners of the land, filed their bill reciting the above facts, and praying that a mandatory order issue to compel its replacement. The answer filed concedes the plaintiffs' right to the crossing, but denies their right to the relief prayed for, on the ground that the statute which confers the right to a crossing provides also a remedy where the crossing is withheld, and insists that to this remedy plaintiffs must be confined. The case was heard on bill, answer, and evidence, and a mandatory order requiring defendant to restore the crossing was entered, which on appeal to the superior court was affirmed. The present appeal is from the decree of affirmance.

[1] As in the lower court and in the superior court, so here, the only question raised is that of jurisdiction. The position taken by appellant assumes the appropriateness, the adequacy, and the exclusiveness of the remedy provided by the statute, where a wrong is done such as is complained of here. If upon examination it is found that the remedy lacks any one of these characteristics, it is not necessarily a barrier to the jurisdiction here invoked. In section 12 of the act of February 19, 1849 (P. L. 84), investing railroad companies with the right of eminent domain, it is provided:

"That for the accommodation of all persons owning or possessing land through which the said railroad may pass, it shall be the duty of such company to make, or cause to be made, a good and sufficient causeway or causeways, whenever the same may be necessary, to enable the occupant or occupants of said lands to cross or pass over the same, with wagons, carts and implements of husbandry as occasion may require; and the said causeway or causeways, when so made, shall be maintained and kept in good repair by such company. And if the said company shall neglect or refuse on request, to make such causeway or causeways, or when made, to keep the same in good order, the said company shall be liable to pay any person aggrieved thereby all damages sustained by such person in consequence of such neglect or refusal; such damages to be assessed and ascertained in the same manner as provided in the last section for the assessment of damages."

Of course, if what was sought by the bill filed in the present case was the recovery of damages, by way of compensation for the inconvenience and loss suffered and sustained by plaintiffs in consequence of the defendant's failure through neglect or refusal to supply the crossing, the plaintiffs were in the wrong court. Unquestionably this statutory remedy in such case would be both appropriate and adequate. But the bill here is

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not for the recovery of damages; it asks none; what it asks, and all it asks, is that defendant be required to supply to the plaintiffs a convenience which the latter have a legal right to demand, and which the defendant company is under a legal duty to provide. To hold that they must be content with damages for the inconvenience they have been put to by defendant's unjustifiable refusal to supply the crossing is equivalent to saying that neither the right conferred by the statute nor the duty imposed was absolute, and that the railroad company can escape the duty and defeat the right by a process of commutation—by paying the damages assessed in successive suits against it for the inconvenience suffered by the plaintiffs through the defendant company's default. We cannot give assent to any such view.

[2] We are dealing with a vested right in the plaintiffs to a private crossing on their own lands over the defendant's tracks, a right as sacred as any other property right, which has been disturbed and its free exercise prevented by the defendant, not only without a semblance of right, but in open disregard of the statutory duty imposed on it to provide and maintain the means of its enjoyment. Can the plaintiffs be thus dispossessed of their property and have no remedy for its recovery? It is little less than mockery to say to them, you may get damages for the inconvenience you have suffered in consequence, that is, in consequence of a dispossession effected by a party without pretense of right to the thing itself. The right of these plaintiffs in the crossing was the gift of the state, and no power but that of the state could deprive them of it. The state had delegated to the defendant company its power in this regard, to be exercised only, however, in the way prescribed. By the ninth section of the act of June 7, 1901 (P. L. 531), the power is given to railroad companies to discontinue and remove private crossings under prescribed conditions; but the removal and discontinuance of the plaintiffs' crossing was not effected pursuant to any law or agreeably to any established or pretended right. Therefore the right remains in the plaintiffs in its original force and vigor, except as we shall now say to them that you have been dispossessed of the thing itself by an intruder, and you must be content with compensation for the inconvenience you have suffered. We have no hesitancy in adjudging the statutory remedy prescribed in the act to be neither appropriate nor adequate for the injury here complained of. We think it manifest that the only purpose in providing it was to furnish the means to quicken the defaulting railroad company in the discharge of the duty the act imposed. Because the plaintiffs might have adopted it for that purpose is no reason that they should be denied the right to equitable relief, when the inadequacy of the remedy to right the wrong done is so ap-

parent as it is here. Speaking of the obstruction of a right of way, Mr. Justice Trunkey, in Hacke's Appeal, 101 Pa. 245, says:

"A judgment for damages does not transfer the plaintiff's property in the way, to the defendant, as would a judgment in trover or trespass for taking goods. Nor will the law restore enjoyment to the owner. He may have repeated actions for damages, and neither gain enjoyment nor lose his right thereto. The law does not offer an adequate remedy. He is entitled to a remedy that will restore him to enjoyment, and is not confined to actions at law for damages resulting from obstructions."

The appellant's sole reliance is upon the adjudication in the case of Dimmick v. D., L. & W. R. R. Co., 180 Pa. 463, 36 Atl. 866. The decision in that case has been largely misunderstood; not that the per curiam opinion filed is in the least ambiguous, but chiefly because it has too frequently been overlooked that the opinion nowhere rests the decision on the views expressed by the court below which appear at great length in the report. While the facts in that case are very closely analogous to those we have here, there is this very marked distinction which, without more, would have justified a dismissal of the plaintiffs' bill. In that case, as here, the bill sought to compel the railroad company to construct a farm crossing. The railroad company had neglected its duty for more than 35 years, and during all this period the complaining party had made no attempt to enforce their right, a fact specially emphasized in the opinion. All that was decided in the case was (1) that the bill did not present a case for relief in equity, and (2) that plaintiffs had an adequate remedy at law under the act of February 19, 1849, which it was their duty to resort to. Both conclusions may well be derived from the one fact referred to; and, from the prominence given it in the opinion, it was doubtless allowed controlling significance.

For the reasons we have stated, the assignments of error are overruled, and the decree is affirmed, at cost of appellant.

(245 Pa. 202)

#### BOOTH v. KEYSTONE SPINNING MILLS CO.

(Supreme Court of Pennsylvania. May 4, 1914.)

#### MASTER AND SERVANT (§ 276\*)—INJURIES TO SERVANT—DANGEROUS MACHINERY.

Where plaintiff was assisting a boss spinner in repairing a machine, evidence held insufficient to show that the injury was caused by failure to provide proper machinery.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Samuel Booth against the Keystone Spinning Mills Company. Judgment for defendant, and plaintiff appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The undisputed evidence disclosed that the negligence of the boss spinner was the natural, primary, and proximate cause of the injury to plaintiff, but no issue involving this question was raised by the pleadings, or at the trial, nor was the question of contributory negligence on the part of the defendant determined.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Harry S. Ambler, Jr., Walter P. Bishop, and Ardemus Stewart, all of Philadelphia, for appellant. A. D. Wiler, of Philadelphia, for appellee.

POTTER, J. In this action plaintiff sought to recover damages for the loss of an eye. He was employed by the defendant company as a spinner. It appears that in connection with the spinning machinery a wire was used, known as a faller wire, which was fastened at one end of the spinning mule and ran through fingers placed about three feet apart. The plaintiff testified that on the day of the accident he went to the third floor to assist a machinist and the boss spinner to make some repairs. His statement as to the manner in which the accident occurred is as follows:

"I was down on my knees reaming out collars, and the machinist was standing alongside of me, and he was helping me; he was telling me what to do; and so just as he looked around and said, 'This wire is in my way, cut it and get it out of the road,' Mr. Gilbert said, 'I will soon fix that;' and he said, 'Booth, grab the wire.' I dropped the reamer, and was just about to grab the wire, when it flew up and hit me in the eye."

He also testified that the machinist was the particular boss of the job in which they were engaged at the time of the accident. The right to recover here was based upon the proposition that the wire furnished was not the kind in general use. Fault was found with it upon the ground that it was too hard, and was more dangerous on that account in case of a break owing to its greater tendency to fly. It was suggested that a softer wire would not be so apt to cause injury by flying in case of a break. The court below in entering judgment non obstante veredicto admitted that it might be that defendant should be held to have foreseen that the use of a hard wire might entail injury when in the ordinary course of the work it became necessary to cut it, but that in this case the injury did not result from an ordinary or usual succession of events. The facts were not in dispute, and but one conclusion as to the cause of the injury could reasonably be drawn from them; it therefore became the duty of the court to determine whether or not the injury was a natural or proximate consequence which could fairly have been anticipated by the defendant as likely to follow from the use of the wire. Admittedly the wire did not break in the ordinary course of

the work, nor was it cut in order to be replaced by a new one. The accident did not occur in the use of the machinery, but it happened while repairs were being made, and was the result of too hasty action upon the part of the boss spinner in cutting the wire after requesting the plaintiff to hold it, but without waiting for him to get the wire within his grasp. The men were not at the time working with the wire, but were engaged in repairing the machinery, and found, while so engaged, that the wire obstructed them in their work. The machinist therefore directed the wire to be cut. The boss spinner carried out the direction, and told the plaintiff to take hold of the wire, evidently to prevent the end from flying. It is also apparent from the evidence that plaintiff was not given sufficient time to grasp the wire, and that the boss spinner cut it before the plaintiff succeeded in seizing it. The direct and proximate cause of the accident was therefore the negligence of the boss spinner in failing to give the plaintiff time to carry out the direction given to him before making the cut. For this reason judgment was properly entered for the defendant non obstante veredicto. We think the court below was clearly right in its conclusion that the character of the wire which was used was not to be considered as the proximate cause of the accident. Nor do we find anything in the testimony which can fairly be regarded as indicating beforehand that the making of the repairs would necessarily involve any interference with the wire. As it turned out, it was discovered that the wire obstructed the work of the machinist, and to get it out of the way, the boss spinner, having asked the plaintiff to hold it, promptly proceeded to cut the wire without giving him time to seize it. The accident therefore resulted directly, not from the presence or character of the wire, but from the manner of its removal. We do not see that the court below could have properly reached any other conclusion than that which it did.

The assignment of error is overruled, and the judgment is affirmed.

(245 Pa. 150)

MATLACK v. FAYETTE R. PLUMB, Inc.  
(Supreme Court of Pennsylvania. April 20, 1914.)

MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—FAILURE TO GUARD MACHINERY.

In an action to recover for negligence of a master in failing to guard an emery wheel as required by Act May 2, 1905 (P. L. 352), a nonsuit was properly entered, where plaintiff proved that the wheel was guarded, and there was no evidence that it was not a proper guard.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1003, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

Moschzisker, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by William A. Matlack against Fayette R. Plumb, Incorporated. Judgment of nonsuit. Plaintiff appeals. Affirmed.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

John J. McDevitt, Jr., of Philadelphia, for appellant. Henry Spalding, of Philadelphia, for appellee.

ELKIN, J. At the trial a judgment of nonsuit was entered when the plaintiff rested his case. The negligence charged was failure to properly guard an emery wheel within the meaning of the act of May 2, 1905 (P. L. 352). It is conceded on all sides that the requirements of this act cannot be disregarded by an employer without making himself liable in damages to an employe for injuries resulting from failure to properly guard machinery as the statute requires. The question here is whether a prima facie case was made out under the act. In his case in chief the plaintiff established the fact that the emery wheel was guarded, and the testimony admitted at the trial did not show that the guard provided was not a proper guard. On this exact question there was no evidence at all. The plaintiff did offer to prove by witnesses with more or less expert knowledge that the guard in question was not the same kind of a guard as that used in some other establishments, but the trial judge ruled that the offers were incompetent, and refused to admit the testimony. Under the facts we think this testimony was properly excluded. It was not of the character to meet the question involved under the pleadings.

The case stands with the fact clearly established that the emery wheel had a guard, and no evidence to show that it was not a proper guard. Under these circumstances should the case have been submitted to the jury? The learned court below answered this question in the negative, and after consideration we have concluded that this was the proper view of the case under the facts. The present case differs from all other cases in which the application of the act of 1905 was involved, because in most of those cases the machinery was not guarded at all, and in those cases in which a guard had been provided there was evidence that the guard relied on was not a proper one. When the facts show that no guard was provided for dangerous machinery, or when a guard is provided, but there is evidence to show that it was not a proper guard, the case is clearly for the jury, and we have said so in a number of recent decisions. In no case, however, has it been decided, when the plaintiff proves the machinery to have been guarded, and offers no evidence to show that the guard thus provided was not a proper one, the case must go to the jury. In every case of this kind the burden is on the plaintiff to prove the negligence charged, and if that negligence be failure to properly guard dangerous machin-

ery, it is not sufficient to prove that the machinery was guarded and then rest without offering any competent testimony to show that the guard provided was not a proper guard for the purpose intended.

Under these circumstances we think the learned court below properly disposed of the case, and that nothing contained in the present record warrants a reversal of the judgment.

Judgment affirmed.

MOSCHZISKER, J. (dissenting). I cannot agree that "in chief the plaintiff established the fact that the emery wheel was guarded." The most that the testimony shows is that "it had a covering over it to carry the dust away," made of "tin"; and there was nothing to suggest that this was intended for, or would serve as, a protection to an operator in case the wheel should break, which was the contingency to be guarded against. Next, I do not agree that the plaintiff was obliged to produce opinion testimony to show this tin device was not a "proper guard." In entering the nonsuit the trial judge indicated that, in his opinion, the plaintiff's proofs were lacking, because he had not produced a witness who "was familiar with the trade and customs in regard to such machinery to testify that this guard was not a proper guard"; and the majority opinion seems to concur in that view. To my mind this is clearly wrong; for, even if it be assumed that the tin dust shield which surrounded this wheel might be found to be a device that would serve as some protection, there was no necessity for opinion testimony in order to determine its sufficiency as a "proper guard," and that was the issue. In other words, conceding for the purposes of this case that the burden was upon the plaintiff to show that the wheel was not properly guarded, the facts were susceptible of, and were given, exact description, and the inferences to be drawn therefrom depended upon the application of common sense and general knowledge, and not upon the advice of those possessing special knowledge; hence it was for the jury to take the testimony describing the wheel and the dust shields and therefrom to decide for themselves whether or not the latter was a proper guard.

"When all the circumstances can be fully and adequately described to the jury, and are such that their bearing on the issue can be estimated by all men, without special knowledge or training, opinions of witnesses, expert or other, are not admissible." *Ake v. Pittsburgh*, 238 Pa. 371, 375, 86 Atl. 268.

Finally, in *Wagner v. Standard Sanitary Mfg. Co.*, 244 Pa. 310, 91 Atl. 353, we decided that:

"It is competent to produce testimony to show the kind of guards that were available to the defendant and regularly employed by others using such wheels."

And under this rule the plaintiff was permitted to show that it was usual to inclose emery wheels in "three-sixteenth and quarter

inch steel guards"; further, that a guard of this character was "sufficient to resist a breaking emery wheel."

It seems to me that the evidence was ample to take the case to the jury and that error was committed in the nonsuit; therefore I dissent.

(245 Pa. 220)

**COMMONWEALTH v. ABEL.**

(Supreme Court of Pennsylvania. May 4, 1914.)

**1. CRIMINAL LAW (§ 519\*)—EVIDENCE—CONFESSIONS.**

A statement signed by defendant setting forth that it was made of his own free will, and that his shooting of deceased was accidental, was properly admitted in evidence, where it appeared that he made it voluntarily, without being induced by any promises, and with knowledge of its contents and that it would be used against him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1163-1174; Dec. Dig. § 519.\*]

**2. HOMICIDE (§ 203\*)—STATEMENT OF DECEASED—COMPETENCY AS DYING DECLARATION.**

Where it appeared that deceased, a boy 12 years old, was taken to a hospital after being shot, and there told by a physician that his condition was serious, that he was a Catholic, and received from a priest the last rites of the church, which are only administered when danger of death is imminent, and that after he was operated on he asked his father to have him buried in the country in case of death, his statement made the next day, about two hours before his death, and after being told by the physician that he could not live much longer, was properly admitted in evidence as a dying declaration.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 430-437; Dec. Dig. § 203.\*]

**3. HOMICIDE (§ 253\*)—MURDER OF FIRST DEGREE—SUFFICIENCY OF EVIDENCE.**

Evidence held to warrant the inference of a deliberate and willful intent to take life, and to authorize a verdict of murder of the first degree and sentence of death.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 523-532; Dec. Dig. § 253.\*]

Appeal from Court of Oyer and Terminer, Philadelphia County.

William Abel was convicted of murder of the first degree, and appeals. Affirmed.

From the record it appeared that the evidence was not contradicted that the defendant had attempted to commit an unnatural crime upon the deceased, a boy of about 12 years; that the boy struggled to escape from defendant; and that defendant then drew a revolver and shot deceased in a vital part of his body, and ran away. The deceased was taken to a hospital, where he died the next day. Other facts appear in the opinion of the Supreme Court.

The jury found a verdict of guilty of murder in the first degree, upon which sentence of death was passed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHISZKER, JJ.

Peter M. MacLaren and John R. McLean, Jr., both of Philadelphia, for appellant. Joseph H. Taulane, Asst. Dist. Atty., and Samuel P. Rotan, Dist. Atty., both of Philadelphia, for the Commonwealth.

POTTER, J. [1] It appears from this record that at a court of oyer and terminer for the county of Philadelphia William Abel, the defendant, was indicted, tried, convicted of murder of the first degree, and sentenced. The first assignment of error is that the learned court erred in admitting as evidence in the case an alleged voluntary statement made by the defendant. It is suggested in the argument that undue pressure was brought to bear on the prisoner in order to procure the statement. This suggestion is not strongly pressed, however, and our reading of the evidence has not satisfied us that any undue pressure was brought to bear. The testimony shows that the statement was made without any promises whatsoever being made to the prisoner, and with the knowledge upon his part that it would be used against him at the trial. The defendant can read and write; and it appears that he signed the statement knowing its contents, and knowing that it set forth that it was made of his own free will and accord. In the statement he admitted that he shot the boy, but claimed that it was accidental. In view of these facts, and in the absence of any denial on the part of the defendant that the statement was made voluntarily, we think it was admissible against him.

[2] The second assignment relates to the admission in evidence upon the trial, as a dying declaration, of a statement alleged to have been made in the hospital by the boy, Thomas King, who was shot, and who died as a result thereof. We think the requisites for the admission of the declaration existed in the present case. The testimony shows that after the boy was shot and was taken to the hospital he was advised by the physician in charge that his condition was serious. That it was doubtful if they could pull him through. It appeared that the boy was a Catholic, and that a priest was sent for, who administered to him the last rites of the church, which are only administered when the danger of death is imminent. After this the boy was operated upon. The next morning the police came to the hospital, and the physician said to the boy, who had passed a bad night:

"Tommy, I don't think you are going to live much longer. We want you to tell us the truth; tell us all you know, so we can find out who did this to you, and have them punished in the proper way."

The boy nodded his head and told his story. It also appeared that shortly after the operation the boy twice asked his father if, in case of his death, the father would

take him to the country and bury him. The father said he would. In the face of this testimony we do not see that it can be reasonably doubted that the boy told his story under the impression that his death was near at hand. As a matter of fact, he died within two hours thereafter. We cannot therefore say there was error in admitting the statement.

[3] Nor do we see any merit in the assignment of error which suggests that the ingredients necessary to constitute murder in the first degree were not shown. It appeared that the boy was first assaulted, and then was brutally shot in a vital part of the body; the pistol being held so close as to singe and blacken the flesh. From the facts attending the shooting, which were shown, the jury could reasonably infer the existence of an intention to kill. Taking into account the part of the body in which the boy was shot, it is to be presumed that whoever fired the shot knew that it was likely to be fatal. No extenuating circumstances whatever were shown. We regard the evidence as sufficient to warrant the inference of a deliberate and wilful intent to take life. Our examination of the record has satisfied us that the defendant received a fair and impartial trial, and we have no reason to doubt the justice of his conviction. Neither in the charge to the jury nor in the admission of evidence do we find anything of which the defendant can justly complain.

The assignments of error are overruled, and the judgment is affirmed, and it is ordered that the record be remitted to the court below, for the purpose of execution.

(245 Pa. 184)

SCHLEICH et al. v. BALTIMORE & O. R. CO.

(Supreme Court of Pennsylvania. April 27, 1914.)

**1. RAILROADS (§ 281\*)—INJURY TO TRESPASSER—NEGLIGENCE—LIABILITY.**

The fact that a flagman is negligent in starting a train without making sure that boys who have been playing about in plain view are not still on the cars will not render the railroad company liable for injuries to a boy who has hidden himself in a car, and was not one of those playing about the train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 902-909; Dec. Dig. § 281.\*]

**2. RAILROADS (§ 281\*)—INJURY TO TRESPASSER—NEGLIGENCE.**

Where a boy hid himself in a car, and was injured from the starting of the train at the signal of a flagman who did not know of the boy's presence, the fact that the boy was of tender years did not render negligent the flagman's failure to discover him; the standard of duty in case of concealed trespassers being the same whether the person injured be an adult or a child.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 902-909; Dec. Dig. § 281.\*]

**3. RAILROADS (§ 281\*)—INJURY TO TRESPASSER—NEGLIGENCE.**

While trainmen should not intentionally or wantonly injure a trespasser, they need not hunt for concealed trespassers before starting a train.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 902-909; Dec. Dig. § 281.\*]

**4. APPEAL AND ERROR (§ 882\*)—GIVING FULL CREDIT TO WITNESS—RIGHT TO COMPLAIN.**

Plaintiffs in a negligence case could not complain on appeal that the jury gave full credit to their own witness.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Charles Schleich and another against the Baltimore & Ohio Railroad Company for damages for death. From a judgment refusing to take off nonsuit, plaintiffs appeal. Affirmed.

Upon a motion to take off the nonsuit, Audenried, J., filed the following opinion:

On the afternoon of March 8, 1912, the plaintiff's son, Raymond, a boy about nine years old, met another boy of his own age at Sixteenth and Porter streets, in this city, and set out with him for the railroad tracks laid on a strip of ground belonging to the defendant, and running east and west along the south side of Oregon avenue; their purpose being to steal coal from the coal cars there. The grade of Oregon avenue at this point is six or seven feet above that of the railroad.

The boys crossed that street and descended to the defendant's tracks by a path that runs south from a point opposite the mouth of Bancroft street, a small thoroughfare which leads north and south. They found standing on the northernmost track a west-bound train consisting of 45 or 50 coal cars. Its rear car was then opposite Sixteenth street, while its locomotive was about three blocks to the west of that point.

This train had become stalled for want of steam. Its crew consisted of an engineer, a fireman, a brakeman, a conductor, and a flagman. When the two boys arrived on the scene, all of the crew except the flagman were on or about the engine or its tender. The flagman had been stationed one block to the east of the rear end of the train. The train had lain at this point for 20 minutes, and the engineer, having at last succeeded in getting up enough steam to start with, had given the signal recalling the flagman.

Five minutes elapsed before the latter regained the train. During that time Raymond succeeded in climbing upon a car which stood fourth or fifth from the rear end of the train, and got down inside of it. Here he was completely hidden. Nobody could see him without mounting the car and peering over its side, or getting up on top of the adjoining cars and looking down. No one saw him board the train except his companion, and the latter seems to be the only person who knew that Raymond was anywhere near it.

Within a minute or two after the boy had boarded it, the flagman reached the rear car and from its platform gave the engineer the signal to start. The train immediately began to move. As the flagman signaled the engineer he had looked along first one side of the train and then the other, but had observed none near it who could be hurt by its motion. A number of boys had been playing on the cars before this; but they had been called away by a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

woman at the window of a neighboring house before the train started, and they did not approach it again until it got under way.

The plaintiffs' son was not with those boys. The first person to see him after he passed from the sight of his comrade into the coal car was the flagman. When the train had moved about five car lengths the latter, who was on the back platform of the last car, noticed him sitting on the north side of the ditch between the railroad tracks and the Oregon avenue embankment. His attention had been arrested by the child's call; but until the latter called a second time the man thought that he was playing, and did not observe that he had been hurt. The rear end of the train was then a car's length to the west of where the boy was sitting. As soon as he realized that something was wrong the brakeman jumped from the car and, finding that the child's leg had been cut almost off, carried him up the bank to Oregon avenue. Subsequently the boy was carried by an ambulance to the hospital. There he died the next day. How he came to be injured, nobody knows. Presumably the wheels of the train passed over his leg; but no one saw this happen.

The plaintiffs' evidence at the trial disclosed the facts above outlined. The court on motion of the defendant entered a nonsuit, which we are now asked to take off.

[1] The plaintiffs contend that the jury should have been allowed to say whether or not the flagman was negligent in failing to observe the presence of their son on the train before starting it, and in starting the train without making sure that there was nobody on it who wanted to get off. This proposition is based on the fact that a dozen or more boys had been playing about the train in plain view of everybody, and the assumption that it might have been expected that some of them were still on the cars when the flagman was called in.

The answer to this argument is that all the boys whom the flagman saw or might have seen without extraordinary effort had actually left the train before he signaled the engineer to start it, and none of them were injured. Even if it could fairly be said that with respect to these boys he was guilty of negligence, it does not follow that such negligence made him responsible for the death of the boy who was hurt. To fix responsibility on the flagman for the death of the latter, it must be shown that the death resulted from negligence as to him.

[2, 3] As to the Schleich boy, however, there was no negligence on the part of the flagman. He was hidden in one of the cars. There he had no right to be. The car was private property. It was standing on private land. Neither the flagman nor the other men on the train were bound to hunt for concealed trespassers. It was their duty, it is true, not to injure him intentionally or wantonly. Had the flagman seen him in the act of climbing down from the car, he would have been negligent if he signaled for the engineer to start the train before the boy reached a place of safety. Even trespassers are entitled to humane consideration. But the flagman did not see the boy at all, and he was no more bound to take notice of his presence on the train, because the trespasser happened to be of tender years, than he would have been had the latter been a man. The standard of duty in a case like this is the same whether the person injured is an adult or a child. *Thompson v. Railroad Co.*, 218 Pa. 444, 67 Atl. 768, 19 L. R. A. (N. S.) 1162, 120 Am. St. Rep. 897, 11 Ann. Cas. 894.

The correctness of this view was recognized in *Walsh v. Pittsburgh Rys. Co.*, 221 Pa. 463, 70 Atl. 826, 32 L. R. A. (N. S.) 559, the case on which counsel for the plaintiffs principally relies. The sending of that case to the jury was held to be warranted only because the evi-

dence showed that the man by whose negligence the plaintiff was injured had the fullest opportunity to see her, to observe where she was, and to realize the consequence that would probably result from his act. The presence of this person could not be secured by either party at the trial, and the jury was left to inference as to his actual knowledge of the circumstances under which he committed the act that did the injury.

[4] In the case at bar the man whose alleged negligence is pointed to as the cause of the accident appeared on the witness stand at the call of the plaintiffs and swore that he did not see their son on the train. If that evidence be accepted as true, and the plaintiffs who put him on the stand cannot complain if full credit be accorded to their own witness, no room was left for conjecture on this subject.

The court dismissed the motion to take off the nonsuit.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

Henry B. Hodge, T. Truxton Hare, and Paul Reilly, all of Philadelphia, for appellants. W. B. Linn and H. B. Gill, both of Philadelphia, for appellee.

PER CURIAM. Nothing can be added to the clear and concise statement of the facts and the law applicable thereto by Judge Audenried, and on his opinion we affirm the judgment appealed from.

(245 Pa. 107)

Appeal of CUMBERLAND VALLEY R. CO.  
(Supreme Court of Pennsylvania. April 20, 1914.)

1. RAILROADS (§ 99\*)—GRADE CROSSINGS—PETITION FOR LEAVE TO ESTABLISH—BURDEN OF PROOF.

In view of the fact that Act June 7, 1901 (P. L. 531), forbidding public authorities, except in cities of the first and second classes, to construct grade highway crossings without permission of court, is not an enabling act to facilitate the building of highways over railroads at grade, but is prohibitory, a heavy burden of proof to establish the necessity rests on public authorities petitioning for leave to establish a grade crossing.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 293-295, 297-304; Dec. Dig. § 99.\*]

2. RAILROADS (§ 99\*)—GRADE CROSSINGS—PETITION FOR LEAVE TO ESTABLISH.

Where, on a petition by township supervisors for leave to establish a grade crossing, the court found that between 50 and 60 trains daily passed over the proposed crossing, some at a speed of from 40 to 45 miles an hour and others from 65 to 70 miles an hour, that the railroad traffic was increasing and the view of the track obstructed by growing corn at certain seasons, though the smoke from the engines could be seen above the corn, and that the cost of constructing an overhead crossing would be \$20,000, half of which would be borne by the railroad company, and there was no finding as to the probable amount of travel on the highway, but the petition for opening same had been signed by 150 residents of the township, it was error to grant the petition in consequence of a conclusion of law that the highway traffic would be small, and that the cost of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



constructing an overhead crossing would be excessive.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 293-295, 297-304; Dec. Dig. § 99.\*]

**Appeal from Court of Common Pleas, Franklin County.**

Petition of the Board of Township Supervisors of Antrim Township, Franklin County, for permission to establish a grade crossing in Antrim Township over the Cumberland Valley Railroad. From a decree granting the petition, the Cumberland Valley Railroad Company appeals. Reversed.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZIS-KER, JJ.

Walter K. Sharpe and O. C. Bowers, both of Chambersburg, for appellant. A. J. W. Hutton and W. J. Patton, both of Chambersburg, for appellee.

BROWN, J. [1] The settled policy of the state—no longer merely judicial—is against grade crossings over railroad tracks. By the act of June 7, 1901 (P. L. 531), public authorities, except in cities of the first and second classes, are forbidden to construct a public highway at grade over the tracks of a railroad company, unless permission to do so be obtained from the court of common pleas of the district in which the crossing is situated; and such permission must be obtained in the manner provided by the fourth section of the act. It is not an enabling act to facilitate grade crossings of railroads by highways; on the contrary, it is a prohibitory one, and, when public authorities petition for a grade crossing under the provisions of its fourth section, they come into court with a heavy burden of proof resting upon them. *Mifflinville Bridge*, 206 Pa. 420, 55 Atl. 1122.

[2] This appeal is from permission granted by the court below to the supervisors of Antrim township, Franklin county, to construct a public highway at grade over the double tracks of the Cumberland Valley Railroad Company. In view of the facts found by the court and of an unchallenged averment in the sixth paragraph of the answer of the appellant to the petition of the appellees for permission to construct the crossing, the order authorizing it ought not to have been made. In 1912 a petition, signed by more than 150 residents of Antrim township, was presented to the court of quarter sessions of the county, asking for the appointment of viewers to view and lay out a public road to run from the Hagerstown road to the Williamsport turnpike, two public thoroughfares in the township. The viewers reported in favor of the proposed road, and, after their report had been absolutely confirmed by the court, and an order made for the opening of the road, the supervisors of the township presented their petition, under the provisions of the

act of 1901, asking permission to construct the road at grade over the tracks of the appellant. Between 50 and 60 trains pass daily at the point where the proposed public road crosses the tracks of the railroad company. Most of these are fast freight and passenger trains, the former running at a speed of from 40 to 45 miles an hour, and the latter at a speed of from 65 to 70 miles an hour. The traffic of the railroad company is rapidly increasing. The land on each side of its tracks where the new public road will cross them is cultivated by farmers, and a finding of the court below is that, when corn grows high in the fields at the point of the proposed grade crossing, the roadbed of the company cannot be seen in approaching the tracks, though smoke from the engines can be seen above the corn. In this latter part of the finding the court below seems to have forgotten that smoke is not visible in darkness or in fog. Though the learned judge failed to find as a fact that the proposed grade crossing will be dangerous, one of his legal conclusions, inconsistent with the facts which he found, is that the crossing will not be a dangerous one. We are unable to understand how such a conclusion could have been reached in view of the facts to which we have referred. Our conclusion, from a review of what has been brought up on the record, is that the proposed grade crossing will be dangerous, and that the court below erred in concluding otherwise.

The act of 1901 provides that a grade crossing may be constructed if the court having jurisdiction of the matter shall be satisfied that such a construction is reasonably required to avoid excessive expense, in view of the small amount of traffic on the highway. Among the court's findings there is none that the amount of traffic on the highway will be small. True, there is a finding that it is likely to be used only for neighborhood travel, but how extensive that may be does not appear. It does appear, however, that more than 150 residents of Antrim township petitioned for the road, which connects two public highways running parallel to each other, east and west of the railroad, and it may be in view of this that the court below could not have found as a fact that the "amount of traffic" over the road would be small. One of its legal conclusions was that, as the amount of travel on the highway was likely to be small, the expense which would be incurred in constructing an overhead structure would be excessive and almost prohibitory. As just stated, there was no finding as to the probable amount of travel on the highway. It may be large, even if it be likely that the highway will be used only for the neighborhood travel; for many people may live there. More than 150 of them set forth in their petition for the road that it was necessary for the accommodation of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexer

public, and the viewers so found. The cost of erecting an overhead crossing will be at least \$20,000, as found by the court; but one-half of this will be borne by the railroad company. We cannot concur in the conclusion that the half to be paid by the county will be excessive and ought to be avoided, in view of the amount of traffic over the new road. The only expense to the township, based upon the interest it will have to pay if it should make a loan to enable it to pay for one-half of the construction of an overhead bridge, will be but \$500 or \$600 a year. The crossing authorized by the court below will, under the circumstances to which we have referred, be a death trap to the public. Few or many may be caught in it, but, without regard to the number for which the appellees would set it, it was not for the court below to compare and estimate the value of life and limb and weigh that value with a few thousand dollars additional expense to be incurred in erecting an overhead crossing, and call that expense excessive. *Pennsylvania Railroad Co. v. Bogert*, 209 Pa. 589, 59 Atl. 100.

The proposed public road will occupy the bed of a private road at the point where it crosses the railroad, and this was given as an additional reason by the court below for permitting the public grade crossing. This private road was for the exclusive accommodation of two farmers, and was their only means of access to a public highway. The public had no rights in it, and could not use it, but they need a road to enable them to get from one public thoroughfare to the other, paralleling the railroad, and such road necessarily crosses the railroad tracks. The route adopted by the viewers happened to take in the private road used by the two farmers, which crossed the tracks at grade; but that crossing, which accommodated but two families, has been wiped out by the new road, which is to accommodate the traveling public.

The private crossing is not in the case. *Pennsylvania Railroad Co. v. Bogert*, supra. The crossing in controversy is a new and public one, and not the perpetuation of an old, private one. It was, therefore, a forbidden one under the act of 1901, unless those who asked for it were able to show that it ought to be permitted under the provisions of the fourth section of that act. This, in our judgment, the appellees failed to do, and the court below should have so concluded, in the exercise of the discretion vested in it.

The order or decree appealed from is reversed, at the costs of the appellees.

(245 Pa. 113)

CUMBERLAND VALLEY R. CO. v. KOONS  
et al.

(Supreme Court of Pennsylvania. April 20,  
1914.)

Appeal from Court of Common Pleas, Franklin County.

Bill by the Cumberland Valley Railroad Company against George W. Koons and others. From a decree dissolving a preliminary injunction, plaintiff appeals. Reversed.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

Walter K. Sharpe and O. C. Bowers, both of Chambersburg, for appellant. A. J. W. Hutton and W. J. Patton, both of Chambersburg, for appellees.

BROWN, J. This appeal is from a decree dissolving a preliminary injunction restraining the supervisors of the township of Antrim, Franklin county, from constructing the grade crossing involved in appeal No. 294, January term, 1913 (*Cumberland Valley R. R. Co.'s Appeal*, 91 Atl. 254), in which we have this day filed an opinion reversing the order or decree of the court below. For the reason stated in that opinion, this appeal is sustained.

The decree of the court below is reversed and the preliminary injunction is reinstated, the costs below to be disposed of on final decree, and those on this appeal to be paid by the appellees.

(33 Conn. 394)

**HILLS v. HART et al.**

(Supreme Court of Errors of Connecticut. July 13, 1914.)

**1. WILLS (§ 163\*)—CONTESTS—UNDUE INFLUENCE—BURDEN OF PROOF.**

One contesting a will on the ground of undue influence has the burden of proving the undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.\*]

**2. WILLS (§ 163\*)—UNDUE INFLUENCE—PRESUMPTIONS—EXISTENCE OF PERSONAL CONFIDENCE BETWEEN PARENT AND CHILD.**

The existence of a relation of personal confidence between a favored legatee and testatrix, her mother, does not raise a legal presumption of undue influence by the legatee, nor place on her the burden of proving that the will was not procured by undue influence, for a child may use all fair and honest methods to secure his parent's confidence and obtain a share of his bounty.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 388-402; Dec. Dig. § 163.\*]

**2. WILLS (§ 82\*)—TESTAMENTARY CAPACITY—CONTESTS.**

One possessing testamentary capacity may dispose of his property as he pleases, and neither judge nor jury, in proceedings to contest the will, may make one for him, though they may think they could treat his family connections with greater justice.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 203; Dec. Dig. § 82.\*]

**4. WILLS (§ 166\*)—CONTESTS—UNDUE INFLUENCE—EVIDENCE.**

A finding that a will executed by a woman of active mind, strong intelligence, and good reasoning powers was procured by undue influence of a favored legatee, a child, cannot be rested on surmise, or suspicion, or inferences drawn from inconsequential facts, but can be based alone on material facts established, and inferences which fairly and convincingly lead to the conclusion of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

**5. WILLS (§ 166\*)—CONTESTS—UNDUE INFLUENCE—EVIDENCE.**

The existence of undue influence may be shown by direct proof, or by inferences from facts proven which logically and reasonably lead to the conclusion of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

**6. WILLS (§ 166\*)—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.**

Evidence held not to justify a finding that a will was procured by undue influence of a favored legatee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

**7. WILLS (§ 155\*)—UNDUE INFLUENCE—EVIDENCE.**

Where a will represents the wishes of testatrix, and is such a disposition of her estate as she desires, and she has not done anything against her will, and her discretion has not been controlled, or her free agency overcome, the mere fact that a favored legatee had succeeded in poisoning testatrix's mind against a child practically disinherited does not alone justify an inference that the will was the result of undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 376-381; Dec. Dig. § 155.\*]

Appeal from Superior Court, Hartford County; William S. Case, Judge.

Proceedings for the probate of the will of Julia G. Hills, deceased. From a decree of the probate court, an appeal was taken to the superior court by Stuart F. Hills, where there was judgment setting aside parts of the will, and permitting the remainder to stand, and A. Elijah Hart and another, executors, appeal. Reversed, and new trial ordered.

Joseph L. Barbour and Lewis Sperry, both of Hartford, for appellants. William M. Maltbie, Albert C. Bill, and Hugh M. Alcorn, all of Hartford, for appellee.

**WHEELER, J.** Mrs. Hills died June 22, 1912; her will was executed November 13, 1911, and probated July 9, 1912. She was a widow, 65 years of age, having three adult children, Louis, Stuart, and Mrs. Hinkley. The will gave to Mrs. Hinkley her personal and household effects and a savings bank deposit of about \$680; to Stuart \$2,000; to a long-time domestic servant \$1,000; and in the fifth paragraph it disposed of the residue, giving in the second clause two-thirds thereof to Mrs. Hinkley, and in the third clause it disposed of the remaining one-third, giving \$1,500 to Louis and his wife and daughter, and the balance in trust, the income of which should go to Louis for life, with remainder to his daughter.

The jury found that the third clause of the will and the second paragraph of the fifth clause of the will had been procured by the undue influence of Mr. and Mrs. Hinkley, and were not the will of Mrs. Hills. From the decree entered upon this verdict, the defendant executors appeal.

In our discussion we shall consider in the main the facts which are conceded and those most favorable to the plaintiff which the jury might reasonably have found upon the evidence.

[1] The burden of proving the issue of undue influence was upon the contestant. He alleged it; he must prove it by a fair preponderance of the evidence.

[2] The fact that there existed a relation of personal confidence between Mrs. Hinkley and her mother raised no legal presumption of undue influence, and did not place upon her the burden of proving that the will had not been procured by undue influence as alleged.

Confidence, close and continuing, should exist between parent and child. It is the child's privilege to anticipate some share of the parent's estate. He may use all fair and honest methods to secure his parent's confidence and obtain a share of his bounty. From such a relationship alone, the law will never presume confidence has been abused and undue influence exercised. *Lockwood v. Lockwood*, 80 Conn. 513, 523, 69 Atl. 8; *Mooney v. Mooney*, 80 Conn. 446, 452, 68 Atl. 985; *Dale's Appeal*, 57 Conn. 127, 144, 17 Atl. 757.

The distinction between a legatee who is a

child and one who is a stranger, being the religious adviser, business agent, attorney, or physician of the testatrix, is marked. The law casts the burden of showing the absence of undue influence upon the legates holding such fiduciary relation; otherwise it remains with the party alleging it.

Mrs. Hills was, at the time she executed her will on November 11, 1911, and long prior thereto, in good physical and mental health, and so continued until a few days of her death, which occurred June 22, 1912. She was a woman of quick and active mind, of strong intelligence, fair education, broad information, widely traveled, keenly observant, of retentive memory, and deeply interested in all current events. She possessed good reasoning powers and reached her conclusions by a logical sequence of reasoning; she was a strong thinker, very independent in her judgment and positive in her opinions; she had had unusual business experience for a woman, and held religious views, liberal and catholic. She regulated her own life, dominated her household, and managed her business affairs with such sagacity, courage, and success that the competency her husband left her had more than doubled, although she had provided for her children and self generously.

[3] She had the legal right to make her own will as she pleased. Neither judge nor jury have the power to make one for her, even though they may think they can treat her family connections with greater justice. *Sturdevant's Appeal*, 71 Conn. 392, 397, 42 Atl. 70.

[4] It is not inconceivable that a testatrix of this character, even in the strength of her vigor, may have been unduly influenced; it is, however, certain such a conclusion, so foreign to her true character, should not be reached upon surmise, or suspicion, or inferences drawn from inconsequential facts, but should rest on the safe foundation of material facts proven, and inferences which fairly and convincingly lead to that conclusion.

The circumstances surrounding the making and execution of Mrs. Hills' will furnish no evidence whatever of undue influence.

The will makes an unequal distribution among the children, yet one which is neither unnatural nor in dissonance with the testatrix's expressed intent.

There were special reasons for leaving Louis' share in trust. Mrs. Hinkley was an only daughter, who had always lived with her mother, and her mother had frequently declared her purpose of giving her the largest share of her estate. Stuart had inherited and still retained a share of his father's estate, and was capable of earning and did earn a fair living.

The jury might have found from the testimony of Stuart that some time prior to January, 1911, a former will of Mrs. Hills existed

under which, assuming the estate was then as much as at the decease of Mrs. Hills, Mrs. Hinkley would have received about \$27,000, and Stuart and Louis about \$15,000 each.

Under a former will admittedly made in January, 1911, Stuart received \$5,000; Louis and Mrs. Hinkley about \$28,000 each.

Under the will before us Stuart received \$2,000, Louis about \$19,000, or \$9,000 less than by the January will, and Mrs. Hinkley about \$40,000, or \$12,000 more than by the January will.

If the verdict stands, Louis would get over \$32,000, and \$13,000 of this would be free from a trust, Mrs. Hinkley would get nearly \$15,000, and Stuart would get over \$13,000.

It is conceded that Mrs. Hills never departed from her settled purpose to leave the body of Louis' share in trust, and to give Mrs. Hinkley a larger share than either of the sons.

The verdict reverses her intention and gives Louis over twice as much as Mrs. Hinkley, and gives him about \$13,000 free from the trust.

In the first will Stuart receives substantially the same share as Louis; in the January will he only receives a \$5,000 bequest; and in the November will he receives only \$2,000. Were these changes in her disposition of her property due to a natural increase in her love for her daughter and a decrease in her feeling for Stuart, or were they due to other causes?

[5] The existence of undue influence may be shown by direct proof, and none such is here claimed, or by inferences from proven facts which logically and reasonably lead to such conclusion; and it is from such proof the contestant insists the jury might have drawn the inference of undue influence.

[6,7] The ultimate question is: Upon the evidence could the jury reasonably have drawn the inference of undue influence?

The contestant bases his claim of undue influence, in general, upon these considerations: That there existed on the part of Mrs. Hills toward her son Stuart so great love as to make him her favorite child; that this manifested itself in the will made prior to January, 1911, which gave him about one-third of her estate; that her affection for him began to abate in the year 1900, and her association with him ceased in December, 1910, but that in reality her love for him never died; that there was no adequate cause in his conduct or in their relations to each other to account for her change in affection or for the diminished share in her bounty shown by the wills of January and November, 1911; that Mr. and Mrs. Hinkley, living as they did with Mrs. Hills, had the fullest opportunity to have not only gained her confidence, but to have influenced her testamentary treatment of Stuart to the advantage of Mrs. Hinkley; that Mrs. Hinkley was of a hard and domineering character, and on sev-

eral occasions indicated her control over her mother and her own purpose to bend her mother to her will; that both Mr. and Mrs. Hinkley were keenly alive to bettering their own financial prospects; that through advancing years Mrs. Hills must have become more or less dependent upon her daughter; that Mrs. Hinkley was a woman capable of intense feeling and loved her brother deeply, never became reconciled to his marriage, always disliked his wife, and toward the end of their association the relation between Mrs. Hinkley and Mrs. Stuart Hills reached a point of armed neutrality until in February, 1910, the estrangement, through a quarrel, developed into an open rupture of all association; that the root of the trouble lay in a feeling of jealousy engendered in her because of her brother's marriage; that Mrs. Hinkley was the instigator of the February quarrel and the one at fault; that Mrs. Hills' knowledge of it must have come through her, and that in consequence of it the relations between her brother Stuart's family and her mother's almost ceased, and her mother's feeling for Stuart began to change; that the cessation of all family relations ceased at Christmas, 1910, when Stuart returned the Christmas gifts sent by Mrs. Hills', Louis' and Mrs. Hinkley's families to Stuart and his children because no present had been sent his wife; that the recital of the reasons for his course in returning the presents must have come to Mrs. Hills through Mrs. Hinkley, and could not have been fairly presented in view of the immediate making by Mrs. Hills of the January will; that on several occasions Mr. Hinkley had made false statements of Stuart to his mother, and after her decease had expressed deep regret at his course; that all the circumstances indicate Mr. and Mrs. Hinkley poisoned the mind of Mrs. Hills against Stuart, and as a consequence she determined to deprive him of the great part of her bounty as given him by the earliest will, and in November, 1911, as her prejudices grew, she further decreased his share.

Aside from the conduct of Mr. and Mrs. Hinkley toward Stuart in the last sickness of Mrs. Hills, and after her decease, and the inferences to be drawn from the demeanor of witnesses and the conduct of the appellees' case, these are the considerations from which the contestants maintain that the jury might reasonably have found undue influence on the part of Mr. and Mrs. Hinkley.

Assuming that the jury might have found the substantial elements of these considerations proven, it would still be necessary to inquire where is there any evidence that Mrs. Hills was unduly influenced in making her will?

If Mr. and Mrs. Hinkley had systematically sought to poison the mother's mind against her son and had succeeded, and under the influences of the prejudices so generated she made her will, it does not follow as an inference that the will was the product of their

undue influence. If the will represented her wishes, and was such a disposition of her estate as she desired, and she was then of sound and disposing mind, it is her will, and not another's. She has not done something against her will, and contrary to her wishes. Her discretion and judgment have not been controlled, and her free agency has not been overcome. This is our test. St. Leger's Appeal, 34 Conn. 434, 442, 91 Am. Dec. 735.

All the evidence points to the uncontradicted fact that the will of November, 1911, represented fairly and fully Mrs. Hills' desires and feelings at that time toward her children. She went about its making, as she did about all of her business, alone; she instructed her lawyer as to her desires, and she did not ask him for advice as to how she should dispose of her estate. Neither Mr. nor Mrs. Hinkley were present at the interviews regarding the will, and, so far as this record shows, they never knew nor made a request or a suggestion about its contents, and never made a request of Mrs. Hills as to the disposition of her estate.

If they could be held responsible for having poisoned the mind of Mrs. Hills against Stuart, they cannot be found guilty of having controlled the provisions of her will, in the absence of proof that they had ever communicated with her about it, or she with them, and in the face of the fact that the will represented her feelings and wishes, and was made in their absence, and that they were and remained ignorant of its contents.

In addition to this, we do not think the evidence fairly susceptible of the inference that either Mr. or Mrs. Hinkley designedly sought to poison the mother's mind against the son. It was an unhappy family difference. The mother had changed in her feeling for her son. Its beginnings came through the family dislike for Stuart's wife. The February, 1910, difference between Mrs. Hinkley and Mrs. Stuart Hills—and the jury might very reasonably have found that Mrs. Hinkley was the one at fault at this time—greatly aggravated the strained relations. When Stuart returned the Christmas presents because his wife had been overlooked, his loyalty toward his wife deeply offended his mother, and was the occasion for a cessation of family relations between the families. It was not what Mrs. Hinkley told her mother of this incident, but the fact of the return of the presents which led to the breach between mother and son. The will of January, 1911, immediately followed. Mother and son failed to greet each other when they met. Each side claims the other was at fault; but it is clear the mother believed it was her son's fault, and she grieved greatly over it.

The testimony is abundant and unimpeachable that the November will did express Mrs. Hills' wishes, and continued to express them to the last.

If the jury did find that Mrs. Hinkley had a motive for desiring a change in her moth-

er's will, and found that she had abundant means and opportunity for influencing her mother, this is very far from furnishing evidence that the opportunity was used and used for an improper purpose.

All of the statements Mr. Hinkley is said to have made to Mrs. Hills of Stuart—and they appear to be confined to three subjects—were made quite a time before the breach between mother and son; the son subsequently had an opportunity to explain them; two of the subjects were founded on fact; the relations between the mother and son continued until long after cordial and affectionate; and no change in her will was made until much later. Under these circumstances we regard the statements, if made, as of very little weight in tending to prove the undue influence charged.

There is no reasonable basis, when all the evidence is considered, for the argument that Mrs. Hills was dependent upon Mrs. Hinkley. The character and characteristics of Mrs. Hills show the reverse to be the truth.

So, too, it could not be reasonably found that Mrs. Hills was under the dominion of her daughter. She appears to have been as little likely to be a subject for undue influence as any reasoning woman, and to have possessed and retained a positive, even aggressive, and independent mind.

To take up, one by one, and analyze in detail the several matters which the contestants assert furnish ground for the inference of undue influence would prolong the opinion to unseemly lengths. It is sufficient to say that we have examined the evidence with care, and are satisfied that the verdict is manifestly against its weight, and should not stand. We reach this conclusion after giving due consideration to the court's refusal to set aside this verdict, and with a full appreciation of the work of the court throughout the presentation of the evidence, and in its admirable charge to the jury. We know of no substantial error which the record shows the trial court committed save only in its failure to set aside the verdict.

There is error, the judgment is reversed, and a new trial ordered. In this opinion the other judges concurred.

(88 Conn. 442)

#### STEVENS v. RISLEY et al.

(Supreme Court of Errors of Connecticut.  
July 13, 1914.)

#### 1. PLEADING (§ 129\*)—PLEA OR ANSWER—ADMISSIONS.

In an action by the assignee of a note and mortgage to foreclose the mortgage, defendant, by not denying that the note and mortgage were given by him to another or that they had been assigned to the plaintiff or that they had been made, admitted such facts.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 270-275; Dec. Dig. § 129.\*]

#### 2. MORTGAGES (§ 423\*)—TIME TO FORECLOSE.

Defendant purchased an equity of redemption in property which he was to repair, and the seller agreed to release a second mortgage

so that a larger first mortgage might be obtained and to pay interest on the first mortgage, and the defendant executed a note payable on demand with interest after six months and began repairing the premises on the understanding that the second mortgage should not be demanded until the repairs were made and a larger first mortgage secured. Held, an agreement to forbear demand of interest of defendant if he made the repairs, and that an assignee of the note with notice was affected by the agreement, so that his demand of interest and his action to foreclose before the expiration of the six months was premature.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1262; Dec. Dig. § 423.\*]

Error from Superior Court, New Haven County; Joseph P. Tuttle, Judge.

Action by Edward E. Stevens against Joseph Risley and another. Judgment for defendants, and plaintiff brings error. Writ of error dismissed.

George E. Beers, of New Haven, and L. Russell Carter, of Waterbury, for plaintiff in error. Walter J. Walsh and Charles J. Martin, both of New Haven, for defendants in error.

THAYER, J. [1] The plaintiff in error, as assignee of a note and mortgage given by the defendant in error to one Cables, brought his action to the superior court to foreclose the mortgage. It was not denied upon the trial that the note and mortgage were given by the defendant to Cables, or that they had been assigned to the plaintiff, or that they had not been paid. Admitting by not denying these facts, the defendant as a second defense alleged that the plaintiff had received the interest on the mortgage note to a date subsequent to the date of bringing the action for foreclosure without reserving the right to bring suit upon the note prior to the date to which interest was paid, and also that the plaintiff took the assignment with full knowledge of an agreement, which appears in the record, between the defendant and Cables, the mortgagee, and that the defendant was at work carrying out the agreement at the time the suit was brought. The reply admitted that the plaintiff had knowledge of the agreement at the time he purchased the assignment. The agreement, of the same date as the note and mortgage, provides that:

If Risley "shall overhaul the Grand avenue property, this day deeded by Cables to Risley, converting the main building situated on said Grand avenue, at the corner of South Front street, in said New Haven, converting to consist of putting the stores in order, and making tenement rooms on second and third floors, and generally repairing what is necessary in both buildings to make them rentable, that he, the said Cables will, assist the said Risley to obtain credit for some of the material for the said repairs when necessary, and to release the second mortgage so that a larger first mortgage can be obtained on said premises, Risley to receive up to \$2,500 of the increase of the first mortgage, and the balance of the said increase to be applied to his credit on the second mortgage, Cables to pay the interest on first mort-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index.

gage, due July 1, 1913, and to collect the rents due at that time, to all of this we both agree."

The note dated June 20, 1913, reads, so far as material here:

"On demand for value received I promise to pay to Cornelius H. Cables or order fourteen thousand dollars with interest after six months from date, at six per cent. per annum payable semiannually."

The judgment file sets out the facts upon which the court founded its judgment (and many other facts more appropriate to a finding for appeal than a judgment file), and it shows that at the time the assignment was made, August 21, 1913, Risley was engaged in good faith in carrying out his part of the agreement. It appears, also, among the facts set forth in the judgment file, that the plaintiff secured a reduction in the purchase price to be paid for the assignment because of the interest stipulation contained in the note, and that this was sufficient to prevent a demand either of interest or principal of the note until December 20, 1913, the end of the six months' period. It appears, also, that the plaintiff made demand for the payment of the note on September 22, 1913, and brought the action for foreclosure two days later. The court found that the action was prematurely brought and rendered judgment for the defendant.

[2] The plaintiff in error has seized upon the court's finding that an allowance was made for interest, and insists that the court's finding that the suit was prematurely brought rests upon its conclusion that this was enough to preclude a demand before the end of six months from the date of the note. This does not meet the entire situation, but leaves unanswered the fact alleged and established that the plaintiff was bound by the agreement of Cables so far as that postponed the time for demanding payment of the note. If it were to be granted that the court was wrong in its conclusion in the respect claimed, still the record shows, as we think, that the suit was prematurely brought.

It is apparent that the giving of the note and mortgage and the agreement between the defendant in error and Cables on June 20th were but a single transaction. It appears clearly on the papers that Cables had sold the defendant in error an equity of redemption in the Grand avenue property, the buildings upon which required repairs and remodeling to fit them for new purposes which would make them more rentable. It required time to make these repairs and they would be an expense. They would make the property better mortgage security. The note and agreement were adapted to give Risley the time to make the repairs, and Cables agreed to help him raise additional money on the first mortgage, a part of which he was to retain and a part was to go to Cables to apply on the second mortgage. There was a clear understanding implied in the agreement that

the second mortgage should not be demanded until the repairs and improvements were made and a larger first mortgage secured. The note accords with the agreement in this, for admittedly no interest was to be called for for six months, and the defendant claims that by a proper construction of the language of the note the principal was not demandable until after six months. We do not find it necessary to adopt this construction. Assuming that it was by its face demandable at an earlier period, the agreement signed at the same time implies an agreement to forbear making demand if Risley performed his part of the agreement and made the repairs. This was enough to prevent Cables making demand so long as Risley was performing, and the fact that interest was to be forborne for six months indicates that the parties understood that this time would be required for making the repairs.

The agreement between Cables and Risley was not a part of the note and mortgage and had the plaintiff taken his assignment in ignorance of the agreement he would not have been bound by it. As a bona fide holder of these, he would not have been affected by the equities which existed as between Risley and Cables. But he admits in his reply that he had knowledge of the existence of the agreement, and the judgment file contains a finding by the court that he knew that Risley had made repairs and performed services in carrying it out. He was thus placed in the position of Cables, of whom he purchased the note and mortgage with this knowledge. The latter would be estopped in the equitable proceeding to foreclose the mortgage to claim the right to enforce the payment of the note in face of his agreement to forbear demand and collection until the improvements were made and an increased first mortgage could be obtained.

It is claimed in behalf of the plaintiff in error that it appears from the record that the judgment was not rendered until after the date when, according to the reading of the note, interest would be payable, and that, as the proceeding was an equitable one, the court should have taken notice of this fact and given effect to the terms of the note by its judgment. But it does not appear that equity would have been done by simply disallowing interest to December 20th and rendering judgment allowing interest from that date. It appears that the plaintiff caused a receiver of the mortgaged property to be appointed who collected the rents pending suit, thus taking the property from the possession of the defendant in error. It may be that he was thus deprived of an opportunity to complete his contract as well as being deprived of his rents. Upon the record nothing erroneous appears in the judgment before us.

The writ of error is dismissed, with costs to the defendant.

(38 Conn. 388)

**WILCOX v. DOWNING et al.**(Supreme Court of Errors of Connecticut.  
July 13, 1914.)**1. APPEAL AND ERROR (§ 656\*)—APPLICATION TO RECTIFY APPEAL—EVIDENCE.**

An application to rectify an appeal by a purported transcript of the testimony and by correcting rulings on the admissibility of evidence will be denied where an answer has been filed denying the correctness of the transcript, unless further proof than the affidavit of counsel is furnished.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2828-2828; Dec. Dig. § 656.\*]

**2. APPEAL AND ERROR (§ 970\*)—RULINGS ON EVIDENCE—DISCRETION OF TRIAL COURT—REVIEW.**

The determination of trial judge whether entries in an account book are of such a character as to render the same admissible in evidence will not be interfered with, unless clearly wrong.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3849-3851; Dec. Dig. § 970.\*]

**3. EVIDENCE (§ 382\*)—BOOK OF ACCOUNTS—ADMISSIBILITY.**

Where a book of accounts offered in evidence was not properly kept within the requirements of the rule, it was within the power of the trial court to reject it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1658, 1659; Dec. Dig. § 382.\*]

**4. EVIDENCE (§ 354\*)—BOOK OF ACCOUNTS—ADMISSIBILITY.**

An account book, to be admissible in evidence, must appear to have been honestly kept, and not intentionally altered, and to have been an account of the daily business of the party, and made to establish a charge against another.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1432-1433; Dec. Dig. § 354.\*]

**5. EVIDENCE (§ 376\*)—BOOK OF ACCOUNTS—ADMISSIBILITY.**

Mutilation of a portion of a book of account, material to the inquiry presented, may prevent the admission in evidence of the book, unless the mutilation is satisfactorily explained.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1628-1646; Dec. Dig. § 376.\*]

**6. EVIDENCE (§ 376\*)—BOOK OF ACCOUNTS—ADMISSIBILITY.**

Where a memorandum book, containing memoranda of accounts and other matters, not in regular chronological order, and indicating that it was not a book in which were regularly kept accounts in the regular course of business, and indicating that many pages had been torn, was offered in evidence, and a witness testified that the book was an account book of his own, and that all the daily transactions were entered in the book, which was the only account book kept by him, the trial court did not err in rejecting it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1628-1646; Dec. Dig. § 376.\*]

**7. ASSIGNMENTS (§ 134\*)—CHOSES IN ACTION—ACTIONS BY ASSIGNEE—BURDEN OF PROOF.**

An assignee suing on choses in action assigned to him has the burden of proving that he is the bona fide holder and owner thereof for his own benefit, as alleged in his complaint, though defendant pleads only the general issue.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 229-231; Dec. Dig. § 134.\*]

**8. FRAUDULENT CONVEYANCES (§ 286\*) — TRANSFER TO WIFE.**

Where the issue was whether an assignment by a husband to his wife of choses in action was fraudulent, evidence of any other transaction from which any inference of the intent of the parties could be drawn was admissible.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 822-825, 827-834, 863-866; Dec. Dig. § 286.\*]

**9. FRAUDULENT CONVEYANCES (§ 287\*) — TRANSFERS TO WIFE—EVIDENCE—ADMISSIBILITY.**

Where an action by a wife, as assignee of her husband, of choses in action, was defended on the ground that the assignment was fraudulent as against creditors of the husband, evidence of a judgment filed in a suit against the husband, execution on the judgment, date of the commencement of the action against the husband, date of the verdict therein, appeal by the husband, and affirmance was competent as against the husband to show fraud and against the wife to show the circumstances under which she received the assignment.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 835; Dec. Dig. § 287.\*]

**10. FRAUDULENT CONVEYANCES (§ 155\*) — TRANSFERS TO WIFE—EVIDENCE.**

A creditor who assails a transfer by a husband to his wife of choses in action as fraudulent may obtain relief by showing a fraudulent intent on the part of the husband or the wife, unless the wife shows that she paid a valuable consideration, in which case there must be proof of a fraudulent intent on her part or notice by her of the fraudulent intent of the husband.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 493; Dec. Dig. § 155.\*]

**11. WITNESSES (§ 392\*) — IMPEACHMENT — PLEADINGS.**

The pleadings of a witness in another action may be received to contradict his testimony.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1249-1251, 1257; Dec. Dig. § 392.\*]

**12. EVIDENCE (§ 208\*)—ADMISSIONS—PLEADINGS.**

Where the issue was whether an assignment by a husband to his wife of choses in action was fraudulent as against his creditors, pleadings in another case against the husband are admissible as declarations against interest to be considered in connection with all the allegations of the pleadings.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 713-725; Dec. Dig. § 208.\*]

Appeal from Court of Common Pleas, New London County; Charles B. Waller, Judge.

Action by Martha R. Wilcox against James Downing and another for the value of timber cut on shares and the price of a steam boiler and other articles. From a judgment for defendants, plaintiff appeals. Affirmed.

William H. Shields and Telley E. Babcock, both of Norwich, for appellant. Edmund W. Perkins, of Norwich, for appellees.

**RORABACK, J.** The complaint in this action contained two counts. In the first count the plaintiff sought to recover upon an express agreement that Calvin Wilcox, her as-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



signor, should have one-half the value of timber cut on his land and sold by the defendants. The second count was for an alleged sale of a steam boiler and its appurtenances. Both counts contained an allegation that the plaintiff, for a valuable consideration, was the actual bona fide owner of the claims above set forth. These allegations were denied in the answer.

[1] There was an application to rectify the appeal made by the plaintiff supported by an affidavit in conformity with the Rules of the Supreme Court of Errors, p. 270, § 4. This application contained two separate paragraphs. The application in paragraph 1 contained a purported transcript of testimony which the plaintiff alleged was given upon the trial of the case. The defendants' counsel filed an answer, under oath, to the application to rectify. This answer, as to paragraph 1 of the application, in substance denied that the transcript of testimony was correct. No depositions were offered in support of the application to rectify, and it is not clear from the printed record whether the plaintiff's claims for correction are true or not.

Applications of this kind where an answer has been filed, as in the present case, will be denied, unless further proof than the affidavit of counsel is furnished. *Norman Printers' Supply Co. v. Ford*, 77 Conn. 461, 469, 59 Atl. 499.

Paragraph 2 of this motion relating to the rulings of the court as to the admissibility of an account book of the plaintiff is also denied for substantially the same reasons that are given as to paragraph 1 of the application.

The errors assigned relate either to rulings upon evidence or the refusal of the court to instruct the jury as requested.

[2-6] The rejection of Calvin Wilcox's memorandum book was not erroneous. In support of her claim that Calvin Wilcox, the plaintiff's assignor, had sold and delivered the articles of merchandise to the defendants as alleged in the second count of the plaintiff's complaint, Mr. Wilcox produced a book containing memoranda relating to the sale and delivery of these articles which the defendants claimed were never sold to them.

Calvin Wilcox was called as a witness, and testified that it was an account book of his own; that all the daily transactions were entered in this book; and that this was the only account book kept by him.

Upon this question the trial court found that the book in question was a memorandum book about ten inches long, eight inches wide and three-eighths of an inch thick, from which many pages had been torn. It contained memoranda of some accounts and other matters, but not in regular chronological order. The book itself did not indicate that it was a book in which were regularly kept accounts of the witness, or that it was kept in the regular course of his business.

It is for the presiding judge to say, in the first instance, whether entries in an account book are of such a character as to render it admissible, and his decision will not be interfered with, unless clearly wrong. *Riley v. Boehm*, 167 Mass. 183, 187, 45 N. E. 84.

As a general rule, when a book of accounts shows that it is not properly kept within the requirements of the rule, it is within the power of the court to reject it. *Pratt v. White*, 182 Mass. 477, 478. To a certain extent the basis of a ruling of the trial judge as to the admission of an account book may consist of facts gained by his personal examination. *Riley v. Boehm*, 167 Mass. 183, 186, 187, 45 N. E. 84.

The trial court may exclude an account book where either its condition or appearance or the evidence reasonably creates a suspicion that it is not a true record of what it purports to be. It must appear to have been honestly kept, and not intentionally erased or altered, and to have been an account of the daily business of the party, and made for the purpose of establishing a charge against another. *Pratt v. White*, 182 Mass. 478; *McNulty's Appeal*, 135 Pa. 210, 19 Atl. 936.

Mutilation of a portion of a book, material to the inquiry, may prevent its admissibility, unless satisfactorily explained. *Crane v. Brewer*, 73 N. J. Eq. 558, 68 Atl. 78; *Chamberlayne on Evidence*, vol. 4, §§ 3051 to 3149, inclusive.

We cannot say that the court below was not justified in the rejection of the book.

[7] It is asserted now, and was unsuccessfully asserted in the court below, that, under the general issue pleaded by the defendants, they could not show that the assignment was not made in good faith. This reason is insufficient.

In her complaint the plaintiff alleges that she is the actual and bona fide holder and owner of the choses in action upon which she bases her claim. The burden of proof was upon her to sustain this allegation that she was the owner in her own right, for her own benefit, the genuine, honest owner, and not a feigned one. *Uncas Paper Co. v. Corbin*, 75 Conn. 677, 55 Atl. 165.

[8, 9] The reasons of appeal present in various forms the right of the defendants to inquire into the financial relations and transactions between Calvin Wilcox and Martha, the plaintiff, and also as to the circumstances relating to the motive for this assignment.

It was conceded that Calvin R. Wilcox and the plaintiff have for many years been husband and wife. On March 9, 1911, the defendants recovered a judgment of \$500 against Calvin in the court of common pleas for New London county. He appealed from this judgment to the Supreme Court of Errors, which court affirmed the judgment of the court of common pleas June 15, 1911. On the day that the written opinion of the Supreme Court was received by the clerk

of the court of common pleas Calvin assigned the claims in controversy to his wife, the plaintiff in this action.

The defendants deny that there is any foundation for the claims so assigned, and also contend that this assignment was not made in good faith, but that it was made for the purpose of defrauding them.

The latter question was one of the controlling issues for the consideration of the jury. Upon questions of good faith or intent, any other transaction, from which any inference respecting the *quo animo* may be drawn, are admissible, and where fraud is imputed considerable latitude must be allowed in the admission of evidence. *Hoxie v. Insurance Co.*, 32 Conn. 21, 37, 85 Am. Dec. 240.

The scope of the inquiry when fraud is under investigation may be a very broad one, and the inquiry in some instances may extend over a wide field. It should not be limited, as it must be in an action by a creditor to recover his debt from his debtor. *Loos v. Wilkinson*, 110 N. Y. 195, 213, 18 N. E. 99, 1 L. R. A. 250.

The defendants, against the objection of the plaintiff, were permitted to put in evidence the judgment file in the suit of the defendants against Calvin Wilcox; the execution on the judgment in the case just referred to; the date that the defendants commenced their action against Calvin Wilcox with the date of the verdict rendered thereon; the appeal in this action by Calvin Wilcox to the Supreme Court of Errors; and the fact that he procured a record of the case. This evidence was competent as against Calvin Wilcox, towards whom it was material for the defendants to show that he had made an assignment of these claims for the purpose of defrauding them, and, being competent against him, it could not be rejected by the court. The testimony was also competent as against the plaintiff in this connection, as showing under what circumstances she had received an assignment of the claims from her husband, which she now alleges and claims were made to her in good faith.

[10] Frauds upon the assignment, either by the assignor or assignee, do not necessarily avoid the assignment, but they may be considered in determining whether there was any fraud in the assignment, and sometimes furnish convincing evidence upon that point. *Loos v. Wilkinson et al.*, 110 N. Y. 195, 210, 18 N. E. 99, 1 L. R. A. 250. A creditor assailing a transfer of property as fraudulent may succeed by simply showing a fraudulent intent on the part of the vendor or on the part of the vendee; but, if the vendee shows that he paid a valuable consideration for the property transferred to him, there must be proof also of a fraudulent intent on the part of the vendee, or that he had notice of the vendor's fraudu-

lent intent. *Starin v. Kelly*, 88 N. Y. 419, 422.

The appellant has brought to our attention a number of other alleged errors as to the admission of evidence which are not of sufficient importance to demand extended consideration. It is sufficient to say of them that they have been carefully considered, and that none of them point out error prejudicial to the plaintiff.

[11, 12] The defendants offered in evidence the third defense of the answer and counterclaim in the case of the Downings against Calvin Wilcox, hereinbefore referred to. This was offered and received by the court as an admission by Calvin Wilcox inconsistent and contradictory to his testimony as a witness for the plaintiff as to the merits of her claim described in the first count of her complaint. For these purposes this evidence was admissible. Declarations of this class are admissions, and may be used by the opposing party. *Connecticut Insane Hospital v. Brookfield*, 69 Conn. 1, 36 Atl. 1017.

There is no reason why the allegations of a verified pleading, even if not conclusive against the pleader, should not be treated as admissions against the person or persons making them, the same as if made orally, or in any document or proceeding. The admissions in a pleading must be taken in connection with all the allegations thereof, and the weight to be given to admissions which are not in themselves conclusive against the pleader is to be determined by the court or jury the same as other evidence offered on the trial. *Talbot v. Laubheim*, 188 N. Y. 421, 424, 81 N. E. 163.

The jury were properly instructed upon this subject when they were informed that:

"There has been considerable evidence received on this trial, gentlemen, which is of value as affecting the credibility of the witness Wilcox and the defendants. The pleading called the answer or counterclaim filed by Calvin Wilcox in the prior case of *Downing Bros.*, the present defendants, against Calvin Wilcox, was received simply as a claimed contradictory statement inconsistent with statements made by him in his testimony in this trial in relation to the same subject-matters. Whether there is an inconsistency in these statements, or whether it has been satisfactorily explained, are questions for you to consider in weighing the testimony of this witness. If you should believe that there is a contradiction between the testimony given on this trial and the statements contained in this pleading referred to, you will give no more weight to that statement in the pleading than you would if the same inconsistent statement had been made in conversation. In other words, because it is found in the pleading in the prior case, that of itself gives it no particular weight as evidence. It is simply one of the facts to be considered with all the other facts in evidence before you, bearing upon the degree of credibility you will attach to the testimony of that witness."

The plaintiff contends that the court erred in failing to instruct the jury as to the application that they were to make of the

judgment file and execution in the former suit of Downing Bros. against Calvin Wilcox that were laid in evidence by the defendants. In this connection the court correctly instructed the jury that:

"Whether this was a simple coincidence or whether it was an arrangement designed by Wilcox and his wife is for you to determine, and, in fact, this occurrence, together with all the other circumstances in evidence bearing upon the situation of Wilcox and his wife, are to be considered by you, in connection with the other facts in evidence concerning the transfer of these claims, in determining whether the plaintiff, Martha Wilcox, is the honest, bona fide owner of these claims. If you should determine from the evidence that the plaintiff, Martha Wilcox, is not the real, genuine, honest owner of these claims—that is, owner in her own right and for her own benefit—but that she is simply the make-believe owner for the purpose of this present action, and that she is accountable to her husband, Calvin Wilcox, for these claims, then she is not entitled to recover in this action, irrespective of the merits of the two claims. Unless you are satisfied by a fair preponderance of the evidence that the plaintiff acquired these claims for a real consideration, that she is the real, genuine, honest owner of these claims, and not accountable to any one, then your verdict should be for the defendants. If you find that the plaintiff has established proper ownership of these claims, then you would properly consider the merit of the claims themselves in accordance with the instructions I have before given you, and return such a verdict as you believe is warranted by the evidence in accordance with the charge I have given you."

We have read the entire charge with care, and are unable to agree with the contention of the plaintiff that:

"It was not correct in law, was not adapted to the issues in the case and to the claims of the plaintiff, and was not sufficient for the guidance of the jury."

The record discloses that the instructions given presented the issues in a plain, concise, and accurate manner. The law adapted to these issues was correctly stated and sufficient for the guidance of the jury.

There is no error.

(88 Conn. 360)

#### STATE v. PERKINS.

(Supreme Court of Errors of Connecticut.  
July 13, 1914.)

#### 1. HOMICIDE (§ 250\*)—PROSECUTION—EVIDENCE.

In a prosecution for manslaughter, evidence held to warrant acquittal.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 515-517; Dec. Dig. § 250.\*]

#### 2. HOMICIDE (§ 123\*)—SELF-DEFENSE—RIGHT OF.

An assault on one's residence can be regarded as an assault on the person, within the meaning of the law relating to self-defense, and hence a householder, when an intruder attempts to break in, need not retreat, but may, if necessary, kill the intruder.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 182, 183; Dec. Dig. § 123.\*]

#### 3. HOMICIDE (§ 123\*)—OFFENSES—SELF-DEFENSE.

Where accused's daughter married deceased, who deserted her, but returned after the birth of a child, the custody of which he de-

manded, and the child was left in accused's house, accused might, where she did not seize upon the incident as a pretext for destroying deceased, kill him when he attempted to break and enter her residence for the avowed purpose of seeing his child, and of taking accused's life, for while the law countenances the use of force in the defense of a person, no one has the right to redress his own wrongs.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 182, 183; Dec. Dig. § 123.\*]

Appeal from Superior Court, New London County; Gardiner Greene, Judge.

Lillian M. Perkins was charged with manslaughter, and from a judgment of acquittal, the state appeals. No error.

Hadlai A. Hull, State's Atty., of New London, for the State. Jeremiah J. Desmond and Charles V. James, both of Norwich, for appellee.

**RORABACK, J.** The record discloses three reasons of appeal, two of which relate to the charge of the court upon the question of self-defense when a person is attacked in his own household. The third one complains of the action of the court in instructing the jury as to the rights of the father and mother as joint guardians of their minor children.

[1] The accused is charged with the crime of manslaughter in causing the death of Thomas V. Coatchaly at Ledyard in New London county by shooting him with a shotgun. Coatchaly was a Greek, and came to this country about 1907. He married a daughter of the accused in April, 1912. He lived with his wife and mother-in-law upon the Perkins homestead until October, 1912. At this time he quarreled with his wife and left her. In the month of December he went to Texas, and his wife continued to live with her mother. Upon February 12, 1913, Mrs. Coatchaly gave birth to a child, the offspring of the marriage with the deceased. In April, 1913, Coatchaly came to New London and proposed through his attorney that his wife come to New London and live with him. She did not accept this proposition. During the month of April he made two or three unsuccessful attempts to see his child.

The defendant offered evidence to prove and claimed to have proven the following: After the baby was born Coatchaly never asked his wife to live with him, and that he posted her; that in a letter to his wife he threatened to take the child away from her, and at one time told his wife that he would kill her and her mother if they did not do as he wanted. At another time she told him that she had told her mother he was coming, and that her mother did not wish him to go to the house. Coatchaly said, "I don't care for the law. If I don't see my baby I'll kill every one of you." Coatchaly was then mad, excited, and nervous. That on the afternoon of June 3, 1913, Coatchaly came to the house of the accused and demanded admission,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

which being refused he immediately proceeded to break down the doors of the house, all the while threatening to kill the accused. After he had broken down the storm porch door, the accused warned him that she had two revolvers, and that if he broke through the double house doors and attempted to come in she would shoot him. Notwithstanding this warning Coatchaly continued his violent assault upon the double doors, and, as the right-hand door was giving way, he said to the accused, with an oath, "Now I've got you, and I'll cut your guts out." That the accused at the time of his breaking into her house believed that the deceased intended to carry out his threats to kill her, and believed that her life was in imminent danger from Coatchaly, who was a strong, robust man, 28 or 29 years of age, weighing about 180 pounds. After the accused had warned the deceased that she would shoot if he broke in, and after he had broken down the right half of the house doors, and was attempting to enter, the accused attempted to fire a revolver at him, but it would not work. She then thought of the shotgun, which was kept near by, and fired at Coatchaly. The accused shot the deceased as he was breaking into the house to prevent his entering and taking her life. While living with the accused he had beaten her and threatened to take her life. At the time when the deceased attempted to break into the house the accused was alone in the house, except that she had in her charge two infants, one her son's child, 11 months old, the other her daughter's child, between 3 and 4 months old.

Many of the claims of the defendant as to the facts surrounding the shooting were controverted by the state. The state claimed that it might fairly be inferred from the evidence that when Coatchaly was breaking in the doors and attempting to make a violent entry into the house, the accused had no reason to believe that he intended to do or would do her, or either of the children, any harm or violence, or that he intended to do or would do anything but to gain access to his child. The state claimed to have proven that Coatchaly's only motive in breaking and entering was to obtain access to his child. It was conceded by the state that Coatchaly was a trespasser in so breaking and entering. Yet it is claimed that no necessity existed for killing him for the simple purpose of preventing him from breaking into the house to see his child. It was said in substance that, admitting that all the conditions existed substantially as the defendant contends, she was guilty of manslaughter, unless it appeared that she had reasonable grounds to believe that Coatchaly intended to kill or seriously injure her, or that she was in imminent danger of death or of great bodily harm.

Although the evidence was conflicting, the jury had the right to believe the version of the defendant and her witnesses as to the im-

portant facts surrounding this unfortunate affair.

[2] The evidence and claims of the parties were such as to require a charge upon the theory that Mrs. Perkins' motive in shooting the deceased was to save her own life or to protect herself from any bodily harm. An assault on one's house can be regarded as an assault on the person, within the meaning of the law with reference to self-defense, where the purpose of the assault is an injury to the person of the occupant or members of his family, to accomplish which the assailant attacks the house in order to reach the inmate. In this connection it is said and settled that in such case the inmate need not flee from his house in order to escape injury by the assailant, but he may meet him at the threshold and prevent him from breaking in by any means rendered necessary by exigency, and upon the same ground and reason that one may defend himself from peril of life or great bodily harm by means fatal to the assailant, if rendered necessary by the exigency of the assault. *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200. This proposition was cited with approval by this court in the case of *State v. Scheele*, 57 Conn. 328, 18 Atl. 253, 14 Am. St. Rep. 106.

Upon this branch of the case the trial court, among other things, stated to the jury that:

"A man may thus do what seems reasonably necessary under the circumstances in which an assault is made upon him to preserve himself from personal danger, with this limitation: That he must not take the life of a fellow being who is assaulting him when such fellow being is doing no more than committing an ordinary assault and battery upon him, but only in case of extreme necessity as the only practicable method of saving his own life or protecting himself from great bodily harm, and even then he must not have brought upon himself the necessity which he set up in his defense by beginning or continuing the fight. A man who is attacked by another under circumstances which denote an intention to take his life or to do him great bodily harm may lawfully kill the assailant, provided he uses such means as he reasonably can to avoid the necessity. It is only when the circumstances are such as to authorize a reasonable belief that the assault is made by the first aggressor with a design to take life or inflict extreme bodily harm that a man would be justified in attempting to kill the assailant or using violence upon him likely to kill him. What it is reasonably necessary to do in making a defense against the first aggressor depends upon all the circumstances of the particular case, the nature of the attack, and the degree of danger in which an accused person was at the time, or reasonably believed he was in. If the circumstances at the time reasonably appear to him to indicate great danger, and he acts upon such belief, he will not be deprived of the benefit of the law of self-defense because in fact the danger was less than he reasonably believed it to be. It will, of course, be a question for the jury whether the circumstances were such as could reasonably give him the belief of the existence of such great danger."

These instructions were well adapted to this issue.

[3] The jury were warranted from the evidence before them in finding the accused not

gully upon this theory and claim. But the state contends that the court erred in stating to the jury that:

"A man is not obliged to retreat if assaulted in his dwelling, but may use such means as are absolutely necessary to prevent the assailant's forcible entry, even to the taking of life. If a man is making an unlawful entry by force into the house of another, the owner may, for the sole purpose of preventing the execution of such unlawful act, make resistance sufficient in degree and in time to prevent it. He is under no obligation to admit the unlawful intruder, or to flee from the house and permit him to effect an unlawful entrance. If the resistance is neither greater in degree nor earlier in time than is necessary, and it results in the death of the assailant, it is justifiable homicide; and the slayer is to be judged as the circumstances really appeared to him at the moment. If the resistance is unnecessarily great in degree, or early in time, and therefore unreasonable, and therefore unlawful, and results in the death of the assailant, it is manslaughter. But even if the circumstances are such as would justify the householder in taking the life of the assailant who is violently and unlawfully breaking into the house for the purpose of preventing such breaking in, still, if the houseowner take the opportunity of the breaking in to kill the intruder, not for the sake of preventing the unlawful intrusion, but to gratify his hatred, malice, or ill will against the intruder, then the killing will be at least manslaughter, if not murder. You should apply these principles to the facts in this case as you find them from the evidence. First, was the accused, as the defense claims, making a reasonable and necessary defense against the deceased in an attempt, either real or apparently real, to take the life or do serious bodily harm to herself or the children who were under her charge and part of her family? Second, was the deceased, as the defense claims, violently and unlawfully breaking into the house of the accused against her will, and was her resistance, as the defense also claims, no greater or earlier than necessary to prevent such breaking in? Third, if the defense made by the accused was no greater or earlier than necessary to prevent such breaking in, was it made in good faith, for the sole purpose of preventing such breaking in, or did the accused merely take advantage of the opportunity afforded by the breaking in to gratify ill will against the deceased by killing him?"

The state claims that by these instructions the jury were told that:

"No matter what the object of an intruder might be when the doors are shut the householder may kill the intruder to prevent his entry into the house. As it was admitted that the deceased was breaking into the house under the charge, the jury had no alternative."

This is not a fair interpretation of these remarks. In effect the jury was instructed that if one is attacked unlawfully in his own dwelling house by one who is attempting to make a forcible and unlawful entry therein, he is not obliged to retreat, but he may use such means as are absolutely necessary to prevent the assailant's forcible entry, even to taking life. It is justifiable homicide if it appears that the resistance is neither greater in degree nor earlier in time than is necessary, and it results in the death of the assailant, unless the householder under such circumstances should take the opportunity of the unlawful entry to kill the intruder to

gratify his hatred, malice, or ill will, when the killing will be at least manslaughter.

While these instructions are not in accord with the law of those jurisdictions where the right to take life in the defense of one's dwelling is limited to occasions where it is reasonably apparent that the intruder is actuated by a felonious purpose, they well state what we regard as the better and sounder rule. Wharton, Criminal Law (11th Ed.) § 634; Bishop's New Criminal Procedure, § 196.

The court did not err in instructing the jury that:

"Assuming that the deceased had a right to see the child, and had an equal right to its custody with the mother, he had no right to enforce his prerogatives with regard to the child by a violent intrusion into the house of another person. The law was open to him, and it would be very easy for him to have tested the right of possession, either by an attempt to remove his coguardian, if she were an improper person, or to let the court decide who, in regard to the best interests of the child, was the best person to have the custody of it."

The right of self-defense and the right of redress are two different things. You may prevent an injury from being done by all proper means, but, when done, you cannot take redress into your own hands. The right of redress is provided for in no uncertain terms. Our Constitution provides that:

"All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale denial or delay." Constitution of the State of Connecticut, art. 1, § 12.

This declaration asserts the broad doctrine that for every injury to the person or property the redress is to be administered by the "courts" and "in due course of law."

There is no error. The other Judges concurred.

(88 Conn. 423)

#### Appeal of KING.

#### In re GEDNEY'S ESTATE.

(Supreme Court of Errors of Connecticut.  
July 18, 1914.)

#### 1. ABSENTEES (§ 5\*)—ADMINISTRATION OF ESTATE—PROBATE COURT—POWER.

Laws conferring on the probate court power to administer the estates of persons unheard of for seven years are valid, if provision is made for giving proper notice of the proceedings and adequate safeguards are provided.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. §§ 3-11; Dec. Dig. § 5.\*]

#### 2. ABSENTEES (§ 5\*)—ADMINISTRATION OF ESTATE—NOTICE—SUFFICIENCY.

Under Gen. St. 1902, § 319, giving to courts of probate jurisdiction to administer estates of nonresidents who are presumptively dead, and providing that a sufficient notice shall be given, notice by one publication in a newspaper is sufficient, where the absentee had been away and not heard from for over 27 years, and his age at the time of leaving was not shown.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. §§ 3-11; Dec. Dig. § 5.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 3. ABSENTEES (§ 5\*)—ADMINISTRATION OF ESTATE—PERSONS ENTITLED TO APPEAL.

An administrator not personally interested in the estate of an absentee, whose property was being distributed under administration had on the presumption of his death, cannot attack a decree of distribution on the theory that the notice was insufficient; for, if the notice was insufficient, the administrator's appointment was invalid, and he was without standing in court on any theory.

[Ed. Note.—For other cases, see Absentees, Cent. Dig. §§ 8-11; Dec. Dig. § 5.\*]

Appeal from Superior Court, Fairfield County; Joseph P. Tuttle, Judge.

In the matter of the distribution of the estate of William E. Gedney. From a decree of distribution, Ciltus H. King, administrator, appeals. Affirmed.

Edward P. Nobbs and John P. Gray, both of Bridgeport, for appellant. Paul L. Miller, of Bridgeport, for appellees.

THAYER, J. The appellant appeals in his capacity as administrator of the estate of William E. Gedney, who, as the agreed statement of facts shows, left his home in Trumbull about 27 years ago for parts unknown, and has not been heard of since. At the time of his departure he was unmarried, and was then the owner of an undivided interest in certain land in Trumbull and of a deposit in a savings bank. On June 27, 1913, his two brothers and the widow and children of a deceased brother made application for the appointment of an administrator upon his estate, representing to the court in their petition the facts as to his absence unheard of for more than 7 years. The probate court, after notice by publication as ordered by it one time in a Bridgeport newspaper, heard the application on July 1, 1913, the day appointed for the hearing in the notice, granted the petition, and appointed the appellant administrator of Gedney's estate. He qualified by giving bonds, and proceeded with the settlement of the estate, procuring as part of the administration an order to sell the real estate, and on January 30, 1914, after notice and hearing, the probate court approved his administration account. On the same day it ascertained the heirs at law and distributees of said Gedney, and made the order which is now appealed from, which, in substance, ordered and directed the appellant as administrator to pay and deliver to each distributee his share of the estate upon his giving bond with surety conditioned for the return of the amount thereof, with interest thereon, to the presumed decedent, if he reappear, and, upon failure of either distributee to give such bond, to hold such distributee's share of the property for 5 years, and until further order of the court.

No exception is taken in the reasons of appeal to the form or substance of this order, the only reasons of appeal being: (1) That the court of probate had no jurisdiction over Gedney's estate, because the statute which

purports to give to probate courts jurisdiction over absentee's estates does not provide for adequate notice to the absentee, and therefore is unconstitutional; and (2) that, if the statute provides for a sufficient notice, such notice was not, in fact, given.

[1] That a court of probate, under its statutory power to grant administration on the estates of deceased persons, has no jurisdiction to grant administration binding upon him, on the estate of an absentee unheard of for seven years, and so at common law presumptively dead, is well established. *Scott v. McNeal*, 154 U. S. 34, 43, 14 Sup. Ct. 1108, 38 L. Ed. 896, and cases cited. It is equally well settled that the state may give to these courts the power to regulate and administer the estates of absentees, so presumptively dead, if provision is made for giving proper notice of the proceeding and adequate safeguards are provided to protect the absentee's interest in case of his reappearance. *Cunnius v. Reading School District*, 198 U. S. 458, 471, 477, 25 Sup. Ct. 721, 49 L. Ed. 1125, 3 Ann. Cas. 1121, and cases cited.

[2] General Statutes, § 319, gives to courts of probate this jurisdiction, requires notice of the proceeding to be given, and safeguards the property of the absentee against his return. The notice to be given is left to the discretion of the court, except that it requires that proper notice shall be given. Different cases might call for different notices in order that the latter should be proper notice. If an absentee when last heard from had been living for some years in a designated locality, and could, if living, probably be reached by a notice personally directed to him there, such notice or a public notice published in that locality might be required to satisfy the call for a proper notice. When the absentee has gone to parts unknown and been absent for a great many years under circumstances which make the presumption of death conclusive, a different notice might satisfy the call of the statute for a proper notice. In the present case the notice given was very short, and the finding gives no facts, except that the absence had been long—27 years—with no notice of his whereabouts and an apparent abandonment of his property in this state. It is not claimed that he is now alive. What his age was when he absented himself does not appear. If he was then above 70 years of age, there is little probability that any notice would have been better than the one given. The presumption of death in that case would be so conclusive that any notice would be a practical compliance with the statute. We cannot say, therefore, from the facts before us that the notice which was given was not a proper notice.

[3] But we have no occasion to inquire whether it was or not; for we have before us no one who in this proceeding is entitled to question it. If, as the appellant claims, the notice was not a proper one, and the order

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

taking jurisdiction of the estate and appointing him administrator was void, then he is not administrator, and has no standing in court. As his appeal is taken solely as he is administrator, he is not as such aggrieved by the order. If the notice was proper, the probate court is rightfully exercising jurisdiction over the estate, and, as no complaint is made by the appellant as to the form or substance of the order, he is not aggrieved thereby.

The superior court is advised to erase the case from its docket.

The other Judges concur.

(68 Conn. 404)

LEE v. LEE et al.

(Supreme Court of Errors of Connecticut.  
July 13, 1914.)

1. WILLS (§ 439\*) — CONSTRUCTION — INTENTION OF TESTATOR.

No rule for the construction of wills is permitted to defeat the intention of the testator expressed in the will itself.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.\*]

2. WILLS (§ 536\*) — CODICIL — REAFFIRMING WILL.—LAPSE OF LEGACIES—STATUTE.

Testatrix by will executed in 1897, gave certain amounts of money to each of two sisters, and, after they had both died, executed a codicil reaffirming all the provisions of her will, except as altered by the codicil. Gen. St. 1902, § 296, on the death of the legatees, converted their legacies into valid gifts to their issue. *Held* that, as testatrix is presumed to have known the law, the codicil did not convert the legacies contained in the will into void legacies, but that under the statute they were operative as gifts to the issue of the deceased legatees.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1161; Dec. Dig. § 536.\*]

3. WILLS (§ 486\*)—CONSTRUCTION—CIRCUMSTANCES SURROUNDING EXECUTION OF WILL.

In the construction of a will leaving pecuniary bequests to each of two sisters of testatrix, and of a codicil reaffirming the will, executed after the deaths of the sisters, and after a statute had converted their legacies into valid gifts to their issue, *held*, that evidence of the knowledge of testatrix of her sisters' death was admissible as one of the circumstances surrounding the execution of the codicil, but not that she believed that because thereof the legacies were void.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1016-1022; Dec. Dig. § 486.\*]

4. WILLS (§ 627\*) — CONSTRUCTION — INTENT.

Under a will directing the executors to divide all the residue into six equal shares, and to pay over one of such shares to each of six separately named children, no joint tenancy or class gift with right of survivorship was created; but the share of a son dying, without issue, before the testatrix was intestate estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1452-1459; Dec. Dig. § 627.\*]

Case Reserved from Superior Court, Hartford County; Marcus H. Holcomb, Judge.

Action by Charles N. Lee, executor, against Thomas G. Lee and others, to obtain a judicial construction of the will of Louise M. Lee. Case reserved. Will construed, and superior court advised.

The reservation presents two questions. The testatrix executed a will in December, 1897, by the third clause of which she gave to her sister Sarah R. Guinn \$10,000, and to her sister Jerusha A. Winsolow \$5,000. Both of these legatees having died, the testatrix, in January, 1908, executed a codicil reaffirming all the provisions of her will, except as altered by the codicil, and giving to four nieces \$5,000 each. Of these nieces one was the surviving issue of the testatrix's deceased sister Sarah, and one the sole surviving issue of the testatrix's deceased sister Jerusha.

The first question presented by the reservation is whether the legacies to the deceased sisters lapsed, or whether their issue are entitled to take the estate so bequeathed, under our statute for the prevention of lapses (section 296, G. S. of 1902).

The second question arises under the sixth clause of the will, directing the executors to divide the residuary estate into six equal shares, and to pay over one of such shares to each of three children, and to hold one share as trustee for the benefit of each of the three others. Frederick H. Lee, a son, died, without issue, before the testatrix, and the question is whether the legacy to him lapsed, and, if so, whether the residuary estate should be divided into five equal shares, and distributed among the surviving children.

Reuben Taylor, of Hartford, for plaintiff. Lewis Sperry, of Hartford, and William A. Morse, of Boston, Mass., for Louisa L. Daggett and others. Lewis Sperry, of Hartford, for Campbell Smidt and others. E. Henry Hyde, of Hartford, for Thomas G. Lee and others.

BEACH, J. (after stating the facts as above). [1] The question whether the legacies to the sisters who died before the testatrix are saved for the benefit of their issue by section 296 of the General Statutes depends primarily on the effect to be given to the execution of the codicil of 1908, as a republication of the will of 1897. The defendants who are residuary legatees rely upon the rule that the execution of a codicil which in terms ratifies and confirms a previous will gives to the original will the same force and effect in law as if it had been rewritten, re-executed and republished at the date of the codicil. *Giddings, Ex'r, v. Giddings*, 65 Conn. 149, 160, 32 Atl. 334, 48 Am. St. Rep. 192; *Whiting's Appeal*, 67 Conn. 379, 388, 35 Atl. 268; *Carpenter v. Perkins*, 83 Conn. 11, 18, 74 Atl. 1062. Then it is said that, as both of the sisters named in the third clause of the will were dead when the codicil was executed, the bequests contained in the third clause are in legal effect gifts to persons already dead at the date of the execution of the will, and therefore legacies which were void when made. The legal conclusion of the

argument is that our statute for preventing lapses in certain cases is confined to legacies which lapse by reason of the death of the beneficiary after the execution of the will, and that it does not operate to save a bequest which was void when made, because the beneficiary was already dead when the will was executed. In the view we take of the case it is unnecessary to determine whether our statute is so limited or not, because this case must be controlled by the universally accepted principle that no rule for the construction of wills shall be permitted to defeat the intention of the testator expressed in the will itself.

[2, 3] The first enacting clause of the codicil here in question is as follows:

"First, I hereby reiterate and reaffirm all the provisions of my said last will and testament, except in so far as the same are altered hereby."

That is to say, the testatrix reiterates and reaffirms, as of January 20, 1908, the third clause of her will making certain bequests to sisters already dead, obviously intending, so far as her written word is concerned, that such legacies, in common with all other unaltered provisions of her will, should continue in the same legal force and effect as before the codicil was executed.

The statute, which the testatrix is presumed to know, had, at the dates of the sisters' deaths, converted their legacies into valid gifts to the issue of such sisters; and it would be a misapplication of the rule contended for to hold that the testatrix, by the very act of reaffirming these gifts, had inadvertently made them utterly ineffectual in law. *Blakeslee v. Pardee*, 76 Conn. 263, 267, 56 Atl. 503.

The codicil of 1908 did not convert the bequests contained in the third clause of the will into void legacies. They still remained of the same effect, and therefore still remained operative under the statute as gifts to the issue of the original legatees.

[4] In this connection we are asked to determine whether extrinsic evidence is admissible to prove that the testatrix, when she executed the codicil, knew that her sisters were dead, and also that she then believed the legacies had lapsed and become void by reason of their deaths. We answer that evidence of her knowledge of the sisters' deaths is admissible as one of the circumstances surrounding the execution of the codicil, but that evidence of her belief that the legacies to her sisters had become void is not admissible. Its only importance would be as tending to prove that the testatrix, in executing the codicil, did not intend to make cumulative gifts to the issue of her deceased sisters; extrinsic evidence of such intent is inadmissible. *Bishop v. Howarth*, 59 Conn. 455, 22 Atl. 432; *Bryan v. Bigelow*, 77 Conn. 604, 614, 60 Atl. 266, 107 Am. St. Rep. 64; *Seymour v. Sanford*, 86 Conn. 516, 521, 86 Atl. 7.

The determination of the second question presented by the reservation depends upon whether the sixth clause of the will creates a gift to a class with a right of survivorship or a gift to each of the six children of the testatrix. The decisive words are as follows:

"Sixth. I direct my executors hereinafter named to divide all the rest, residue and remainder of my property into six equal shares or parts and 1. To pay over one of such shares or parts to my son Charles N. Lee. 2. To pay over one other of such shares or parts to my son Frederick H. Lee."

And so each share is to be paid over or held in trust for one separately named child. It seems too clear for discussion that no joint tenancy or class gift with right of survivorship can be constructed from such language. The question has been so recently before us that it is only necessary to refer to *Allen v. Almy*, 87 Conn. 517, 89 Atl. 205, and *White v. Smith*, 87 Conn. 663, 89 Atl. 272. It follows that the share of Frederick H. Lee, who died, without issue, before the testatrix, is intestate estate.

The superior court is advised, first, That the issue of Sarah R. Guinn and Jerusha A. Winsolow, respectively, take the legacies given to the testatrix's sisters under the third clause of the will; second, that the portion of the rest, residue, and remainder of the estate given to the testatrix's son Frederick H. Lee is intestate estate. The other Judges concurred.

(38 Conn. 353)

#### STATE v. MCGEE.

(Supreme Court of Errors of Connecticut. July 13, 1914.)

#### 1. FOOD (§ 15\*)—SALES—REGULATIONS—STATUTORY PROVISIONS—CONSTRUCTION.

Acts 1911, c. 134, penalizing any person selling or offering for sale food in package form, unless the net quantity of the contents be marked on the outside of the package, and declaring that the act shall take effect from its passage, but no penalty shall be enforced for any violation arising from the sale of food "prepared and inclosed in package form" prior to 18 months after passage of the act, does not have any effect as to sales of unbranded packages prepared and inclosed at the time of the taking effect of the act, provided the sale is made within 18 months thereafter, but a sale of food prepared and inclosed in unmarked packages after the passage of the act subjects the seller to the penalties imposed, and a sale after 18 months after the passage of the act in unmarked packages, whenever inclosed, renders the seller liable.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 14; Dec. Dig. § 15.\*]

#### 2. INDICTMENT AND INFORMATION (§ 111\*)—STATUTORY OFFENSES—REQUISITES.

An information, charging a sale of a can of tomatoes without the net quantity plainly marked on the outside, charges a violation of Acts 1911, c. 134, penalizing any person selling food in package form, unless net quantity of contents be plainly marked, and it need not negative the proviso that no penalty shall be enforced for any violation arising from the sale of food prepared and inclosed in package form prior to 18 months after the passage of the act,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and the fact that the sale is within the provision is a matter of defense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 295-298; Dec. Dig. § 111.\*]

Appeal from Criminal Court of Common Pleas, Fairfield County; John J. Walsh, Judge.

Thomas H. McGee was convicted of violating Pub. Acts 1911, c. 134, and appeals, assigning as errors the court's action in overruling a demurrer to the information, in refusing to charge as requested, in charging that on the agreed facts the state is entitled to a verdict, and in overruling defendant's objection to the imposition of any penalty, and in imposing a fine of \$50. Affirmed.

Ralph O. Wells, of Hartford, for appellant. Frederick W. Huxford, Pros. Atty., of Stamford, for appellee.

THAYER, J. [1] The defendant was convicted in the criminal court of common pleas upon an information which charged him with having sold, on March 8, 1913, food in package form, namely, one can of tomatoes, without the net quantity of the contents of the package being plainly and conspicuously marked upon the outside of the package. The information was founded upon the provisions of chapter 134 of the Public Acts of 1911, which, so far as material to this case, reads as follows:

"Sec. 1. Any person who shall sell or offer for sale food in package form, unless the net quantity of the contents be plainly and conspicuously marked on the outside of the package \* \* \* shall be subject to the penalties provided in chapter 255 of the Public Acts of 1907. \* \* \*

"Sec. 3. This act shall take effect from its passage but no penalty shall be enforced for any violation of the provisions of section one arising from the sale of food prepared and inclosed in package form prior to eighteen months after the passage of this act. Approved July 11, 1911."

There was a demurrer to the information which was overruled, after which the case was submitted to the jury upon an agreed statement of facts with an instruction that if they found the facts as stipulated to be true their verdict should be for the state. All the facts alleged in the complaint were admitted by the stipulation and also the additional fact that the can of tomatoes described in the information had been prepared and inclosed in the can prior to January 11, 1913. The defendant's claim is that by reason of the provisions of section 3 of the act he could not properly be convicted or sentenced upon these facts, the tomatoes having been prepared and inclosed in the can prior to 18 months after the passage of the act. The question of the proper construction to be placed upon the statute is thus raised.

The purpose of the statute is apparent. It contains in the first section a general prohibi-

tion of the sale of food in package form unless it is marked as indicated. Prior to this enactment the sale of food in unmarked packages was not unlawful. Chapter 255 of the Public Acts of 1907, to the penalties of which violators of the act now in question are made subject, makes it unlawful to sell or offer for sale adulterated or misbranded package foods, but it does not require that foods sold in packages be marked or branded. If branded they must be correctly branded, and the act makes it clear that to state upon the package in terms of weight or measure any other than the correct weight or measure of the contents of the package is "misbranding." That is, the correct net quantity of the contents must be stated if the package is marked or "branded." That statute was aimed at "misbranding," where the food packages were in fact marked or branded. The purpose of the present act was to prevent the sale of food in packages unless the net quantity of the contents of the package is marked thereon. Considering the condition of the law at the time the act was passed this is entirely clear. To effectuate this purpose the offering of such foods for sale, unmarked as to the quantity, was included in the penalty.

Section 3 of the act, after providing expressly that it shall take effect from its passage, adds the provision upon which the defendant relies to support his claim. He says that the last clause of the section, "prior to 18 months after the passage of this act," modifies the words "prepared and inclosed" which immediately precede it. This would doubtless be the natural grammatical construction, and should be followed unless it leads to results which it is clear that the Legislature in enacting the statute did not intend. If followed it leads to the result claimed by the defendant and the prohibition of the act applied only to the sale of food which should be prepared and inclosed in packages after January 11, 1913, 18 months after the passage of the act. That is, the act did not prohibit the sale at any time of unbranded package foods which existed in packages at the time the act was passed, or which should be prepared and inclosed in packages within 18 months thereafter. This means that during the period of 18 months after the act was passed there could be no sales of food in unmarked packages which would subject the seller to the penalties prescribed by the act. This is repugnant to the plainly expressed intent of the act. Had this been intended section 3 should have read:

"This act shall not take effect until eighteen months after its passage and shall not apply to sales of foods prepared and inclosed in packages prior to the time when it takes effect."

The construction thus claimed renders the first clause of section 3 nugatory. Some other construction must therefore be sought, for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

it must be presumed that the Legislature by the explicit language of the first clause of section 3 intended the act to immediately affect some sales at least, included in the general prohibition of section 1 of the act. We must look through the whole statute to determine its proper construction and the proper construction of its parts.

To determine what sales, if any, were intended to be saved from the penalties of the general enactment it is pertinent to ask, What sales, if any, ought to be saved from such penalties? Naturally sales of foods prepared and inclosed in packages at the time the act took effect. These packages would be on hand at the time when the law making their sale unlawful, when unmarked with the net quantity of their contents, was enacted. There would be good reason for excepting their sale from the immediate operation of the statute. It might lead to public inconvenience to prevent the immediate sale of these, because time would be required for merchants and packers to restock with new goods properly marked of the character ordinarily carried by them, or to properly mark the goods which were on hand. As such goods had been prepared and inclosed when their sale, unmarked, was lawful, it would be proper to except from the provisions of the act, for a reasonable time, the sale of such unmarked packages. No good reason is apparent for allowing the owners of such packages and others during this time to stock up with other unmarked foods to be sold without penalty afterwards for an indefinite period until wholly disposed of. This would violate the plain intent of the enacting clause. It is not conceivable that the Legislature intended this when it said that the act should take effect from its passage. What it intended was that the act should have effect as to sales of unbranded package foods thereafter prepared and inclosed, but that the sale of such package foods prepared and inclosed at the time the act took effect should not, for 18 months after its passage subject the seller to the penalties provided by the act. While the language is not felicitously chosen to express this intent we think that it is readily susceptible of that meaning. It is the only construction of the whole act which gives effect to all of its language and gives the act an immediate effect after its passage as its language requires; unless it be said that the proviso relates only to sales of foods and leaves the act to operate upon the offering of them for sale. Such a construction would be preposterous. It would render the defendant guilty and punishable for offering the goods for sale at any time after the passage of the act, while for the actual sale of them he would be immune from punishment. We cannot impute to the Legislature an intent to accomplish such a result.

We think that the words "prepared and in-

closed in package form" refer and were intended to refer to foods as inclosed at the time the statute in question was enacted. This construction renders the defendant's claim that the final clause of section 3 modifies the words "prepared and inclosed" untenable. Had the word "now" preceded these words, thus clearly expressing the intent which we hold that the language of the proviso as it now reads expresses, the claim could hardly have been made. Our construction makes the last clause of section 3 modify the word "sale." It thus gives effect to the proviso by exempting from the operation of the general prohibition of section 1, for 18 months, sales of foods already inclosed in packages when the statute was enacted. It gives immediate effect to the first clause of section 3 and to the first section of the act, for under that construction the sale at any time after the act was passed of any foods which were prepared and inclosed in unmarked packages after the passage of the act subjects the seller to the penalties provided, and the sale after January 11, 1913, of food in such packages, whenever inclosed therein, renders the seller liable. The defendant, admittedly, sold such an unmarked package of food on March 8, 1913, as alleged in the information, and it follows from our construction of the statute that he was properly convicted and sentenced.

[2] The claim upon the demurrer was that the information is insufficient because it does not state when the tomatoes sold were prepared and inclosed in the package, and negatives the proviso. This was not necessary. The proviso does not enter into the description of the offense. The information counts upon the general prohibition of section 1 of the statute. The proviso in the subsequent section merely excepts a case from that prohibition. If the sale in this case fell within the exception, it was a matter for the accused to prove as a defense. The state was not called upon to negative the proviso. Bishop, *Crim. Procedure*, vol. 1, § 639; *State v. Miller*, 24 Conn. 522, 527; *State v. Powers*, 25 Conn. 48, 51; *State v. Wadsworth*, 30 Conn. 55, 59; *Adams v. Way*, 33 Conn. 419, 428. This is the general way. But were the rule otherwise the information sufficiently shows that the sale alleged did not fall within the excepted class, for the exemption from liability extended only to sales of this class made within 18 months after the act went into effect, and it is alleged that the sale complained of was made nearly three months after that period. The demurrer was therefore properly overruled.

As the defendant's claims under the other exceptions depend upon the correctness of his construction of the proviso, it is unnecessary to consider them further.

There is no error.

In the opinion the other Judges concurred.

(88 Conn. 377)

## McCABE v. ARMOUR &amp; CO.

(Supreme Court of Errors of Connecticut.

July 13, 1914.)

## 1. EASEMENTS (§ 44\*)—DEED—CONSTRUCTION.

A deed through which defendant claimed title granted the right, in common with the grantors and others, to pass and repass along a certain passageway and court leading from C. street to the west side of the premises conveyed, bounded north by C. street, east and west by land of the Commercial Stock Company, about 9.25 feet wide, for a distance of 43.7 feet, running into an open court about 40 feet by 36 feet, and thence over, along, and across the court to the west side of the premises conveyed, etc. It appeared, however, that the grantor had no rights in a 7-foot strip next south of its building extending from the archway to the grantors' property on the east, and at the time the deed was executed such strip was occupied by permanent structures erected thereon, as it was when the grantors acquired their rights in the open court, and had continued to be so occupied up to the time of the trespasses complained of. *Held*, that the statement in the description giving the length of the east wall of the archway as 43.7 feet was a mere mistake of the scrivener; it appearing that the court began 43.7 feet south of C. street, and hence did not include the entire open space, but only a portion 80x33 feet excluding the 7-foot strip on the south side of the Commercial Stock Company's building east of the archway, and a strip about 9 feet adjoining the west side of defendant's building, extending the entire 40 feet from north to south.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 98-100; Dec. Dig. § 44.\*]

## 2. EASEMENTS (§ 44\*)—DEED—CONSTRUCTION.

Where a deed to certain property including a right of way over a court gave defendant a right of way across a specified strip to its building, but at the time the deed was executed the way in use extended across the strip just south of an ash pit where the only door opening out of defendant's building upon the strip was located, and all space to the north of it was obstructed by plaintiff's ash pit, and by the obstructions which continued to exist on the adjoining seven-foot strip belonging to another, defendant was not entitled to a right of way over the entire nine-foot strip on the west of its building not a part of the court, and hence the removal of a slab covering the pit and the use of the top of it as a platform from which to load wagons constituted a trespass.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 98-100; Dec. Dig. § 44.\*]

Appeal from Superior Court, Hartford County; Marcus H. Holcomb, Judge.

Action by Patrick McCabe against Armour & Company. Judgment for plaintiff, and defendant appeals. Affirmed.

James E. Cooper and John H. Kirkham, both of New Britain, for appellant. John Walsh and Bernard F. Gaffney, both of New Britain, for appellee.

THAYER, J. [1] It appears from the finding and exhibits which are a part of it that the defendant owned a lot of land in New Britain covered by a brick building which abuts westerly, in part, upon an open space about 36 by 40 feet in dimensions, which is inclosed on the other three sides by buildings

which are owned in severalty by the plaintiff, one Dawson and the Commercial Stock Company. The plaintiff's building occupies the entire southerly side, Dawson's building occupies the westerly side, and the Commercial Stock Company's building occupies the northerly side. These three abutting owners own in severalty the fee of the entire open space, the plaintiff owning the entire easterly portion upon which the defendant's land and building abut. The defendant owns no part of this open space, the line of the westerly face of its building being the westerly boundary of its lot. Access to this open space is had through an arched passageway 9¼ feet wide through the building of the Commercial Stock Company from Commercial street upon which that building and the defendant's building front on the north. At the extreme northeast corner of the open space as thus described, the plaintiff had erected upon land of which the fee was in him an ash pit about 5 feet and 4 inches wide from east to west and 6 feet long from north to south and 5 feet in height covered with a blue stone slab. The defendant removed this slab and about a foot of the brickwork and recovered the pit, and is using the top of the ash pit as a platform from which to load and unload meat in the prosecution of its business. This action is brought to recover damages for this claimed trespass and to restrain the further use of the top of the ash pit as a means of entrance to the defendant's building. The defendant's title to its land and building came to it through mesne conveyances from the plaintiff and his brother, and it is a conceded fact in the case that the defendant has a right of way, granted in the McCabe deed, to pass from Commercial street through the arched passageway and across the open space to the west side of its building in connection with the use of its property. The dispute between the parties is as to the extent of the defendant's rights in the open space west of its building. So far as appears, no claim was made to any right otherwise acquired than by this deed. The court held that the defendant did not acquire through the McCabe deed any right to do the acts which are complained of as having been done or threatened to be done. The portion of this deed upon which the defendant relies reads as follows:

"Together with the right in common with the grantors and others to pass and repass on foot and with animals, vehicles and teams of all kinds, over along and upon a certain passageway and court way leading from Commercial St. to the west side of the premises herein conveyed; said passageway leading from Commercial St. southerly, and is bounded north by Commercial St.; east and west by land of the Commercial Stock Company, and is about nine and twenty-five one hundredths (9.25) feet wide for a distance of forty-three and seven-tenths (43.7) feet when the same opens into an open court about forty (40) feet by about thirty-six (36) feet and thence over, along and across said open court to the west side of the premises herein conveyed, with the right to the use of the same

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 91 A.—18

for loading and unloading merchandise from and on teams and vehicles; said passways rights and rights in said court being more fully and at large set forth in a deed from the Commercial Stock Company to said grantors dated June 25, 1895, and recorded in Volume 12 (Mss.) Land Records of New Britain, page 177, and by an agreement between James L. Dawson and the grantors dated November 5th, 1897, and recorded Volume 14 (Mss.) Land Records of New Britain, page 172, to which deed and agreement reference is hereby made."

The defendant claimed that the "open court" referred to in this description includes the entire open space 36x40 feet in dimensions within the rear walls of the four buildings mentioned. The court has found that the open court does not occupy this entire space, but occupies only a portion of it 30x33 feet in dimensions and excludes a strip about 7 feet wide on the south side of the Commercial Stock Company's building east of the archway and a strip about 9 feet adjoining the west side of the defendant's building and extending the entire 40 feet from north to south. The deed and agreement which are referred to in the deed from the McCabes to Armour and the map which is made a part of that deed show that the Commercial Stock Company did not convey to the McCabes any right of way or other rights in the seven-foot strip next south of its building extending from the archway to the McCabe property on the east. At the time the deed was given to Armour, this strip was occupied by permanent structures erected thereon, as it was when the McCabes acquired their rights in the "open court" and has continued to be so occupied, as found by the court, up to the time of the trespasses complained of. Both the language of the deed from the Commercial Stock Company to the McCabes and the map which is made a part thereof show that the north line of the court described therein is about seven feet south of the south line of that company's building. These conclusively show as the court has found that the statement in the description giving the length of the east wall of the archway as 43.7 feet is a mere mistake of the scrivener and has not the importance which is given to it by counsel for the defendant. The map makes it clear that the open court begins 43.7 feet south of Commercial street, and the trial judge finds that the east side of the brick wall of the archway is 37.2 feet.

[2] The defendant, having failed in its claim that the open court included the entire 36x40 feet included within the brick walls of the buildings, has no case unless the deed upon which it relies grants a right over the entire 9-foot strip on the west of its building now owned by the plaintiff which is not a part of the court. The deed undoubtedly gives the defendant a right of way across this strip to its building. The location of the way is not fixed by the deed as a matter of mere construction of the deed. At the time when it was given, the way in use extended

across the strip just south of the ash pit, where the only door opening out of the defendant's building upon this strip of land was located. All to the north of it was obstructed by the plaintiff's ash pit and by the obstructions which continue to exist upon the adjoining 7-foot strip of the Commercial Stock Company. The defendant has changed the location of its door to the north, making it necessary in order to enter the building to pass over the ash pit. These and other extrinsic circumstances were to be considered in connection with the language of the deed to reach a proper determination as to the intention of the parties expressed by the general language. Its construction was thus rather a question of fact than a question of law for the court to determine. *School District v. Lynch*, 33 Conn. 830, 833. But, whether of law or of fact, we think it was correctly decided.

There is no error. The other judges concurred.

#### STATE v. PECK.

(33 Conn. 447)

(Supreme Court of Errors of Connecticut.  
July 13, 1914.)

#### 1. ATTORNEY AND CLIENT (§ 45\*) — DISBARMENT—GROUNDS.

Misconduct on the part of an attorney, who was judge of the probate court, in the course of the settlement of an estate of a deceased person in such court, justified his disbarment, since it directly involved a misuse of his professional privilege and was misconduct as a member of the bar, and moreover any misconduct, professional or nonprofessional, disclosing a moral unfitness for the enjoyment of the professional privilege, justifies disbarment.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 63; Dec. Dig. § 45.\*]

#### 2. ATTORNEY AND CLIENT (§ 46\*) — DISBARMENT—DEFENSES—HOLDING JUDICIAL POSITION.

That an attorney sought to be disbarred was judge of the probate court did not prevent his disbarment, since the judge of the probate court need not be an attorney, and his disbarment could have no effect upon his official status.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. § 71; Dec. Dig. § 46.\*]

#### 3. ATTORNEY AND CLIENT (§ 52\*) — DISBARMENT PROCEEDINGS—COMPLAINT—SUFFICIENCY.

The sufficiency of the complaint in a proceeding to disbar an attorney must be determined upon an examination of the complaint as a whole.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 69, 70; Dec. Dig. § 52.\*]

#### 4. ATTORNEY AND CLIENT (§ 52\*) — DISBARMENT PROCEEDINGS—COMPLAINT—SUFFICIENCY.

A disbarment proceeding is not a criminal prosecution, nor is it a civil action, though section 11 of the rules regulating the admission, suspension, and displacement of attorneys requires complaints for misconduct to be proceeded with as civil actions, and the complaint need not have the same technical precision of statement or conformity to recognized formalities required in criminal prosecutions

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or civil actions; it being sufficient if it is sufficiently intelligible and informing to advise the court of the matter complained of in order that it may determine whether it shall institute an inquiry and properly conduct it if instituted, and to advise the attorney of the accusation in order that he may be prepared to meet the charges.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 69, 70; Dec. Dig. § 52.\*]

**5. ATTORNEY AND CLIENT (§ 38\*) — DISBARMENT—GROUNDS.**

Where an attorney who was judge of the probate court procured the payment of \$750 to him from the assets of an estate as compensation for pretended services as an attorney on behalf of the estate which were never rendered, and exerted his authority as such judge to secure such payment, resorted to deception and concealment in his efforts to secure such payment, and made use in his official position of threats calculated to produce the end desired, for the purpose of coercing payment, he was properly suspended from practicing law indefinitely.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 51, 61; Dec. Dig. § 33.\*]

**6. ATTORNEY AND CLIENT (§ 51\*) — DISBARMENT—PROCEEDINGS—PARTIES ENTITLED TO PROSECUTE.**

Acts 1907, c. 120, authorizing the appointment of a grievance committee in each county whose duty it shall be to inquire into and present to the court offenses involving the character, professional standing, etc., of members of the bar, does not provide an exclusive mode of instituting such inquiries, and does not restrict the inherent power of the court to inquire into the conduct of its own officers on its own motion or on the complaint of any party, and hence the state's attorney could present a complaint against an attorney as authorized by section 10 of the rules of court.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 67; Dec. Dig. § 51.\*]

**7. ATTORNEY AND CLIENT (§ 51\*) — DISBARMENT—PROCEEDINGS—PARTIES ENTITLED TO PROSECUTE.**

The state's attorney was not disqualified to present a complaint of professional misconduct against an attorney by reason of his bitter enmity to the accused attorney or his prejudice against him, since he does not appear as a prosecuting officer and has no power to control the proceeding, and his only duty is to call the attention of the court to the alleged misconduct; the duty thereafter resting upon the court to see that the interests of justice are preserved and the rights of the accused attorney protected.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 67; Dec. Dig. § 51.\*]

**8. ATTORNEY AND CLIENT (§ 54\*) — DISBARMENT—PROCEEDINGS—FINDINGS.**

It was immaterial in a disbarment proceeding that the court found facts outside of the charges contained in the complaint, where its judgment was not based upon such findings, but upon matters alleged in the complaint and unquestionably sufficient to support the judgment.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 73; Dec. Dig. § 54.\*]

**9. ATTORNEY AND CLIENT (§ 54\*) — DISBARMENT—PROCEEDINGS—SCOPE OF INQUIRY.**

The question for determination in a disbarment proceeding was whether the defendant by reason of his past conduct evidencing his qualities of character and uprightness was a fit person to longer exercise the functions of an attorney, and in determining this question a

large measure of judicial discretion was to be exercised reasonably, fairly, and dispassionately.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. § 73; Dec. Dig. § 54.\*]

**10. ATTORNEY AND CLIENT (§ 48\*) — DISBARMENT—PROCEEDINGS—RIGHTS OF DEFENDANT.**

An attorney accused of professional misconduct is entitled to notice of the charge against him, an opportunity to be heard, a fair and dispassionate investigation, and a reasonable exercise of the judicial discretion.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 64, 65, 68; Dec. Dig. § 48.\*]

Appeal from Superior Court, Fairfield County; William L. Bennett, Judge.

Proceeding in the name of the State against Charles H. Peck on a complaint for alleged professional misconduct by the defendant as an attorney at law. Facts found and judgment rendered suspending the defendant from practicing law in the courts of the state indefinitely, and he appeals. Affirmed.

Robert E. De Forest, of Bridgeport, for appellant. J. Moss Ives, Special State's Atty., of Danbury, for the State.

PRENTICE, C. J. [1] The acts, which in the complaint are charged as misconduct calling for the respondent's disbarment, and for which, as appears by the judgment file, he was disbarred, were all done by him in the course of the settlement of an estate of a deceased person in the probate court over which he presided. The misconduct alleged and made the basis of the judgment was misconduct connected with the performance of his judicial office. The claim made upon demurrer to the complaint, and renewed at the hearing, that such misconduct was not misconduct as a member of the bar, and therefore not of a kind to justify discipline as such member, is, for a double reason, wholly without foundation. In the first place, it did directly involve a misuse of the professional privilege. In the second, it disclosed a moral unfitness for the enjoyment of that privilege, and it matters not whether the disclosure came through professional channels or not.

An attorney at law admitted to practice, and in the exercise of the right thus conferred to act as an officer of the court in the administration of justice, is continually accountable to it for the manner in which he exercises the privilege which has been accorded him. His admission is upon the implied condition that his continued enjoyment of the right conferred is dependent upon his remaining a fit and safe person to exercise it, so that when he, by misconduct in any capacity, discloses that he has become or is an unfit or unsafe person to be intrusted with the responsibilities and obligations of an attorney, his right to continue in the enjoyment of his professional privilege may and ought to be declared forfeited. As important

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as it is that an attorney be competent to deal with the oftentimes intricate matters which may be intrusted to him, it is infinitely more so that he be upright and trustworthy. Unfortunately it is not easy to limit membership in the profession to those who satisfy the standard test of fitness. But scant progress in that direction can be hoped for if, in the determination of the qualification of professional fitness, nonprofessional dishonor and dishonesty in whatsoever path of life is to be ignored. Professional honesty and honor are not to be expected as the accompaniment of dishonesty and dishonor in other relations. So it is that we, in common with other courts, hold, as did Lord Mansfield more than a century ago, that misconduct, indicative of moral unfitness for the profession, whether it be professional or nonprofessional, justifies dismission as well as exclusion from the bar. In *re Durant*, 80 Conn. 146, 147, 67 Atl. 497, 10 Ann. Cas. 539; *Fairfield County Bar v. Taylor*, 60 Conn. 11, 17, 22 Atl. 441, 13 L. R. A. 767; *Ex parte Brounsall*, Cowp. 829; *Boston Bar Ass'n v. Greenwood*, 168 Mass. 169, 183, 46 N. E. 568; *Sanborn v. Kimball*, 64 Me. 140, 148; *Delanoe's Case*, 58 N. H. 5, 42 Am. Rep. 555; *In re Percy*, 36 N. Y. 651, 654.

[2] The demurrer suggests in this connection that disbarment proceedings so far partake of the character of official impeachment that they are not to be permitted in the case of a judicial officer. This objection is not well taken. Since a judge of probate need not be an attorney, his disbarment can have no effect upon his official status. The courts cannot be held responsible for the character of elective officers, but they can and ought to be for the fitness of those who enjoy the privileges of the legal profession under their authority and sanction.

[3] The demurrer asserts further that the complaint addressed to the court fails to set out misconduct, either professional or judicial, on the part of the accused. This general charge is elaborated by reference to specified disassociated allegations, of each of which it is said that it does not charge misconduct. The complaint, however, is to be looked at as a whole, and the question of sufficiency attempted to be presented by the demurrer must be determined upon the result of such an examination. The demurrer and counsel's argument in support of it proceed upon the assumption, or rather assertion, that the same tests are to be applied to a charge of misconduct on the part of an attorney addressed to a court for investigation and appropriate action as to a complaint in a civil suit between parties. This assumption mistakes the true character of a complaint of the former sort.

[4] It has been contended in other jurisdictions that disbarment proceedings partake of the nature of criminal prosecutions, and accordingly require an observance in the preparation of complaints of the formalities

and technicalities prevailing in such procedure. This contention, however, has not met with other than occasional approval by the courts. The most have made emphatic and sound reply that the proceeding was in no sense criminal but one undertaken "for the purpose of preserving courts of justice from the official ministrations of persons unfit to practice in them." *Ex parte Wall*, 107 U. S. 265, 288, 2 Sup. Ct. 569, 27 L. Ed. 552; *Sanborn v. Kimball*, 64 Me. 140, 147; *Boston Bar Ass'n v. Greenwood*, 168 Mass. 169, 183, 46 N. E. 568; *In re Bowman*, 7 Mo. App. 567.

Neither are they civil actions. A "civil action" is one between parties. Here an attorney is called to answer to the court of his appointment for his conduct as an officer of that court. The inquiry is directed solely to his continued fitness. There is no plaintiff. The state is not a party, as would appear by the title mistakenly given upon the record to these proceedings. No person is a plaintiff. There may be, indeed, as in this case there is, one who has called the court's attention to alleged misconduct; but he is in no sense a party, and has no interest in the outcome save as all good citizens or worthy members of the bar may have. The complaint made, the court controls the situation and procedure in its discretion as the interest of justice may seem to it to require. It may even act upon its own motion without complaint, and thus be the initiator of proceedings:

"It (the hearing) was an investigation by the court into the conduct of one of its own officers, not the trial of an action or suit." *Fairfield County Bar v. Taylor*, 60 Conn. 11, 15, 22 Atl. 441, 442 (13 L. R. A. 767).

"The proceeding to disbar an attorney is neither a civil action nor a criminal proceeding, but is a proceeding sui generis, the object of which is, not the punishment of the offender, but the protection of the court." *In re Bowman*, 7 Mo. App. 567.

Section 11 of our rules regulating the admission, suspension, and displacement of attorneys, indeed, provides that complaints for misconduct shall be proceeded with as civil actions, but this does not either make the proceeding a civil action, or necessitate that the complaint be marked by the same precision of statement or conformity to the recognized formalities or technicalities of pleading which are expected in complaints in civil actions. The one supreme requisite is that it be sufficiently intelligible and informing to advise the court of the matter complained of and the attorney of the accusation or accusations made against him to the end that the former may determine whether or not it shall institute an inquiry, and, if one is ordered, properly conduct it, and that the latter may prepare to meet the charges against him, if inquiry shall be made. If this condition is satisfied so that the accused is fully and fairly apprised of the charge or charges made, the complaint is sufficient to give him an opportunity to be fully and fairly heard, and therefore to entitle the

court to entertain it, and thereon proceed to an investigation.

In *Randall v. Brigham*, 7 Wall. 523, 539 (19 L. Ed. 285), where the foundation of the proceeding was nothing more formal than a letter, the court used this language:

"The information imparted by the letter was sufficient to put in motion the authority of the court, and the notice to the plaintiff was sufficient to bring him before it to explain the transaction to which the letter referred. The informality of the notice, or of the complaint by the letter, did not touch the question of jurisdiction."

"No formal or technical description of the act complained of is deemed requisite to the validity of such a proceeding." In *re Randall*, Petitioner, 11 Allen (Mass.) 473, 479; In *re Bowman*, 7 Mo. App. 569; *Sanborn v. Kimball*, 64 Me. 140, 147.

"We entertain no doubt that a court has jurisdiction without any formal complaint or petition, upon its own motion, to strike the name of an attorney from the roll in a proper case, provided he has had reasonable notice, and been afforded an opportunity to be heard in his defense." *Ex parte Wall*, 107 U. S. 265, 272, 2 Sup. Ct. 569, 575 (27 L. Ed. 552).

Turning now to the complaint, we find that it is confined to a simple narrative of alleged facts and occurrences touching the accused's conduct in the course of the settlement in his court of the estate of a deceased person. There is no such distinct and precise specification and characterization of acts of misconduct as would be incorporated into a criminal indictment or even a well-drafted civil complaint. But the charges of misconduct are there. They are unmistakably involved in the narrative, and could scarcely be made more apparent by a more scientific pleading. The accused could not have failed to appreciate the charges involved, and be thereby supplied with all the information requisite for the adequate preparation for the court's inquiry. That he was not misled or inadequately informed is apparent from an examination of the transcript of the quite voluminous evidence presented upon the hearing which is before us in the record.

[5] The story told in the complaint embodies the charge that the accused was guilty of misconduct, in that he obtained from the assets of the estate the payment to himself of \$750 as compensation for pretended services rendered by him as an attorney on behalf of the estate, but never in fact rendered, that he exerted his influence and authority, as the presiding judge of the court having jurisdiction of the settlement of the estate, to secure such payment, that in his efforts to secure it he resorted to deception, misrepresentation, and concealment, and that in those efforts he made use in his official position of threats calculated to produce the end desired for the purpose of coercing and compelling the payment and consent thereto on the part of the persons in interest.

These charges certainly are of misconduct, unfitting one to continue to exercise the

functions of an attorney, and they are all apparent upon the face of the complaint. The court did not err in accepting it as embodying charges deserving of investigation, or in calling upon the accused to answer to them. Inartificial as the complaint may be, it is no pointless story that it tells. The following language used by the court in *Re Lowenthal*, 78 Cal. 427, 429, 21 Pac. 7, 8, under somewhat similar conditions, is quite appropriate to it, and for the most part might well be borrowed by us in commenting upon it:

"We must say that the accusation is not a model pleading in this respect. The facts stated, as we have said, are set out in narrative form, without any allegations connecting them with one or the other of the general charges of misconduct, and are unnecessarily long; but we think they are such as to show misconduct on the part of the respondent, as an attorney of this court, sufficient to put him upon his trial."

Before filing his demurrer to the complaint, counsel for the accused pleaded in abatement for two reasons, to wit: (1) That the proceedings were improperly begun by a presentment by a state's attorney; and (2) that the state's attorney who began them by the presentation of the complaint acted in the premises without legal right or authority by reason of his bitter enmity to the accused and his bias and prejudice against him, rendering him incapable of fair and impartial action as an inquiring and complaining officer.

[6] The first of these reasons rests upon the provisions of chapter 120, P. A. 1907, wherein the appointment of a grievance committee in each county is provided for, their duties defined, and certain powers conferred upon them. Among the duties enumerated in the first section is that of presentment to the court for offenses by attorneys not occurring in its presence. Section 10, of the rules of court, subsequently passed under authority of section 458 of the General Statutes and chapter 256 of the Special Laws of 1907, provides that presentment may be made by the grievance committee or the state's attorney or any member of the bar by direction of the court. The respondent's contention is that the provisions of the General Statutes are controlling and exclusive so that complaint can now be made by grievance committees only. The effect of the adoption of the rule after the enactment of the statute aside, it is apparent that the statute did not intend to provide an exclusive mode of instituting inquiries into the conduct of attorneys. The manifest purpose of the statute was to equip grievance committees with powers adequate for the effective performance of their duties. These committees, already existing under judicial authority, were given statutory recognition and powers adequate to the performance of the duties assigned them were conferred upon them. But there the act stopped. Neither by expression or by implication does it

contain a restriction of the right of complaint to these committees, or a prohibition to the courts of the right to entertain complaints not thus presented. Such an apparent invasion of the power inherent in courts to supervise the conduct of their own officers is not to be presumed, and the provisions of the statute give no countenance to the existence of a legislative intention to that end. See *Grievance Committee v. Ennis*, 84 Conn. 594, 603, 80 Atl. 767.

But that particular consideration aside, it is quite apparent that neither the statute nor the rule, save as the latter comprehends most, if not all, practicable methods of procedure, undertakes to frame exclusive provisions. Each provides methods of procedure, but neither exclusive methods. The courts are, as they should be, left free to act as may in each case seem best in this matter of most important concern to them and to the administration of justice. They may of their own initiative, and without complaint, set on foot inquiries as to professional conduct and fitness, or they may in their discretion entertain a complaint received from any source within or without the profession. Statute and rule provide orderly methods of procedure possessing the advantage of uniformity, thoroughness, and the promise of efficiency. But the power of the courts is left unfettered to act as situations, as they may arise, may seem to require for efficient discipline of misconduct, and the purging of the bar from the taint of unfit membership. Such statutes as ours are not restrictive of the inherent powers which reside in courts to inquire into the conduct of their own officers, and to discipline them for misconduct. *Boston Bar Ass'n v. Greenhood*, 168 Mass. 169, 183, 46 N. E. 568.

[7] The second ground of abatement finds its justification in the qualification of impartiality required of grand jurors in the performance of their duties in presenting for criminal prosecution. The argument is that the same qualification is, under our system, required of a state's attorney in the filing of informations by him, and further by assumption rather than assertion that it attaches to a state's attorney's action when he undertakes to act under the provision in our rules which names him as one who may present to the court complaint of misconduct on the part of an attorney. It is unnecessary to follow the course of this argument, or to examine its premises. It is enough for present purposes to observe that proceedings looking to inquiry into the conduct of an attorney are in no sense, as we have already had occasion to notice, criminal prosecutions; that the state's attorney, if he acts, does not appear as a prosecuting officer; and that his only duty in such case is to do what others might in calling the attention of the court to alleged misconduct on the part of one of its officers, and thereafter to conform to the behests of the court in whose hands the proceeding rests.

The duty which he performs from first to last is one which he owes as a member of the bar and an officer of the court to whose orders in the premises he is subject, and not as a criminal prosecutor. He has no power to direct or control the proceeding. The complaint being made, the duty rests upon the court to see that the interests of justice are preserved and the rights of an accused attorney protected, and when that duty is performed, as it was in this case, by the transfer of the management of the proceeding and the conduct of the hearing to confessedly impartial hands, the accused can have no just cause for complaint.

[8] Beyond question the facts found, as a result of the court's inquiry, furnish ample justification for the order of disbarment. It is, however, asserted on behalf of the respondent that some of these facts lie outside of the charges contained in the complaint. It is true that two features of the finding involving serious matters of misconduct and possibly others of less importance are not touched upon in the complaint. One of these, the most serious of all, could not be, since it related to the presentation upon the hearing of written testimony falsified by the accused. But no one of these matters is made the basis of the judgment. Whether the one referred to as the most serious might not have been made a cause of disbarment, as having occurred in the presence of the court, we need not inquire. It is enough that it was not. The matters which in a sense lay outside of the field of the charges of the complaint are related in the finding as incidental to its story and as having a bearing upon the charges made and the conclusions reached with respect to them; but the misconduct, for which judgment of disbarment was entered as appears by the memorandum of decision, the judgment file, and the finding, is limited to matters clearly within the complaint.

The judgment file, following the memorandum of decision, beyond finding the allegations of the complaint true, confines its finding of misconduct to three particulars:

(1) That the respondent "as an attorney deliberately planned to obtain possession of, from an estate before him as judge of probate, a fee for services as attorney which he had not rendered, and to which he was in no manner entitled." (2) That "he did collect and receive from said estate such fee as attorney, knowing that he was obtaining and receiving it without right and with intent to deprive the owners of the sum so received." And (3) that he, "in order to retain to himself as attorney the sum so obtained, did, by threats to make use of his power as judge of probate to deprive the heirs of the testatrix of the immediate possession of the estate, extort from them against their will a waiver of objection to the allowance by him as judge of the fee received by him as attorney."

These matters were all within the complaint, and it cannot reasonably be contended that they do not amount to misconduct justifying the judgment. An examination of this statement of misconduct furnishing the basis



for the judgment clearly shows that the court understood its duty, and was careful to recognize the limitations which the complaint imposed upon it. This is further shown by its distinct ruling in favor of the respondent's claim of law that it "could not legally find, consider, or regard as a basis of judgment against the defendant in this case any operative fact not directly and positively alleged in the information." The story told in the finding furnishes more incidental details than does that in the complaint, and it is more precise in its statement of ultimate conclusions, and more direct in its characterization of wrongdoing; but it is, after all, the same story in essence, and leads to the establishment of the same operative facts in so far as they influenced the judgment.

It is further contended that the finding of the court, in its significant details and ultimate conclusions of misconduct, is not supported by the evidence, and should be corrected; and the evidence is before us to secure such correction. If it be assumed that our jurisdiction in proceedings of this character extends to the point of reviewing the conclusions of the investigating court upon matters of fact, as in civil actions, it nevertheless appears to us upon an examination of the transcript of testimony that the evidence is such that the court could not have arrived at other conclusions than those upon which its judgment was based. See *In re Durant*, 80 Conn. 140, 149, 67 Atl. 497, 10 Ann. Cas. 539.

[8, 10] The question for the court's determination was whether the respondent, by reason of his past conduct evidencing his qualities of character and uprightness, was a fit person to be longer allowed to exercise the functions of an attorney and to act as an officer of the court in the administration of justice. *Fairfield County Bar v. Taylor*, 60 Conn. 11, 16, 22 Atl. 441, 13 L. R. A. 767. In to the determination of this question there entered a large measure of judicial discretion to be exercised not arbitrarily, impulsively, or under the influence of hatred or prejudice, but reasonably, fairly, and dispassionately. The accused attorney was entitled to notice of the charge against him and opportunity to be heard, a fair and dispassionate investigation, and a reasonable exercise of the judicial discretion. In *re Durant*, 80 Conn. 140, 148, 150, 67 Atl. 497, 10 Ann. Cas. 539. We fail to discover wherein he has not been accorded all these rights.

There is no error.

(88 Conn. 308)

**BROCK v. TRAVELERS' INS. CO.**

(Supreme Court of Errors of Connecticut.  
July 13, 1914.)

**INSURANCE (§ 514\*)—CONTRACTS—CONSTRUCTION.**

A policy, indemnifying insured against bodily injuries accidentally sustained by others

by reason of his operation of an automobile, provided the policy shall not apply while any automobile is driven by any person under the age fixed by law, or under the age of 16, when construed, as it must be, in connection with Pub. Acts 1911, c. 85, § 5, declaring that no person shall operate a motor vehicle without a license, and that no license shall be issued unless the applicant is over 18 years of age, and is a proper person, but nothing shall prevent the operation of a motor vehicle by an unlicensed person 16 years of age or more if accompanied by a licensed operator, makes insurer liable for a loss sustained by insured paying damages for the death of a person struck by his automobile operated by his son, between 16 and 17 years of age, not licensed to operate an automobile, and not accompanied by a licensed operator, for under the statute any person 16 years of age or more may operate an automobile if accompanied by a licensed operator, or if himself licensed, but no license can be issued unless the applicant is over 18 years and a proper person.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1298; Dec. Dig. § 514.\*]

Case Reserved from Superior Court, New Haven County; William L. Bennett, Judge.

Amicable suit under Gen. St. § 955, by Charles W. Brock against the Travelers' Insurance Company, on an agreed statement of facts. Cause reserved by the superior court for the advice of the Supreme Court of Errors. Judgment for plaintiff advised.

Charles F. Clarke, of New Haven, for plaintiff. William Brosmith and Robert C. Dickenson, both of Hartford, for defendant.

THAYER, J. The plaintiff holds a policy or agreement of indemnity of the defendant whereby the latter agrees to indemnify him against loss suffered by him on account of bodily injuries accidentally sustained by others by reason of his ownership and maintenance of an automobile, which is described in his declaration attached to the policy. The policy or agreement contains the following provision:

"This agreement shall not apply while any such automobile is driven or manipulated in any race or competitive speed test, or by any person under the age fixed by law or under the age of sixteen in any event."

While the automobile was being driven by the plaintiff's son in the plaintiff's business an accident occurred, resulting in bodily injuries to another boy, causing his death. The plaintiff's son at the time was between 16 and 17 years of age, was not licensed to operate an automobile, and was not accompanied by a licensed operator. The plaintiff was compelled to pay damages for the above-named injuries, and asked indemnity therefor from the defendant. The defendant refuses to indemnify him upon the ground that at the time of the accident the automobile was being driven by a person under the age fixed by law.

Most, if not all, of the states regulate by statute the operation and maintenance of automobiles, and fix the age and qualifications to be required in the persons operating them.

These requirements are not uniform; younger persons being permitted to operate them in some states than in others. A blank form, which is in broad and general language, manifestly intended for use in different states, and not in this state alone, was used in writing the policy now in question. The proviso quoted above undoubtedly has reference to these statutes, and was intended to save the defendant from liability for losses resulting when the automobile should be driven by a person under the age thus fixed by law for the operation of these vehicles, or when driven by a person under the age of 16 although the age fixed by law should be less than 16.

Our statutes do not in direct terms fix the age at which it shall be unlawful for a person to operate a motor vehicle in the public highways. Public Acts of 1911, c. 85, § 5, which is the statute by which the question between the parties to this action must be determined, provides as follows:

"No person shall operate a motor vehicle upon the public highways of this state until he shall have obtained from the secretary a license for that purpose, but no such license shall be issued until said secretary is satisfied that the applicant is over eighteen years of age and is a proper person to receive it. \* \* \* Nothing herein contained shall prevent the operating of a motor vehicle by an unlicensed person sixteen years of age or more \* \* \* if accompanied by a licensed operator."

The first part of this section, if taken by itself, in effect fixes the age at which a person may operate a motor vehicle at 18 years; for it provides that none but a licensed operator may operate one, and that no person under the age of 18 years may obtain a license. But the statute is to be interpreted as a whole, and the last part provides in effect that any person above the age of 16 years may operate such vehicle if accompanied by a licensed operator. The effect of the section taken as a whole is the same as it would be had it read:

Any person sixteen years of age or more may operate a motor vehicle upon the public highways of this state if accompanied by a licensed operator or if himself licensed by the secretary for that purpose but no such license shall be issued until the secretary is satisfied that the applicant is over eighteen years of age and is a proper person to receive it.

The statute unquestionably fixes 16 as the age under which a person may not in this state operate a motor vehicle upon the highways. Under that age no person may operate such vehicle. Above that age any person may operate one if accompanied by a licensed operator and if licensed, as he may be, if qualified, after the age of 18, without being so accompanied. Had the plaintiff's son at the time of the accident been accompanied by a licensed operator, it could not be claimed rationally that he was under the age fixed by law for operating a motor car. The defendant does not claim that in such case he would have been under the age fixed by law. Its claim is that the words "under the age fixed by law" in its policy are to be taken in their

ordinary, popular sense, and that, so taken, they show that the parties to the policy "intended that the insurer should not cover the operation of the car by a person too young to be licensed to operate a car alone, and yet who was so operating it." We think that this reads something into the provision which the language taken in its ordinary sense does not import. The provision of the statute that an unlicensed person operating a car must be accompanied by a licensed operator has no relation to the age of the operator. It applies to the man of 70 as well as to the boy of 17. Neither may operate the car unless so accompanied, and when so accompanied either may, although unlicensed, operate it. If the operator is not so accompanied the law in each case is violated, not because the operator is under the age fixed by law for operating the car, but because of his noncompliance with the other provision of the statute. The provision in the policy upon which the defendant relies excepts from the coverage of the policy cases where the operator may be duly licensed and above the age fixed by law, but under the age of 16 fixed by the defendant, as well as cases where he may be above the age fixed by the defendant and under that which is fixed by the law. It raises these two questions: First. Was the operator under 16 years of age? If so, the case is not covered by the policy, although the law of the state may permit a person under that age to operate a car and receive a license to do so. Second, if above the age of 16 years fixed by the defendant, was the operator under the age fixed by law. If so, the case is not covered by the policy. The provision relates solely to the question of age, and not at all to the question whether the operator has complied with the other requirements of law. The defendant's construction makes liability depend upon the question whether a licensed operator accompanied the plaintiff's son at the time of the accident, and not upon the question of his age. But the proviso does not attempt to excuse the defendant from liability for losses incurred by the operation of the automobile contrary to the provisions of the statute. It is not claimed that the defendant would not be liable if an unlicensed person above the age of 18 years had been operating the car at the time of the accident without being accompanied by a licensed operator, or if a licensed operator had been operating it in violation of the statute when not equipped with suitable brakes, markers, or lights. The manifest purpose was to excuse from liability only in case the operator was too young, either in the opinion of the defendant or under the terms of the statute, to operate a motor vehicle upon the public highways.

It is said that one construction will tend to encourage violations of the statute. Such is the tendency of accident and indemnity policies generally. They all in a sense encourage neglect of duties which the law im-

poses. While a construction should be sought which will not encourage a violation of the statute, this consideration will not warrant the giving it an impossible construction.

The superior court is advised to render judgment for the plaintiff for \$675, with interest from the date of his payment of the damages to the date of judgment, without costs. No costs will be taxed in this court in favor of either party. The other Judges concurred.

(112 Me. 149)

**PALMER v. PALMER et al.**

(Supreme Judicial Court of Maine. July 13, 1914.)

**1. ASSIGNMENTS (§ 86\*)—RIGHTS OF ASSIGNEE AS AGAINST DEBTOR.**

Where a trustee of a fund, after notice of a prior assignment of part of the fund to plaintiff, paid the whole fund to a subsequent creditor under an equitable trustee process, without disclosing the prior assignment, he was personally liable to plaintiff, since the assignment gave plaintiff a right of property in the amount assigned.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 152-154; Dec. Dig. § 86.\*]

**2. ASSIGNMENTS (§ 119\*)—PROPERTY ASSIGNABLE — RIGHTS OF ASSIGNEE AS AGAINST DEBTOR.**

An entire demand or chose in action may be assigned, and the assignment is binding upon the debtor after notice, whether he accepts it or not, and the assignee may sue at law against the debtor upon the acceptance, if accepted, otherwise upon the original claim itself.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 199; Dec. Dig. § 119.\*]

**3. ASSIGNMENTS (§ 50\*) — PARTIAL ASSIGNMENTS—VALIDITY.**

An assignment of a part only of an entire demand or chose in action, though invalid in law, except as between the parties, is valid and may be enforced in equity.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 99-105; Dec. Dig. § 50.\*]

**4. ASSIGNMENTS (§ 57\*)—RIGHTS OF ASSIGNEE AS AGAINST DEBTOR.**

After notice of an assignment the debtor cannot lawfully pay the amount assigned either to the assignor or to his attaching creditors.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 116-120; Dec. Dig. § 57.\*]

**5. ASSIGNMENTS (§ 137\*) — EVIDENCE — CONSIDERATION.**

A statement in an assignment that it was "for value received" was sufficient prima facie evidence of consideration.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 234; Dec. Dig. § 137.\*]

**6. ESTOPPEL (§ 58\*)—EQUITABLE ESTOPPEL—RIGHTS OF PARTIES.**

An assignee of a part of a fund, who gave notice to the debtor who refused to pay because the fund was "under control of the courts," was not estopped from suing the debtor after the funds were exhausted by payment of subsequent creditors; the debtor not having been misled in any way by the assignee.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 144, 145; Dec. Dig. § 58.\*]

**7. ASSIGNMENTS (§ 128\*)—RIGHTS OF PARTIES — LACHES.**

An equitable assignee of a part of a fund gave notice to the debtor in April, 1910, and

payment was refused because the funds were "under control of the courts." The debtor afterwards exhausted the fund by paying subsequent creditors. *Held*, that a delay of three years before suing was not such laches, as to preclude recovery.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. § 199; Dec. Dig. § 128.\*]

Report from Supreme Judicial Court, York County, in Equity.

Bill by Bartlett Palmer against Francis Palmer and others. On report. Bill sustained, with costs.

Argued before SAVAGE, C. J., and SPEAR, CORNISH, KING, BIRD, and HANSON, JJ.

Clinton C. Palmer, of Biddeford, for plaintiff. James O. Bradbury, of Saco, and Cleaves, Waterhouse & Emery, of Biddeford, for defendants.

CORNISH, J. Bill in equity to recover from a drawee the sum of \$800, with interest, the amount of an order dated April 16, 1910. Prior cases before this court arising out of the same estate have fully set forth the preliminary facts, and it is unnecessary to repeat them in detail. It is sufficient to say that one of the defendants, Clinton C. Palmer, has been held to possess an equitable estate in fee in a certain portion of the residuary estate of his mother, Elizabeth C. Palmer, which was held in trust for him by Francis Palmer, the other and real defendant, "to be used for his comfort and necessities according to the direction" of said trustee. *Holcomb v. Palmer*, 106 Me. 17, 75 Atl. 324, the opinion in that case being rendered on September 8, 1909.

Clinton C. Palmer had previously given to George F. Haley two promissory notes of \$500 each, for money loaned, one in November, 1908, and the other in March, 1909. An equitable trustee process was brought on these notes against Clinton C. Palmer, the maker, and Francis Palmer, the testamentary trustee, under R. S. c. 79, § 6, par. 9, and was sustained, the decree of the single justice being entered on March 24, 1910, and, on appeal, was affirmed by the law court on November 9, 1910. *Haley v. Palmer*, 107 Me. 311, 78 Atl. 368.

On April 16, 1910, Clinton C. Palmer gave his brother, Bartlett Palmer, the plaintiff, the following order:

"\$800. Philadelphia, Pa., April 16, 1910.

"Pay to Bartlett Palmer, for value received, eight hundred and no/100 dollars out of the fund constituting the trust established by the residuary clause of the will of Elizabeth C. Palmer, deceased, and charge the same to the account of

Clinton C. Palmer.  
"To Francis Palmer, trustee under the will of Elizabeth C. Palmer, deceased.

"Trenton, New Jersey."

This order was presented to Francis Palmer for payment at Trenton on April 19, 1910, but payment was refused by him; the reason assigned being, as appears by the indorsement, "Funds are under the control of the

courts." This order is the basis of the present bill in equity.

On November 15, 1910, Clinton C. Palmer gave to Fred A. Tarbox, as collateral for a promissory note, an assignment of all his residuary interest in his mother's estate, subject to the lien established by the decree in the Haley Case. The defendant Francis Palmer refused to honor the assignment or to make the payment, and therefore another equitable trustee process was instituted by the assignee and was sustained; the opinion of the law court being rendered on May 17, 1913. *Tarbox v. Palmer*, 110 Me. 436, 86 Atl. 847. The amount remaining in the hands of Francis was insufficient to pay the Tarbox claim in full, so that, when the present bill was brought on June 11, 1913, the trust estate had become exhausted.

[1] The precise question presented therefore is whether the plaintiff, as holder of the order and therefore as assignee of part of this particular fund, can recover in equity from the trustee of the fund, who was duly notified of the order, but refused to accept or pay it, who at the time of notice had ample funds in his hands with which to meet it, but has since paid the same to a subsequent creditor of the assignor under a decree of court. This case is of somewhat novel impression, as the controversy has usually arisen between attaching creditors and the equitable assignee, where the debtor or drawee assumed the position of stakeholder and stood ready to pay to whichever party might be declared by the court entitled to the funds, as in *Exchange Bank v. McLoon*, 73 Me. 498, 40 Am. Rep. 388, and *Harlow v. Bangor*, 96 Me. 294, 52 Atl. 638, trustee actions at law, and in *Kingsbury v. Burrill*, 151 Mass. 199, 24 N. E. 36, a bill in equity in the nature of interpleader.

In such cases the debtor stands indifferent. Here, however, the debtor is a contending party, as he has paid the funds to the assignor's creditors, regardless of the previous partial assignment to the plaintiff, so that the issue here is between the assignee and the debtor and depends upon the force and effect of the assignment itself, after notice to the debtor. Is the debtor still liable to the assignee notwithstanding the payment he has made?

This question must be answered in the affirmative.

[2, 3] It is familiar law that an entire demand or chose in action may be assigned; that the assignment is binding upon the debtor after notice, whether he accepts it or not; and that the assignee may enforce his rights in an action at law against the debtor, upon the acceptance if accepted, otherwise upon the original claim itself. In like manner the assignment of a part only of an entire demand or chose in action, though invalid in law except as between the parties, is valid in equity and binding upon the debtor whether accepted and assented to by him or not, and

may be enforced in equity against the debtor. This distinction and the reason for its existence are clearly set forth in the leading case of *Exchange Bank v. McLoon*, 73 Me. 498, 40 Am. Rep. 388, as follows:

"The law permits the transfer of an entire cause of action from one person to another, because in such case the only inconvenience is the substitution of one creditor for another. But if assigned in fragments, the debtor has to deal with a plurality of creditors. If his liability can be legally divided at all without his consent it can be divided and subdivided indefinitely. He would have the risk of ascertaining the relative shares and rights of the substituted creditors. He would have, instead of a single contract, a number of contracts to perform. A partial assignment would impose upon him burdens which his contract does not compel him to bear. \* \* \* In a court of equity, however, the objections to a partial assignment of a demand which are formidable in a court of law disappear. In equity, the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court, and run no risks as to its proper distribution. \* \* \* In many ways a court of equity can, while a court of law, with its present modes, cannot, protect the rights and interests of all parties concerned."

In other words, the assignee of a part of a particular fund has the same rights in equity that the assignee of an entire demand has in law. His remedy in equity arises when notice of the assignment is given to the debtor and does not depend upon acceptance by the debtor. The fund is from that time forward impressed with a trust; it is as it were impounded in the debtor's hands, and must be held by him not for the original creditor, the assignor, but for the substituted creditor, the assignee. Mr. Pomeroy states the rule thus:

"In order that the doctrine may apply, and that there may be an equitable assignment creating an equitable property, there must be a specific fund, sum of money, or debt actually existing or to become so in future upon which the assignment may operate, and the agreement, directions for payment, or order must be in effect an assignment of that fund or of some definite portion of it. \* \* \* The agreement, direction, or order being treated in equity as an assignment, it is not necessary that the entire fund or debt should be assigned; the same doctrine applies to an equitable assignment of any definite part of a particular fund. The doctrine that the equitable assignee obtains not simply a right of action against the depository, mandatory, or debtor, but an equitable property in the fund itself, is carried out into all its legitimate consequences. \* \* \* The fund in this respect resembles a fund impressed with a trust." 3 Pomeroy, Eq. Jur. § 1280.

In *Bank of Harlem v. Bayonne*, 48 N. J. Eq. 246, 21 Atl. 478, the court on this point say:

"It is evident from this statement of the incidents of an equitable assignment that acceptance by the debtor of the order or assignment is not, in equity, necessary to its validity as a transfer pro tanto of a fund in his hands. It takes effect from the acts of the assignor and assignee, and the debtor, so far as the right to the fund is concerned, is but the instrument through whom the transfer is to be actually made. The debtor's acceptance or promise gives the assignee an action at law against him, not on the assignment, but on the promise; in equity, it neither creates, increases, nor diminishes his liability to the assignee."

See, also, the same principles accepted in *Lazarus v. Swan*, 147 Mass. 330, 17 N. E. 655; *Warren v. Bank of Columbus*, 149 Ill. 9, 38 N. E. 122, 25 L. R. A. 746; *Todd v. Meding*, 56 N. J. Eq. 58, 38 Atl. 349; *Merchants' & Miners' Nat. Bank v. Barney*, 18 Mont. 335, 45 Pac. 218, 47 L. R. A. 737, 56 Am. St. Rep. 586.

It is clear then on this first proposition that the plaintiff's order not only gave him the right of property in the amount assigned, but also that on demand it became the duty of Francis Palmer, the drawee, to pay the sum so assigned, and on his refusal this bill in equity would lie.

[4] It therefore follows that after notice of the assignment the debtor cannot lawfully pay the amount assigned either to the assignor or to his attaching creditors, and if he does make such payment it is at his peril.

The payment of the Haley judgment in no way affects the rights of the parties here because final decree was entered by the single justice in that proceeding nearly a month before the plaintiff's order was given and therefore clearly had the priority.

But the assignment to Tarbox was not given until seven months after the plaintiff's order, and the equitable proceedings in that case were not concluded until the final decree was affirmed by the law court on May 17, 1913. When the bill in equity in that case was served upon the defendant Francis Palmer, in which Tarbox claimed the entire balance of the trust fund, less the Haley judgment, it was the plain duty of Francis in his answer to set up this prior assignment to Bartlett Palmer, and to ask the court to pass upon both claims and determine their validity and priority. This he neglected to do. He revealed the true situation neither in his answer nor by evidence. Had the court been apprised of the facts, the plaintiff could have been made a party and his rights determined in that proceeding.

Not having done this, which it was his duty to do, the trustee paid the Tarbox claim at his peril. He was knowingly using the property of the plaintiff to pay the debt of another, and the mere fact of having thus expended all the fund affords no defense to the claim of the rightful owner. Here again the rights of the parties to an assignment of an entire claim are analogous. Payment under trustee process at law will not protect a debtor who had notice of a prior assignment and neglected to set up the assignment in his disclosure. *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515; *Milliken v. Loring*, 37 Me. 408; *Bunker v. Gilmore*, 40 Me. 88; *Larrabee v. Knight*, 69 Me. 320. And notice even after attachment but before disclosure is seasonable. *Horne v. Stevens*, 79 Me. 262, 9 Atl. 616.

For the same reason payment under an equitable trustee process cannot protect a debtor who had notice of a prior assignment and neglected to set it up in his answer or

to show it in evidence. That is the situation in which the defendant Francis Palmer is now placed, and his liability therefore is established.

But even conceding the original liability of Francis Palmer on the equitable assignment, his learned counsel raises two other objections to the maintenance of his bill.

[5] First because the plaintiff has failed to show the relation of debtor and creditor between the assignor and assignee. This claim, however, rests upon suspicion rather than proof. As was said in *Dix v. Cobb*, 4 Mass. 508:

"The assignment in this case may be fraudulent, but on its face it appears to be regular, and for a valuable consideration; and we cannot presume fraud." *Robbins v. Bacon*, 3 Me. (Greenl.) 346.

The plaintiff's order was expressed to be for value received, and that is sufficient prima facie evidence of consideration. The defendant offered no evidence to overcome this, and therefore the consideration remains unshaken, so far as proof is concerned. *Tarbox v. Palmer*, 110 Me. 436-441, 86 Atl. 847.

[6] In the second place the defendant Francis sets up estoppel and laches, but we fail to find in the record sufficient proof to warrant the application of either of these equitable defenses.

As concerns estoppel, the plaintiff did nothing and said nothing which in any way misled the drawee or caused him to change his position. Nor did he keep silent when he should have spoken. He notified the drawee of the order immediately after it was made, and after payment was refused they had no further dealings. The plaintiff resided in Philadelphia, Francis in Trenton, N. J., and they did not meet. Francis acted entirely on his own motion in the Tarbox suit and was not placed in his present position by any conduct on the part of the plaintiff. The elements of estoppel are lacking. *City Bank of New Haven v. Wilson*, 193 Mass. 164-166, 79 N. E. 246.

The plaintiff was not obliged to repeat his notice, nor to watch court proceedings in Maine in order to ascertain if other parties subsequently claimed his property. It was the duty of the drawee to disclose the assignment; not of the assignee to take precautions to intervene in a proceeding which never came to his knowledge so far as appears from the evidence. It is true that the original assignor, who is now counsel for the assignee in this proceeding as well as a nominal party defendant, was cognizant of all the proceedings in the Tarbox Case and took part therein; but there is no evidence that he was acting for the plaintiff at that time nor that he informed him in regard to the matter. And even if he had it might well be questioned whether such knowledge of itself would relieve the drawee of the duty which rested upon him in order to protect himself from the legal consequences of the

assignment of which he had been given due and prompt notice.

[7] Nor can the plaintiff be held to lose his property because of laches. When he gave notice to the drawee in April, 1910, his request was refused, and the reason assigned was that the funds were "under the control of the courts." He refrained from enforcing his claims for a little over three years, but we cannot hold that his rights are thereby precluded. By the plaintiff's delay the defendant has lost no evidence necessary to a fair presentation of the case on his part and has been deprived of no just advantage and subjected to no hardship, tests which are always applied. *Spaulding v. Farwell*, 70 Me. 17.

The hardship which exists arises, not from the fault of the plaintiff, but from the unfortunate inadvertence or neglect of the defendant himself, and for this the plaintiff should not be made to suffer.

Bill sustained, with costs.

Decree in accordance with opinion.

(112 Me. 156)

**PALMER v. PALMER et al.**

**NORTHWESTERN INV. CO. v. SAME.**

(Supreme Judicial Court of Maine. July 13, 1914.)

**EXECUTORS AND ADMINISTRATORS (§ 814\*) — DISTRIBUTION OF ESTATE.**

The rule that an action at law does not lie to recover a distributive share of an estate before the amount to be distributed has been ascertained in the probate court also prevails in equity in the absence of other and compelling reasons.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1274-1297; Dec. Dig. § 314.\*]

Appeal from Supreme Judicial Court, York County, in Equity.

Bills in equity by Clinton C. Palmer and the Northwestern Investment Company against Francis Palmer and others. From an order dismissing the bill in each case, complainants appeal. Modified and affirmed.

Argued before SAVAGE, C. J., and CORNISH, KING, BIRD, HANSON, and PHILBROOK, JJ.

Clinton C. Palmer, of Biddeford, for appellants. Robert B. Seidel, of Biddeford, for appellee Bartlett Palmer. Cleaves, Waterhouse & Emery, of Biddeford, and James O. Bradbury, of Saco, for appellee Francis Palmer and others.

CORNISH, J. On appeal from the decision of the sitting justice dismissing the bill in each case.

Clinton C. Palmer in his bill seeks to establish a lien on Bartlett Palmer's share in the residue of the estate of Elizabeth C. Palmer in the hands of the executors of her will, to secure payment of advances aggregating \$175 made by him to said Bartlett,

and to collect from the executors the amount secured by the lien.

The Northwestern Investment Company in its bill seeks to reach the balance of Clinton C. Palmer's share in the residue of the same estate remaining in the hands of the executors and to apply the same on account of a \$1,500, note of said Clinton taken by the company, of which Clinton is treasurer and which had a paid up capital of only \$300, in payment of 15 shares of its capital stock.

The defendants in each bill allege, among other things, that the estate is in process of settlement in the probate court of York county, that their second account has been filed and is still open for further hearing, that no order of distribution has been made, and that upon final settlement of said estate nothing will be found due to said Bartlett because of advances already made, and the amount, if any, due to said Clinton is uncertain.

From the allowance of the second account in the probate court an appeal was taken both by Clinton C. Palmer and the executors to the Supreme Court of Probate, which modified to a slight extent the findings below. The executors abided by the decree of the Supreme Court of Probate, but Clinton excepted to the allowance of seven items of credit and the case was heard in this court on those exceptions. Three of these exceptions were overruled, and four were sustained. Clinton C. Palmer, Applt., 110 Me. 441, 86 Atl. 919. One of these four pertained to the "private account" of Francis Palmer, an executor, and in disallowing it as not being "particularly stated" as required by R. S. c. 66, § 65, the law court said:

"The statute is peremptory. The claim, if not properly stated, cannot be saved by proof. Upon the present statement the claim should be disallowed as a matter of law, and this exception must be sustained. Whether it ought to be disallowed without prejudice to the right to present it properly in a further account is a question which must be determined when the matter comes up for further hearing in the Supreme Court of Probate." Clinton C. Palmer, Applt., supra, 110 Me. at page 447, 448, 86 Atl. 919, 923.

Another exception related to the allowance of commissions of 5 per cent. on \$37,901.02, while the total amount with which the executors charged themselves in that second account was only \$18,538.85. The record failed to disclose how much was accounted for in the first account, or that the entire estate aggregated the \$37,901.02 on which commissions were computed. For this technical reason the exception was sustained, but the law court add:

"The omission was doubtless inadvertent. If we were permitted to supply the omission by the knowledge of the situation which we have gained in other litigation between these parties, we might do so. But we have no right to do this. We are limited to the record before us. We cannot go outside of it. *Hunter v. Heath*, 76 Me. 219, and many other cases. We must

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

leave the omission to be supplied on a further hearing. Reluctantly therefore we are compelled to say that the exception must be sustained." Clinton C. Palmer, Applt., supra, 110 Me. at pages 448, 449, 86 Atl. 919, 923.

This decision was rendered on May 20, 1913, and on June 5, 1913, the executors filed a written motion for further hearing in the Supreme Court of Probate, as suggested in the opinion of the law court, upon the matters above referred to, and another motion was pending to strike out from said second account an item of \$2,800, which the executors claim was improperly inserted.

The sitting justice in his decree, in each case after making a finding of facts, held:

"That until the matters mentioned in the three preceding findings are determined, the balance, if any, belonging to the estate of Elizabeth C. Palmer and in the hands of these executors as such, cannot be determined."

It was then ordered that each bill be dismissed without prejudice and without costs.

This decree should stand. The estate of Elizabeth C. Palmer remains unsettled. It is in process of such speedy settlement as continuous and protracted litigation will permit. The final account cannot be rendered nor the decree of distribution made until the controverted claims are determined, and the proper tribunal for the determination of those claims is the probate court, which has full jurisdiction of the subject-matter and of the parties. The law court in the opinion before cited has in effect so stated, and we merely reiterate it. An action at law does not lie to recover a distributive share of an estate before the amount to be distributed has been ascertained in the probate court. *Graffam v. Ray*, 91 Me. 234, 39 Atl. 569; *Hawes v. Williams*, 92 Me. 483, 492, 43 Atl. 101. And the same rule should prevail in equity, at least in the absence of other and compelling reasons.

The decree of the sitting justice in each case is affirmed, except in the matter of costs, which we think under all the circumstances the defendants are entitled to. The decree as modified should be in each case: "Bill dismissed without prejudice and with a single bill of costs."

So ordered.

(5 Boyce, 150)

## LOFLAND'S BRICKYARD CROSSING CASES.

ROBERTS v. MARYLAND, D. & V. RY. CO.  
(Superior Court of Delaware. Sussex. June 29, 1914.)

### 1. RAILROADS (§ 344\*)—CROSSING ACCIDENTS—ACTIONS—DECLARATION.

In an action for injuries sustained in a crossing accident, a count alleging that it was defendant's duty to give due and timely notice and warning of the approach of its trains to the crossing by sounding the whistle, and that it failed to perform its duty in this respect, sufficiently negated the giving of warning other than by blowing the whistle, as it alleged a duty to give warning, a failure to perform such

duty, and then particularized such failure, by stating a failure to blow the whistles.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1107-1112; Dec. Dig. § 344.\*]

### 2. RAILROADS (§ 344\*)—CROSSING ACCIDENTS—ACTIONS—DECLARATION.

In an action for injuries sustained in a collision at a crossing, which plaintiff approached from the south, a count alleging that it was not possible for the driver of an automobile approaching the crossing or a locomotive from the east either one to see the other until the driver of the automobile had approached within a very few feet of the crossing, was demurrable, since if it was intended to allege that it was impossible for either to see the other when the traveler was approaching from the north the allegation was not pertinent, while if it was intended to allege that this was impossible when the traveler was approaching from the south the defendant was entitled to a definite allegation to this effect.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1107-1112; Dec. Dig. § 344.\*]

### 3. RAILROADS (§ 344\*)—CROSSING ACCIDENTS—LIABILITY.

The failure of a railroad company to station a flagman at a crossing is evidence to be submitted to the jury upon a proper showing of unusual dangers at the crossing, and to be considered by the jury in determining under all the circumstances whether the company was negligent in respect to giving due and sufficient warning of the approach of trains; but such failure is not negligence per se, as the company may have used other and more appropriate and sufficient means of warning, and hence a count alleging a duty to provide a flagman and a failure to perform such duty was demurrable.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1107-1112; Dec. Dig. § 344.\*]

### 4. RAILROADS (§§ 309, 312\*)—OPERATION—HIGHWAY CROSSINGS—SIGNALS.

A railway company must operate its trains with the care and prudence which the peculiar circumstances of the place reasonably require, and under peculiar circumstances or on extraordinary occasions must give warnings at some crossings in addition to those required by statute.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 981, 988-1001, 1003-1005; Dec. Dig. §§ 309, 312.\*]

### 5. RAILROADS (§ 312\*)—OPERATION—HIGHWAY CROSSINGS—SIGNALS.

If at a railway crossing there are obstructions of such a nature that a traveler on the highway is prevented from seeing an approaching train, or if the peculiar conditions surrounding the crossing prevent a traveler using due care and caution from hearing the blowing of the whistle, the degree of care required on the part of the railroad company to warn travelers of the approach of trains is correspondingly increased.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 988-1001, 1003-1005; Dec. Dig. § 312.\*]

### 6. RAILROADS (§ 344\*)—CROSSING ACCIDENTS—ACTIONS—DECLARATION.

In an action for injuries sustained in a crossing accident, a count alleging a duty to provide a bridge across and over the railroad at such crossing, and a failure to perform such duty, was demurrable, in the absence of any statute requiring the maintenance of a bridge there; the common law not obliging railroads to erect bridges over grade crossings.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1107-1112; Dec. Dig. § 344.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In *Grippen v. N. Y. Central*, 40 N. Y. 34, the court used the following language:

"The greater the circumstances of difficulty in avoiding the train, in hearing its signals, in seeing its approach (howsoever they arise), the greater caution is devolved upon the railroad company in making that approach."

The authorities are uniform in requiring railroads to use reasonable care and diligence and give such warning as the dangers of a crossing demand, and this in addition to the statutory requirements. Much confusion, however, has arisen as to whether due diligence in this respect, under peculiar circumstances, imposes on the company the legal duty of placing a flagman at the crossing, or whether under the circumstances the absence of a flagman is only evidence of the company's failure to perform its duty of giving due and timely notice of the approach of its trains.

In support of the first doctrine the plaintiff cited the case of *English v. Southern Pacific Co.*, 13 Utah, 407, 45 Pac. 47, 35 L. R. A. 155, 57 Am. St. Rep. 772, in which case the court said:

"It is clear that, while the statutes of Utah make some provision for the safety of the public while crossing tracks when crossing over the public thoroughfares in thickly settled communities or cities, yet these statutes will not relieve the railroad company from adopting such other reasonable measures for the public safety as common prudence may dictate, considering the danger, locality, travel, and surrounding circumstances of the case. The reason of such rule is founded in the common law that every one must so conduct himself and use his own property as that, under ordinary circumstances, he will not injure another in any way, if such injury can reasonably be avoided by the use of reasonable care. The vigilance and care to be used would be much greater at public crossings in populous cities and towns, where many tracks are built across the streets, and are constantly in use, than the ordinary road crossings in the country, or less populous and less used localities; so that the reasonable care and prudence to be used must depend upon the facts of each case. In the crossing of this particular street, where the travel is shown to be great, and the danger in crossing to be greater, we are of the opinion that reasonable care and prudence would require that a flagman be kept constantly at the crossing during the time that trains continue to cross over it, or that gates should be erected and controlled so as to lessen the danger of injury to passengers and travelers, and thus lessen the danger caused by the almost constant use of the tracks by the defendants and their trains. And, while this is true of this particular crossing, we are not of the opinion that these precautions should be observed by railroad companies in country districts, cities, or smaller localities, where but few persons pass each day, and where the probable danger would be much lessened."

The doctrine, as stated in the Utah case, while accepted in a few jurisdictions, is not generally approved by the courts of this country. The greater weight of authority accepts the doctrine that the failure of a railroad company to maintain a flagman at a peculiarly dangerous crossing is only evidence of negligence on the part of the company.

In *Grand Trunk Railway v. Ives*, 144 U.

S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485, it was said by Justice Lamar:

"As a general rule, it may be said that whether ordinary care or reasonable prudence requires a railroad company to keep a flagman stationed at a crossing that is especially dangerous is a question of fact for a jury to determine under all the circumstances of the case, and that the omission to station a flagman at a dangerous crossing may be taken into account as evidence of negligence. \* \* \*"

In *Barnum v. Grand Trunk Western Railroad Co.*, 148 Mich. 370, 111 N. W. 1036, the court said:

"It is not ordinarily negligence to neglect to have a flagman at a crossing in the absence of an order from the commissioner of railroads, and yet circumstances of the particular case may be such that the absence of a flagman may be evidence of negligence."

The court in *Seifred v. Penna. R. R. Co.* (appellant), 206 Pa. 399, 55 Atl. 1061, said:

"On running its trains over a crossing, a railroad company must exercise the care required by all the circumstances, and the failure to perform this duty is negligence. It must adopt and use some means for the protection of those who may be crossing its tracks at their intersection with a public highway. But what particular means shall be used to protect the public when using the crossing with due care is left to the railroad company which operates the road, the law merely demanding and requiring reasonable care in view of all the circumstances."

The statute in this state requires only that the whistle on the locomotive be blown as the train approaches crossings, such as in this case, and we have already stated the rule in this state, based on the common law, requires the company to give timely and sufficient warning to travelers of the approach of its trains to a crossing, and that the degree of care and caution in performing that duty is increased as the hazards of the crossing are increased. It appears that the common-law duty of the railroad company is to give due and timely warning to travelers on the highway, and it does not require the company to station a flagman at the crossing, nor to adopt any particular method of signals or means of warning the public. The method and means of warning the public, exclusive of statutory warnings, are questions for the company to determine and put into effect in the strict compliance, compelled by law, of its duty in giving timely and sufficient warning of the approach of its trains. The failure on the part of the company to use the common, ordinary, and appropriate methods of warning is an evidential fact relevant to the question whether the company did do what a reasonably prudent and careful person would have done, under all the facts and circumstances, to warn travelers of the impending danger.

We are of the opinion that the failure of a railroad company to station a flagman at a crossing is evidence to be submitted to the jury, upon a proper showing of unusual dangers of the crossing, and by the jury to be considered in determining, under all the circumstances, whether the company was



negligent of its duty in giving due and sufficient warning of the approach of its train to the crossing. We believe the following cases in this state to be authorities for this statement of the law: *Parvis v. P., W. & B. R. R. Co.*, 8 Houst. 436, 17 Atl. 702; *MacFeat's Adm'r v. P., B. & W. R. R.*, 5 Pennewill, 52, 62 Atl. 898; *Short v. P., B. & W. R. R. Co.*, 7 Pennewill, 108, 76 Atl. 303; *Welch v. B. & O. R. R. Co.*, 7 Pennewill, 140, 76 Atl. 50; *P., B. & W. R. R. v. Buchanan*, 2 Boyce, 243, 78 Atl. 776; *Trimble v. P., B. & W. R. R.* (1913) 89 Atl. 390.

It will be noticed in the present pleading that the plaintiff avers, and asks the court to hold as a matter of law, that it was the duty of the defendant to provide a flagman at the crossing, and maintains that the collision was caused by the defendant's failure to perform its duty in this respect, and that it is not averred that the duty of the defendant was to give timely and sufficient warning, and that the violation of that duty consisted in the defendant's failure to station a flagman at the crossing. This difference under the principles of pleading recognized in this state and the law concerning negligence is most material. If we were to hold as a matter of law that it was the duty of the defendant to place a flagman at the crossing, then a failure in this duty would be negligence per se, notwithstanding the company might have used other and more appropriate and quite sufficient means of warning the public. But if the negligence averred had been that the defendant failed in the performance of its duty to give due and timely warning in that it did not station a flagman at the crossing, then proof of the absence of a flagman would not establish negligence per se on the part of the defendant, but would only be an evidential fact to be considered by the jury in determining whether the defendant neglected its duty to give timely and sufficient warning, and would let the defendant into a defense that it gave timely and sufficient warning otherwise than by a flagman.

As we have determined that the law in the absence of statute imposes no duty on the part of a railroad company to station a flagman at a crossing of a railroad and a public highway, even when the crossing is a peculiarly dangerous one, it necessarily follows that the count in this case which charges such a duty to the defendant is faulty and cannot be sustained on demurrer. We therefore sustain the demurrer to the fifth count.

[6] The sixth count avers that it was the duty of the defendant company to provide a bridge across and over the railroad at Lofland's Brickyard Crossing, and the defendant is charged with negligence in failing to fulfill that duty.

The defendant denies the existence of such a duty and claims that the failure to have a

bridge at the crossing was not an act of negligence.

At the argument it was admitted by counsel for the plaintiff that no statute of this state, either general or special, requires the maintenance of a bridge at Lofland's Brickyard Crossing, and as we know of no principle of common law which obliges railroads to erect bridges over grade crossings, we hold that the count does not set forth a statement of facts which, if proved, would establish in law a right of recovery against the defendant on the part of the plaintiff. We sustain the demurrer to the sixth count.

[7] In the seventh count the defendant's averred duty in which it is claimed to have failed was the placing of a signboard indicating the dangers of the crossing to travelers.

We find the law in respect to signboards to be much the same as we have, previously in this opinion, held it to be concerning flagmen; and as we have already dealt at some length with that question, we think it neither necessary nor practicable now to restate the law on the subject. For the same reasons the court assigned in sustaining the demurrer to the fifth count, we hold the demurrer to the seventh count to be well taken.

The two other actions were brought, one by Mary A. Nailor, widow, and the other by the administrators, to recover damages for the death of David B. Nailor, occasioned by a collision of an automobile owned and driven by David B. Nailor, the deceased, and a locomotive operated by the defendant railroad company at Lofland's Brickyard Crossing, in Sussex county. The collision is alleged to have been caused by the defendant's negligence.

Originally each of the narrs contained six counts, but counsel for the plaintiffs withdrew the fifth and sixth counts.

Counsel for the defendant demurred either generally or specially to each of the four remaining counts in both narrs.

The conditions surrounding the crossing and the allegations of defendant's duty and negligence in the four counts of the narrs under consideration are stated in identical language, and we will in this opinion refer to one case only, but our rulings are to both cases.

The question raised by the demurrer to the first count is the same as was raised by the demurrer to the first count of the narr filed in the action brought by Evans Roberts against the same defendant, and above considered by the court. For the reasons there stated we overrule the demurrer.

[8] That the defendant failed to blow the whistle attached to the locomotive in the manner required by section 1, chapter 685, volume 18, Laws of Delaware, is the act of negligence charged against it in the second count.

The cause of demurrer is stated to be the failure of the plaintiff to specifically aver that Lofland's Brickyard Crossing is not located in the city of Wilmington, as the provisions of section 1, by proviso, do not apply to crossings in that city.

This objection must fail, for it is averred with clearness and certainty in the pleading that the crossing in question is located at a point in Sussex county between the towns of Lewes and Milton, which averment sufficiently negatives any possibility of its being located in Wilmington, which is in New Castle county.

[9, 10] In the third count the plaintiff in general terms alleges the crossing to be a dangerous one and further alleges that the defendant—

"did \* \* \* negligently and carelessly drive and propel a certain locomotive and train of cars \* \* \* at a great rate of speed over and across a public road \* \* \* without giving due and timely notice or warning of the approach of the steam locomotive thereto."

To this count the defendant demurs specially, contending that it is necessary for the plaintiff to set forth the kind and nature of the warning which the defendant failed to give.

The averment that the defendant carelessly and negligently propelled its locomotive, in that due and timely warning was not given of its approach to Lofland's Brickyard Crossing, a dangerous grade crossing, discloses the negligence imputed, and charges the defendant with the duty to give warning which is neither so complicated, nor so varied in its performance, that the defendant is not informed of the act of negligence with which it is charged. Under the pleading, the defendant's duty was only to exercise that degree of care and caution which the law compels it to use at ordinary grade crossings in the country, notwithstanding that the crossing is alleged to be a dangerous one. To claim that the company did not exercise that high degree of care and caution which the law requires of it at peculiarly dangerous crossings, then the plaintiff must plead, sufficiently in detail to inform the plaintiff of the high degree of care and caution expected of it, those circumstances and conditions that cause the crossing to be a particularly dangerous one.

We are of the opinion that the pleading does acquaint the defendant of the facts it is called upon to meet in preparing its defense, with the sufficiency and particularity required under our rules of pleading as stated in the following cases: *Campbell v. Walker*, 1 Boyce, 580, 76 Atl. 475; *Loteman v. People's Ry. Co.*, 1 Boyce, 588, 77 Atl. 772; *Hunter's Adm'r v. P., B. & W. R. R. Co.*, 1 Boyce, 5, 75 Atl. 962. The demurrer to the third count is overruled.

The defendant's failure to give due and timely warning by ringing a bell attached to

the locomotive is the allegation in the fourth count. The demurrer to this count presents the same question of law raised by the demurrer to the first count, and, for the reason there stated, we overrule the demurrer.

(5 Boyce, 162)

# STATE v. DELAWARE SAENGERBUND, Inc.

(Court of General Sessions of Delaware. New Castle. June 11, 1914.)

## 1. INTOXICATING LIQUORS (§ 6\*)—SALE—REGULATION—LEGISLATIVE POWER.

The state government may regulate the liquor traffic for the purpose of deriving revenue, and also in the exercise of its police power for the benefit and protection of society.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 4; Dec. Dig. § 6.\*]

## 2. INTOXICATING LIQUORS (§ 50\*)—SALE—REGULATION—STATUTES—CONSTRUCTION.

14 Del. Laws, c. 418, provides that no person, directly or indirectly, shall sell any intoxicating liquors, except as provided in the act, which then provides for the sale of liquor in certain and limited ways relating to the quantity to be sold and the place on which the liquor is to be drunk, limiting the right to sell liquor to the persons and in the manner described. *Held*, that such act should not be construed as limited to sales by persons selling liquor as a business, but prohibited sales of liquor without a license by an incorporated club organized and maintained for other and innocent purposes, though the sales were restricted to members.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 51; Dec. Dig. § 50.\*]

## 3. INTOXICATING LIQUORS (§ 172\*)—WRONGFUL SALE—"PERSON"—CORPORATION.

An incorporated club, organized to furnish musical and other entertainment among its members, was a "person," within 14 Del. Laws, c. 418, providing that no person, by himself, his agent, or servant, directly or indirectly, shall sell any intoxicating liquors, except as provided in the act.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 186; Dec. Dig. § 172.\*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5322-5335, vol. 8, p. 7752.]

## 4. INTOXICATING LIQUORS (§ 146\*)—WRONGFUL SALE—"SALE."

An incorporated club, organized for social, literary, and musical purposes, with its own funds purchased a stock of intoxicating liquors, which through its authorized agents and employees were furnished to members in quantities less than a quart, to be drunk on the premises; the member paying an agreed price per drink. Only members of the club were permitted to obtain liquors from the club, and the proceeds of sales were used for the club's general purposes, and not set aside to replenish the stock. *Held* that, when liquor was so furnished to a member of the club, there was a "sale" of liquor, within 14 Del. Laws, c. 418, providing that no person shall sell any intoxicating liquors, except as therein provided, and declaring that such liquors may not be lawfully sold without a license.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 159, 160, 163; Dec. Dig. § 146.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6291-6306; vol. 8, p. 7793.]

The Delaware Saengerbund, Incorporated, a Delaware corporation, was indicted for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

selling liquor without a license, in violation of 14 Del. Laws, c. 418. The facts were submitted to the jury and questions of law addressed to the court on the following statement of facts:

"\* \* \* It is agreed by and between the parties hereto, the state of Delaware acting by and through the Attorney General, and the defendant acting by and through Robert G. Harman, Esq., and Robert H. Richards, Esq., its attorneys, that this cause shall be submitted to the court for its determination upon the following agreed statement of facts:

"Delaware Saengerbund, Incorporated, is an incorporated club created in the year 1883 by special act of the Legislature of the state of Delaware, and whose corporate existence has been continued and renewed under the present General Corporation Law of the said state, a copy of the charter of the said defendant being annexed hereto and marked 'Exhibit A.'

"A copy of the by-laws of said defendant is annexed hereto marked 'Exhibit B'; and it is agreed that the said charter and the said by-laws shall be considered as a part of this case stated.

"Delaware Saengerbund is an organization formed for social, literary and musical purposes and particularly for the training and development of the human voice in the art of singing. It is a German singing society and not only gives entertainments of that character, but takes a prominent part in singing contests throughout the United States.

"That since the date of the incorporation of the said club, it has, from time to time, purchased in bulk spirituous and malt liquors, and through its authorized agents and employes, has furnished the same to its members in quantities less than one quart to be drunk on the premises and at an agreed price per drink.

"That every member of said club pays for the quantity of spirituous and malt liquors he calls for and consumes.

"That only members of the said club are permitted to thus obtain spirituous and malt liquors from the said club.

"That said club is located and domiciled at Grubb's Landing, in Brandywine hundred, New Castle county and state of Delaware, and also owns a one-half interest in and occupies a building in the city of Wilmington, located at 205-206 East Sixth street; and that at said properties the said club uses in connection with one or the other of them the following stock, fixtures and personal property, to wit: A pool table, shuffle board, piano, library, newspapers and magazines, stock of cigars, soft drinks, malt and spirituous liquors.

"That the said defendant is the owner of the building which it occupies in Brandywine hundred as a club-house, which building is of the value of upwards of \$15,000, and is the owner of a one-half interest in the said building in the city of Wilmington, which building is of the value of upwards of \$10,000.

"That the said club has between 700 and 800 members, all of whom are elected in accordance with its charter and by-laws.

"The said club, since the date of its incorporation up to and including the date hereof, never applied for, held or had issued to it by the state of Delaware, any license to sell intoxicating liquors in any quantities whatsoever, nor any license to sell any other merchandise furnished by said club to its members.

"That said club has paid to the United States of America, for the year beginning July 1, 1913, an internal revenue tax as a retail liquor dealer.

"That said club, as an incident to the objects of its incorporation, as stated in its charter, furnishes spirituous and malt liquors to its members, who pay to said club money therefor; that the selling price of the liquors so furnished exceeds the cost thereof to said club; that all

such money arising from such furnishing of such liquors to members is placed in the treasury of said club and becomes a part of the general funds of said club and is expended for club uses by said club for any purpose the said club sees fit; that none of such money, or of any funds of the club, is distributed to or divided among the members of said club, or any of them, as profits, dividends or otherwise.

"That on the 28th day of October, A. D. 1913, one John H. Litz, a member of said club in good standing, at the said club-house of said club, in Brandywine hundred, New Castle county, Delaware, gave to a certain agent and employe of said club, then acting as such agent, the sum of five cents, and received in exchange therefor one drink of intoxicating liquor, to wit, a glass of that malt liquor called lager beer, the same being furnished from the stock and supplies of such liquor kept by said club and purchased out of the funds of said club for the purpose of being furnished to the members of said club upon their paying the price or charge fixed therefor by a tariff or schedule of prices fixed for the same by said club. That in acting and doing as aforesaid, said agent was authorized so to act and do by said club.

"That said club-house is located in a district wherein the qualified electors of said district have voted that the manufacture and sale of intoxicating liquors shall be licensed in accordance with the provisions of article 13 of the Constitution of the state of Delaware.

"If the court shall be of the opinion that it is material to this case, and that the defendant in a trial would be entitled to offer it as evidence, then the further statement of fact is agreed as contained in the next succeeding paragraph, as follows, to wit:

"It is agreed that for upwards of 40 years numerous clubs and organizations, in the said county of New Castle, both incorporated and unincorporated, have furnished and dispensed intoxicating liquors to their members, without applying for or holding any license under the laws of the state of Delaware, to sell intoxicating liquors.

"It is further agreed that if the court shall be of the opinion, upon the facts aforesaid, that, under the laws of the state of Delaware, an offense punishable by such laws is stated or shown to have been committed by the defendant, then judgment shall be entered against said defendant upon the verdict of the jury charged accordingly by the court upon the said admitted facts; and if the court shall be of the opinion, upon the facts aforesaid, that such an offense is not stated or shown to have been committed, then judgment shall be entered accordingly upon a verdict of not guilty. The said defendant, in case of a judgment against it, as aforesaid, reserves the right to except to the charge of the court upon the law. \* \* \*

Verdict of guilty.

Argued before WOOLLEY and RICE, JJ.

Josiah O. Wolcott, Atty. Gen., for the State. Robert G. Harman and Robert H. Richards, both of Wilmington, for defendant.

WOOLLEY, J., charged the jury as follows:

Gentlemen of the jury: The acts for which the defendant has been indicted, and the facts upon which this case is submitted to you for your determination, have been admitted and agreed to by the state and by the defendant, in the case as stated and read in your hearing, thereby dispensing with the necessity of formal proofs. Under this

agreed state of facts the defendant is guilty or innocent of the misdemeanor charged to it by the indictment, according as the court states and instructs you upon law applicable thereto.

The admitted facts of this case, that have the most direct bearing on the question raised by them, are: That that defendant is a corporation; that it is a bona fide club, consisting of several hundred members, organized and conducted for an innocent and a lawful purpose; that as an incident and not as an object of its organization and conduct, it purchased intoxicating liquors with funds from its treasury, and when requested, dispensed the same in general to its members, and in this particular instance, to one John H. Litz, one of its members, in return for money paid by him; that the money received from its members in return for the liquor dispensed was placed in the general funds of the club, to be used for club purposes, and was not set apart and kept as a separate fund with which to replenish its stock of liquor; and that it never applied for nor did it ever receive from the state of Delaware, a license to sell liquors.

The question of law, presented by this statement of facts, is whether the defendant, in so dispensing intoxicating liquors to its members without a license from the state of Delaware to sell intoxicating liquor, violated the provisions of chapter 418, volume 14, Laws of Delaware, as amended; or stated with especial reference to the precise issue by which alone that question may be solved, was the described transaction a sale, or rather a sale of liquor within the meaning of the statute?

[1] The sale of intoxicating liquors has for many years been a subject over which the state of Delaware has assumed regulation and control. The exercise of such a power over such a subject as liquor may be resorted to by a state government primarily for two objects; the state may treat the sale of liquor as a proper subject of revenue, and with that object alone in view, exert its power in producing for the state an income from the sale of liquor by and to its citizens. Such a statute is called a revenue statute. A state, however, may go further than this, and while retaining the revenue feature, it may consider that because of the nature of the commodity, and its effect upon the health, morals and the habits of its citizens, it will by statute control the sale of liquor for the benefit and protection of society, under its police power.

[2] In contemplation of the first object, the General Assembly of the state of Delaware, in 1867, enacted a statute which provided:

"That no person \* \* \* without having first obtained a proper license therefor, shall \* \* \* be engaged in \* \* \* any business \* \* \* in this section hereafter next mentioned, that is to say: \* \* \* Selling vinous,

spirituous and malt liquors." Chapter 117, volume 13, Laws of Delaware.

Observing a long line of cases decided under like statutes in other states, regulating and affecting the *business* of selling vinous, spirituous, and malt liquors, in which were raised the question whether under such statutes the dispensing of liquor by a club comes within the provisions thereof, we can readily see how the transaction, though possibly a sale, is not an act committed by the defendant in the "business of selling vinous, spirituous and malt liquors," for certainly a bona fide club, such as this defendant, is not engaged in the business of selling liquor, and therefore we can understand how the courts in the jurisdictions adverted to, might very readily hold that the transaction complained of is not a violation of the provisions of such statutes.

But the law of our state with respect to the sale of intoxicating liquors was changed by the act of 1873, and with that change the question whether such a transaction as that of the defendant club in dispensing liquors to its members is a violation of the law against the sale of liquor, assumed a different aspect, and created the necessity of determining it with respect to language and within the meaning of an altogether different statute. The former statute, in so far as it related to the business of selling liquor was repealed and its provisions with respect to the business of selling liquor were superseded by the provisions of a new act (chapter 418, volume 14, Laws of Delaware), which abandoned the regulation of the *business* of selling liquor and addressed itself to the regulation of the *sale* of liquor. It begins with a sweeping declaration that:

"No person, by himself, his agent, or servant, directly or indirectly, shall sell any intoxicating liquors except as herein provided."

If this had been all of the statute, the words and their unequivocal meaning would have constituted a statute of total prohibition. Following these words of general prohibition, however, the statute provides for the sale of liquor in certain and in limited ways, which have a relation to the quantity to be sold and the place upon which the liquor is to be drunk, thereby indicating in the first paragraph that no person excepting those thereafter designated may sell liquor in this state, and by the latter paragraphs limiting the right to sell liquor to the persons and in the manner described. As the defendant admits that it was not a person licensed under this law to sell liquor, but two questions are presented for consideration, first, whether the defendant is a "person" within the meaning of the act; and, second, whether the transaction was a sale within the meaning of the act.

[3] It is not denied that the defendant corporation is a "person" within the meaning of the statute. The word person is a

generic term, and as such may extend to and include artificial as well as natural persons. The intention of the Legislature in the use of the word is manifest, and in construing the statute, we hold that when the Legislature by statute attempted to regulate the sale of liquor in all ways it intended its control to extend to all persons, and this embraced corporations as well as individuals. Rev. Code, c. 5, § 1, subd. 10; *Germania v. State*, 7 Md. 1; *United States v. Amedy*, 11 Wheat. 392, 6 L. Ed. 502; *People v. Ins. Co.*, 15 Johns. (N. Y.) 358, 8 Am. Dec. 243.

In support of the opposing contentions that the transaction of the defendant, in dispensing liquors to its members, is or is not a sale, counsel for the respective parties have cited a vast number of cases, which upon examination we find difficult to classify and impossible to reconcile. As every case involving the question of the right of a club to sell or dispense liquor to its members has arisen under a charge of violating the prohibition of some statute, so every case turns upon the peculiar language and particular meaning of the statute under which the charge is made and the case is tried. As the force of a decision is not known until the language of the statute under which it is rendered is known, we have been compelled to give to the study of each case a corresponding consideration of the statute under which each case was decided, in an effort, by elimination and comparison, to distinguish the cases decided under statutes with prohibitive features similar to our own from those decided under statutes with dissimilar features, and thereby collect and weigh the decisions that may have an authoritative bearing upon the case before us.

To review the consideration we have given to all the cases cited together with the statutes under which they were decided, would result in an opinion, the inordinate length of which would tend to confuse rather than facilitate a ready comprehension of the subject. We will therefore attempt a classification of the cases and give to the cases so classified a consideration of the general principles by which they are controlled.

Amid the conflict of decisions upon the question under consideration, the courts everywhere have been uniform in their effort to stamp out any trick or device, which, in the guise of legal form, is resorted to in order to evade the laws regulating or prohibiting the sale of liquor. Clubs that are organized to evade the law present no problems under any kind of a statute, with respect to their right to sell or dispense liquor. They have none. And when such devices are resorted to, they are readily unmasked and are promptly swept aside. We therefore eliminate from our consideration, as of no authoritative weight upon the case before us, all those cases cited which might

be termed "device cases." The case under consideration is admitted to be a case of a bona fide club, dispensing liquor in a manner which, if unlawful, was without attempt to evade the law.

[4] A transaction such as is charged to the defendant in this case is in many jurisdictions held to be a sale in the ordinary legal meaning of that term, and held to be a violation of statutes that prohibit the sale of liquor. On the other hand, such a transaction is held in other jurisdictions under like statutes not to be a sale, and not a violation of the law, upon the theory that the liquor is owned in common by all the members of the club, for the use and refreshment of those who desire it, that when a member is served with a drink, he but takes from the common stock a portion of what already is his own, and the money he pays for it is but a contribution to replenish the stock by the amount he took out, that the transaction, instead of being a sale, is but an equitable mode of distributing among the owners, in proportion to their use of it, the property which they hold in common.

In searching for the cases that hold to these opposing contentions under statutes similar to our own, in order to apply to this new question under our statute the light of the reasoning that elsewhere has been given it, we find that many of the cases cited, in support of one contention or the other, though adopting in some instances the theory of either one contention or the other, have really been decided under statutes with such a lack of resemblance to ours that the cases are without weight in aiding or controlling our conclusions in the case in hand.

There are statutes of many other jurisdictions which do not flatly inhibit the sale of liquor as does our statute, but which prohibit certain businesses in connection with the sale of liquor, except by license, etc. Such statutes are construed to extend only to the particular things for which they were enacted, and when they do not include clubs, the courts very naturally hold that a sale by a club is not an offense against such a statute. Thus when the prohibition of a statute extends only to the sale of liquor without licenses by those engaged in "the business of selling liquor," "retail dealers," "dramshop keepers," "tippling houses," "selling by retail," in which occupations or trades a bona fide club is not by expression and cannot by implication be included, the courts construe the statutes to mean what they say and exclude sales by clubs from their operation. Thus in Missouri the act (Laws 1891, p. 128; sections 7186-7229, Rev. Stat. 1909) is known as the Dramshop Act a dramshop keeper is defined, and the law prohibits the sale of liquor by a dramshop keeper without a license. The defendant was a bona fide incorporated social club, at which liquors were dispensed, or it may be sold; but such a

club was not a dramshop within the given definition of the act, and against a sale of liquor by such an organization there was no law, therefore the sale or dispensing of liquor by a club was held not to be a sale within the meaning of the Dramshop Act.

While there is logic and consistency in such rulings, they are made under statutes the prohibitory features of which do not extend to the sale of liquor in the sense in which our statute employs that term, and therefore should be eliminated from our consideration. Cases under such statutes have been cited, however, by both sides to this controversy, for the reasoning employed by the courts upon what constitutes a sale.

Cases under such states holding the transaction no sale: *Piedmont Club v. State*, 87 Va. 541, 12 S. E. 963 (1891); *Tenn. Club v. Dwyer*, 11 Lea (Tenn.) 452, 47 Am. Rep. 298 (1883); *State ex rel. Columbia Club v. McMaster*, 35 S. C. 1, 14 S. E. 290, 28 Am. St. Rep. 826 (1892); *State ex rel. Bell v. St. Louis Club*, 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573 (1894); *State v. Austin Club*, 89 Tex. 20, 33 S. W. 113, 30 L. R. A. 500; *Moriarity v. State*, 122 Tenn. 440, 124 S. W. 1016, 25 L. R. A. (N. S.) 1252; *Koenig v. State*, 33 Tex. Cr. R. 367, 26 S. W. 835, 47 Am. St. Rep. 35 (1894); *Cuzner v. California Club*, 155 Cal. 303, 100 Pac. 868, 20 L. R. A. (N. S.) 1095 (1909); *Merced County v. Helm*, 102 Cal. 159, 36 Pac. 899 (1894); *State v. University Club*, 35 Nev. 475, 130 Pac. 468, 44 L. R. A. (N. S.) 1026.

Cases under the same kind of statutes holding transaction a sale: *State v. Shumate*, 44 W. Va. 490, 29 S. E. 1001 (1898; retailing); *State v. Gelpi*, 48 La. Ann. 520, 19 South. 468 (1896; place of public business); *State v. Law and Order Club*, 203 Ill. 127, 67 N. E. 855, 62 L. R. A. 884 (1913; dramshop); *South Shore Country Club v. People*, 228 Ill. 75, 81 N. E. 805, 12 L. R. A. (N. S.) 519, 119 Am. St. Rep. 417, 10 Ann. Cas. 383 (1907; dramshop); *State v. Mudie*, 22 S. D. 41, 115 N. W. 107 (engaging in business of selling liquor); *State v. Soule*, 74 Mich. 250, 41 N. W. 908, 2 L. R. A. 494 (business of selling liquor); *Martin v. State*, 59 Ala. 34 (retailing without license); *State v. Nels*, 108 N. C. 787, 13 S. E. 225, 12 L. R. A. 412 (retailing); *Mohrman v. State*, 105 Ga. 709, 32 S. E. 143, 43 L. R. A. 398, 70 Am. St. Rep. 74 (1898; tipping house); *Spokane v. Baughman*, 54 Wash. 315, 103 Pac. 14 (1909; barroom).

It is urged by the defendant that the cases cited by the state, decided in jurisdictions under prohibition or "local option" statutes, are without weight in support of its contention that the transaction charged to the defendant is a sale.

The text writers and some judges find a distinction between statutes regulating the sale of liquor in license territory and statutes prohibiting the sale of liquor in prohibition territory, as affecting what constitutes a sale

of liquor by a club. It is difficult for us to find the distinction to exist merely upon the ground that in one jurisdiction the sale of liquor is partially prohibited and in another the sale is totally prohibited. When a distinction exists between statutes the distinction usually is one of terms and intent, and if the terms and intent of a statute prohibiting the sale of liquor, excepting in a designated manner, are as positive as the terms of another statute prohibiting the sale of liquor in any manner, a case within the prohibition of either has a bearing upon a case within the prohibition of the other. Of the same opinion was the court in *Conococheague Club v. State*, 116 Md. 317, 81 Atl. 602.

We know of no statute that absolutely prohibits the sale of liquor. All prohibition statutes, that have come to our knowledge, allow the sale of liquor for some purpose, usually for medicinal purposes, and sometimes for sacramental, mechanical and scientific purposes. While it is commonly understood that total prohibition prevails by law in Kent and Sussex counties, such is not the case. Liquor may be lawfully sold in those counties in the manner prescribed by law, just as it may be lawfully sold in New Castle county in the manner prescribed by law. The sale of liquor in New Castle county is as positively prohibited in all ways excepting those designated as the sale of liquor in Kent county is prohibited in all ways excepting those designated, namely, for medicinal and sacramental purposes. There are exceptions as to sales under statutes relating to each county and the prohibition of the statute relating to New Castle county so far as it extends is as absolute and complete as the prohibition in the statute that relates to Kent county so far as it extends. After all is said and done, the right of sale by a club, either in license or prohibition territory, depends upon the terms and intent of the statutes, and the intent of each statute, in the cases illustrated, is to prohibit the sale of liquor in all ways other than those excepted. We are of the opinion that the "local option" statutes, under which the following cases were decided, are of sufficient similarity to the prohibition of our own statute, and the similarity of the acts there done with the act here charged, as to make the following cases authorities in support of the contention that the transaction is a sale: *State v. Easton Club*, 73 Md. 97, 20 Atl. 783, 10 L. R. A. 64 (1890); *State v. Chesapeake Club*, 63 Md. 446 (1885); *State v. Kline*, 50 Or. 426, 93 Pac. 237 (1907); *State v. Nels*, 108 N. C. 787, 13 S. E. 225, 12 L. R. A. 412 (1891); *State v. Lockyear*, 95 N. C. 633, 59 Am. Rep. 287.

This case is to be distinguished from a line of cases decided under statutes or ordinances which by their terms embrace "clubs," and which expressly prohibit the sale or furnishing of liquor by clubs without licenses. Under such statutes, the transaction of dispens-

ing or selling liquor is not open to construction, and decisions under such statutes bear remotely, if at all, upon the question in this case. *Woollen & Thornton on Intoxicating Liquors*, § 794.

The cases decided in England and in the English provinces are decided under statutes the prohibitory terms of which are not distinguishable in any material respect from the terms of our own statute. They are in effect that "no person shall sell or expose for sale, etc., except," etc. Under these statutes the courts of England and of the English provinces wherever the occasion has arisen have uniformly held that the dispensing of liquor by a club to its members for a consideration paid or promised does not constitute a sale of liquor within the meaning of the statute, but amounts merely to an equitable mode of distributing among the members of the club the property which they own in common. *Graff v. Evans*, L. R. 8 Q. B. Div. 373 (1882; unincorporated club); *Newell v. Hemingway*, 16 Cox, Crim. Cases 604 (1888; incorporated club); *Victoria v. Union Club*, 3 British Columbia, 363 (1894); *Davies v. Burnett*, 1 K. B. D. 666 (1902); *Rex v. Doyle*, East L. Rep. (Pr. Edw. Is.) 97 (1910).

The theory of the English courts that the transaction of dispensing liquor to its members by a bona fide club is not a sale, but is a method of dispensing to the members of the club property which is their own, has been followed by the courts in certain American jurisdictions with statutes sufficiently similar to our own to make them authoritative. The American cases that hold to this theory are the following: *People v. Adelphi Club*, 149 N. Y. 5, 43 N. E. 410, 31 L. R. A. 510, 52 Am. St. Rep. 700 (1896); *Klein v. Livingston Club*, 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. St. Rep. 717 (1896); *Selm v. State*, 55 Md. 566, 39 Am. Rep. 419 (1890); *Barden v. Montana Club*, 10 Mont. 330, 25 Pac. 1042, 11 L. R. A. 593, 24 Am. St. Rep. 27 (1891); *State ex rel. Columbia Club v. McMaster*, 35 S. C. 1, 14 S. E. 290, 28 Am. St. Rep. 826 (1892); *Russel v. State*, 19 Wyo. 272, 116 Pac. 451 (1911); *State v. Duke*, 104 Tex. 355, 137 S. W. 654 (1911); *Adams v. State* (Tex. Cr. App.) 145 S. W. 940 (1912); *Trezevant v. State* (Tex. Cr. App.) 145 S. W. 1191 (1912).

When the federal courts have been called upon to construe the transaction of dispensing liquor by a club to its members they have uniformly held the transaction to be a sale. It is contended, however, by counsel for the defendant, that the rule in the federal decisions is to be distinguished from the rule to be applied in this case, upon the ground that the federal cases were decided under the revenue act of the federal government, and that, being excise cases, all questions were resolved in favor of the tax. An examination of the cases, however, does not support this contention. The federal statute requires that "retail dealers in liquor" shall pay a special

tax of \$25. If this were all of the statute, cases arising under it would come under the class of cases decided under statutes pertaining to the business of selling liquor, retail dealers, dramshops, etc.; but the federal statute goes further and proceeds to define who are "retail dealers in liquor," viz.:

"Every person who sells or offers for sale distilled spirits or wine, or malt liquors, "shall be regarded a retail dealer in liquors."

This definition takes the federal cases out of the class in which at first view they would seem to belong and leaves open the question whether the transaction described is such a sale as the statute prohibits, the court saying in one case:

"The test under the statute is: Was the act a sale?"

We are therefore of opinion that, although the federal cases are cases arising under a revenue statute, their adjudication has depended upon the construction placed upon the transaction as a sale. We consider the following leading federal cases are authoritative citations in support of the contention of the state: *United States v. Wittig*, 2 Lowell, 486, Fed. Cas. No. 16,748; *United States v. Giller* (C. C.) 54 Fed. 656; *United States v. Alexis Club* (D. C.) 98 Fed. 725.

The American state cases that hold the transaction to be a sale, and repudiate the theory that the transaction is an equitable mode of distributing property among its owners, decided under statutes with prohibitory features similar to our own, some of which might properly be classified as device cases, but were cited for the reasoning of the courts upon the question of a sale, are the following: *Marmont v. State*, 48 Ind. 21; *State v. Lockyear*, 95 N. C. 633, 59 Am. Rep. 287; *People v. Soule*, 74 Mich. 250, 41 N. W. 908, 2 L. R. A. 494 (1889); *Newark v. Essex Club*, 58 N. J. Law, 99, 20 Atl. 769 (1890); *Nogales Club v. State*, 69 Miss. 218, 10 South. 574; *Krnavek v. State*, 38 Tex. Cr. App. 44, 41 S. W. 612; *Mohrman v. State*, 105 Ga. 709, 32 S. E. 143, 43 L. R. A. 398, 70 Am. St. Rep. 74; *State v. Kline*, 50 Or. 426, 93 Pac. 237; *State v. Minn. Club*, 106 Minn. 515, 119 N. W. 494, 20 L. R. A. (N. S.) 1101 (1909); *Lloyd v. Canon City*, 46 Colo. 195, 103 Pac. 288 (1909); *Spokane v. Baughman*, 54 Wash. 315, 103 Pac. 14; *Ada County v. Boise Commercial Club*, 20 Idaho, 421, 118 Pac. 1086, 38 L. R. A. (N. S.) 101 (1911); *Rothschild v. State*, 12 Ga. App. 728, 78 S. E. 201 (1913); *Manning v. Canon City*, 45 Colo. 571, 101 Pac. 978, 23 L. R. A. (N. S.) 192; *Conococheague Club v. State*, 116 Md. 317, 81 Atl. 602.

With the aid of the cases cited, we will now address our consideration to the transaction involved in this case, viewed in connection with the statute under which the transaction is claimed by the defendant to be lawful and by the state to be unlawful. The statute is as follows:

"That no person, by himself, his agent or servant, directly or indirectly, shall sell any intoxicating liquors except as herein provided."



Following this expression of general prohibition, the statute designates the type of licenses that may be issued to persons who thereunder may lawfully sell liquor, and to that end provides for licensing druggists, innkeepers, etc. It has been earnestly contended by counsel for the defendant, that notwithstanding the general prohibitory language of its opening sentence, the statute after all is but a statute regulating the business of selling liquors, and that a sale by a club is not embraced within the businesses described and intended to be regulated, and that, even if the transaction could otherwise be considered a sale, it is not a sale within the meaning of the statute.

In support of this contention, counsel for the defendant have placed especial reliance upon the opinion of the Court of Errors and Appeals of this state, delivered in the case of *Hall v. State*, 4 Har. 132, decided in 1844, in which Chief Justice Booth, in construing the statute then under consideration, referred to the sale of liquor by an innkeeper as a part of the "business" of an innkeeper, and that the license to the innkeeper authorized him "to sell liquor, generally, as a business." But the statute under construction was not a statute regulating the sale of liquor or regulating the business of selling liquor. It was a statute entitled "An act more effectually to prevent the profanation of the Lord's Day, commonly called Sunday," enacted originally in 1740 and re-enacted in 1795 (Laws 1795, c. 78), the first section of which prohibited any servile work, labor or business on Sunday, excepting works of necessity, charity and mercy. The question was whether the keeper of an inn, tavern or public house of entertainment, by the act of furnishing liquor from his bar on Sunday, was guilty of a profanation of the Lord's Day. There was no question of a violation of a law against the sale of liquor on Sunday. It was admitted he had a right to sell liquor on Sunday, under law as it then existed, if his business of a tavern keeper for public entertainment was such a business as by the terms of the statute was not prohibited on Sunday. The point decided was that the business of a tavern keeper was not such as was prohibited on Sunday within the meaning of the statute, and therefore the sale of liquor on Sunday by one licensed to engage in the business of keeping an inn was not a violation of the act against the profanation of the Lord's Day.

We do not think the case of *Hall v. State*, supra, is authority for the contention that our present statute prohibiting the sale of liquor is in effect a statute regulating the business of selling liquor.

If the statute under which the controversy in this case has arisen, were a "liquor business" statute, a "dramshop statute," or the like, the contention that clubs and sales by clubs are not embraced within its true intent and meaning would appeal to us with

force; but as we read the statute, we gather from its opening sentence a declaration of a state policy respecting not the business of selling liquor, but the act of selling liquor. Although producing revenue for the state, we do not consider the statute distinctively a revenue act, but rather a law enacted under the police powers of the state, having in view primarily the prohibition of the sale of liquors except in specified ways, and secondly, the regulation of the sale of liquors in those designated ways. Giving to the statute this interpretation, the remaining question is whether the transaction with which the defendant is charged is a sale.

A sale may be defined to be a transfer of ownership in property from one person to another, upon a valuable consideration. *Martin v. State*, 59 Ala. 34, 36. The transaction charged to and admitted by the defendant was a purchase of liquor by an incorporated club with moneys from its treasury, and the transfer of a portion thereof to one of its members in exchange for money paid by him.

When liquor is purchased by such a club with the funds of the club, the liquor becomes the property of the club and so remains until it disposes of it. In such property the club holds the legal title, and as property it is a part of the club's assets. If destroyed, the loss is the loss of the club, and if insured, the indemnity is payable to the club. In case of the club's insolvency, its stock of liquor may be claimed by its receiver or may be levied upon and sold under execution process, in either event for the benefit of the club's creditors. So long as the club retains the liquor, it is difficult to see how a member has a legal interest in it or a legal right to it, except it be a right to buy it. While so retained, a member who resigns or is expelled from the club has no right to claim a portion of the liquor, nor upon his death or insolvency may his personal representative or trustee in bankruptcy reach into and take as the member's property any part of the liquor so purchased and held.

In the theory of a property right of a member in the liquor of a club, as held by the English and some American cases, that right seems first to arise, or at least is first recognized, when the member calls for, receives and pays for or promises to pay for the liquor. When this is done there is a transaction between the club and the member, resulting certainly in the physical transfer of the liquor from the former to the latter. This transaction suggests the transmutation of title as well as the actual transfer of the property from the club to the member. The club surrenders a quantity of liquor and receives from the member a sum of money. In the exchange of the club's liquor for the member's money, the member gets something, which before was not altogether his, otherwise he would not give money for it, and the club gets something that before did not belong to it at all. Instead of liquor as an as-



set the club then has money as an asset, and no one has yet claimed that in the club's money asset a member owns or has any right to a separable part.

When liquor is thus transferred for money and money is at the same time paid for the liquor, the club becomes divested of the title and the member becomes vested with the title in the liquor by virtue of a transaction which in its completeness and simplicity possesses every element of a sale.

While many clubs and organizations in this state have for many years dispensed liquor to their members in the manner disclosed by this case, in the belief that they were acting within the law, and while such uniform conduct covering a considerable period of time may reflect the popular understanding of the law in this regard, nevertheless, we do not feel, for that reason or in deference to that understanding, that the court has a right to give to the law a meaning different from that which its language conveys.

The court are therefore of opinion, upon the agreed statement of facts, that under the laws of the state of Delaware an offense punishable by such laws is stated or shown to have been committed by the defendant. Being of such opinion the jury is charged and directed to return a verdict of guilty against the defendant.

Verdict, guilty.

In conformity with the terms and stipulations of the case stated, the court orders that judgment be entered against the defendant upon the verdict of the jury.

(10 Del. Ch. 263)

CATTS et al. v. TOWN OF SMYRNA et al.  
(Court of Chancery of Delaware. April 18, 1914.)

**1. MUNICIPAL CORPORATIONS (§ 979\*)—TAXATION—WRONGFUL COLLECTION—REMEDIES.**

The owner of personalty seized for the collection of an illegal municipal tax is not entitled to enjoin the sale of the property, having an adequate remedy at law, either by paying under protest the amount demanded and suing to recover it back, or by an action of trespass for damages.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2120-2123; Dec. Dig. § 979.\*]

**2. MUNICIPAL CORPORATIONS (§ 979\*)—TAXATION—WRONGFUL COLLECTION—REMEDIES.**

Where an illegal municipal tax is assessed upon real property, the owner is not entitled to enjoin the collection of the tax, or to equitable relief to remove it as a cloud upon his title, unless the tax appears regular and valid on its face.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 2120-2123; Dec. Dig. § 979.\*]

**3. MUNICIPAL CORPORATIONS (§ 536\*)—TAXATION—RESTRAINING ENFORCEMENT.**

Where an assessment for paving levied upon the land of the abutting owner was irregular, because the pavement was not laid as authorized by statute, but that fact did not appear from the record, the abutting owner is enti-

tled to equitable relief to remove the lien as a cloud from his title, and to enjoin the sale of his property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1253; Dec. Dig. § 536.\*]

**4. MUNICIPAL CORPORATIONS (§ 266\*)—PUBLIC IMPROVEMENTS—CONSTRUCTION.**

The general charter of the town of Smyrna (20 Del. Laws, c. 537) provides a general system for improvement of streets. 25 Del. Laws, c. 186, authorized the town to issue bonds for the purpose of paving certain streets and to assess part of the improvement against the abutting owners. This act did not authorize the construction of sidewalks and limited the improvements to such as could be constructed with the funds borrowed. *Held*, that it did not repeal the charter provisions, nor was it an amendment to the charter; and hence ordinary street improvements, including the laying of sidewalks, are governed by the charter, and not by 25 Del. Laws, c. 186.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 712; Dec. Dig. § 266.\*]

**5. MUNICIPAL CORPORATIONS (§ 266\*)—IMPROVEMENTS—STATUTES GOVERNING.**

After the money authorized to be borrowed by the town of Smyrna under 25 Del. Laws, c. 186, to improve certain streets, has been expended, the town council is without power, under the provision of the act limiting the improvements to those possible with the money borrowed, to act further thereunder; and hence, even if the act be construed an amendment to the charter, it does not apply to improvements made after the expenditure of the borrowed funds.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 712; Dec. Dig. § 266.\*]

**6. MUNICIPAL CORPORATIONS (§ 281\*)—PUBLIC IMPROVEMENTS—NOTICES.**

Statutes requiring notice to abutting owners to make certain improvements, being for the protection of such owners, are generally regarded as mandatory, and, if omitted, assessments for improvements, when made by the municipality, cannot be collected.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 745-749; Dec. Dig. § 281.\*]

**7. EQUITY (§ 373\*)—PRACTICE—HEARING.**

On motion for a decree notwithstanding answer, allegations in the answer are to be taken as true.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 711-713; Dec. Dig. § 373.\*]

**8. MUNICIPAL CORPORATIONS (§ 281\*)—PUBLIC IMPROVEMENTS—NOTICE.**

Where the charter of a municipality provided that abutting owners should be notified to make certain improvements, and, if they failed, they might be made at their expense without notice, the notice need not be in writing.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 745-749; Dec. Dig. § 281.\*]

**9. MUNICIPAL CORPORATIONS (§ 281\*)—PUBLIC IMPROVEMENTS—NOTICE—SUFFICIENCY.**

While a notice should disclose on its face that it emanates from some person, or body, or tribunal, and that it has power to act in the manner indicated by the order, a notice directing the owners of abutting property to cause certain paving and guttering to be done is sufficient, under the city charter, providing for 30 days' notice, though reciting that it was given by the board of commissioners, instead of the town council, and though signed by G. as secretary,

when it should have been signed by the clerk of the council, because apprising the owners that it emanated from an official body which claimed authority to act.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 745-749; Dec. Dig. § 281.\*]

**10. MUNICIPAL CORPORATIONS (§ 321\*)—PUBLIC IMPROVEMENTS—RIGHT TO MAKE.**

The council of a municipality is the judge of the necessity of public improvements.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 837-840; Dec. Dig. § 321.\*]

**11. MUNICIPAL CORPORATIONS (§ 281\*)—PUBLIC IMPROVEMENTS—ASSESSMENTS—NOTICES.**

Where notice to landowners to cause certain paving to be done was given as required by statute, and the owner of property died before the municipality completed the work, the heirs of the owner cannot defeat the assessment on the ground that they were given no additional notice, for they inherit their rights to the property subject to such notice.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 745-749; Dec. Dig. § 281.\*]

**12. EQUITY (§ 373\*)—PLEADING—HEARING.**

On motion for decree notwithstanding an answer in a suit to enjoin the sale of property seized for the payment of a special assessment, which was claimed to be void on the ground that the pavement for which it was levied was not located in accordance with statute, that matter cannot be determined, where the record does not clearly show that the pavement was located in the wrong place.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 711-713; Dec. Dig. § 373.\*]

**13. MUNICIPAL CORPORATIONS (§§ 488, 489\*)—TAXATION—DEFECTIVE NOTICE—ESTOPPEL.**

A landowner, who stands by and allows a municipality to lay pavement which he was required to provide, cannot, after the pavement has been constructed, defeat the assessment on the ground that the notice given him by the municipality was defective, having concealed the defect and allowed the municipality to proceed; but where the improvement was not laid as required by statute, and the defect was not apparent on inspection, the owner was not estopped to attack the assessment on that ground.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1147-1152; Dec. Dig. §§ 488, 489.\*]

Bill by Samuel Catts and others against the Town of Smyrna, a municipal corporation, and others. On motion for decree notwithstanding the answer. Motion denied.

Bill to restrain sale of personal property. The complainants were the owners of unimproved real estate situate on the westerly side of Main street, in the town of Smyrna, extending from a street in said town known as Hamilton's Lane to Lake Como, a lake or pond which constitutes the southern boundary of the town. Main street is a continuation through the town of Smyrna of a road known as the "State Road," running the entire length of the state of Delaware, which, according to the allegations of the bill, under section 2, chapter 60, of the Revised Code of 1893, is required to be 40 feet wide, and according to a plat recorded in the office of the recorder of deeds, in and for Kent county,

made and recorded under the provisions of chapter 280, volume 11, Laws of Delaware, Main street was laid out at a width of 40 feet.

Under an act of the Legislature, passed in 1911 (chapter 186, volume 25, Laws of Delaware), the town of Smyrna was authorized to borrow money and issue bonds to secure the same, for the purpose of improving streets of the town to be selected by the town council, to assess against the owners of the property abutting on the streets improved a portion of the expense of such improvement, and the amount so assessed became a lien against the property.

The charter of the town, being chapter 537, volume 20, Laws of Delaware, also authorized the town council to direct the construction of curbs and gutters and the laying of pavements four feet wide, and provided a method of doing the work at the expense of the property owners upon failure of the property owners to do the work after thirty days notice to them, and for the collection of the cost thereof (1) by the sale of personal property, and (2) by sale of the real estate.

It was alleged in the bill that in 1912 the town council of Smyrna, without notice to the complainants, entered upon the land above mentioned, the estimated value of which is \$600, laid a pavement 4 feet 3 inches wide on the easterly side thereof and constructed "a curb and gutter within the limits of the said roadway in front of the said lands," prior to which time there had never been a curb, gutter or pavement in front of said land; that by the construction of the curb and gutter the roadway has been narrowed to 38 feet; that on May 8, 1913, a bill for \$471.12, to cover the cost of the labor and material used in doing the work, was presented to Samuel Catts and Anna Cunningham, two of the complainants. In June, 1913, Eugene Crow, the alderman of the town of Smyrna, levied on certain goods and chattels of Samuel Catts and Anna Cunningham to pay the cost of said work, and advertised the same for sale. The bill also alleged that the pavement could be laid only under the provisions of the charter of the town (chapter 537, volume 20, Laws of Delaware), and the curb and gutter constructed only under authority of chapter 186, volume 25, Laws of Delaware, under the provisions of which the cost of the curb and gutter became a lien on the real estate and the personal property could not be levied on and sold to pay said cost. It is further alleged that the provisions of neither of these statutes have been complied with as to notice to the complainants to do the work and respecting subsequent proceedings; that the work did not result in an improvement to the land, was unnecessary for the traveling public and was done for the purpose of beautifying the southern portion of the town.

In addition to prayers for subpoena, answer and other relief, the bill prays that the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

charges be set aside and declared null and void, for an injunction restraining the sale of the goods and chattels levied on, and for the production of the minutes, ordinances and records and proceedings of the town council concerning the matters complained of.

The answer averred that on June 23, 1911, the town council passed an ordinance directing this work to be done, and on June 26, 1911, notice thereof was served on Samuel Catts, Charles Katz and Sarah E. Cunningham; that Samuel Catts was a resident of Smyrna and had charge of, managed and controlled the land, and was several times requested to do the work by a member of the town council; and that Sarah E. Cunningham, who died after the service of the notice and prior to the filing of the bill of complaint in this cause, was the mother of Anna and Alan Cunningham, two of the defendants, through whom they claim an interest in the land. The notice specified the kind of material to be used and stated that unless the work was done by the owners of the land within one month the "commissioners of the town of Smyrna" would proceed to do it, and the owners of the land would be looked to for payment of the cost thereof. It was admitted that Main street is a part of the "State Road," but the defendants were unable to say whether it is one of the roads described in section 2, chapter 60, of the Revised Code, to be 40 feet wide. It was also admitted that the pavement was 4 feet 3 inches wide, but the answer averred that the complainants were charged only for a pavement 4 feet wide. It was also averred by the answer that prior to the laying of the pavement and construction of the curb and gutter, a ditch existed in front of the complainants' premises, which made the space available for use by the public much less than 38 feet. It was denied that the curb and gutter could be constructed only under the provisions of chapter 186, volume 25, Laws of Delaware, and it was averred that it could be and was done under the provisions of the charter of the town, which were compiled with in all respects, and, therefore, it was not necessary to comply with the requirements of chapter 186, volume 25, Laws of Delaware. The defendants, in their answer, claim that the work done has greatly improved and enhanced the value of the complainants' property.

The cause was heard on bill and answer, on a motion made under rule 29a for a decree notwithstanding the answer.

Charles H. Le Fevre and William M. Hope, both of Dover, for complainants. James H. Hughes, of Dover, for defendants.

**THE CHANCELLOR.** [1-3] The objects of the bill being to enjoin a sale of personal property advertised for sale by a municipality in collecting an assessment for the cost of laying pavement, curb and gutters in front of land of the complainants, and in

addition to effect a cancellation of the assessment, it becomes necessary to inquire first as to the jurisdiction of the court to hear and determine the matter. This question was raised by the defendants at the argument, and it was claimed that as the complainants sought to enjoin the sale of personal property the court had no jurisdiction. The law on this subject is settled in this state by the Court of Errors and Appeals in *Murphy v. Wilmington*, 6 Houst. 108 (1880), 22 Am. St. Rep. 345. Some of the principles there stated were evidently overlooked by the same court in the case of *Fulton v. Dover*, 8 Houst. 78 (1888), 6 Atl. 633, 12 Atl. 394, 31 Atl. 974, but *Murphy v. Wilmington* was not there cited or considered, so far as the report of the case shows, either in the Court of Chancery or in the appellate court, and there is nothing in the later case overruling the earlier one. The cases of *Curry v. Jones*, 4 Del. Ch. 559, and *Sharpe v. Tatnall*, 5 Del. Ch. 302, if they be in conflict with *Murphy v. Wilmington*, are not authoritative.

The law as stated in *Murphy v. Wilmington* is binding on this court and furthermore is based on sound reason and the decisions of other courts elsewhere. In that case the bill was filed to enjoin the collection of an assessment made on real estate of the complainant for a part of the cost of building a sewer, it being alleged that the assessment was illegal. In sustaining the decree of the Chancellor dismissing the bill, the court held that a Court of Chancery should not interfere to prevent the collection of such assessments except under special circumstances, such as left the complainant without any remedy at law, or where it was clear that the tax had been imposed without authority and was absolutely void. Even in such cases it must come within some one of the recognized heads of equity jurisprudence, and there must be the clearest grounds therefor. On the general subject of tax sales, the court used the following language:

"The owner of personal or real property, seized or sold under execution for the collection of an illegal municipal tax, has an adequate remedy at law, either by paying under protest the amount demanded, and bringing an action against the city to recover it back, or by an action of trespass for the recovery of damages. In the case of a sale of real property under a void assessment, as in the case of a sale by the sheriff on a void judgment, the purchaser buys at his peril, and the owner may fold his arms in defiance, or, if dispossessed, maintain his rights by an action of ejectment. Under such circumstances the owner can sustain no irreparable injury, and would suffer a loss only by his own passive submission to a wrong. A party claiming title under a corporation tax sale must show that every prerequisite to the power of sale has been complied with, and compliance with law must appear on the face of the proceedings."

The remedy by certiorari is also referred to as generally furnishing adequate relief in such cases. From this decision it is clear

that if the sole relief sought by the complainants in the case now before this court had been to enjoin the sale of personal property, there would be at least a serious question as to the jurisdiction of this court to grant relief. But there is in this case a lien upon land of the complainants arising from the work done by the town of Smyrna on land of the complainants. Whichever of the two acts of the General Assembly, hereinafter referred to, applies to the municipal improvements in question, there is a lien on the land abutting the place improved. Both statutes make the cost of sidewalks, curbs and gutters liens on the abutting land. Therefore, if the assessment be invalid the apparent lien constitutes a cloud on the title of the complainants to their land. But not every such cloud on title to land is remediable in equity.

In the case of *Murphy v. Wilmington*, supra, the powers of the Chancellor are clearly defined in these words:

"A lien or incumbrance, to throw a shadow upon title to real property so as to give the owner a right to relief in equity, must be one that is regular and valid on its face, but is in fact irregular and void from circumstances which have to be proved by extrinsic evidence."

In the case cited the court found that all the points relied on to show invalidity of the assessment appeared from the statute and the journals and records of the city government, and did not call for any outside evidence for the purpose of testing the validity of the assessment there made, and so the Court of Chancery had no jurisdiction. In the case before this court, however, it is urged that the assessment was invalid because the curb and gutter were laid about 2 feet further east than it should have been, and in fact was laid partly within the confines of the highway as fixed by law at 40 feet, whereby the highway is narrowed to about 38 feet. So far as now appears, this alleged error in locating the curb and gutter is not shown anywhere in the town records, and would not be shown in a certiorari proceeding. Therefore, as evidence outside the municipal records must be given to establish the error, the cloud on the title arising from the lien is such a one as a court of equity will grant relief, if the error is shown. Though not clearly shown by the allegations of the bill, still taken in connection with the answer it does appear that the court has jurisdiction to determine the validity of the assessment for the reason above stated.

[4.5] In order to decide the several questions raised by the complainants, it is necessary first to determine which of two statutes applies. The general charter of the town of Smyrna was a reincorporation in 1897 by chapter 537, volume 20, Laws of Delaware. By it a system of municipal government was provided, giving the town council the power to require pavements to be laid and curbs and gutters constructed by abut-

ting owners. In brief, it was provided that after the council determined on such improvements the owners of abutting land should be notified to do the work, and if they neglect to do so for 30 days, the council may proceed to have it done, and present to the owners a bill for the expense thereof. Any notice required by law to be given to the owners could be served on any one of several co-owners. If the bill be not paid, the personal property of the owners may be levied on and sold, and in default of such property, the real estate may be reached. The assessments are made a lien on real estate.

In 1909 an act was passed (chapter 186, volume 25) authorizing the town council to improve the roadways of the town between the curb lines, which did not include laying sidewalks, or the improvement of the portion of the street between the curb and the building line of the abutting owner. The act provided that council might select certain streets to be so improved and when the work was done were required to assess against the abutting owners on each side of the street the cost of improving 3 feet of the roadway outside the curb line. The sum payable by each owner is then listed and advertisement made by posting the list. After an opportunity for objections, the list is certified to the collector of town taxes for collection. Owners of land may elect to pay in installments. After 30 days default the collector may levy on the land and sell it. The amount assessed against each parcel of land is made a lien thereon. The town is prohibited from spending, in addition to what is assessed against the owners, more than \$25,000 in such improvements, and this sum must be raised by an issue of bonds by the town. All moneys collected from abutting owners, as well as by the bond issue, were payable into a special fund, which could be used for no other purpose.

The complainants claim that the charter provisions of 1897 apply to the paving of the sidewalks of the streets, and that the act of 1909 is the only one that now applies to curb and gutter construction, it being to that extent a permanent amendment to the charter. As a consequence of so holding there are two methods of municipal improvements. As to the paving of the sidewalk, the claim is that the notice required by section 12 of the charter was not given. As to the curbing and guttering, it is claimed that the town had no power under the act of 1909 (which was the only statute which applied) to levy on or sell the personal property of abutting owners, and that the procedure provided by the later act for assessing and collecting the cost of curbing and guttering had not been adopted.

The complainants urged that there was another error in the assessment which invalidated it, viz., the location of the curb and

gutter about 2 feet too far east. This objection applies whichever act is held to be controlling.

The charter provisions, and not the act of 1909, apply to the assessment in question, and its validity is to be determined by it. It is clear that the later statute was for a special temporary purpose, and was not intended to be an amendment to the charter. Evidently the purpose was to spend a certain sum to be obtained not by taxation, but by borrowing it on town bonds, and with the money so raised and with what could be collected from abutting owners, to repave and so improve the roadway of some of the streets of the town, and for this purpose the abutting owners were made chargeable with a portion of the cost of such improvements, including the cost of 3 feet on each side of the curb line. When the sum so borrowed by the town was exhausted, there could be no further improvements made under the act, and thereafter the charter provisions applied. This is made clear by the fact that otherwise there would be two remedies for collecting from abutting owners the cost of improving streets. New sidewalks would be governed by one act and the curb, gutter and roadway by another act, differing widely from the earlier one. For other reasons, which it is difficult to state, the later act does not effect a permanent amendment to the charter. Besides, it appears affirmatively by allegations of the answer, which are taken to be true, that, before the council determined to pave, curb and gutter the street in question in front of the complainants' land, the special purposes of the act of 1909 had been fulfilled, and all the money borrowed under it had been spent. It is also an important fact, appearing from the answer, that the street in front of the land in question was not selected by the council for improvement under the provisions of the act of 1909. Therefore, even if that act be a continuing statute, and so an amendment to the charter, the particular assessment would not be governed by it, but by the general charter provisions.

[8-9] The validity of the assessment is attacked in the bill by the want of a notice to the abutting owners, as required by the charter. Statutory requirements to abutting owners to make improvements already determined on are for the benefit and protection of such owners and are generally regarded as mandatory. So that if omitted the assessment cannot be collected from the abutters. 4 Dillon on Municipal Corporations (5th Ed.) § 1457 (other edition, §§ 803, 804).

It is objected by the complainants that the notice required by section 12 of the charter of 1897 was not given to them. The allegations in the bill as to the want of such notice is met by the answer. The ordinance directing by name the owners of land situated on the west side of Main street to lay pavement, curb and gutter along the west side of the street

was passed June 23, 1911, and on June 26, 1911, "a notice was served on the then owners, Samuel Catts, Charles Katz and Sarah E. Cuningham directing them to cause the paving, curbing and guttering required by the ordinance to be done," and a copy of the notice so given was attached to the answer as an exhibit. This allegation is taken to be true in this method of hearing this cause, viz., on a motion for a decree notwithstanding answer. But it is urged that the form of the notice is defective, and, therefore, the notice was insufficient. By attaching the form of the notice, probably the defendants give an opportunity for the making of the objection. The complainants urge that the notice is insufficient because it appears from the notice that it was given by the "commissioners," or "board of commissioners" of Smyrna, instead of by the town council, and, further, that it was signed by "Harry B. Grieves, Secretary," when it should have been signed by the clerk of council.

The charter says that the owners shall be notified to make the improvements, and does not require that the notice be in writing, or be served on the owners, nor does it state by whom the notice is to be given. It was treated in the argument as an unsigned notice. An unsigned notice in itself is probably insufficient. In re Road Notices, 5 Har. 324.

A notice should disclose on its face that it emanates from some person, or body, or tribunal, claiming to have the power to act in the manner indicated by the order, for this alone gives it force or authority. The following cases cited by the complainants sustain this most reasonable proposition: *Minard v. Douglas County*, 9 Or. 206; *Niles v. Ransford*, 1 Mich. 338, 51 Am. Dec. 95; *Bausman v. Kelley*, 38 Minn. 197, 36 N. W. 333, 8 Am. St. Rep. 661. A notice signed by a name, without giving the title of that person who gave it officially, may in itself be insufficient. *McVichie v. Knight*, 82 Wis. 137, 51 N. W. 1094. But this notice was not unsigned. It was signed by the name of a person and his official title was stated. It does not clearly appear that his title was erroneously stated.

The form of a notice, unless it be prescribed by law, is not important, and will not be critically considered so long as it fairly and fully apprises the person to be notified of the subject-matter of the notice. It surely appears in the notice under consideration with sufficient clearness that the town council of Smyrna had acted and required the paving and other work to be done by the owners in such manner as to meet the approval of the council; and the mistake in calling the council the commissioners, or board of commissioners, and the statement of his official title to be that of secretary instead of clerk, were quite unimportant and immaterial. By the language of the notice served on the owners it appeared to have been given by an official body with authority in the premises, and the notice sufficiently apprised those to whom it

was directed of the duty required of them. This notice is sufficient, without relying on the further allegation of the answer that one of the co-owners was frequently requested by officers of the town, or members of the council to comply with the ordinance.

[10] It is, of course, not a valid objection that the improvement was not needed. Of this the town council was the sole judge, and the decision of that body is not reviewable by this court.

[11] It was further urged by the complainants at the argument that after June 28, 1911, when the notice in question was served, and before the work of paving, etc., was done by the council, Sarah E. Cunningham, one of the three co-owners of the land, had died and the title to her share had descended to her heirs at law, her two children, both of whom are complainants, and also that during the same interval, as appears from the charter, there had been an election in the town of Smyrna. In the brief of the complainants' solicitor it is stated that Sarah E. Cunningham died in October, 1911, and that the paving, etc., was done in August, 1912. From these assumed facts it is contended that the change of ownership, the change in the membership of the town council and the unreasonableness of the delay in making the improvements each rendered the assessment invalid. But it does not appear in the record when the work was in fact done. By the account rendered to the owners dated May 8, 1913 (complainants' Exhibit A) it is only stated that the work was done in the year 1911 and 1912, and the defendants' answer says that Sarah E. Cunningham died in the fall of 1911. Therefore, there does not appear of record any evidence to show unreasonable delay, even if that be a valid ground of objection; nor does it appear that there was any change in the membership of the town council as a result of an election, if in fact one was held in the interval above mentioned, so that this is not debatable as an objection, and no opinion is expressed as to the sufficiency of such objection.

It does appear as a fact, however, that in the interval after the passage of the ordinance ordering Sarah E. Cunningham and the other two tenants in common to do certain work in a certain manner in front of this land, and after the giving to them of a notice to do the work, and before all of the work was done, Sarah E. Cunningham died and her share descended to two of the four complainants. Does this change of title so occurring render invalid the whole assessment? Clearly not. The work may have been begun in the lifetime of Sarah E. Cunningham. Even if the work be begun and done after her death, it is not claimed that her death and the descent of the land to her heirs at law made it necessary for the town council to begin a new proceeding, and no authority is shown for such a proposition.

If a valid notice be given to a landowner to make a certain improvement, such as paving in front of his land, within a fixed time, the one succeeding to the title of the land by death or otherwise is bound by the notice and by the proceeding already begun, and a new notice to such new owner, or new proceeding, is not necessary. 1 Elliott on Roads and Streets, § 343; Taylor v. County Com'rs, 18 Pick. (Mass.) 309.

Even taking the facts to be as stated by the complainants' solicitor, viz., that after the three tenants in common owning the land in question had been notified in a legal manner to make certain street improvements in front of their land, and before the work was done by the town fourteen months later, one of the tenants in common died and her share in the land descended to her heirs at law, who are complainants in this cause, still under the other facts in the case the changes of ownership and delay would not invalidate the assessment. As herein above indicated, the heirs of the deceased tenant in common, who at her death was in default in not complying within 30 days with a valid notice to make the improvement, took title subject to any burden or duty imposed upon their ancestor by the proceedings taken by the town. The delay in making the improvements was the fault of the abutting owners and not of the town. Nothing was done by the town to waive any right, or to relieve the owners from any duty; but on the contrary the owners were on several occasions urged by officers of the town to make the improvements. Neither the death of one of the owners of the land, or the lapse of time, invalidated an otherwise valid assessment.

[12] The point chiefly relied on to show irregularity in the assessment is that the curb and gutter were constructed in the wrong place, in that they were placed more than 6 feet east of the north side of the street, and, therefore, encroach on part of the highway by extending about 2 feet east of what should be the true line of the curb. Being an illegal encroachment on the highway, it is claimed that it is an unlawful structure and the town cannot collect from the abutting owner the cost of constructing it. It should be noted that this objection does not apply to the sidewalk, which is admittedly properly located, and, as already herein indicated, the town had a right to collect from the complainants the cost of laying the sidewalk, or pavement.

To determine whether the assessment for the curb and gutter is valid, it must be found from the admissions or allegations of the answer that the facts are as claimed by the solicitors for the complainants in their argument. The allegation of the bill respecting the error of location is categorically denied by the answer, and without the evidence of the plot attached to the answer, and other statements in the answer, there would be no

evidence of such erroneous location. Attached to the answer is a plot made since the proceeding began, and for the purpose of this suit, by a surveyor. From it it does clearly appear that the highway called Main street, in front of the complainants' land, is since the laying of the curb in question 38 feet wide and not 40 feet wide. If, as contended by the complainants, the legal width of Main street be 40 feet between curbs and the curb on the east side of the street is in its proper location, then the new curb on the west side of the street must be in a wrong place. But the allegations of the complainants and defendants on this subject of the exact location of Main street and its boundaries are conflicting and irreconcilable. Nor does it appear from the plot of the defendants whether the error in the location is on the east or west side of the street. It is alleged by the defendants, and taken to be true, that the curb in front of the complainants' land is a continuance of the same course of the long-existing curb to the west of that land. That tends to show that the curb in question was rightly located. Inasmuch, then, as the facts as established in the case do not clearly show that the curb in front of the complainants' land was located in the wrong place, that is, about 2 feet too far to the east, it is not at this time right to express any opinion as to the effect of such error in location, if such should hereafter be shown to exist.

[13] The defendants urge as a complete defense to the claim of the complainants to relief, the doctrine of estoppel arising from failure to object pending the making of the improvement. This is equitable estoppel based on silence and acquiescence when there is both an opportunity and duty to speak. To make it effective the party maintaining silence must know or be in a situation to know that some one was relying on such silence or acquiescence, and acting, or about to act, as he would not have done had the other spoken and asserted his right. There is ample authority for the proposition that silence and acquiescence on the part of a property owner, who stands by and permits an improvement to be made in front of his land, knowing its progress, knowing that it is intended to pay for the improvement by a special assessment on his property, and knowing also the defects in the proceedings, will estop him from attacking the validity of the assessment by a suit to restrain the collection of the cost of the same, or to vacate or cancel it, on the ground of any defect or irregularity which does not affect the jurisdiction or power of the municipality. 4 Dillon on Municipal Corporations (5th Ed.) § 1455. The learned author supports the above proposition by many citations. He refers especially to the case of *Tone v. Columbus*, 39 Ohio St. 281, 303, 48 Am. Rep. 438, as a leading case and as laying down the limitations of the rule. The circumstances under which

it is the duty of the owner to speak are thus stated in the case just cited:

"When the improvement is of a public street upon which the owner's property abuts, before the duty to speak can be said to exist, which is so imperative that if he keeps silent then he shall not afterwards be heard, it must be shown: First, that he knew the improvement was being made; \* \* \* second, that he had knowledge that the public authorities intended and were making the improvement upon the faith that the cost thereof was to be paid by the abutting property owners, and that an assessment for that purpose was contemplated. \* \* \* Because cities may improve the streets out of the general fund and without a special assessment; third, that he knew of the infirmity or defect in the proceedings, under which the improvement was being made, which would render such assessment invalid and which he is to be estopped from asserting; \* \* \* fourth, some special benefit must have accrued to the owner's property, distinct from the benefits enjoyed by the citizens generally."

The principle of estoppel is not denied by the complainants, who urge that it does not apply here. But it would seem that the owners knew the improvements were being made, that the cost was to be assessed against their land, and that the defect of insufficient notice existed, and there was a special benefit to their property. The knowledge of Samuel Catts was the knowledge of the co-owners, and he knew they were expected to pay for the improvements and not the town from its general fund. The allegations of the answer establish these facts. But it does not appear that the owners knew, or could be reasonably expected to know, of the defective location of the curb or gutter, for it is not reasonably obvious without the exercise of more attention and care than was chargeable to the owners. So far as the pavement is concerned, the owners would be estopped to say that the assessment was invalid for want of notice, but they can notwithstanding object to the assessment so far as relates to the cost of the curb and gutter.

The case is now heard under a rule of court which allows a complainant to move for a decree notwithstanding an answer, the practical effect of which is to test the sufficiency of the answer as a defense in point of law. But in his discretion the Chancellor may decline to decide the questions raised by the motion and direct the case to proceed. This course will be pursued as to the lien for the cost of the curb and gutter. But inasmuch as the defendant had a right to sell so much of the personal property levied on as was necessary to pay the cost of laying the pavement, the preliminary injunction heretofore awarded the complainants should not be continued pending the final hearing, unless the complainants pay to the defendant the cost of the pavement, or else the preliminary injunction be amended so as to apply only to a sale of property to collect the cost of the curb and gutter.

If desired, the parties will be heard as to the form of the order to be entered in accordance with this opinion.

W. J. L. 44, 449

**BLISS et al. v. LINDEN CEMETERY ASSN et al.**

Court of Chancery of New Jersey. July 6, 1914.)

**1. CEMETERIES (§ 5\*)—"PROMOTER"—OBLIGATION.**

Where certain individuals conceived the idea of establishing a large cemetery, and to carry out the scheme arranged to buy the real estate, procure the consent of the township and state board of health to its establishment, and prepare all the necessary papers and documents to carry the scheme through, they were "promoters," and, as such, bound to furnish the cemetery corporation with an independent and disinterested board of directors, and to make a full, open, and fair disclosure to such board of all the profits the promoters designed to make out of the scheme.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. §§ 4-8; Dec. Dig. § 5.\*]

For other definitions, see *Words and Phrases*, vol. 6, p. 5682.]

**2. CEMETERIES (§ 5\*)—ASSOCIATION—INCORPORATION—POWERS—PURCHASE AND DISPOSITION OF LAND.**

Rural Cemetery Association Act (1 Comp. St. 1910, p. 375) § 10, providing that at least one-half of the proceeds of all sales of cemetery lots shall be appropriated to payment for the land acquired by the association, until the whole price shall be paid, and the residue thereof applied to the preservation, improvement, and embellishment of the cemetery grounds, etc., and to defray the incidental expenses of the establishment, and that after the payment of the purchase money and the debts contracted therefor, etc., the proceeds of all future sales shall be devoted to improvement, and to no other purpose or object so long as the embellishment of the cemetery is incomplete, deprived a corporation organized thereunder of the power to divide the proceeds of burial lots into shares, and give to the holders thereof a pro rata lien and claim on the land purchase fund of the association, composed of at least one-half of the proceeds of the sales of all burial lots on the grounds of the association, etc.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. §§ 4-8; Dec. Dig. § 5.\*]

**3. CEMETERIES (§ 11\*)—ASSOCIATIONS—ORGANIZATION—STATUTES—CURATIVE ACTS.**

P. L. 1911, p. 628, supplementing Rural Cemetery Association Act April 9, 1875 (Revision 1877, p. 102), and providing that any and every contract previously entered into by any cemetery association incorporated thereunder, by the terms of which land has been or was to be purchased by the association, and the price fixed at the amount of not more than half of the proceeds of all sales of lots, all moneys remaining of the other half to be expended for the embellishment of cemeteries, and certificates evidencing interest in such purchase price and proceeds are validated, etc., applied only in cases of purchase in which the purchase price was fixed at an amount not more than one-half of the proceeds of all sales of lots or plots, and did not validate a contract in which 60 per cent. of the proceeds were pledged for the payment of the purchase price.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. § 12; Dec. Dig. § 11.\*]

**4. CONSTITUTIONAL LAW (§ 106\*)—REMEDIES—VENTED RIGHTS—STATUTES.**

P. L. 1913, p. 521, is entitled "An act concerning cemetery corporations and contracts made by them with respect to interests in the proceeds of sales of lots or plots;" section 8 declaring that any agreements or arrange-

ments previously made by any cemetery corporations contained in deeds conveying lands to such associations, etc., and any certificates of interests in proceeds of sales of lots or plots, issued in pursuance thereof, not in contravention of the provisions of the act, are declared valid and affirmed, and section 5 declaring that the act shall take effect immediately, and that, if any portion thereof is invalid, it shall not affect any other portion. *Held* that, though section 3 should be held to be retrospective in operation, the statute should not be held to impair the vested right of complainants to the right to vacate an ultra vires contract dividing the proceeds of the sales of the lots of a cemetery association into shares and transferring the same, which right complainants had at the time of filing their bill for such relief.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 186, 212, 238-245, 252-257, 259; Dec. Dig. § 106.\*]

**5. CEMETERIES (§ 5\*)—CONTRACTS—RATIFICATION—FRAUD.**

Where promoters of a cemetery corporation had not provided it with an independent board of directors, and had fraudulently induced it to enter into an ultra vires contract for the disposition of the proceeds of sales of lots for cemetery purposes, such contract could not be ratified by a resolution of a subsequent board, nor by the shareholders at a subsequent meeting, especially where it did not appear that prior to such alleged ratification they were informed of all the facts.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. §§ 4-8; Dec. Dig. § 5.\*]

**6. CEMETERIES (§ 5\*)—CORPORATIONS—SALE OF LOTS—COVENANTS—VALIDITY.**

A covenant by a cemetery corporation organized as provided by Rural Cemetery Association Act (1 Comp. St. 1910, p. 375), obligating the corporation to pay semiannually, in cash, to a promoter one-tenth of the gross proceeds of the sale, lease, or loan of burial plots having been obtained by the promoter deceiving his own uninterested board of directors, was fraudulent and ultra vires.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. §§ 4-8; Dec. Dig. § 5.\*]

**7. CEMETERIES (§ 5\*)—CORPORATIONS—COVENANTS—VALIDITY.**

A covenant by a cemetery corporation organized under Rural Cemetery Association Act (1 Comp. St. 1910, p. 375), binding it, as to a promoter, not to divest itself of the title to any part of its lands, with certain exceptions, without the written consent of the promoter, his heirs, executors, and assigns, and in every case to pay one-tenth of the gross proceeds to such promoter, was void as ultra vires and in restraint of alienation.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. §§ 4-8; Dec. Dig. § 5.\*]

**8. CEMETERIES (§ 5\*)—CEMETERY CORPORATION—COVENANTS.**

Where a cemetery corporation covenanted with the grantor of its land, who was its chief promoter, that 15 acres should be set aside to provide a fund for perpetual care of the cemetery grounds, the land to be selected by the grantor and three other members of the board of trustees to be appointed by him, he having died without making any appointment or selection of plots, the covenant became obsolete.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. §§ 4-8; Dec. Dig. § 5.\*]

**9. CEMETERIES (§ 5\*)—CEMETERY CORPORATIONS—POWERS—BORROWING MONEY.**

A cemetery corporation, though without express power to borrow money to meet necessary expenses of its activities, has implied power to do so, and certificates of indebtedness and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



notes executed for money actually loaned to and received by the corporation constitute valid evidences of indebtedness against it.

[Ed. Note.—For other cases, see *Cemeteries*, Cent. Dig. §§ 4-8; Dec. Dig. § 5.\*]

Suit by William Bliss and others against the Linden Cemetery Association and others. On final hearing on bill, answer, replication, and proofs. Decree for complainants.

See, also, 81 N. J. Eq. 394, 87 Atl. 224.

Abraham H. Cornish, of Newark, for receiver. Terry Parker, of East Orange, for shareholders Boehl and others. Hugh Reed, of Newark, for loan certificate holders. H. Theodore Sorg, of Newark, for guardian of Smith infants. Borden D. Whiting, of Newark, for other shareholders. Robert D. Reynolds, of Newark, for trustees and defendant Cemetery Ass'n.

HOWELL, V. C. The theory of the original bill was that the provisions of our corporation act (2 Comp. St. 1910, p. 1638) relating to insolvent corporations applied to corporations organized under our rural cemeteries act (1 Comp. St. 1910, p. 372) and the supplements thereto. This was found to be incorrect. *Bliss v. Linden Cemetery Association*, 81 N. J. Eq. 394, 87 Atl. 224. An amended bill was then filed, whose object and purpose was the administration of the affairs and property of the defendant as a corporation holding the legal title to real estate in trust for a charitable use. The bill alleges many *ultra vires* and other illegal transactions, and prays generally that the irregularities may be corrected and the illegal and *ultra vires* acts set aside.

[1] The evidence is that in the year 1900, or thereabouts, William F. Smith and Clinton O. Smith, with possibly one or two other persons, conceived the idea of establishing a large cemetery on lands adjoining the Pennsylvania Railroad in the township of Linden, in Union county. Subsequently Roswell D. Benedict and Vernetta Prentice joined them, and these four men thereupon became the promoters of the enterprise. Whatever was done towards carrying the scheme into operation was originated and carried on by them. They formulated the plan, arranged to buy the real estate, provided a scheme by which the purchase money was to be raised in the first instance, procured the consent of the township of Linden and of the state board of health to the establishment of a cemetery, and prepared all the papers and documents which were necessary in order to carry it through. This series of acts constituted these four men promoters of the enterprise, and subjects them to all the liabilities and responsibilities placed upon promoters by our law. *Woodbury Heights Land Co. v. Londenlager*, 55 N. J. Eq. 78, 35 Atl. 436, affirmed 58 N. J. Eq. 556, 43 Atl. 671; *Plaquemines Tropical Fruit Co. v. Buck*, 52 N. J. Eq. 219, 27 Atl. 1094; *Dick-*

*erman v. Northern Trust Co.*, 176 U. S. 181, 20 Sup. Ct. 311, 44 L. Ed. 423; *Pittsburgh Mining Co. v. Spooner*, 74 Wis. 307, 42 N. W. 259, 17 Am. St. Rep. 149.

Among the other duties imposed upon promoters of an enterprise of this character is the furnishing of an independent and self-dissevering board of directors, and a full, open, and fair disclosure of all the profits which the promoters design to make out of their promotion scheme. These questions were examined by me in the case of *Arnold v. Searing*, 78 N. J. Eq. 146, 78 Atl. 762, and I call particular attention to the quotation from the opinion of Lord O'Hagan in *New Sombrero Phosphate Co. v. Erlanger*, 3 A. C. 1218, 48 L. J. Ch. 73, as to the independence of directors, and the remarks of Lindley, M. R., in *Re Olympia, Ltd.*, L. R. 1898, 2 C. D. 153, 67 L. J. Ch. 433, as to the disclosure of intended profits.

There can be no doubt but that these four men, until the death of William F. Smith, and after that event the remaining three men, had full charge and control of the business conducted by the association. They selected the trustees, and qualified them by giving to each the legal title to a cemetery lot in order that they might be ostensible lot owners, which lots they were severally required to retransfer to the corporation whenever they ceased to occupy the position of trustee. Out of the whole number of persons who occupied the position of trustees of the defendant association from 1900 until the present time only two or three, as I remember the evidence, were qualified by an absolute and bona fide ownership of cemetery lots. Early in its history the vendors of the real estate, or some of them, acted as trustees, but apparently they had no interest, except to see to it that the mortgages taken back by them for a portion of the purchase money were protected and paid. It therefore appears to be quite evident that the promoters did not furnish to this corporation an independent and self-dissevering board of trustees, but, quite on the contrary thereof, so managed as that the board was continuously under their control and domination.

After the formal execution and filing of the incorporation papers, the first step toward a consummation of the plan was the actual purchase and conveyance of the real estate to be used for cemetery purposes which had some time before been bargained and arranged for by these promoters. The deed of conveyance to the association was made on January 29, 1901. Up to this time there was no one interested in the project except the promoters; there were no lot holders or creditors or holders of shares in the plan that was afterwards adopted. The scheme was confined to the four promoters, and no other individual had any interest in it. The resolution for the purchase of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 91 A.—20

real estate was passed on January 16, 1901, by the persons who had been selected by the promoters as trustees. It recited that William F. Smith had proposed to sell to the association 129 acres of land situated in Linden, Union county, for the purposes of said association, on condition that the association issue to the said William F. Smith, in exchange for his deed conveying his equity in said land and property to the association, 9,000 shares in the purchase-money fund of said association, to be realized by contribution thereto, under the laws of the state of New Jersey, of one-half the proceeds arising from the sale by the association of plots in said premises. The resolution following this preamble reads as follows:

"Resolved, that the association purchase the property offered by the said William F. Smith and issue to him *therefor as full consideration for his equity* therein 9,000 shares in the purchase-money fund of this association to be made up of one-half of the proceeds from the sale or use of plots as authorized by the laws of the state of New Jersey, this association assuming any mortgage or other incumbrances on said property existing over and above the equity of said William F. Smith therein, which mortgage shall not exceed the sum of \$—— to be dealt with by the association in the future as this association may be advised.

"And be it further resolved, that the president and treasurer of this association be and they hereby are authorized and directed to execute a contract on the part of this association with said William F. Smith agreeing to accept from him a deed of the said property and to deliver to him in exchange for said deed 9,000 shares in the purchase-money fund of this association made up as specified in the next preceding resolution, and to execute any other contract with reference to the said deed that they may deem necessary."

It will be observed that the only consideration agreed by this resolution to be paid by the association to William F. Smith is 9,000 shares in the purchase-money funds. At that time the situation of the property in question as to incumbrances was this: Smith paid for the property \$37,500, subject to mortgages aggregating \$32,000, leaving as his equity only \$5,500.

If the letter of the resolution is to be followed, the cemetery association would receive title to this small equity upon issuing to him 9,000 shares to represent the \$5,500. I have been careful to state this part of the transaction in detail, because, as a matter of fact, this plan was not followed in any respect, but was promptly departed from by the terms of the deed which was delivered a couple of weeks later.

On January 29, 1901, William F. Smith conveyed to the association three tracts of land aggregating 131,675 acres; the conveyance was stated to be in consideration of five certain covenants therein set forth and entered into by the party of the second part. The covenants are as follows:

"(1) To deliver to said William F. Smith nine thousand shares of the Linden Cemetery Association, made out in the name of C. O. Smith at the enrolling and delivery to it by said

first parties of this indenture, said shares giving the holders thereof their pro rata lien and claim upon the land purchase fund of said association, composed, under the laws of New Jersey, of at least one-half of the proceeds of the sale of all burial plots in the grounds of said association conveyed to it by these presents for conversion into burial plots.

"(2) To pay semiannually in cash to said William F. Smith, his heirs, administrators, executors, and assigns, one-tenth part of the gross proceeds of the sale, lease or loan of each burial plot or of any use thereof or interest therein, made by said Linden Cemetery Association, party of the second part, from the land hereinafter conveyed to said association by this indenture.

"(3) To sell, lease, or loan or in any other way to divest itself of any part of its title to or possession of no portion of the lands hereinafter conveyed to it, in any other form or for any other use than as burial plots, except for the purpose of straightening its lines or conforming to some regulation imposed upon it by law, without the consent in writing of the said William F. Smith, his heirs, executors, administrators, or assigns; and in every case to pay one-tenth of the gross proceeds thereof to the said William F. Smith, his heirs, assigns, executors, or administrators.

"(4) To set apart at least fifteen acres, under the direction and in conformity with the wishes of said William F. Smith and any three of the trustees of said association whom said Smith shall appoint to act with him in the premises, such fifteen acres not necessarily being in one solid tract, but possibly made up from various parts of the lands hereinafter conveyed, from which fifteen acres no burial plot shall be sold at less than two and one-half dollars per square foot, the proceeds from the sale of burial plots in which as they are made, after deducting the one-half thereof required by law, to be distributed among the shareholders, and the one-tenth thereof to be paid to said Smith, his heirs or assigns, as hereinbefore provided, shall be lodged with some trust company to be selected by said Smith and the three trustees aforesaid, and shall remain on investment with said trust company, under a trust deed approved by said Smith and his said advisers, until the said proceeds and the accumulations thereof shall have made a fund sufficient to provide an income adequate to the perpetual maintenance of the lands hereinafter conveyed as a high-class cemetery, and such income shall be applied to such maintenance when the exhaustion of burial plots shall cause to cease the fund for embellishing and maintaining such cemetery theretofore derived from forty per cent. of the proceeds of burial plots not within said fifteen acres, the purpose of this provision being to insure the perpetual care of the said cemetery and its maintenance as a park when its capacity as a burial place shall have become exhausted. If there should remain any portion of said fifteen acres unsold as burial plots at the time when such trust fund has become sufficiently large to afford an income adequate to such cemetery maintenance, then the party of the second part covenants and agrees, after paying to the shareholders one-half of the proceeds of future sales of burial plots from said fifteen acres, to pay over the balance thereof to the said William F. Smith, his heirs, executors, administrators and assigns. And the party of the second part further covenants and agrees to defray from such trust fund the expenses of the removal and reburial in lots also purchased from such fund of any bodies directed by law to be removed from the said land hereinafter conveyed, if such bodies shall have remained buried in said land for the space of twenty-five years.

"(5) As a fifth and final covenant and consideration for the conveyance to it of said land hereinafter described, the party of the second

part agrees to assume all mortgage or other incumbrances on the land hereinafter conveyed to it and to hold the parties of the first part, their heirs, executors, and administrators, forever harmless therefrom."

Inasmuch as the matters which are complained of by the complainant arise principally out of one or another of the foregoing covenants, I shall take them up and discuss them seriatim.

It may not be amiss to say at this point that the most superficial examination of the deed containing the above-recited covenants as delivered discloses that it has a very slight resemblance to the document which the minute book shows was negotiated for by the association. This fact accentuates the remarks made by the eminent judge above quoted touching the independent directorate, and demonstrates the actual control which the promoters had over the non-interested board.

[2] The first covenant relates to the creation and disposition of what is known as the land purchase shares. These are supposed to have been authorized by section 10 of the rural cemetery association act (1 Comp. St. 1910, p. 375, § 10 [Rev. 1877, p. 102] as amended by an act found in P. L. 1882, p. 25). This section provides that one-half, at least, of the proceeds of all sales of lots or plots shall be first appropriated to the payment of the purchase money of the land acquired by the association until the whole purchase money shall be paid; and the residue thereof to preserving, improving, and embellishing the said cemetery grounds and the avenues and roads leading thereto, and to defray the incidental expenses of the cemetery establishment; and that, after the payment of the purchase money and the debts contracted therefor and for surveying and laying out the land, the proceeds of all future sales shall be applied to the improvement, embellishment, and preservation of said cemetery, and for incidental expenses, and to no other purpose or object as long as such embellishment is incomplete.

The shares were issued in the following form:

"This is to certify that — is entitled to — shares in the Linden Cemetery Association, of New Jersey, transferable only on the books of the association in person or by attorney, on surrender of this certificate.

"This certificate is a lien on the land purchase fund of the association, which fund, under the laws of New Jersey, must be composed of at least one half of the proceeds from the sale of burial plots in the said cemetery; and the holder hereof is entitled to have paid over to him one 1/9000 part of said fund for each share which this certificate represents; and he will be so entitled until the last burial plot in said cemetery is sold and its proceeds distributed according to law.

"In witness whereof, the said Linden Cemetery Association has caused this certificate to be signed by its president and treasurer," etc.

A scheme of issuing share certificates quite similar to the one now before the court was dealt with by Vice Chancellor Stevens in

the case of East Ridgelawn Cemetery Co. v. Frank, 77 N. J. Eq. 36, 75 Atl. 1006, and was pronounced by him to be entirely outside of the authority conferred by the statute above referred to. He held that the statute contemplated the purchase of the land for a definite price, and that consequently the shares, if shares could be issued at all by the association, must be predicated upon some definite and fixed amount. The remarks and criticisms made by the Vice Chancellor in that case apply with peculiar force to this case, and I have no hesitation in saying that the scheme here entered into is extrastatutory, and cannot be carried out in accordance with the original intention of the parties. There must be an inquiry as to the fair market value of the land in question at the date of the purchase, and, if the issue of shares is to be approved, they must be based upon actual values at that time, and not upon such values as may subsequently be reached when the cemetery lots shall have become much more valuable by reason of the more extensive use of the burial ground. The scheme of issuing shares was one of the methods by which the promoters obtained an undisclosed profit to themselves, and, in so far as it aided and assisted in this design, it is fraudulent and void. The association cannot be made chargeable with anything which it did not lawfully receive. The land purchase fund was divided into 9,000 shares; that is to say, each shareholder was entitled to receive for each share held by him 1/9000 part of the proceeds of the sale of all the lots which were sold by the association for burial purposes. Five thousand of these shares were turned back by the promoters to the corporation, and were sold by it to raise money with which to pay off the mortgage on the property, and the remainder represented the secret profit made by the promoters out of the enterprise. The association must recognize a liability of some sort for the money actually received by it from the land purchase shares or from any other source, but it cannot be made to respond to claims arising out of the issue of land purchase shares from which it received no benefit. Therefore the claims of so-called shareholders which brought no money to the treasury of the company are void and cannot be enforced. The so-called shares have no negotiable quality, and title does not therefore pass by delivery or indorsement. The doctrine of protection which is afforded to bona fide purchasers without notice and for value does not apply, and every purchaser and holder of the 4,000 shares must be held to have known that they were issued without the sanction of any law. In so far as these so-called shares can be traced to the promoters, and from them to the present holders, they must be canceled.

After the decision in East Ridgelawn Cemetery Co. v. Frank, 77 N. J. Eq. 36, 75 Atl. 1006, it was quite evident that schemes like

the present were in great danger. In 1911 and 1913 acts were passed by the Legislature whose undoubted purpose was to cure any defects that there might be in this plan of financial organization; and an able argument was addressed to the court in favor of the view that the Legislature had now sanctioned the plan in question, if, indeed, it had ever been open to question.

[3] But it is doubtful whether the so-called curative acts of 1911 and 1913 (P. L. 1911, p. 626; P. L. 1913, p. 521) have any effect whatever upon the situation developed in this case. It is quite clear that the act of 1911 does not. It applies to only one class of cases; that is, cases of purchase, in which the purchase price is fixed at the amount of not more than one-half of the proceeds of all sales of lots or plots, etc., thus excluding this case, in which 60 per cent. of the proceeds of lots was pledged for the payment of the purchase money.

[4] The act of 1913 is a general act and not a supplement to the rural cemeteries act, the first two sections of which must undoubtedly be construed to be prospective in their operation. *Frelinguysen v. Morristown*, 77 N. J. Law, 493, 72 Atl. 2. The fourth section relates only to joint agreements, so that whatever there is in the act which relates to the case in hand is found in the third section. Concerning that section there are two things to be said: First, its operation is limited by the words "not in contravention of the provisions of this act." Just what that may mean is very difficult of solution. Its sponsors evidently considered it to be difficult because they put in the fifth section a provision that, if any portion of the act should be held to be invalid, it should not affect any other portion. And, second, if the act means what it appears to say, then it is possible for a cemetery company to pledge all its lots and all the proceeds of the sale thereof for the payment of purchase money, and thus abrogate what has been the settled policy of our Legislature since 1877. But, even if the third section should be found to be clearly retrospective, yet it could not affect the vested rights of any interested person, and this act, so construed, would have the effect of depriving the complainants of a remedy which they had at the time of the filing of the bill. Any act which has the effect of impairing the obligation of a contract or of depriving the party of a remedy which existed when the contract was made is obnoxious to the provisions of our Constitution, and therefore void. *Baldwin v. Newark*, 38 N. J. Law, 158; *Maxwell v. Goetschius*, 40 N. J. Law, 383, 29 Am. Rep. 242; *Moore v. State*, 43 N. J. Law, 203, 39 Am. Rep. 558; *Presbytery of Jersey City v. First Presbyterian Church*, 80 N. J. Law, 577, 78 Atl. 207. I therefore conclude that the so-called curative acts have no application to the case in hand, and that the case must

be decided as if no such legislation existed.

[5] An attempt was made to ratify the land purchase and the form of the deed by which the land was conveyed to the association at a meeting of the board of trustees held on January 31, 1901. The board which attempted this ratification was as powerless to act in the matter as was the board which passed the original resolution; hence ratification by it wrought no result whatever, and the situation after January 31, 1901, was exactly the same as the situation before that date. Besides, it is impossible to ratify a fraud and make that good which is vicious from the foundation. Neither does it appear that at the time this ratification was sought there was any disclosure made to the board of the contents of the deed in question. On this point see *Booth v. Land Filling Co.*, 68 N. J. Eq. 536, 59 Atl. 767; *Siegman v. Electric Vehicle Co.*, 72 N. J. Eq. 409, 66 Atl. 1134.

Still another attempt was made to procure a ratification of the deed and the issue of 9,000 shares in the land purchase fund, and the organization, at a meeting of lot holders held on March 13, 1901, at which it was resolved by them to ratify and confirm the acts of the officers and agents of the association in any way connected with the acquirement of the said property, and especially to recognize the 9,000 shares delivered as part consideration for said property, and all agreements, covenants, bargains, and promises contained therein and in said deed, as their free act and deed, adopting all of the same as fully by that resolution as if their names had been subscribed thereto and their seals thereto affixed. But it does not appear that the lot holders were informed at that time of the contents of the deed or of the general situation. It was the duty of the promoters to make such disclosures concerning their profits as would reach the persons who afterward became lot holders. Future purchasers of lots had a right to know just what the condition was. The burden of proof on this point is on the promoters. There is not only a deficiency of proof on their part, but, quite on the contrary thereof, all the lot holders who were called to testify to this point stated that at the time they purchased their lots they knew nothing about the 10 per cent. interest or anything about the financial condition of the association. There can be no ratification without full knowledge on the part of him who ratifies, and all these attempts lack one essential element, viz., a full and complete disclosure of all the facts concerning which the ratification is asked.

I therefore conclude that there has been no efficient ratification by any competent authority to sustain the acts which are now complained of.

[6] The second covenant, which creates what was called in the case the "10 per cent. interest," rests upon a much less secure foundation even than does the so-called

shares. There is absolutely no statutory or other authority for the making of such a covenant. It is not mentioned in the resolution by virtue of which the lands were purchased, and no display of it appears ever to have been made by the promoters. By virtue of this covenant the association is claimed to have bound itself to pay William F. Smith, the grantor, one-tenth of the gross proceeds of the sale, lease, or loan of burial plots in the cemetery. In forcing this deed and this covenant on the cemetery association Smith seems to have deceived even his own board of uninterested directors. That 10 per cent. interest early in the history of the cemetery association was divided into four shares, which are now distributed as follows: One-fourth to William F. Smith, now held by his personal representatives; one-fourth to Dorothy A. Raymond, who subsequently married Roswell E. Benedict; one-fourth to Clinton O. Smith, a son of William F. Smith; and one-fourth to Vernetta E. Prentice. Not only should this covenant be wholly disallowed upon the ground that it was fraudulent in fact, but also upon the further ground that it was a means by which a secret profit was obtained by the promoters of the enterprise, and not only should the covenant be set aside on these grounds, but the promoters, if they have received any benefit thereunder, should account to the cemetery association therefor.

[7] The third covenant binds the cemetery association not to divest itself of the title to any part of the lands in question (with negligible exceptions) without the consent in writing of William F. Smith, his heirs, executors, administrators, and assigns, and in every case the association to pay one-tenth of the gross proceeds thereof to the said Smith. This provision is not authorized by the statute, is not mentioned in the original resolution for the purchase of the land, and is a restraint upon alienation, and is therefore void. *Magie v. German Evan. Church*, 13 N. J. Eq. 77, affirmed 15 N. J. Eq. 500.

[8] The fourth covenant relates to setting aside of 15 acres of the cemetery land for the purpose of providing a fund for the perpetual care of the cemetery grounds. This land is to be selected by Smith in conjunction with any three members of the board of trustees of the association whom Smith shall appoint to act with him in the premises. Inasmuch as Smith, the grantor, has died without making any appointments of trustees or selection of plots for the purposes of the covenant, it would seem as if the provisions of the covenant have become obsolete, there being now no one who can appoint the trustees, and there being no trustees to make the selection. In my opinion, nothing can be done on behalf of either the grantor or grantee with relation to this covenant.

The fifth and last covenant is an assumption by the cemetery association of the mort-

gages then on the land amounting to \$32,000 of principal. Inasmuch as these mortgages have been paid off and discharged of record, there seems to be nothing in this covenant for the consideration of the court.

During the ten years or thereabouts that this cemetery association has been in operation it has been subjected to a continual loss, for the reason that the regular income from the sale of lots, after deducting 60 per cent. thereof for the land purchase shares and the 10 per cent. interest, was insufficient to meet the necessary expenses of conducting the business.

[9] The board of trustees therefore authorized the borrowing of money on what is known as loan certificates issued in denominations of \$100, \$500, \$750, and \$1,000, whereby the association promised to pay, upon a certain date expressed in each certificate, the face value thereof, with 6 per cent. interest, semiannually; it reserving the right to redeem the same on any interest day at 102 and interest. There were three issues authorized, one in 1902, another in 1906, and still another in 1910, the aggregate amount authorized being \$100,000, only \$84,900 of which have been issued. These certificates represent actual cash loaned and paid to the cemetery association, with the exception that certain of the certificates were issued to certain of the trustees at a discount of 10 per cent. It was argued that, inasmuch as there appeared to be no express power granted to cemetery associations to borrow money, such borrowing could not take place lawfully, and, if it did take place, it was ultra vires, and therefore void. This contention, however, is not in accordance with the authorities. The right to borrow money to carry on the objects and purposes of the corporation is implied from the authority to do business as a corporation. It was supposed on the argument that there was a difference between the ordinary business corporation and a cemetery corporation in this respect; but no difference is recognized in the leading case decided by our Court of Errors and Appeals in 1886. *Fifth Ward Savings Bank v. First National Bank*, 48 N. J. Law, 513, 7 Atl. 318. There Mr. Justice Depue holds that every corporation created for transacting business, unless restrained by its charter, or some statute, has, as a necessary incident, the power of incurring debts in the course of its legitimate business, and of making and indorsing negotiable paper in payment of such debt. See, also, *Lucas v. Pitney*, 27 N. J. Law, 221; *National Bank v. Young*, 41 N. J. Eq. 531, 7 Atl. 488; *Hackettstown v. Swackhammer*, 37 N. J. Law, 191. So long as the borrowing of money is for the legitimate purposes of the association, the act is intra vires, and therefore valid, but the argument against these certificates is foreclosed by the cemetery act itself, which recognizes the fact that a cemetery company may contract

debts, and in section 18 it provides a drastic method by which such a corporation can be compelled to pay debts contracted by it out of its profits. If it could not contract debts, there would be no need of any method of collecting debts from it, because there could be none to collect. The implication of power therefore seems to be complete. These certificates must stand as debts or obligations of the association for the amounts respectively advanced thereon by the original purchasers thereof. Not being negotiable instruments, a defect in the original issue will affect them in the hands of the present owners.

It likewise appears that the association owed promissory notes to the amount of \$39,813. In so far as these notes represent money actually loaned to and received by the association, they must be held to be its lawful obligations, and inquiry should be made by a master to ascertain the amounts due upon these various kinds of obligations; if, however, the notes which were testified to include the notes given by the company to the shareholders in lieu of the distribution of cash, such notes should be canceled; otherwise the amount will stand as a double liability of the association.

These views lead to the following results:

(1) The 4,000 shares taken by the promoters as a secret profit, in so far as they can be traced and recognized, must be canceled in the hands of their present owners.

(2) The 5,000 shares which were donated to and sold for the benefit of the association must stand as 5,000 shares in the actual value of the land at the time of its purchase, each of the 4,000 shares being entitled to  $\frac{1}{5000}$  part of the proceeds of the sale of the lots. There will be a reference to a master to ascertain this actual value.

(3) The so-called 10 per cent. interest will be canceled absolutely.

(4) There will be a reference to ascertain the amount actually owing by the association on the loan certificates and promissory notes. This amount, when so ascertained, shall be recognized as indebtedness of the association.

(5) The receiver will be requested and authorized to report to the court a scheme for the resettlement of the trust fund and the readjustment of the association's affairs.

If there are any other questions which need to be decided now they can be mentioned at the time of the settlement of the decree.

(36 N. J. L. 327)

MACH MFG. CO. v. DONOVAN. (No. 21.)  
(Court of Errors and Appeals of New Jersey.  
June 10, 1914.)

# 1. APPEAL AND ERROR (§ 843\*)—ACTIONS REVIEWABLE—AMENDMENTS OF PLEADINGS—POWER OF COURT.

Where a declaration was, by amendment during the trial, restored to its original condition, the question of the power of the court to

allow an amendment changing the declaration is immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8331-8341; Dec. Dig. § 843.\*]

## 2. APPEAL AND ERROR (§ 1041\*) — HARMLESS ERROR—DECLARATION—AMENDMENTS.

Where the issue tried was that raised by the original declaration and the pleading by defendant thereto, the allowance during the trial of an amendment to the declaration so as to restore it to its original state, after the allowance of an amendment changing the declaration, was not prejudicial to defendant.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.\*]

## 3. SALES (§ 363\*)—ACTION FOR PRICE—EVIDENCE.

Where, in an action for brick sold, the quantity of brick delivered was shown, and the bills and statements rendered by plaintiff to defendant were not objected to, but defendant paid on account and repeatedly promised to pay the balance, the amount sued for, the court properly directed a verdict for plaintiff.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1064; Dec. Dig. § 363.\*]

## 4. EVIDENCE (§ 256\*)—ADMISSIONS.

Where a contract signed by plaintiff was excluded because of plaintiff's inability to prove its execution by defendant, defendant was not entitled to introduce the contract as statements by plaintiff, without proof that it was recognized by both parties.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1003, 1005; Dec. Dig. § 256.\*]

## 5. SALES (§ 40\*)—REMEDY OF SELLER—DEFENSES.

The buyer of brick cannot defeat an action for the price on the ground of misrepresentation by the seller as to their quality, where the brick was bought for paving city streets and was precisely that called for by the paving specifications; the buyer not being responsible further for the quality.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 79-83; Dec. Dig. § 40.\*]

Walker, Ch., and Gummere, C. J., and Swayze and Parker, JJ., dissenting.

Appeal from Supreme Court.

Action by the Mach Manufacturing Company against Daniel Donovan. From a judgment for plaintiff, defendant appeals. Affirmed.

Merritt Lane, of Jersey City, for appellant. Roberson & Demarest, of Jersey City, for respondent.

KALISCH, J. This is an appeal from a judgment entered upon a direction of a verdict for the plaintiff, for \$1,415.90. The action was brought to recover for bricks sold by the plaintiff to the defendant. The defendant had a contract with the city of Bayonne to pave certain streets, and the plaintiff's brick was approved and adopted for the work. The original declaration filed contained the common counts, with a bill of particulars annexed. The record does not show that any plea was filed, but only a notice of recoupment, and which sets out that there was a special contract under which the brick was furnished. Thereafter the plain-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tiff gave the defendant notice that he would move to amend his declaration in conformity to a copy served with the notice. This he was permitted by the court to do. The amended declaration contained the common counts and also set up two written contracts which were annexed to and made part of it. The record does not show that any plea was filed to the amended declaration, but it does appear that, in answer to the plaintiff's demand for a specification of defenses, the defendant specified that the goods sued for were never delivered to the defendant; that the defendant did not contract the debt; that the goods were not contracted for at the prices specified and were of inferior quality and not in accordance with the terms of the contract, and hence caused loss and damage; and that there could be no recovery under the common counts. When the case came on for trial, plaintiff's counsel stated to the court that he was doubtful whether he could prove the written contracts and that, if he could not, he would ask to amend by substituting the original declaration. The plaintiff, during the trial, made an effort to prove the execution of the written contracts, but failed in showing that the person who signed for defendant was authorized. It seems that the defendant had made out what purported to be two written contracts, one of them for Bayonne and the other for Westfield; that they were mailed by the defendant and signed, not by the defendant but by his son, who, being called as a witness by the plaintiff, testified that he had no authority from the defendant to sign the defendant's name to bind him to the contracts, and thereupon the plaintiff asked leave to amend and proceed under the original declaration, which was permitted, by the trial judge, against the defendant's objection.

It is now urged before us by appellant that the trial judge erred in allowing the amendments. When the plaintiff first applied to amend his declaration, by declaring, in addition to the common counts, upon the written contracts, it was allowed over an objection made by the defendant that the court had no power to permit it.

When, during the trial, the application was made to amend the declaration by striking out the special counts and thereby to restore the declaration to its original state, it was opposed by counsel of defendant upon the ground that the plaintiff furnished their goods under a written contract.

[1] The declaration, by the second amendment, having been restored to its original state, the question as to the power of the court to make the first amendment ceases to be of any vital importance.

[2] It appears from the record that, when the plaintiff announced that he would apply to amend his declaration, counsel of defendant stated that he would not plead surprise or anything of that kind and placed his objection on the ground that the plaintiff fur-

nished their goods under a written contract. At the time the plaintiff made the application to amend, there was no evidence to that effect. The issue tried was that raised by the original declaration and the pleading by the defendant thereto, and we are therefore unable to discern how the defendant was harmed or prejudiced by the procedure pursued.

[3] It is further insisted that the trial judge erred in refusing to nonsuit the plaintiff, upon the ground urged by the appellant that there was no proof of the quantity of bricks delivered. The motion was properly denied. We think there was proof of the quantity of bricks delivered not only by the calculation made by the witness as based upon the number of yards of brick laid by the defendant at Bayonne and Westfield, but also from the undisputed fact that bills and statements for the brick were rendered by the plaintiff to the defendant, who made no objection to their accuracy and paid on account and had repeatedly promised to pay the balance, the amount sued for.

It is also urged that there was error in directing a verdict for the plaintiff. As has already been observed, there was testimony that the defendant had repeatedly promised to pay the bill. This evidence stood uncontradicted. There was no disputed question of fact to be submitted to the jury. The direction of a verdict, therefore, under the circumstances, was proper.

[4] It is further urged that the trial judge erred in refusing to admit the two contracts, attempted to be proven by the plaintiff. They were offered in evidence by the defendant after the plaintiff had been unable to prove their execution by the defendant, and they were not offered as contracts executed by the defendant, but simply as statements signed by the plaintiff. They were undoubtedly signed by the plaintiff, but they were signed by it for the purpose of making a contract, and, when the defendant challenged the authority of his son to execute them on his behalf, there was no contract. Since the defendant repudiated the contracts as binding upon him, their contents were not evidential, without any proof that the parties recognized and adopted the stipulations contained therein, so that they might be bound thereby. The defendant was not entitled to use the proposed contract against the plaintiff, without himself consenting to be bound thereby. The offer was properly overruled.

[5] The final ground urged why the judgment should be reversed is that the court erred in excluding testimony of the representations made by the plaintiff's agent as to the quality of the bricks at the time the oral contracts were made. This evidence did not relate to any representations made to the defendant for the purpose of obtaining a contract with him. It related to the efforts of the plaintiff's agent to specify his

principal's bricks as those to be used, and, when the city so specified, then, when the defendant supplied what the contract called for, he had performed his contract, and he was not responsible for the quality of the material which the city had itself contracted that he should use. In addition to this, there is no proof or offer of proof that the city in any way objected to the character of the material furnished. The defendant's son was asked whether the work was stopped because of trouble they had with reference to the bricks, and his answer was, "Yes." There was no proof of what the trouble was. It may have been delay in delivery, and the mere fact that the work was stopped does not justify the inference that it was because of the quality of the bricks.

The judgment should be affirmed.

WALKER, Ch., and GUMMERE, C. J., and SWAYZE and PARKER, JJ., dissent.

(86 N. J. L. 290)

**BUILDERS' MATERIAL SUPPLY CO. v. SCHOEN.** (No. 60.)

(Court of Errors and Appeals of New Jersey. July 10, 1914.)

*(Syllabus by the Court.)*

**MECHANICS' LIENS (§ 115\*)—RIGHT TO LIEN—CHANGE OF CONTRACT—STOP NOTICE.**

Where the owner and contractor, by agreement in accordance with the terms of the filed contract, change the terms of payment contained therein, by allowing the owner to undertake a part performance himself, thus eliminating one of the payments specified in the contract, *held*, that such a change was not an alteration of the contract, but was within the contemplation of the parties in interest as subcontractors and otherwise, and that where the plaintiff claimed upon a stop notice, based upon such changed payment, the direction of a verdict for the defendant under the circumstances was proper.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 150-159; Dec. Dig. § 115.\*]

Appeal from Supreme Court.

Action by the Builders' Material Supply Company against Edward Schoen. From judgment for defendant, plaintiff appeals. Affirmed.

Lum, Tamblin & Colyer, of Newark, for appellant. Adams & Schoen, of Newark, and Edward J. Luce, of Rutherford, for appellee.

MINTURN, J. The defendant, who was owner of certain land in Newark, contracted with R. M. Barbutti to erect a building upon the land. The contract which was duly filed in the county clerk's office was in the usual form of building contracts, and contained the provision that no alteration should be made in the work, "except upon written order of the architect, and when so made, the value of the work added or omitted shall be computed by the architect and the amount

so ascertained shall be added or deducted from the contract price."

The plaintiff supplied material to the contractor for use in the building, to the amount in value of \$904.55. The contract provided for a first payment of \$500 when the foundation was laid, and a second payment of \$500 when the stucco work was completed, the third and fourth payments in other contingencies, and to a fifth and final payment of \$922. The contractor received the first, third, and fourth payments, but not the second, which he waived as the result of an agreement with the owner and the architect, pursuant to the above-quoted provision, that the contractor should omit the stucco work, the owner would assume its performance himself, and in consideration of this the sum of \$725 was deducted from the contract price.

The plaintiff bases its claim upon a stop notice served upon the owner in compliance with the third section of the Mechanics' Lien Act (3 Comp. St. 1910, p. 3294). The plaintiff made the necessary proof of the delivery of the material, and the service of the stop notice. The facts upon which the claim is based are not in question, nor is it denied that the contract was altered by eliminating the second payment, and by an agreement which empowered the owner to otherwise contract for the doing of the work covered by that payment.

The defendant's liability is sought to be rested on section 5 of the Mechanics' Lien Act, relating to payments in advance of the terms of the contract, and on the proposition that the making of the third payment before the stucco work was done constituted such an advance payment.

The learned trial judge directed a verdict for the defendant, basing his determination principally on the case in this court of Smith v. Dodge & Bliss Co., 59 N. J. Eq. 586, 44 Atl. 639. We think this action was correct.

The language of Mr. Justice Van Syckel speaking for this court in that case says:

"It is obvious, therefore, that the order in question cannot operate to diminish the sum in the hands of the owner, \* \* \* and thereby to defeat the inchoate lien of the materialman unless the contract itself reserves the right to the parties to change it at their option. In that event the materialman and workman must give credit to the contractor at their peril, and are without this inchoate right of lien, or, more strictly speaking, are subject to have that right taken away by a change of the contract without their consent."

Such was the situation in the case at bar. The right to change the contract in the particular referred to by agreement between builder and owner was expressly reserved, and the only complaint urged here is that the parties to the contract availed themselves of that provision of the contract, without notice to the plaintiff and others interested as materialmen and subcontractors.

It should suffice to say that the justification for the change was the contract itself,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and that the plaintiff therefore is practically estopped from denying that the authority for the change existed if the parties to the contract deemed it necessary to make it.

The argument in opposition to the legal correctness of this principle is based upon a construction given to the language contained in the opinion of the learned Chief Justice speaking for this court in *Coles & Son Co. v. Lothridge*, 81 N. J. Law, 406, 80 Atl. 484, which it is urged must be held in effect to determine that any alteration whatever of the provisions of the contract, whether consented to by the parties in interest, or not, must be held to operate as eliminating the contract in toto from the case, and leaving the parties to their statutory right of lien. We do not so construe that case, and it is manifest that the reasoning contained therein must be limited by the facts to which it was applied.

The subject of complaint in that case was that the owner, under an arrangement with the builder, made advance payments to him in consideration of a discount thereon allowed to him by the builder for that accommodation. Plainly such conduct was in clear violation of the terms of the contract, as well as a contravention of the terms and spirit of the Mechanics' Lien Act, and in practical effect subverted the purpose of enabling the principals to the contract by secret agreement to defraud the subcontractors and materialmen, whose rights were, so to speak, pinned to the provisions and guaranties of the contract. No such subversive result can be attributed to the contractual privilege of which the parties availed themselves here. The contract itself, which in practical effect was the chart by which all subsidiary parties in interest had adjusted their obligations and shaped their course, held out this privilege to the principal contracting parties as a right of which they might avail themselves during the progress of the work, should circumstances require recourse to it.

The insertion of the provision in the contract cannot be said to be unreasonable or intended as a basis for fraud, since it is of the stereotype order of covenant peculiar to such contracts, and intended to answer the reasonable changes of design or convenience which an owner may deem necessary during the progress of the work. No one in interest could be said to be deceived by the change; none defrauded by a course of action, to which all in practical effect had in limine acceded and contemplated.

The instances, which may be cited where the principle invoked by the learned Chief Justice as dispositive of the *Lothridge* Case was applied, will be found to be cases where to hold otherwise would in legal effect be tantamount to declaring that the Legislature by this remedial enactment intended to lend its aid to the indirect perpetration of a fraud.

It is enough for present purposes to deter-

mine that the language of Mr. Justice Van Syckel contained in *Smith v. Dodge & Bliss Co.*, supra, is dispositive of the case at bar, and to hold that the very act complained of here as an alteration, and therefore subversive of the contract, was but the exercise of a contractual right, which the parties in interest, including this plaintiff, must be held to have contemplated when they entered into subcontracts, based, as we must assume, upon a tacit assent to the provisions of the principal contract containing the provision in question. The judgment will be affirmed.

(86 N. J. L. 105)

PUBLIC SERVICE RY. CO. v. BOARD OF  
PUBLIC UTILITY COM'RS et al.

(Supreme Court of New Jersey. July 10, 1914.)

(Syllabus by the Court.)

STREET RAILROADS (§ 31\*)—USE OF BRIDGE—  
COMPENSATION—ORDER OF PUBLIC UTILITY  
COMMISSIONERS—REVIEW.

An order of the board of Public Utility Commissioners, fixing the compensation to be paid by the Public Service Railway Company, for the use of the Clay Street Bridge over the Passaic river, made in pursuance of the provisions of P. L. 1913, p. 777, held not unreasonable.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 67, 68; Dec. Dig. § 31.\*]

Certiorari by Public Service Railway Company against the Board of Public Utility Commissioners and others to review an order of such board. Order affirmed.

Argued February term, 1914, before GAR-  
RISON, TRENCHARD, and MINTURN, JJ.

Benjamin F. Jones, of Newark, for Essex County. Joseph M. Noonan, of Jersey City, for Hudson County. Frank H. Sommer, of Newark, for the Board. Frank Bergen, of Newark, for prosecutor.

MINTURN, J. The question involved in this case is the reasonableness of the order of the Public Utility Commissioners, requiring the defendant to pay the sum of \$2,644.46 annually, one half to the county of Essex and the other half to the county of Hudson, for the use of the Clay Street Bridge spanning the Passaic river and connecting Clay street, Newark, with Central avenue in East Newark.

The authority to fix the compensation is contained in P. L. 1913, p. 777. The power of this court to review the order by certiorari, thus made, is contained in section 38 of the Public Utility Act (P. L. 1911, p. 388), and the power to set it aside so far as the facts are concerned is contained in the statutory limitation:

"When it clearly appears that there was no evidence before the board to support reasonably such order, or that the same was without the jurisdiction of the board."

In giving effect to that section we are not unmindful of the recent adjudication of this court in *Erie Railroad v. Board of Public Utility Commissioners*, 89 Atl. 1001, filed Feb-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ruary 24, 1914, vindicating the right of this court upon certiorari to review the facts under the provisions of the Certiorari Act; but we do not read that deliverance as in effect nullifying the legislative intent contained in the section of the Utility Act under consideration, since it is well settled that the ruling of a state railroad commission made in accordance with law, after an investigation of the facts, may be made final by legislation as to the facts. *Buttfield v. Stranahan*, 192 U. S. 470, 24 Sup. Ct. 849, 48 L. Ed. 525; *Bates Co. v. Payne*, 194 U. S. 106, 24 Sup. Ct. 595, 48 L. Ed. 894.

Since at common law the writ of certiorari was intended to review only the regularity and legality of the record of the lower tribunal, and not to settle disputed facts (1 Tidd. Pr. 399; *Wilson v. Hudson*, 32 N. J. Law, 365), the Legislature, in conferring the power to review the facts by the eleventh section of the Certiorari Act, must be held not to have conferred an inextinguishable or irrepealable power of review. The eleventh section of the Certiorari Act (1 Comp. St. 1910, p. 405) and the thirty-eighth section of the Utility Act must therefore be read as in pari materia.

Such in effect was the construction given to these sections in a case involving the exercise of the power of mandamus by this court. *Eastern Telephone, etc., Co. v. Board of Public Utility Com'rs* (Sup.) 89 Atl. 924.

We are persuaded therefore to conclude that what the Legislature intended in the enactment of both sections was essentially similar, i. e., to concede to this court a power to review the facts, but to set aside the order only upon concluding that the evidence upon which the order rested is not such as will reasonably support it, thus placing the appeal by certiorari upon the same status, relatively, as a district court appeal. Where in such case there is evidence upon which the lower tribunal may reasonably infer the result attained, we will not disturb it. *Warren v. Finn*, 84 N. J. Law, 206, 86 Atl. 530.

But whether we review the facts in this case under the eleventh section of the Certiorari Act, or under the language contained in the thirty-eighth section of the Utilities Act, our conclusion in this case must be identical.

The question presented involved an inquiry into the mooted proposition whether the added weight, and use of the trolley car, upon the bridge, tended to shorten the life of the structure, and what financial return to the counties, if such were ascertained to be the fact, would be fair and equitable as compensation for the superimposed loss.

The board heard testimony as to the facts, and considered the testimony of eminent experts, and worked the problem out upon a basis which allowed a certain sum for interest on the extra cost of construction made necessary by the added service, another sum

for depreciation, due to the shortened life of the structure in use, and a final item for cost of maintenance, based upon this use, making a total of \$2,644.46.

We are unable to accede to the contention that this sum is unreasonable in the light of the testimony, and we think it is entirely supportable by the facts and the testimony.

The contention of the defendant denying the jurisdiction of the board to impose payment of compensation upon the defendant, we are not required to consider, since the act of 1913 specifically confers that power upon the board, and the defendant has by its stipulation in this case admitted that it "has no legal authority to lay its tracks on such bridge or cross the same," thus conceding to the board the necessary jurisdiction to make the order under review.

The order of the Board of Public Utility Commissioners will therefore be affirmed.

(36 N. J. L. 35)

### In re DE VENGOECHEA.

(Supreme Court of New Jersey. July 15, 1914.)

CORPORATIONS (§ 181\*)—RIGHTS OF STOCKHOLDERS—INSPECTION OF BOOKS.

Where all of the other stockholders of a corporation approved the acts of its officers, a minority stockholder who occupied a position antagonistic to its interest and was friendly to a competitor, will not be granted mandamus to compel the officers to allow inspection of the books by counsel employed by him in other litigation against the corporation, where the only charge of bad faith against the officers of the company was the purchase of property which was not shown to have occurred after the applicant acquired his stock.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 674-682, 685; Dec. Dig. § 181.\*]

In the matter of the application of Manuel A. De Vengoechea for a writ of mandamus. Writ denied.

Argued before SWAYZE, J., sitting alone under the statute.

Franklin W. Fort, of Newark (Fort & Fort, of Newark, on the brief), for the application. Robert H. McCarter, of Newark, and Louis Marshall, of New York City (Frederick R. Swift, of New York City, on the brief), opposed.

SWAYZE, J. I do not find it necessary to consider the very interesting and important legal question that was argued as to the limitation of the common-law right of a stockholder to examine the books of a corporation, by provisions inserted in the articles of association. I have reached the conclusion that the application is not made in good faith for the purpose of ascertaining the true status of the company, or of taking measures to protect the interests of the applicant as a stockholder, but rather for the purpose of annoying the company and perhaps assisting the applicant in his pend-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing litigation against it, which is aside from his interest as a stockholder.

The list of questions submitted to the company as to which he desired information is long, and not only covers a large part of the company's operations in Costa Rica and Colombia, but seeks for information as to the actual value of properties already owned by the company which cannot be ascertained from the books, and in the case of many properties was, moreover well known to the applicant. The attempt to have the examination conducted by counsel who were employed by the applicant in litigation adverse to the company is an indication of hostility, and leads me to believe that threats were in fact made by the applicant against the company as testified to in the counter affidavits. The threat to use against the company letters which seem to have been stolen from its files, instead of calling the attention of the company to the theft, and revealing the source from which he obtained the copies, lead me to believe that he is inimical to the company. His relations with the Atlantic Fruit & Steamship Company evince a willingness to help a competitor, not consistent with the interests of the United Fruit Company.

The fact that his holdings of stock are small compared with the whole amount outstanding is, of course, of no importance. It is the duty of the courts in a proper case to protect minority stockholders; but the power to order an inspection of books is so great, its exercise may affect unfavorably so many innocent stockholders, and may cause such inconvenience or perhaps such ruinous results to a corporation whose operations are so extensive in two continents, that the court ought to exercise the power with the greatest care, and only when a case is presented which indicates, not only a bona fide desire to safeguard the interests of all stockholders, but a probability that the interests of all will be served by the proposed investigation. It is a striking fact that, although this effort of the applicant to secure an inspection of the books has been pending several months, and although he had the opportunity at the annual meeting in 1913, at which the stockholders were largely represented by more than 70 per cent. of the total stock outstanding, and although the applicant then raised questions as to the conduct of the directors and officers, he stood alone in his disapproval of their acts, and the intervening time has brought no other stockholder to his aid. In such a case the court ought to consider with even greater care than usual the grounds alleged for an inspection. The charge that banana plantations were bought at an excessive price, that the Lindo Fruit Company, which owned them, was controlled by officers and directors of the United Fruit Company, that the Lindo Company sold to an English corporation also controlled by

officers and directors of the United Fruit Company, from which the latter acquired the properties, is a charge that would require investigation and justify action by the court if it were properly sustained by the proofs. It is, however, made solely upon information and belief, the source of which is not disclosed, and the date of the transaction is left uncertain. So far as appears, the United Fruit Company acquired these properties within a few months after "the early part of the year 1912"; that is, probably before the applicant became a stockholder, which was not until August, 1912. Whether he bought his stock with knowledge of this transaction is an important circumstance in determining whether the discretion of the court to award a mandamus shall be exercised in his favor. The knowledge of the fact rests in his breast alone, and he has not chosen to make it known. Serious as the charge is, I am not willing in the state of the proofs to throw open to the applicant the books of the company, certainly without the approval and apparently against the wishes of his fellow stockholders who have, by formal resolution from which the applicant alone dissented, approved the acts of the officers of the company.

The charge that the company has acquired various other banana plantations at excessive prices imputes at most only bad judgment to the responsible officers, and not necessarily even that. The depreciation is said to be due to the fact, as the applicant says, that the plantations are affected with the banana disease, or with a saline impregnation known as salitre. Whether the condition existed at the time of the purchase or arose afterward, whether it was known or ought to have been known to the officers of the company, does not appear. No doubt in transactions as numerous and as large as those of the United Fruit Company mistakes are made, and the company's agents are sometimes deceived. That fact would not necessarily show mismanagement, and the long-continued success of the company indicates good management. The drop in the stock exchange value of its stock is no more than happens in the case of stock of the best managed corporations due to fluctuations in general market conditions entirely outside the control of the company.

In one case it is conceded that the company paid more for a plantation than it was worth; but it is shown that other considerations valuable to the company were involved. The effort of the applicant to make a case by the use of a portion only of Mr. Schermerhorn's entirely frank letter, and by concealing an essential portion, does not commend him to favorable consideration.

The applicant himself avers that he had personal knowledge of these transactions, or had seen copies of the deeds recorded in

Colombia; whether any of this knowledge antedated his purchase of stock does not appear.

Other charges that are made on information and belief I disregard, in the absence of proof of the source of the information and the responsibility and knowledge of the informants.

The charge that there are discrepancies between the reports for 1912 and 1913 is, I think, sufficiently met by the explanation of the company, which the applicant does not controvert.

The applicant fails to make out a case which would justify me in allowing the writ. The application is therefore denied, with costs.

(83 N. J. Eq. 650)

**MACKAY v. MACKAY. (No. 101.)**

(Court of Errors and Appeals of New Jersey.  
July 10, 1914.)

**1. HUSBAND AND WIFE (§ 283\*)—RIGHT TO ALLOWANCE FOR MAINTENANCE—NEGLECT OF HUSBAND TO PROVIDE FOR WIFE.**

Where a husband earning from \$150 to \$175 a week during the theatrical season of 40 weeks abandoned his wife and two small children, without justifiable cause, and thereafter paid her \$1.50 a day, which was subsequently increased to \$15 a week, he paying the rent, coal, and gas bills, he was guilty of refusing and neglecting to maintain and provide for her within Divorce Act, § 26 (2 Comp. St. 1910, p. 2038), providing that, if a husband, without justifiable cause, abandons his wife or separates himself from her, and refuses or neglects to maintain and provide for her, the court of chancery may order suitable support and maintenance to be provided by the husband for the wife and her children.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 1062-1073; Dec. Dig. § 283.\*]

**2. HUSBAND AND WIFE (§ 298\*)—ACTIONS FOR SEPARATE MAINTENANCE—EXCESSIVENESS OF AWARD.**

Where a husband who abandoned his wife and two small children, without justifiable cause, was earning from \$150 to \$175 a week when employed during the theatrical season of 40 weeks, an allowance of \$40 a week to the wife for the support and maintenance of herself and children was not excessive.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 1093; Dec. Dig. § 298.\*]

**3. APPEAL AND ERROR (§ 356\*)—TIME FOR TAKING APPEAL FROM INTERLOCUTORY ORDERS.**

Under Chancery Act, § 111 (1 Comp. St. 1910, p. 450), requiring all appeals except from final decrees to be made within 40 days after filing the order or decree appealed from, an appeal from an order for ne exeat taken more than 40 days after the filing of the order would not be considered, as orders incidental to the suit, and not affecting the merits, are conclusive, unless appealed from within 40 days.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1926, 1927; Dec. Dig. § 356.\*]

**Appeal from Court of Chancery.**

Suit by Eloise Mackay against Edward Jay Mackay. From a decree for complainant, defendant appeals. Affirmed.

Smith, Mabon & Herr, of Hoboken, for appellant. Weller & Lichtenstein, of Hoboken, for appellee.

**KALISCH, J.** The complainant filed her bill of complaint against her husband, the appellant, for support and maintenance, under section 26 of the Divorce Act (2 Comp. St. 1910, p. 2038).

The complainant in the bill charged her husband with having, without justifiable cause, separated himself from her, and with refusing and neglecting to support her in a suitable and proper manner.

It appeared that the wife had the custody and care of two boys, aged two and three years, respectively, the issue of the marriage.

The advisory master found the charges in the bill proven, and advised a decree directing the appellant to pay \$40 a week for the support and maintenance of his wife and children.

[1] The first ground urged by the appellant against the validity of the decree is that the Court of Chancery was without jurisdiction to make a decree in favor of the wife.

This claim is based upon the assertion of counsel of appellant that the evidence adduced before the master does not support a finding that there has been a neglect or refusal on the husband's part to maintain his wife.

We think the evidence is ample to support the finding. The husband without justifiable cause abandoned his wife, leaving their two children with her. He is an actor, by profession, and when employed during the theatrical season of 40 weeks earns from \$150 to \$175 a week. It appears that while earning \$150 a week he was paying his wife for the support of herself and children about \$110 a month. At first he paid his wife \$1.50 a day, which was increased to \$15 a week; the rent, coal, and gas bills being paid by him. Out of the \$15 the wife was to provide all other necessities of life. The wife had no other source of income, had no means of her own, and was in ill health.

We think the evidence warranted a finding that the husband was guilty of refusing and neglecting to maintain and provide for his wife, in the sense in which the words are used in the statute, upon which her bill is founded, because it appeared that the husband did not, according to the income he was receiving, suitably and properly provide for her, under the circumstances.

[2] It is also urged that the amount of \$40 a week for the support and maintenance of the wife and children is excessive.

In view of the fact that the appellant's standing in his profession is such that he commanded a salary of \$150 to \$175 a week when employed during the theatrical season, we do not think the amount fixed is excessive.

[3] Lastly, the appellant appeals from an order for ne exeat, made and filed in the

cause, on the 3d day of September, 1913, and the notice of appeal was filed on the 24th day of January, 1914, more than four months after the order was filed. Section 111 of the chancery act (1 C. S. 1910, p. 450), among other things, requires that:

"All appeals, except from final decrees, shall be made within forty days after filing the order or decree appealed from."

This clause of the section of the act was construed, by this court, in *Decker v. Ruckman*, 28 N. J. Eq. 614, to mean such orders and decrees relative to pleadings and adjudications merely incidental to the suit, and not affecting the merits, and as to those that they were conclusive, except when appealed from within 40 days.

The order for rehearing was clearly incidental to the suit, and in no manner affected the merits. The appeal not having been taken within the time prescribed by law, the matter is not properly before us, and will not be considered.

The decree should be affirmed.

(36 N. J. L. 92)

**BURLINGTON DISTILLING CO. v. STATE BOARD OF ASSESSORS.**

(Supreme Court of New Jersey. July 10, 1914.)

(Syllabus by the Court.)

**TAXATION (§ 236\*)—FRANCHISE TAX—EXEMPTION—CORPORATION EMPLOYED IN BUSINESS.**

The prosecutor, a manufacturing corporation, having stated in its annual return to the State Board of Assessors that it had not begun business yet, but that its factory was in process of erection, and it was not disputed that at least 50 per cent. of its capital stock was thereby invested here, *held* that it was thereby employed in business in New Jersey and was carrying on its business here, so as to come within the provisions of the franchise tax act.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 383-385; Dec. Dig. § 236.\*]

**Certiorari** by the Burlington Distilling Company against the State Board of Assessors to review a tax assessment. Assessment set aside.

Argued February term, 1914, before GARRISON, TRENCHARD, and MINTURN, JJ.

H. H. Voorhees, of Camden, for prosecutor. Edmund Wilson and Francis H. McGee, both of Trenton, and John W. Wescott, of Camden, for defendant.

**MINTURN, J.** This is a certiorari to review an assessment for taxes imposed upon the prosecutor for the year 1912. The Burlington Distilling Company was incorporated under the laws of the state of New Jersey on the 14th day of August, 1911, for the purpose of manufacturing denatured alcohol and its by-products, and immediately thereafter purchased land and began the erection and construction of a plant for the purpose of carrying out the objects of its incorporation. The company sold its capital stock, and from the proceeds of the sale erected a plant, which

was in the course of erection very soon after the incorporation of the company, in 1911, and down to the fall of 1913, when according to the testimony it began the actual manufacture of denatured alcohol and its by-products. During that time that company expended upwards of \$200,000, in the erection and construction of its plant, all of which expenditure was derived from the sale of its stock. The testimony shows that no part of the capital of the company was used for any purpose other than the erection and construction of its plant, and the necessary working capital to carry on its business.

The corporation made its report under the law on the form issued by the State Board of Assessors. It is the contention of that board that because paragraphs 9 and 10 of the report are not filled out or answered, the company is liable for an assessment upon the total amount of the capital stock authorized to be issued. It is also contended that a corporation is liable to taxation from the time of its incorporation until the process of manufacturing is actually begun in the state. The officers of the company in not answering paragraphs 9 and 10 of their report, added by way of explanation the following, "Have not begun business yet. Factory in process of erection."

The act under which the tax is sought to be imposed is, "An act to provide for the imposition of state taxes upon certain corporations and for the collection thereof," approved April 18, 1884 (P. L. 1884, p. 232) as amended by P. L. 1906, p. 31, and provides that the act of assessing franchise taxes of this nature shall not apply to manufacturing corporations, at least 50 per centum of whose capital stock issued and outstanding is invested in mining or manufacturing carried on in this state, and which mining or manufacturing corporation shall have stated in the annual return to the State Board of Assessors where the manufacturing establishment of such corporation is located, the character of the goods manufactured, and the total amount of its capital stock, embarked in the business of manufacturing, and the amount of capital stock employed in New Jersey in carrying on such manufacturing business.

The question presented becomes one of legislative intent. *Taylor v. United States*, 3 How. 197, 11 L. Ed. 559; *Cliquots Champagne*, 3 Wall. 114, 18 L. Ed. 116. Quite obviously the legislative purpose manifested in this legislation was to encourage by liberal enactment the locating in this state of useful manufactures. From this point of view, the capital of the corporation is employed, in this state, when it is devoted in a bona fide endeavor to building the necessary plant for carrying on the business of manufacturing. It would be manifestly unreasonable to assume that the Legislature intended a corporation to carry on its manufacturing without

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the construction of a plant in this state, as a necessary condition thereto. A legislative policy exhibiting such a liberal scheme of industrial encouragement should not receive a construction so narrow and illiberal as to subvert the very policy which quite obviously such legislation was intended to erect and subserve. Black on Interpretation, 325.

The assessment under review will be set aside.

(83 N. J. Eq. 564)

**THROPP et al. v. PUBLIC SERVICE ELECTRIC CO.**

(Court of Chancery of New Jersey. July 7, 1914.)

**1. ELECTRICITY (§§ 1½, 6\*)—STREET LIGHTING—POLES IN STREET.**

Township Act March 24, 1899 (P. L. p. 399) § 67, provides that a township committee may provide for lighting the streets and public places of the township, and may contract with any person or private corporation for a supply of light for public use in the township. *Held*, that the power to light the streets includes the power to use the prevailing and approved methods of illuminating by electricity, which implies the right to employ the instruments required to effectuate the object, including the right to erect poles and wires in the streets for public lighting without the consent of abutting owners.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. §§ 1½, 6.\*]

**2. ELECTRICITY (§ 6\*)—DISTRIBUTION—PRIVATE TRANSMISSION—USE OF STREETS.**

Where an electric light company having a franchise to light the streets of a township and to construct poles and wires in the streets for that purpose erected poles in the streets much larger and higher than was necessary for that purpose in order to carry a high-tension transmission system intended for the sale of electricity to private consumers, the construction of such poles without the consent of abutting owners was unlawful, and subject to injunction.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 6.\*]

Suit by William R. Thropp and others against the Public Service Electric Company. Decree for complainants.

Richard S. Wilson, of Trenton, for complainants. Frank Bergen, of Newark, for defendant.

**BACKES, V. C.** The defendant erected electric light poles on the highway in front of the complainants' land, located in Hamilton township, Mercer county, without their consent, which they seek to have removed. At the time the poles were put up, and wires were strung, the defendant was under contract with the municipality to furnish street electric lighting, and, with others, the highway in front of the complainants' property was designated by the authorities for that purpose.

In so far as the poles and wires may be considered as means for public lighting, authority for their construction is to be found in the Township Act of 1899 (page 372), section 67 of which reads:

"The township committee shall have the power to provide for lighting the streets and public places of the township, and for that purpose may contract with any person or private corporation for a supply of light for public use in said township."

[1] The power to light the streets includes the power to use the prevailing and approved methods of illuminating by electricity, and necessarily implies the right to employ the instruments required to effectuate the object of the grant; and when the privilege thus granted is exercised through the medium of another, as authorized, the right is automatically conferred on that other. *French v. Robb*, 67 N. J. Law (38 Vr.) 260, 51 Atl. 509, 57 L. R. A. 956, 91 Am. St. Rep. 433; *Andreas v. Gas & Electric Co.*, 61 N. J. Eq. (16 Dick.) 69, 47 Atl. 555. That poles and wires may be placed in a highway by a municipality for its public lighting, without the consent of abutting owners, is settled by authority in this state. *Meyers v. Electric Co.*, 63 N. J. Law (34 Vr.) 573, 44 Atl. 713.

"The use of a street of a city or other municipality for the purpose of placing lamp posts or of laying gas pipes and mains therein, or erecting electric poles and conductors, for purposes of public lighting, is one of the burdens upon the fee which must be borne as an incident to the public right of traveling over the way, and is one of the uses for which the land was taken or dedicated as a public highway." *Dillon on Mun. Corp.* (5th Ed.) § 1213.

The complainants do not pretend that they have sustained any injury which is not common to all abutting landowners, nor do they invoke any special equities in their favor; but, on the argument, rested their claim to relief in this respect exclusively upon the theory that the poles on their property, even for public lighting purposes, are an unlawful invasion of their property rights. Upon this aspect of the case they must fail.

[2] There is, however, another element in the case which they have vigorously pressed. They insist that the poles are very much larger than is required for the lighting of the highways of the township, and that the defendant's design in erecting poles of such great sustaining capacity as these have was to carry wires for private lighting and wires of a high-tension transmission system, the standard voltage of which is 13,200 volts. As to this, the proof is abundant. The defendant has power plants at Trenton, Bordentown, Burlington, and Camden, which have recently been connected by the high-tension transmission system, the wires of which extend from the Trenton Station along highways to the northerly line of the complainants' property and then by detour to a point below their southerly line, where they again strike the highway and thence on to Camden. The poles of the trunk line are of a uniform height of about 53 feet when in position and measure at the ground base approximately 16 inches in diameter, with gains for three or four cross-arms near the top. The

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

line was being built, and 10 poles had been set along the complainants' lands, when, because of their protest, the work at this point was stopped, and the detour made. The 10 poles remained, and more were added to complete the closure, upon which were strung a single line of two wires, 40 feet up the poles, to supply lamps, which hang 17 feet from the ground.

Although the defendant's witnesses aver that the poles in front of the complainants' property were of standard size, and were set to enable the defendant to carry out its contract with the township, it is also made plain by them that they are an integral and indispensable part of the defendant's general plan of operation for the transmission of electrical energy for public and private consumption, to wherever the current can be profitably marketed; and, indeed, they state very candidly that but for the objection of the complainants, the detour, so far as the high-tension wires are concerned, would not have been made, and that they would have been strung on the poles, the subject of this litigation.

In testifying to the effect that the building of the transmission line was not entertained by the defendant until nearly a year after these poles were set, the assistant engineer of the defendant is evidently mistaken, because a year has not, as yet, transpired. What he evidently meant was that it was nearly a year after the township began negotiating for this lighting, which was in 1912, that the trunk line was projected. This harmonizes with the rest of the facts, all of which clearly evince that this construction was chiefly to further the private enterprise of the defendant. The use made of the poles in furnishing public lighting to the township is merely incidental to the defendant's general scheme or project, and, as one of the defendant's witnesses testified, they were put up "for future purposes," obviously meaning "for future distribution of electricity, elsewhere and to others than the township." It is perfectly patent that this line of two wires, all that is needed to light the township roads, does not require these massive poles to suspend it, and it is equally incredible that the poles were erected solely for that purpose. It is of no consequence that the poles on the complainants' property are of the standard approved in electrical engineering, and of a size uniform with those on the highway, on lands of adjoining owners, who perhaps consented to their erection. We are dealing strictly with the rights of the complainants and the extent to which the defendant may exercise its power under the statute without invading those rights.

The power conferred by the statute on the defendant, in virtue of its agency of the township, is measured and fixed by the power granted to the principal. To the extent of erecting such poles and stringing such wires

as may reasonably be required for the carrying out of its contract with the township, the defendant had authority to put them in the highway on the lands of the abutting owners without their consent. Any erections in excess of these requirements, though they may serve in performing the contract, are, without such consent, unlawful. P. L. 1896, p. 322. *Andreas v. Gas & Electric Co.*, supra.

An injunction will issue to remove the poles. Application may be made to have determined the size of poles to be substituted.

(83 N. J. Eq. 645)

W. M. OSTRANDER, Inc., v. UNITED NEW JERSEY R. & CANAL CO. et al. (No. 48.)

(Court of Errors and Appeals of New Jersey. July 10, 1914.)

1. INJUNCTION (§ 37\*)—ESTABLISHMENT OF RIGHT AT LAW—JURISDICTION.

Where, in a suit to restrain a railroad company from destroying certain farm crossings, and from violating a covenant in its right of way deed, defendant denied that complainant had any right to enforce the covenant, but did not challenge the jurisdiction of the equity court in the answer, it was the duty of the court to retain the bill for a reasonable time to enable complainant to establish its title to the covenant in question at law.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 85; Dec. Dig. § 37.\*]

2. SPECIFIC PERFORMANCE (§ 126\*)—PROCEEDINGS—RELIEF AWARDED.

Where a railroad right of way deed provided that the railroad company should construct and maintain two farm crossings over the right of way, a decree, enforcing specific performance of such covenant and declaring that complainant was entitled to enjoy a right of way or easement for itself, its agents, servants, and licensees on foot or in vehicles over the lands of defendant, was erroneous as in effect changing a farm crossing to a highway.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. §§ 55, 401-405; Dec. Dig. § 126.\*]

Appeal from Court of Chancery.

Suit by W. M. Ostrander, Incorporated, against the United New Jersey Railroad & Canal Company and others. From a decree in favor of complainant, defendants appeal. Reversed, with directions.

Alan H. Strong, of New Brunswick, for appellants. McDermott & Enright, of Jersey City, for appellee.

KALISCH, J. The respondent, complainant below, the owner of a tract of land, in the county of Middlesex, lying on both sides of the railroad, United New Jersey Railroad & Canal Company, which it holds, through mesne conveyances, from Ellis and Edward E. Potter, filed its bill of complaint in the Court of Chancery against the appellants, defendants below, for specific performance.

The prayer for relief is, in substance: That the defendants be enjoined and commanded to restore certain easements, crossings, and rights of way over their premises as the same existed at the time of a conveyance

made by Ellis and Edward E. Potter to the United New Jersey Railroad & Canal Company, one of the appellants, in 1882; and that the defendants be enjoined and commanded to remove all obstructions erected and maintained by them in said crossings or rights of way; and that the defendants be enjoined and restrained from further obstructing the easements and crossings by the building of embankments, the excavation of ditches, and by the construction of further railroad tracks thereon, without maintaining thereover platforms and approaches at such grades as to afford the complainant free and unobstructed passage suitable for pedestrians and vehicles; and that the defendants be enjoined and commanded, not only to re-establish the crossings and rights of way, but to maintain the same over their premises in suitable condition for the passage of pedestrians and vehicles, and for such further and other relief as the nature and circumstances of the case may require.

The basis for invoking the jurisdiction of the Court of Chancery, by the complainant, was an alleged breach of a covenant contained in the deed of conveyance, made by the Potters to the United New Jersey Railroad & Canal Company, in the year 1882, and which is as follows:

"And it is hereby understood and agreed by and between the parties hereto that the said parties hereto of the second part (viz., the United New Jersey Railroad & Canal Company) shall and will construct and maintain fences between the strips of land hereby conveyed and the remaining land adjoining of the said parties of the first part. And the said party of the second part (viz., the United New Jersey Railroad & Canal Company) shall and will maintain the two farm crossings now existing across the said strips or pieces of land hereby conveyed."

The effect of the Potter conveyance was to extend the line of the United New Jersey Railroad & Canal Company about 3,200 feet through the Potter property, and divided the farm through which it traversed into two almost equal parts, leaving 72 acres lying easterly of the railroad, and a little over 73 acres lying westerly of the railroad. For a long time prior to the Potter conveyance to the railroad company, the easterly and westerly portions of the farm were connected by the crossings over the tracks of the railroad company, passable for pedestrians and vehicles, over which the Potters and their licensees were accustomed to pass on foot and in vehicles. It was these crossings which the complainant claims constituted rights of way over the defendant's lands, and which it asserts passed to it by the conveyance to the Potters.

The bill charged that the defendants have torn up and demolished the two farm crossings and have constructed embankments and ditches and have laid railroad tracks upon the embankments without providing platforms between the same and had fenced the lands so as to make the rights of way and

crossings impassable to the complainant, its agents, servants, and licensees either for pedestrians or vehicles, etc. The defendants in their answer admitted the complainant's title to the farm as set forth in the bill, and also the conveyance by the Potters to the railroad company containing the covenant above set forth, and also admit the existence of the easements and rights of way which the Potters and their licensees enjoyed at the time of the making of the deed by them to the railroad company. The defendants denied that the complainant became seized and possessed of these rights of way or easements, and further asserted that in the year 1890 they had torn up and demolished the two crossings and constructed embankments and ditches and made the crossings impassable and incapable of use, and that this condition has continuously existed ever since, thus setting up an exclusive and continuous possession of the premises for more than 20 years adverse to the rights of way or easements, if any, reserved by the covenant in the deed, and the consequent extinguishment thereof. The answer further contained a plea of a lost grant or release, releasing and discharging to the defendants all rights of way or crossings over the railroad tracks.

The Vice Chancellor adjudged that the complainant is seized and of right possessed and entitled to enjoy a right of way or easement for itself, its agents, servants, and licensees on foot and in vehicles over the lands of the appellants at the more westerly of the two crossings mentioned in the bill of complaint, and that the appellants be enjoined and restrained from in any way obstructing, etc., with the free passage of the complainant, etc., and that the appellants be enjoined and commanded to remove the fences, embankments, etc., in interference with the free passage of the complainant, its officers, agents, servants, and licensees, either on foot or in vehicles over the lands of the appellants, and to restore to the complainant a crossing over said lands at the place aforesaid, passable for pedestrians and vehicles, as the same was possessed and enjoyed by Ellis Potter and Edward E. Potter, and that the appellant maintain the same. The appellants appeal from this part of the decree, upon the ground that the fundamental right upon which the complainant prays equitable relief is the legal title to an easement in lands of the defendants, and, that right being in substantial dispute, until such right is settled at law the aid of a court of equity cannot be properly invoked.

[1] The right of the Court of Chancery to entertain jurisdiction at the present time is not challenged in the answer. But this was not necessary. In *Mason v. Ross*, 77 N. J. Eq. 527, 77 Atl. 44, it appears that the defendant did not challenge the jurisdiction of the Court of Chancery, but this court, speaking through Gummere, C. J., held, that the question whether a right of way over the



lands of one place exists in favor of another is purely a legal one, and, where the existence of such an easement is in dispute, the proper tribunal in which to settle it is a court of law, and that if the defendant had challenged the right of the court to entertain jurisdiction at this time, the bill would have been dismissed for lack of it, but, that not having been done, the proper course for the court to have pursued was to retain the bill until the complainant had had a reasonable opportunity to establish her title at law. The decree was reversed so that the course indicated in the opinion could be pursued.

It can make no difference that the bill of complaint in this instance is for specific performance of a covenant out of which the easement arises, since the substantial question raised by the bill and answer is whether the complainant has legal title to the easement. It is wholly immaterial under what form of bill the question arises. The disputed question must be first settled at law and in favor of complainant before it is entitled to the relief sought by the bill. See *Imperial Realty Co. v. West Jersey & S. R. R. Co.*, 79 N. J. Eq. 168, 81 Atl. 837, and the cases there collected.

[2] Aside from the question of the present right to entertain jurisdiction the decree cannot be justified. It adjudges the complainant to be entitled to enjoy a right of way or easement for itself, its agents, servants, and licensees, on foot or in vehicles, over the lands of the defendants, and so materially broadens and enlarges the right of way or easement reserved by the covenant between the parties. *Marino v. Central R. R. Co.*, 69 N. J. Law, 628, 58 Atl. 306. It virtually converts a private road into a public one. The right of way covenanted for was a farm crossing to be used and enjoyed as such. It was never contemplated that the farm crossing was to become, in the course of time, a public road, between farms plotted and laid out into building lots for the benefit of the complainant or the purchasers of such lots, to be maintained by the defendants. Under the form of the decree as pointed out there is nothing to preclude the complainant from asserting the right of the use of the easement to the extent described.

The decree will be reversed, with the direction that the bill be retained in the Court of Chancery and the complainant be given a reasonable opportunity to establish its title at law.

(36 N. J. L. 325)

#### LOWE v. DOREMUS. (No. 135.)

(Court of Errors and Appeals of New Jersey. July 10, 1914.)

#### WITNESSES (§ 175\*)—COMPETENCY—TRANSACTIONS WITH DECEDENTS.

In an action on a note given by the defendant executor's decedent to plaintiff, the admission in evidence, over plaintiff's objection,

of interrogatories propounded to plaintiff prior to trial as to the consideration of the note and her answers thereto, was not violative of the Evidence Act (2 Comp. St. 1910, p. 2218; P. L. 1909, p. 363) § 4, relative to the admission of testimony of transactions with decedents, though defendant did not offer himself as a witness to such transactions; such act not requiring that a party who is suing or being sued in a representative capacity offer himself as a witness to conversations and transactions of the deceased before calling as a witness thereto the opposite party who is not so suing or being sued.

[Ed. Note.—For other cases, see *Witnesses*, Cent. Dig. §§ 711-713, 715, 720, 721, 915; Dec. Dig. § 175.\*]

#### Appeal from Supreme Court.

Action by May Lowe, formerly May Wood, against Cornelius Doremus, executor of Henry Van Riper, deceased. From judgment for defendant, plaintiff appeals. Affirmed.

See, also, 84 N. J. Law, 658, 87 Atl. 459.

Isadore V. Klenert and James F. Carroll, both of Paterson, for appellant. Michael Dunn, of Paterson, and Joseph H. Lecour, Jr., of Ridgewood, for appellee.

**KALISCH, J.** The plaintiff brought her action on a promissory note given by the defendant's decedent to the plaintiff, May Lowe, formerly May Wood. It was for \$3,000 payable 30 days after the death of the maker. This is the second time the cause is before us for review. Prior to the first trial the defendant propounded interrogatories to the plaintiff as to the consideration of the note, and her answers make it appear that it was given if plaintiff would stay and continue in defendant's decedent's employ and not marry until his death.

In the first trial the plaintiff recovered a verdict for the amount of the note. Upon review in this court the judgment entered thereon was reversed, because it appeared that the consideration of the note was in general restraint of marriage.

At the second trial the facts, from which it appeared at the first trial that the consideration of the note was in general restraint of marriage, were controverted, and the trial judge submitted the case to the jury, which resulted in a verdict for the defendant. The appellant now seeks a reversal of this judgment upon the ground that the interrogatories were admitted in evidence against objection duly made. To sustain this position appellant argues that, as the defendant was sued in a representative capacity and did not offer himself as a witness as to the conversations and transactions of the decedent, by virtue of the fourth section of the evidence act, the plaintiff was precluded from testifying as to these things and that the interrogatories and answers were such evidence and were improperly admitted.

This is manifestly an erroneous conception of the act. The statute was clearly intended for the protection of parties suing or being sued in a representative capacity. The stat-

ute was wholly inapplicable to the situation which presented itself to the court. The defendant was being sued in a representative capacity. He called the plaintiff, who was suing in her own proper person, as a witness, to testify to conversations and transactions of the decedent, by the interrogatories submitted to her. This he had a perfect legal right to do. Neither by the terms nor spirit of the act is a party who is suing or being sued in a representative capacity required to offer himself as a witness to conversations and transactions of the deceased before calling the opposite party who is not so suing or being sued as a witness as to conversations and transactions of the decedent.

The judgment will be affirmed.

(86 N. J. L. 348)

**MISSPELL v. HAYES et al. (No. 129.)**

(Court of Errors and Appeals of New Jersey.  
July 10, 1914.)

*(Syllabus by the Court.)*

**1. MASTER AND SERVANT (§ 332\*)—INJURY TO THIRD PERSON—ACTION AGAINST MASTER—QUESTION FOR JURY.**

In a suit against a father for his son's negligence in operating the father's automobile on the public highway, where it appeared that the automobile was for the use of the father's family, and that at the time of the accident the son was driving and the father's wife and daughter were in the automobile, and that all three were members of the father's immediate family, it was held to be a jury question whether the son was the father's servant on the father's business, in which case the father would be liable, or whether, as all the other testimony alleged, the son was going to call on a friend, and his mother and sisters were accompanying him on his invitation and as his guests. *Doran v. Thomsen*, 76 N. J. Law, 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677, distinguished.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.\*]

*(Additional Syllabus by Editorial Staff.)*

**2. PROCESS (§ 157\*)—MOTION TO SET ASIDE—SUPPORT—DEPOSITIONS—EX PARTE AFFIDAVITS.**

A motion to set aside a summons for failure of service should be supported by depositions properly taken, rather than by *ex parte* affidavits.

[Ed. Note.—For other cases, see *Process*, Cent. Dig. §§ 212-217; Dec. Dig. § 157.\*]

The Chief Justice and Kalisch, J., dissenting in part.

Appeal from Supreme Court.

Action by Florence Missell, by Frank Missell, her next friend, against J. Arthur Hayes and another. From judgment for plaintiff, defendants appeal. Affirmed.

See, also, 84 N. J. Law, 196, 85 Atl. 818.

Edmund A. Hayes, of New Brunswick (George S. Silzer, of New Brunswick, on the brief), for appellants. Fred G. Stickel, Jr., of Newark, for appellee.

**WHITE, J.** [1] This is an appeal from the judgment of the Supreme Court against both defendants, who are father and son, in favor of the plaintiff (a little girl 7 years old) upon the verdict (for \$150) of a jury for injuries received by her from being struck by an automobile negligently operated on the public highway. The automobile was owned by the defendant Edward R. Hayes, who had purchased it for the general use of his immediate family, and it was for this purpose habitually operated by himself and his two sons (who were members of his family) sometimes with and sometimes without his express consent or direction. At the time of the accident, one of the sons, the defendant J. Arthur Hayes, was driving the automobile, and it contained also the wife and daughter of the father, who were also members of his immediate family, and two others, one a young lady guest of the daughter, and the other a young man guest of the son. It is urged that these facts are insufficient to form a basis for a finding that the son was acting as the servant of the father and within the scope of his employment as such, and that therefore the motions made in behalf of the father for a nonsuit and for the direction of a verdict in his favor should have been allowed, under the leading and well-considered case of *Doran v. Thomsen*, 76 N. J. Law, 754, 71 Atl. 296, 19 L. R. A. (N. S.) 335, 131 Am. St. Rep. 677.

We disagree with this view. In the *Doran* Case the defendant's daughter, whose negligent driving caused the accident, took his automobile out for her own pleasure and the pleasure of her three friends who accompanied her. No other members of the father's family were in the car. The only element in the case tending to show that the daughter was acting as the servant of the father was the bare fact that the father owned the automobile, which being personal property was presumably, in the absence of evidence to the contrary, in his possession or the possession of his servant at the time of the accident; possession being the badge of ownership of personal property. This presumption, however, in that case was overcome by the uncontradicted proof that in fact the automobile was not in the possession of the owner or his servant, but that, on the contrary, it was in the possession of a third party (who happened to be his daughter) who was using it for her own pleasure and the pleasure of her friends, and not upon the owner's business.

In the present case there exists a very important fact (the absence of which was commented upon in the opinion of Mr. Justice Voorhees speaking for this court in the *Doran* Case), which is that the automobile at the time of the accident was occupied by the father's immediate family and their guests. This fact constituted affirmative evidence that the automobile was being used in the fa-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ther's affairs or business. It was within the scope of the father's business to furnish his wife and daughter, who were living with him as members of his immediate family, with outdoor recreation just the same as it was his business to furnish them with food and clothing, or to minister to their health in other ways. It cannot be said, therefore, that in this case there was no evidence of possession except a mere presumption which could be overcome by proof of inconsistent facts. Here there was affirmative proof of the fact of possession quite apart from any presumption. Under these circumstances, testimony having also been given to the effect that the son invited his mother and sister to take a ride as his guests on a trip which he was taking for his own pleasure or business and that they were doing so as such and not as members of his father's family, it became a question for the jury to decide whether they would or would not believe this testimony and the effect claimed to result from it, or whether they would entirely disbelieve it, or, at least, conclude that, while one purpose was to enable the son to make the call mentioned, he was at the same time in his father's behalf taking the members of the family out for a trip for their health and recreation as members of his father's family. If they should decide in favor of the latter alternative, then the son was clearly acting for his father and as his servant in so doing. This question was submitted to the jury by the learned trial judge in the language of this court in *Doran v. Thomsen*, *supra*, as follows:

"To constitute the relation of master and servant as to third persons, it is not essential that any actual contract should subsist between the parties or that compensation should be expected by the servant. While the relation of master and servant in its full sense invariably and only arises out of a contract between the servant and the master, yet such contract may be either expressed or implied. 'The real test as to third persons, \* \* \* is whether the act is done by one for another, \* \* \* with the knowledge of the person sought to be charged as master with his assent, expressed or implied, even though there was no request on his part to the other to do the act in question.'"

We think the question was one of fact and that it was properly submitted to the jury.

[2] It is also claimed that there was error in the refusal of the Supreme Court to set aside the summons as to the defendant J. Arthur Hayes, the son, on the ground of failure of service. *Missell v. Hayes*, 84 N. J. Law, 196, 85 Atl. 818. The return of the sheriff was:

"Within summons and complaint served December 26, 1912, upon J. Arthur Hayes, by leaving true copies thereof at his residence, No. 42 Lewis street in New Brunswick, N. J."

Notice of an intention to apply to have the name of young Hayes stricken out, because

he had not been served, was given, and at the appointed time and place the motion was made before a justice of the Supreme Court, and there were read for and against it *ex parte* affidavits, from which it appeared that No. 42 Lewis street was the residence of the father, Edward R. Hayes, and that the son had lived there with the father as a member of the family until he, the son, had gone away to college to prepare for the ministry, which preparation had already occupied nearly four years and was expected to consume as many years more; but that at the time of the alleged service in question the son was home from college at the address in question, the father's residence, during the Christmas vacation.

As was pointed out by the Supreme Court in *Baldwin v. Flagg*, 43 N. J. Law, 495, the proper practice to support motions (or, rather, as they should be, rules) of this character in courts of law is by depositions taken under rule, or in accordance with the rules of the Supreme Court, and not by *ex parte* affidavits, as was done in this case. If depositions had been taken in this case, doubtless cross-examination would have sifted out and developed facts which would have enabled the court to say with much more certainty than is now possible whether there was or was not such an actual change of residence when the son went away to college as to deprive his father's residence, even while the son was actually there on vacation, of the character of the latter's "usual place of abode" within the meaning of the act of assembly. Under the *ex parte* affidavits, however, consisting as they did largely of conclusions resulting from facts rather than a statement of the facts themselves, the Supreme Court was unable to say with any certainty that the writ had not been properly "served." Upon the denial of the motion the son filed his answer to the complaint, in which he set up a defense on the merits, and while he protested against the legality of the service of the summons upon him and alleged facts to show that the alleged service was in fact no service at all, he went to trial on the merits and did not offer any proof of the facts upon which he relied to attack the legality of the service. Under these circumstances, we think he is in no position to ask a reversal of the judgment against him at the hands of this court on the ground that he has not been properly served with process.

We find no merit in the exceptions involving the negligence of the driver of the automobile or the alleged contributory negligence of the plaintiff, and the judgment is therefore affirmed.

THE CHIEF JUSTICE and KALISCH, J., dissent in part.

(36 N. J. L. 101)

**NEW YORK, S. & W. R. CO. v. MAYOR AND ALDERMEN OF CITY OF PATERSON.**

(Supreme Court of New Jersey. July 10, 1914.)

*(Syllabus by the Court.)***MUNICIPAL CORPORATIONS (§ 247\*)—CONTRACTS—LIABILITY FOR PUBLIC WORK.**

The facts in this case present a public work done for the benefit of the city, at the instance of its officials under a written contract, not ultra vires, which the city contends was irregularly executed, the necessity for which work was not denied, nor its cost disputed. *Held*, under *Bourgeois v. Freeholders*, 82 N. J. Law, 82, 81 Atl. 358, the defendant is liable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 651-656, 682; Dec. Dig. § 247.\*]

Appeal from District Court of Paterson.

Action by the New York, Susquehanna & Western Railroad Company against the Mayor and Aldermen of the City of Paterson. From a judgment for defendant, plaintiff appeals. Reversed, and venire de novo awarded.

See, also, 81 N. J. Law, 72, 80 Atl. 949.

Argued February term, 1914, before GARRISON, TRENCHARD, and MINTURN, JJ.

Collins & Corbin, of Jersey City, for appellant. Edward F. Merry, of Paterson, for appellee.

MINTURN, J. The appeal in this case brings before this court for review a judgment entered by the district court of the city of Paterson in favor of the defendant, in an action wherein the plaintiff brought suit against the city for the cost of work done by the company in supporting and sustaining its railroad tracks and roadbed during the construction of two sewers across and under the company's right of way, laid in East Thirty-First street and Godwin street, in the city of Paterson.

The work was done by the company on the faith of two written agreements with the city, executed under the city's seal, dated, respectively, August 25, 1906, for the Godwin street sewer, and October 3, 1906, for the East Thirty-First street sewer.

Both of these agreements recite that the party of the second part (the city) desires to construct and maintain its cement sewer across and under the right of way and tracks of the plaintiff along the center of the respective streets, and that the plaintiff is willing to consent to such crossing under certain conditions, respecting the size of the sewer, and the distance of the top thereof below the base of the rails of the tracks, etc. Both of the agreements further provide as follows:

"The railroad company may, at its option, do all the work within the exterior lines of its right of way necessary to support and sustain its tracks and roadbed during the laying of said sewer, or during any repairs thereto, and in case the party of the second part shall fail to make necessary repairs, or to restore the

tracks and roadbed as hereinbefore provided, the railroad company may do such work; the cost of all work done by the railroad company as herein provided shall be paid by the party of the second part upon receipt of proper vouchers therefor."

Thereafter the company, pursuant to the terms of the contracts, proceeded to do all the work necessary to support and sustain the tracks and roadbed during the laying of the sewers.

The actual cost for the labor at Godwin street was \$64.56, and at East Thirty-First street \$55.12, making a total of \$119.68. The suit was brought for the cost of labor alone, and no charge was made for the material.

The trial judge found, as a fact, that the amount claimed by the plaintiff was reasonable, if the plaintiff was entitled to recover at all.

After the decision of this court in the former appeal (*New York, S. & W. R. R. v. Paterson*, 81 N. J. Law, 72, 80 Atl. 949) ordering a venire de novo, the plaintiff amended its state of demand, which at that time proceeded upon the theory of a special contract, and annexed the common counts, thereby presenting the question involved upon the theory of an assumpsit at common law.

The concrete question at issue, therefore, may be resolved into the legal inquiry, whether conceding the facts to be as the trial court has found them, and as they are conceded by the parties to exist, is the plaintiff's claim supportable in law?

The legal status of the case, therefore, is substantially similar to the inquiry which we would be called upon to determine upon a demurrer. If this were a question in which the doctrine of ultra vires might be involved, as in *Atlantic City Water Works Co. v. Read*, 50 N. J. Law, 665, 15 Atl. 10, and *Jersey City Supply Co. v. Jersey City*, 71 N. J. Law, 631, 60 Atl. 381, 2 Ann. Cas. 507, an entirely different rule of law would be applicable, and might properly be invoked. But the municipal corporation here was engaged in the execution of a public work, peculiarly within its province, under the provisions of its charter, and the fundamental theory underlying its creation, so that the question of legal power to perform the act, for executing which, at its request, the plaintiff bases its demand, is eliminated from consideration. It is quite evident from the record that so far as the administrative officers, charged with the practical execution of the work of the city, could give legal effect to their acts, by the application of the usual formalities, by which official acts are indicated, the attempt was made by them in the manner which they usually adopted in the execution of such contracts.

The decision of the trial court is rested entirely upon the finding that the contract in question did not receive the approval of the board of aldermen or the departments

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of streets and sewers. It is to be observed, however, that in no instance when the bills for the work were before the board of works, which had superseded the board of aldermen, did that board oppose payment because of illegality or irregularity in the contracting of the claim, but acted solely upon the ground that the bills were excessive.

The defendant now insists that it was under no legal necessity to enter into such a contract, because it possessed the power to construct its sewers, and incidentally to compel the plaintiff to perform the work involved in this suit at its own expense, and that therefore no legal consideration existed as *quid pro quo* for the contract.

This construction, however, presents a debatable question, and if the acts and representations of the defendant's authorized agents and officials up to the completion of the work may be accepted as a criterion of the defendant's legal attitude upon that question, it is quite obvious from the record, that the work was undertaken by the plaintiff upon the theory, either that the defendant conceded its lack of power in the premises, or lacked the disposition and will to perform the work, and the plaintiff, manifestly acting upon that concession, assumed the obligation and performed the work.

From such a status as we have here detailed, an action of *assumpsit ex debito justitiæ* has been conceded by the common law to exist as between individuals, since the distinct promulgation of that doctrine in *Slade's Case*, 4 Coke, 92, 1 Chitty, Pl. 100. That it will lie in the case of a municipal corporation acting through its duly accredited officers, in the performance of a duty clearly not *ultra vires*, and for the public interest and benefit, is equally well settled by the trend of modern adjudications. *Arlington v. Peirce*, 122 Mass. 270; *Murphy v. Moies*, 18 R. I. 100, 25 Atl. 977; *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659.

In *Cory v. Freeholders*, 47 N. J. Law, 181, Mr. Justice Dixon, quoting the language of Lord Mansfield, in *Moses v. McFarlain*, says:

"In one word, the gist of this kind of an action is that the defendant, upon the circumstances of the case, is obliged, by the ties of natural justice and equity, to refund the money."

And the equitable doctrine underlying the action is similar, whatever its subject-matter may be, where the corporation has received and enjoys the benefit of an act not *ultra vires*, and refuses to make compensation therefor without the citation of further authority. We consider the principle enumerated in the case of *Bourgeois v. Freeholders*, 82 N. J. Law, 82, 81 Atl. 358, to be controlling here. In that case Mr. Justice Bergen, speaking for this court, says:

"A contract entered into on behalf of a municipality by its unauthorized agent in excess

of the powers granted to the municipality, or without observing the conditions or limitations imposed on the exercise of a granted power, cannot be ratified by the corporation, nor can it by any act of recognition raise an implied promise to carry it out, for the reason that it is without power to make an express promise, and the law will not in such case raise one by implication; but, where the contract of the unauthorized agents is one which the corporation may lawfully make, it can by ratification, or by any efficient dealing with the subject-matter amounting to an affirmation of the contract and an appropriation of its benefits to public use, create a situation from which an implied promise to pay may arise."

The judgment under review will therefore be reversed, and a *venire de novo* will be awarded.

(83 N. J. Eq. 538)

FISH v. HARRISON et al.

(Court of Chancery of New Jersey. July 10, 1914.)

CORPORATIONS (§ 170\*)—OFFICERS—ACCOUNTING.

Evidence held to require a finding that complainant was a stockholder in a certain corporation as distinguished from a holder of the shares thereof as collateral to a loan, and was entitled to maintain a bill against the corporation's treasurer for an accounting.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. §§ 624-632; Dec. Dig. § 170.\*]

Suit by Frederick K. Fish against A. Gould Harrison and others. Decree for complainant.

Edward Maxson, of Jersey City, for complainant. Robert H. McCarter and J. Henry Harrison, both of Newark, for defendants.

LEWIS, V. C. This is a bill asking for an accounting from A. Gould Harrison, treasurer of the Harrison Milling Company, and that 15 shares of stock now held by him be transferred to the corporation; it being alleged that they were purchased with the funds of the corporation.

The complainant's right to an accounting is resisted, in the first instance, on the ground that he is not a stockholder of the Harrison Milling Company, as is alleged in the bill. It is asserted that he merely made a loan to the company of \$4,000 and never purchased 40 shares of its stock for this amount, but held the stock as collateral security for his loan. The only basis for this claim that I find is the evidence of the complainant himself, when undoubtedly he inadvertently speaks of taking the stock "as collateral for my money." No other testimony whatsoever is offered to indicate that the stock was taken as collateral for a loan. The books show no record of a loan made by the complainant, but they do show the issuance of 40 shares of stock to Frederick K. Fish. He exhibits a certificate of stock for these 40 shares. The resolution of the board of directors, passed June 18, 1903, directed the sale of the stock to Fish. He was the president of the corporation for many years, and a mem-

ber of the board of directors. He attended the meetings of the corporation and participated in its business affairs. He was not paid interest on his money, but was paid a salary of \$100 per month and dividends. I am satisfied by the evidence that he is the bona fide holder of 40 shares of the capital stock of the company.

The bill sets up several alleged overdrafts on the part of the treasurer, Harrison. There is no doubt that at the time when Fish in 1903 acquired his stock Harrison had overdrawn his account to a considerable extent. It is undoubted, also, that when Fish became such stockholder he was informed of the practice of overdrawing, it being explained to him by Harrison, and some time in 1905 he was informed further by the defendant that he had drawn his salary, which up to this time amounted to \$20 per week, and in addition thereto had overdrawn to the extent of \$4,500. It was at this time that the complainant assented to the proposition that the salary be increased to \$40 per week, and that the overdrafts be charged off and the defendant be relieved of responsibility for it. After this complainant appears to have taken a new stand. He says that he assented to no further overdrafts, although the evidence indicates that they continued; for in August, 1906, we find an overdraft of \$1,000 above the salary, in August, 1908, an overdraft of \$1,500 appears, and in 1909 about \$1,000 drawn in excess of salary is shown. These were all overdrafts by the treasurer. The defendant claims that there was a clear understanding between complainant and himself that the practice of overdrawing should continue, and it is urged by his counsel that the resolution of 1905 is strong corroborative evidence of the truth of their client's claim. While it appears from the testimony that Fish knew about some of the overdrafts—one at least—it being shown that he, Fish, wrote an entry in the minute book, page 40, immediately after one of these later resolutions, i. e., later than the resolution of 1905, he denies seeing the resolution, and says that he had no knowledge of these acts of Harrison, and that he never assented to the situation. In March, 1910, Fish complained of the management of the corporation and called a meeting. He alleges that he asked for an audit of the books, which was refused by the defendant. It is apparent that at this meeting the question of the overdrafts subsequent to 1905 and the general financial affairs of the corporation were a matter of serious controversy. After this meeting Fish brought his action in this court. It is urged that Fish, as president of the corporation and the holder of 40 shares of stock, could have asserted his position some time before, while he was in close touch with the affairs of the company, and thus have avoided lengthy litigation, still on the demurrer to the bill filed by the defendant the court has

said that the complainant has not been guilty of laches. A. Gould Harrison was in actual charge of the business, and the complainant claims to be in the dark as to the condition of its affairs. The books were kept in such manner as would necessarily make it difficult to ascertain the exact financial condition of the company without careful examination. The accounts are not intricate, but they are entangled. They, however, can be analyzed and explained. In such a case equity has jurisdiction, if the complainant's right to apply is established. Charges have been made that Harrison has been guilty of improper conduct in the management of the affairs of the corporation. He may be entirely innocent of these charges, but an accounting alone can establish that fact. I am satisfied that in this case the complainant is entitled to the relief he seeks. In what manner and by whom the account shall be stated, I shall determine at the time the application is made to me to settle the decree.

As to the second question involved in this controversy I am not satisfied that the Beyea stock was purchased with the funds of the corporation, and I shall not dispose of this issue until the account has been taken. Some further evidences of this transaction which may throw light upon it may develop upon the accounting. I feel satisfied that the brother of the defendant has told the truth about his part in the transaction. The money received from the purchase the defendant claims to have loaned to the company. The expert employed by the complainant fails to find an entry on the books showing the loan by Harrison, while he admits that the books do disclose that the company received \$1,800 from some source or other. The defendant claims that he applied the money thus loaned to his purchase of the Beyea stock. However, I deem it advisable, under the circumstances, to retain the disposition of this question until an accounting has been had.

A decree will be advised in accordance with the views herein expressed.

(33 N. J. Eq. 390)  
In re P.

(Court of Chancery of New Jersey. July 8, 1914.)

**1. CONTEMPT (§ 27\*)—CIVIL CONTEMPT—WHAT CONSTITUTES.**

It is a contempt for a solicitor to insert in a decree, after it has been signed by the Chancellor, any provisions, though they are immaterial.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 5; Dec. Dig. § 27.\*]

**2. ATTORNEY AND CLIENT (§ 43\*)—CONTEMPT—PUNISHMENT—DISBARMENT.**

Where a solicitor inserted in a decree, after it had been signed by the Vice Chancellor, some rather immaterial provisions similar to others which had been stricken out, and inform-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep.'s Indexes

ed the Vice Chancellor of his action, stating that he presumed it would meet with his approval, the solicitor, while guilty of contempt, does not merit disbarment; his good faith tending to excuse and purge his offense.

[Ed. Note.—For other cases, see Attorney and Client, Cent. Dig. §§ 59, 60; Dec. Dig. § 43.\*]

In the matter of P., a solicitor in the Court of Chancery, for contempt of court. P. adjudicated guilty of contempt, and the matter of punishment reserved.

P., in pro. per

WALKER, Ch. P., a solicitor in chancery, represented defendants in a suit before one of the Vice Chancellors, in which they filed a cross-bill having for its object the cancellation of the mortgage described in the bill of complaint. The matter being decided in favor of the defendants represented by P., he presented to the Vice Chancellor a form of decree adjudging that the mortgage "be delivered up for cancellation, and the clerk of the county of \* \* \* is hereby directed to cancel said mortgage of record."

[1] P. presented the draft of decree in person, and the Vice Chancellor struck out the concluding words "and the clerk of the county of \* \* \* is hereby directed to cancel said mortgage of record," for the reason that the county clerk was not a party to the suit, and that therefore no decree could be made against him. P. withdrew, taking the decree with him for filing in the clerk's office, and afterwards interlined in it in his own handwriting, after the word "cancellation," which was the concluding word of the decree as amended by the Vice Chancellor, the words "and that the same be canceled of record," so as to make the decree read that the mortgage "be delivered up for cancellation, and that the same be canceled of record," instead of simply that it "be delivered up for cancellation," as it was made to read by the Vice Chancellor when he signed the advisory certificate at the foot thereof. The decree was subsequently signed by the Chancellor, without knowledge of the solicitor's action.

This conduct of P. amounted to a contempt of court.

Among the instances of contempt mentioned by Blackstone are:

"Those committed by attorneys and solicitors, who are also officers of the respective courts; by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice. For the malpractice of the officers reflects some dishonor on their employers, and, if frequent and unpunished, creates among the people a disgust against the courts themselves." 4 Bl. Com. 284.

In 1 Bouv. Law Dic. (Rawle's Rev.) p. 420, it is said:

"Courts of justice have an inherent power to punish all persons for contempt of their rules and orders, for disobedience of their process, and for disturbing them in their proceedings."

[2] The conduct of the solicitor before me, subsequent to his contumacious act, mitigated, while it did not excuse, his contempt.

The decree was advised by the Vice Chancellor on March 30, 1914, and four days later, April 3, 1914, P. wrote the Vice Chancellor a letter, informing him of what he had done. What he said in the letter can best be set forth by copying the letter itself, which is short. It reads as follows:

"I am sending you herewith a copy of the final decree which you gave me in the above case on the 30th day of March. Please note the words in quotation marks. You will recall that I suggested that the decree direct the clerk to cancel the mortgage; but you stated that, the clerk not being made a party, you could hardly do that, and therefore the language which you used was as follows: 'Be delivered for cancellation of record.' I have made the phrase read, 'Be delivered up for cancellation, and that the same be canceled of record.' This is part of the quotation which I above refer to. This, I am sure, is what you meant, and I had no hesitation in adding the extra words."

The solicitor having been before the Vice Chancellor for the purpose of settling the decree, and the Vice Chancellor having struck out the clause above mentioned for the reason which he stated, it is beyond my comprehension to understand the audacity evinced by counsel in deliberately writing in the decree over the Vice Chancellor's signature words by which he doubtless intended to secure the accomplishment of the very thing the Vice Chancellor denied. However, it seems that he did it without corrupt motive, as will hereafter appear.

The Vice Chancellor, upon receipt of the solicitor's naive letter, inclosed it to me with a letter of his own, in which he said:

"While I am loath to burden you with this affair, under the circumstances I think that it is my duty to submit it to you for your consideration. Mr. ——— certainly had no right to alter the language which I formulated myself with my own pen, striking out from his draft of decree the direction that the county clerk cancel the mortgage. You will observe that, while the language which I employed merely directed that the mortgage be delivered up presumably to the defendant for cancellation, Mr. ———'s decree puts in a positive mandate that the mortgage 'be canceled of record.' The words which he inserted can only be regarded as mandate to the county clerk."

Upon the receipt of the Vice Chancellor's letter, inclosing the solicitor's, I immediately wrote the latter for an explanation, and he replied by letter, in which, among other things, he said:

"After I arrived at my office I examined carefully the decree which he [the Vice Chancellor] had advised, and I came to the natural conclusion that by inadvertence he had stricken out the following words: 'And the clerk of the county of \* \* \* is hereby directed to cancel said mortgage of record,'—without leaving the necessary direction, 'to cancel said mortgage of record,' and that by inadvertence he had read the word 'cancellation' as 'canceled,' and therefore in order to make the decree complete, and as I understood he wanted it to be drawn, I added the words which are complained of after the word 'cancellation,' \* \* \* and that the same be canceled."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep's Indexes

"It must be perfectly obvious to you and also to Vice Chancellor — that I was not intended to deceive the court, or to make any alteration of the decree without the consent of the Vice Chancellor. The words which I added were simply words which I considered necessary to properly carry out my suggestion to the Vice Chancellor, that a decree should be entered which might be filed, and which would operate as a cancellation of the mortgage, without compelling the clerk to actually cancel the mortgage on the record, and to which idea and view I thought the Vice Chancellor had agreed, and that he intended that I should have this relief.

"I am exceedingly sorry that Vice Chancellor — feels that I have attempted to do anything in contradiction of the decree which he has advised, and that there has been any misunderstanding about the matter. Your letter came as a complete surprise to me, and naturally I was very much perturbed over its contents."

Subsequently the solicitor, appearing at chambers, was informed by me that I proposed to charge him with contempt of court, and I asked him if he desired to be arraigned on formal charges, or whether he would submit the matter on the facts above detailed. He chose the latter course, as well he might, for it is obvious that the facts speak for themselves. His only defense is a disclaimer of intentional wrongdoing. This, as a rule, is no excuse, especially where the facts constituting the contempt are admitted, or where a contempt is clearly apparent from the circumstances surrounding the commission of the act. 9 Cyc. 25. Disavowal of any intention to commit a contempt may, however, extenuate or even purge the contempt. *Id.* 26.

A case quite pertinent is that of *State v. Finley*, 30 Fla. 325, 11 South. 674, 18 L. R. A. 401, in which it was held:

"While the interlineation into a decree, after it has received the judicial signature, of immaterial words patently omitted therefrom through clerical oversight may not, in the absence of proof of a bad motive or fraudulent design in the attorney who perpetrates it, be cause for disbarment, still any manner of tampering with the decree of a court after it receives the sanction of the judge's signature, no matter in how small a particular, and no matter how innocent or immaterial the alteration may be, is highly reprehensible, and deserves severe punishment. In recognition of the sanctity of judicial decrees, chancery court rule 87 (Florida) has been provided, requiring an order of the court for the correction of clerical mistakes therein, arising from any accidental slip or omission; and an attorney who attempts to accomplish correction otherwise should be dealt with summarily and severely."

And the court, in the opinion, made the following observations:

"As to the second charge, of interlining the words 'of Putnam' in the decree in chancery in the case of *Wood v. Peterman et al.*, after it had been signed by the Chancellor, although it is denied by the relator that such interlineation was done subsequent to the signing of the decree, still we think that the proof, if not prejudiced, is quite sufficient to establish the fact that it was done subsequently to the signing of the decree. This fact being established the next question to be considered is: Does the evidence show that it was done with that fraudulent, corrupt, and bad motive that is nec-

essary to have been shown before disbarment could follow? The evidence shows that the interlineation occurred in that part of the decree that undertook to locate or describe the land involved in the decree; and the interlineation caused the sentence in the decree as signed, 'County and State of Florida,' to read, 'County of Putnam and State of Florida.' It is apparent from the evidence, and from the fact that the decree was in a case pending in Putnam county, that the land involved therein, to whose description the interlineation referred, did in fact lay in the county 'of Putnam'; and it is apparent, also from the evidence of the clerk, Frank Wright, that the land was otherwise sufficiently located or described without the words interlined; and from all this it is evident that the omission of the interlined words 'of Putnam' was a lapsus penne on the part of the draughtsman who prepared the decree, and that of right it was proper that they should have been put into the decree at the point in which they were interlined, prior to its presentation to the judge for his signature thereto.

\* \* \* There was no proof that Mr. Fowler made this interlineation under the impression or belief that it added to or detracted from the substance or form of the decree, or was necessary to give it effect. The omission of the words interlined was so manifestly a clerical oversight and mistake, and in the opinion of both the judge and the clerk of the court did not affect the description of the land or the decree either in form or substance, and the words interlined being such as the law would have supplied from the other contents of the decree, \* \* \* in considering the motive by which Mr. Fowler was actuated in making this interlineation, we might fairly presume that he did it under the impression that the judge would certainly consent to the correction of so palpable a clerical mistake that when made affected nothing either in form or substance, rather than from any evil design.

"We do not wish it to be understood that we are inclined to condone, palliate, countenance, or excuse any manner of tampering with the decree of a court after it obtains the sanction of the judge's signature, even to the crossing of a T or the dotting of an I therein; on the contrary, we think that such a practice is highly reprehensible, and deserves severe punishment, no matter how innocent or immaterial the alteration or change may be. A proper respect for the sanctity of the official judgments and decrees of our courts demands this shall be so, and in recognition of the sanctity of judicial decrees, our (Florida) chancery court rule 87 has been provided, requiring an order of the court for the correction of clerical mistakes in decrees arising from an accidental slip or omission. But when such an interference with a judicial decree is made unauthorizedly and incautiously, but without any bad motive or fraudulent design, it partakes more of the character of a contempt of the court than of that moral turpitude that stamps the perpetrator as being an unfit person to exercise the office of an attorney."

*State v. Finley* was a disbarment case; but the law as laid down by the court is entirely apposite to a case of contempt involving facts of a similar nature.

It can hardly be said of the solicitor in the case at bar, as was said of the attorney in the *Florida* case, that there is no proof that the interlineation in our decree was made under the impression or belief that it added nothing to or detracted nothing from the substance or form of the decree.

P., the solicitor, as already mentioned, incorporated in his draft of decree as presented



to the Vice Chancellor a direction to the county clerk to cancel of record the mortgage in question. The Vice Chancellor deliberately struck out that provision, so that the decree read that the mortgage should be delivered up for cancellation, leaving the solicitor to accomplish the cancellation in the best way he could, with or without further litigation. The solicitor, after leaving the Vice Chancellor, and out of the presence of the court, deliberately wrote into the decree, over the Vice Chancellor's signature, a provision *that the mortgage be canceled of record*, hoping and expecting, doubtless, that with that language in the decree he could induce the county clerk to make the cancellation. If not, why did he incorporate such a provision in the decree, and why was he not content with the form in which the Vice Chancellor signed it? Nevertheless I am happy to say that I have been able to conclude, contrary to my original view, that the solicitor P. can be put within the later observation of the Florida court, where it says that, when an unauthorized interference with a judicial decree is made without bad motive or fraudulent design, it partakes more of the character of a contempt of court than of that moral turpitude that stamps the perpetrator as an unfit person for the office of attorney. Therefore I am enabled to reduce the offense of the solicitor before me from that which would provoke disbarment proceedings to an adjudication that he has been guilty of a contempt of court; and I so find and pronounce.

The decree will be restored to the form in which it was originally signed by the Vice Chancellor, and the matter of punishment of the solicitor will be reserved for further consideration.

(86 N. J. L. 13)

RUSSELL v. RUSSELL-ROBINSON CO.

(Supreme Court of New Jersey. July 10, 1914.)

(Syllabus by the Court.)

1. EXECUTION (§ 7\*)—JUDGMENT NISI—RIGHT TO ENTER.

Upon filing the circuit record and postea a judgment nisi may be entered upon which, notwithstanding a rule to show cause has been allowed, an execution may issue, which will, however, be rendered void if such rule to show cause be made absolute, but which, if such rule be discharged, and judgment final be entered as of the date of such judgment nisi, remains in full force as to lands of which the judgment debtor was seised at the time of the actual entry of such judgment nisi.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 7-15, 17-20; Dec. Dig. § 7.\*]

2. JUDGMENT (§ 772\*)—ENTRY OF JUDGMENT NISI—LIEN.

On May 20, 1913, plaintiff obtained a verdict in an action in the Supreme Court. On May 27, 1913, a rule to show cause why this verdict should not be set aside was allowed. On June 3, 1913, judgment nisi was entered upon the postea. On June 10, 1913, a receiver of the defendant as an insolvent corporation was

appointed by the Chancellor. On May 27, 1914, the rule to show cause was discharged. On March 5, 1914, judgment final was entered as of June 3, 1913. *Held*, that the judgment nisi entered on June 3, 1913, bound the lands of which the judgment debtor was then seised, title to which subject to said lien passed to the receiver on June 10, 1913.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1329-1332, 1335, 1337; Dec. Dig. § 772.\*]

3. RIGHT TO ISSUE EXECUTION — ENTRY OF JUDGMENT NISI.

The cause of Erie Railway Co. v. Ackerson, 33 N. J. Law, page 33, followed.

4. CASE EXPLAINED.

The case of McNamara v. N. Y., L. E. & W. R. R. Co., 56 N. J. Law, page 56, 28 Atl. 313, explained.

Action by Rose Zamelsky, administratrix, against the Russell-Robinson Company and another. A judgment nisi was entered for plaintiff in the Supreme Court, and Frank P. Russell was appointed receiver for the defendant named. From an adverse determination of the receiver, the administratrix appealed to the Court of Chancery, which certified the proceedings to the Supreme Court, propounding a certain question. Question answered in opinion.

This is a proceeding under section 79 of the chancery act, which provides that the court of Chancery may send any matter of law to the Supreme Court for its opinion to be certified thereon. Pursuant to this statute an order was made in a cause pending in the Court of Chancery upon the advice of Vice Chancellor Stevens, who filed the following memorandum, in which the matter of law is stated and the question propounded:

This is an appeal of Rose Zamelsky, administratrix, from the determination of the receiver. It appears that on June 3, 1913, on the filing of the postea in an action of tort, Mrs. Zamelsky obtained a rule for judgment, or judgment nisi, in the Supreme Court for \$6,000. The verdict had been against the Russell-Robinson Company and Wm. L. Blanchard Company. A rule to show cause had, on May 27, 1913, been granted by the circuit judge, with the result that the Supreme Court in banc set aside the verdict against the Blanchard Company, and allowed it to stand against the Russell-Robinson Company.

The rule for judgment nisi (if such is may be called) was entered in the minutes of the Supreme Court in the words following:

"It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant (the two companies designated in the title of the cause) for the sum of \$6,000, besides costs to be taxed, nisi.

"Entered June 3, 1913, on motion of Kalisch & Kalisch, Attys."

The form of the final judgment, as entered on the minutes, is as follows:

"Judgment entered this 5th day of March, A. D. 1914, as of June 3, 1913, for the sum of \$6,000 damages and \$74.34 costs.

"W. S. Gummere, C. J."

Between the date of the rule for judgment nisi and judgment final the Russell-Robinson Company became and was adjudged insolvent by this court. A receiver was appointed on June 10, 1913. The company was at that time the owner of real estate from which the receiver has, by sale, realized \$6,203.26. If the rule

for judgment nisi was a lien upon the land, the purchase money will go to pay the judgment; if not, it will be distributed among the creditors generally.

The corporation act (2 Comp. St. 1910, p. 1652) provides (section 86) that: "After payment of all allowances, expenses and costs and the satisfaction of all special and general liens upon the funds of the corporation to the extent of their lawful priority, the creditors shall be paid proportionately to the amount of their respective debts, excepting mortgage and judgment creditors, where the judgment has not been by confession, for the purpose of preferring creditors."

The act concerning judgments (Comp. St. p. 2955) provides:

(1) "That all lands, tenements, hereditaments and real estate shall be and hereby are made liable to be levied upon and sold by executions to be issued on judgments, which are or shall be obtained in any court of record in this state. \* \* \*"

(2) "That no judgment shall affect or bind any lands, tenements, hereditaments, or real estate, but from the time of the actual entry of such judgment on the minutes or records of the court."

The question is whether the rule for judgment nisi or judgment nisi (if it be more than a rule) bound the land prior to the receiver's appointment. It could not have become a lien upon the land afterward, because the corporation act (section 68) vests the title to it in the receiver immediately upon his appointment.

In an early edition of Tidd's Pr. (1807) p. 813, it is said: "After a general verdict it is incumbent on the prevailing party to enter a rule for judgment nisi causa on the postea or inquisition with the clerk of the rules."

In an edition of Archbold's Practice, published in 1838 it is said (page 484) that such had been the rule until changed by a rule of all the courts made in 2 W. IV; and Chitty, in his General Practice (volume 4, p. 101), says that by the ancient practice it was in many cases necessary, before signing judgment, to give the opponent notice of the intended proceedings, so that he might prepare to take proper measures to prevent such judgment and the execution thereon, as by motion in arrest of judgment, etc., and hence the rule for judgment nisi.

From all this it appears that the rule for judgment nisi causa was nothing more than a four days' rule to show cause why judgment should not be entered, and such was Justice Pennington's opinion as appears from his statement (arguendo) in *Young v. McPherson*, 3 N. J. Law, 897. He remarks: "What is called a judgment nisi is nothing more than a rule to show cause why judgment should not be rendered." From this passage, it would seem that members of the bar even at that day (A. D. 1811) were calling the docket entry not a rule for judgment nisi causa, but a judgment nisi, and the change of name seems to have been attended with a change in the practice, for Judge Elmer, in *Erie R. R. Co. v. Ackerson*, 33 N. J. Law, 33 (A. D. 1868), uses the terms "rule for judgment nisi causa," and "judgment nisi" as if synonymous, and says: "According to the practice of the King's Bench in England, a final judgment was not entered until the lapse of four days after the rule for judgment nisi, during which time the defendant might move for a rule to show cause, or present a writ of error. This delay has been abolished by our rules, which permit a rule to show cause to be moved for during the term (i. e., the term in which the trial is had, old rule 30), and by the provisions of an act respecting writs of error (Nixon's Dig. 262). The established practice of this court is that the plaintiff may issue his execution immediately after the entry of the judgment nisi, if he thinks proper to do so, at the risk, however, of having it rendered a nullity,

by the rule to show cause being allowed absolutely and without directing the entry of a final judgment for the protection of the plaintiff; and subject, also, to the execution being superseded, if a writ of error is presented, and a recognizance of bail perfected, as required by the aforesaid act."

The seventh section of the act respecting writs of error above referred to reads as follows: "No execution shall be stayed or delayed \* \* \* by any writ of error or supersedeas thereon after verdict and judgment on such verdict unless such recognizance as is prescribed in the preceding section shall be first acknowledged as hereinafter directed."

The question then, is whether a judgment nisi is such a judgment as, under section 2 of the judgment act (3 Comp. St. 1910, p. 2956), binds lands from the time of its actual entry and such a judgment as is entitled to priority of payment under section 86 of the corporation act, which prescribes in what order claims against insolvent corporations shall be paid.

I think no distinction can be made between the meaning of the word "judgment" in the corporation act and its meaning in the act respecting judgments. Sections 1 and 2 of the latter act (quoted above) were passed in 1799 (Elmer's Dig. 486), and were then sections 1 and 2 of the act entitled "An act making lands liable to be sold for the payment of debts." The only levy and sale authorized by section 1 was a levy and sale "by executions to be issued on judgments"; which judgments, by section 2, were to bind lands only from the time of actual entry. If a judgment nisi be a judgment within the meaning of this act, it cannot be otherwise, within the meaning of the corporation act. This inevitably follows from the decision of the Court of Errors in *Doane v. Millville Ins. Co.*, 45 N. J. Eq. 282 [17 Atl. 625], where Justice Dixon says that judgment creditors are preferred only so far as they have acquired liens. Their lien upon land is given by the sections quoted from the judgment act transferred from "the act making lands liable to be sold for the payment of debts."

Is, then, the judgment in question a judgment within the meaning of the judgment act? Its form, and the fact that execution may issue upon it, favor an affirmative answer. The form of the entry is "ordered that judgment be and hereby is entered" for the sum specified. This seems to be a declaration by the court that the entry is not merely a rule, but a judgment. While the entry is allowed thus to stand on the minutes, it would seem as if this court at least was not at liberty to call it anything else. I have requested the clerk of the Supreme Court to examine the entries of rules for judgment nisi, as they were entered at the time (A. D. 1868) when Judge Elmer wrote his opinion, and he tells me they were substantially in the same form as the entry now under consideration.

Judge Elmer says that it was then the established practice that the plaintiff might issue execution immediately after the entry of the judgment nisi, and the clerk informs me that this practice is still followed. To issue execution on a mere rule would be an anomaly; and it would not accord with the statute of judgments, which says that lands are liable to be levied upon and sold by executions to be issued on judgments. No authority is given to issue them on anything else.

How specious this reasoning! I cannot reconcile it with the decision of the late Chief Justice Depue in the case of *McNamara v. N. Y., Lake Erie & Western R. R.*, 56 N. J. Law, 56, 28 Atl. 313. That case was in all respects identical with the case now before the court. The action was tort. There was a verdict; a rule to show cause by the justice who tried the case; and entry of judgment nisi; a subsequent discharge of the rule; judgment final entered nunc pro tunc; and a receivership intervening

between the date of the entry of the judgment nisi and of the judgment final. On these facts it was held that, while the judgment final might be entered nunc pro tunc, the date of its actual entry must be expressed, and that only from such date would the judgment be a lien upon real estate. Justice Depue says: "Judgment entered at this time as of a prior day cannot, under the statutes referred to, have relation as a lien upon the defendant's property prior to the date of actual entry; and, if execution be issued thereon, the command of the writ will be to levy upon the lands, tenements, and hereditaments whereof the defendant was seised at the time of the actual entry of the judgment. The defendant's property is in the hands of the receiver and under the control of the federal court. \* \* \* An execution, if issued, would be of no avail against the defendant's property."

It does not expressly appear in the opinion that judgment nisi had been entered, but the minutes of the court show that it was and in the same form in which it was entered here—the entry was "ordered that judgment be and hereby is entered \* \* \* nisi."

The aim of the experienced practitioners who made the application in that case was to secure for their client a lien upon the lands in the hands of the receiver which should antedate the receivership. The Supreme Court apparently refused to give it to them. If they had it already in the judgment nisi, why should they have applied, and why should the Supreme Court have taken pains to say that judgment final entered nunc pro tunc as of the date of the judgment nisi would only bind lands from the date of its actual entry? One would have thought that the court would have said, if it had supposed that the judgment nisi gave a lien: "It makes no difference when the lien of the judgment final first attaches because you have a lien already." As our present corporation act expressly vests the legal title to all the property of the insolvent corporation in the receiver immediately upon his appointment, there can be no lien, not even an apparent lien, unless it attaches prior to that time.

It seems to me that in view of this situation it would be unbecoming in an equity judge to express an opinion upon a point of practice so peculiarly within the province of the Supreme Court and of such great practical importance. Fortunately the Chancellor has power to refer the question to the Supreme Court under section 79 of the chancery act (P. L. 1902, p. 537), and this is a case in which I think it is more than proper to exercise it. An order will be made referring the question of the effect of the judgment nisi to that tribunal.

The order advised by Vice Chancellor Stevens is as follows:

"The Chancellor sends the following questions or matter of law to the Supreme Court for its opinion to be certified thereon; that is to say:

"(1) Is the above entry on the minutes of the Supreme Court dated June 3, 1913, a judgment on which execution may issue, or is it a rule for judgment nisi causa on which no execution can issue?

"(2) Is such entry, standing alone, a judgment that affected or bound the aforesaid lands from the time of its actual entry on the minutes of the Supreme Court within the meaning of section 2 of the act concerning judgments?

"(3) Did the entry of judgment final on March 5, 1914, have the effect of so altering or qualifying the effect of the entry or judgment nisi of June 3, 1913, that the judgment in the action can only operate as a lien upon real estate from the date of its actual entry on March 5, 1914?

"(4) Is there any judgment in said action which now relates back, so that it binds the said lands of the Russell-Robinson Company, title to which passed by operation of law (sec-

tion 68 of corporation act) to the receiver on June 10, 1913, or the money into which they have been converted?"

And it is further ordered that upon the return of such certificate the respective parties may apply for such further order or adjudication as may be proper.

Argued June term, 1914, before GUM-MERE, C. J., and GARRISON and MIN-TURN, JJ.

Lum, Tambllyn & Colyer, of Newark, and Gilbert Collins, of Jersey City, for receiver. Kalisch & Kalisch, of Newark, for claimant.

GARRISON, J. [1-3] The judgment entered on June 3, 1913, is one upon which execution may issue. This was expressly decided in *Erie Railway Co. v. Ackerson*, 33 N. J. Law, page 38 (1868). This decision has not been overruled.

[4] The case of *McNamara v. N. Y. L. E. & W. R. R. Co.*, 56 N. J. Law, 56, 28 Atl. 313 (1898), dealt not with the effect of a judgment nisi entered prior to the discharge of an outstanding rule to show cause, but solely with the effect of a judgment final entered after such a rule had been discharged, holding with respect to such final judgment that, although entered nunc pro tunc as of the time of the filing of the postea, it would be a lien on lands only from the date of its actual entry.

There is no conflict between the rule stated by Judge Elmer in the earlier case and that stated by Judge Depue in the later one; they are to be read together. The practice thus laid down is that upon filing the postea, a judgment nisi may be entered upon which, notwithstanding a rule to show cause has been allowed, an execution may issue, which will, however, be rendered void if such rule is made absolute, but which, if such rule is discharged and judgment final is entered as of the date of such judgment nisi, remains in full force and effect as to lands of which the judgment debtor was seised at the time of the actual entry of such judgment nisi; but this result cannot be obtained by the mere entry of judgment final nunc pro tunc as of the time of the filing of the postea. This last clause is the contribution of the *McNamara* Case, and is all that that case decided upon this point, as appears by the opinion of Mr. Justice Depue, who cited the earlier case of *Erie R. R. Co. v. Ackerson* without a suggestion that it was disapproved, still less that it was repudiated and overruled. To overrule a practice decision of 25 years' standing in any such fashion as this would be at total variance with the judicial habit of this court, and pre-eminently so in the case of Mr. Justice Depue, whose punctiliousness as a practitioner was only equalled by his solicitude for stare decisis.

The fact now shown to us that a judgment nisi had been entered in the *McNamara* Case does not alter the fact that such judgment was not placed before the court for

its opinion as to its force and effect, but that such opinion was rendered solely as to the effect of a judgment final if entered nunc pro tunc as of the time when the plaintiff was entitled to enter a judgment nisi which the court evidently thought had not been entered, and hence expressed no opinion concerning it.

Upon no other theory is it possible to explain the fact that Judge Depue on two occasions went out of his way to suggest the proper practice as to the entry of judgment nisi, evidently under the impression that it had not been followed. The opinion opens with the recital that:

"In the regular course of proceeding the postea would have been filed and judgment entered thereon at the term of February, 1893."

And it closes with this significant paragraph:

"It may be added that the proper practice under this rule is to enter judgment nisi on the coming in of the postea, although the trial judge has previously granted a rule to show cause."

It is inconceivable that this advice would have been tendered if the writer of the opinion was not under the impression that it had not been followed.

Another circumstance tending to the same end is that the notice by which the matter was brought to the attention of the court is entirely silent as to the existence of a judgment nisi, and that the notice given was of an application to order the judgment on the postea and discharge of the rule to show cause nunc pro tunc, from which it would appear that counsel, as well as the court, understood that the sole question presented by the motion was as to the entry of the judgment final and the date at which it took effect as a lien upon lands.

The learned Vice Chancellor has therefore correctly conceived and stated the practice in this court saying as to the doubts he expressed as to the effect of the McNamara case upon the established practice stated in the case of Erie Railway Co. v. Ackerson.

The Court of Chancery, in response to the questions propounded to this court, is therefore certified that the judgment nisi entered on June 3, 1913, bound the lands of the judgment debtor under section 2 of the act concerning judgments, and that entry of judgment final on March 5, 1914, nunc pro tunc did not affect this result adversely to the plaintiff, and hence that the said judgment of April 13, 1913, bound the lands of the judgment debtor, title to which passed to the receiver on June 10, 1913.

Other questions argued by counsel for the receiver, but not referred to us by the Court of Chancery, have for that reason received no attention under this strictly statutory proceeding.

Let the Court of Chancery be certified to the foregoing effect.

(33 N. J. Eq. 554)

HENDERSON et al. v. CHAMPION et al.

(Court of Chancery of New Jersey. July 1, 1914.)

**1. COVENANTS (§ 111\*)—BUILDING RESTRICTIONS—ENFORCEMENT—PARTIES.**

The right to enforce a building restriction, incorporated in all the deeds given by the owner, who was improving and developing a tract according to a general building scheme, inures to each grantee as members of a class, and they may join in a suit to enjoin a breach by other grantees of the covenant; the wrong being common to them all.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 186, 187; Dec. Dig. § 111.\*]

**2. EQUITY (§ 117\*)—PARTIES—MISJOINDER—OBJECTIONS.**

An objection for misjoinder of parties, first made on final hearing, will be disregarded, where no injustice will be done the parties by the decree.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 246, 285-292; Dec. Dig. § 117.\*]

**3. COVENANTS (§ 79\*)—BUILDING RESTRICTIONS—ENFORCEMENT—PARTIES.**

Where an owner, improving and developing a tract pursuant to a general building scheme, executed deeds of parcels containing building restrictions, the restrictive covenants were made for the benefit, not of the grantor alone, but of all who, as purchasers, participated in the project, and they could sue to restrain a breach thereof, though the deeds described the property conveyed by metes and bounds, and stipulated that the grantee covenanted with the grantor not to violate the restrictions.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 78-82; Dec. Dig. § 79.\*]

**4. COVENANTS (§ 103\*)—BUILDING RESTRICTIONS—VIOLATION.**

A building restriction, declaring that no building shall be erected within 12 feet of the lot line facing the street, or within 4 feet of the side lines of the lot, embodied in all deeds of lots of a parcel improved and developed pursuant to a general building scheme, is violated by a building within the 12-foot restricted area, though one purchasing all the lots in a block may erect a building covering the block and face it on any of the streets, provided he remains outside the 12-foot restricted area, and though an owner of one lot may build as many houses as his land will permit, facing them to suit his convenience, so long as they are not within the restricted area.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 169; Dec. Dig. § 103.\*]

**5. INJUNCTION (§ 128\*)—ACTIONS FOR—EVIDENCE.**

Where the right to enforce a building restriction is doubtful, equity will deny injunctive relief.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 278; Dec. Dig. § 128.\*]

Suit by David A. Henderson and others against Joseph G. Champion and others to enjoin the breach of a restrictive covenant. Decree for complainants.

Bleakly & Stockwell, of Camden, for complainants. William B. Davis, of Ocean City, and H. A. Drake, of Camden, for defendants.

BACKES, V. C. The object of this bill is to enjoin the breach of a restrictive cove-

nant. The Ocean City Gardens Company reclaimed a tract of waste land adjoining Ocean City in Cape May county, and subdivided it into streets, blocks, and lots, according to a plan thereof filed with the clerk of that county. For the purpose of improving and developing the tract, a general building scheme was formulated, and by covenants incorporated in all of its deeds to purchasers, one of which reads as follows:

"No building of any description whatever and no porch, fence or other structure of any kind, shall at any time be erected on or over the lots hereby conveyed within twelve feet of the lot line facing the street, or within four feet of the side lines of said lot (excepting where a party may own two or more contiguous lots, in which case a dwelling or hotel may be erected on any part of the lot or lots the owner thereof may desire without regard to the intervening line or lines; provided the same is not built within four feet of the outside lines of said contiguous lots, nor within twelve feet of the lines thereof facing the street)."

There are others which have no bearing on this dispute. The four complainants own, separately, lots in block 9 and 10, fronting on Bay road. Block No. 9 is bound by Bay road and Simpson road, Battersea road and North street, parallel streets, respectively. The defendant owns six adjacent lots in block 9; three front on the easterly side of Bay road, and three on the westerly side of Simpson road, abutting in the rear, and are numbered on the map as 901, 902, and 903, 942, 943, and 944. Lots 901 and 944 are bounded on the southerly side of North street. The complainants and defendant hold immediately from the Gardens Company, and all of the deeds contain the restrictions above quoted, except that buildings, etc., on the lots fronting on the westerly side of Bay road are restricted to 20 instead of 12 feet from the street. On lot 903, facing Bay road, and lot 942, facing Simpson road, being the lots furthest from North street, the defendant erected two dwelling houses, in compliance with the restrictions. The remaining four lots he divided transversely into six lots, and on two built houses, facing North street four feet from the street line, but more than 12 feet from either Bay or Simpson roads, which constitute the breach complained of. A demurrer *ore tenus* in bar of a recovery was interposed, and three grounds were assigned.

[1, 2] The first is that there is no such unity of interests as would justify a joint action by separate lot owners. In pointing out the instability of this objection, it need only be suggested that the right to enforce the covenant inures to each of the complainants as members of a class who may join in seeking redress of a wrong which is common to them all. *Marsellis et al. v. Morris Canal & B. Co.*, 1 N. J. Eq. (Saxt. ch.) 31. Besides, an objection for misjoinder of parties, first made on final hearing, will be regarded as immaterial, where it appears that no injustice will be done the parties by the decree.

It should have been pleaded. *Story's Eq. Pl.*, § 544.

[3] The next ground is that the covenant is personal to, and enforceable only by, the defendant's grantor, the Ocean City Gardens Company. The principle that uniform restrictive covenants regarding improvements, as a part of a community scheme, are made for the benefit of all who, as lot owners, participate in the project has been so firmly established by numerous authorities, both in this country and England, that in this day it is not open to serious discussion. *De Gray v. Monmouth Beach Club House Co.*, 50 N. J. Eq. (5 Dick.) 329, 24 Atl. 388; *Morrow v. Hasselman*, 69 N. J. Eq. (3 Robb.) 612, 61 Atl. 369; *Barton v. Slifer*, 72 N. J. Eq. (2 Buch.) 812, 66 Atl. 899. And indeed, the defendant does not question it, but he urges that the rule is not applicable because of a subjoined limitation in all of the deeds, which he argues vests all interest in the covenants absolutely in the grantor. It reads:

"The description by metes and bounds herein set forth shall be conclusive upon the parties, their heirs, successors and assigns, and shall never be construed so as to enlarge said description or embrace land or rights in land not within said metes and bounds."

It does not so impress me. The stipulation simply defines the exclusive construction to be given to the description of the land as contained in the deed and leaves unimpaired the rights which flow to other lot owners from the covenant which, as Chief Justice Beasley said in *Brewer v. Marshall*, 19 N. J. Eq. (4 C. E. Green) 537, 97 Am. Dec. 679, are enforced "upon the principle of preventing a party having knowledge of the just rights of another, from defeating such rights, and not upon the idea that the engagements enforced created easements, or are of a nature to run with the land." Moreover, the defendant fails to accord the proper significance to be given to a further covenant, which reads:

"And the said party of the second part hereto [defendant] for himself, his heirs, executors and administrators and assigns, doth hereby covenant, promise and agree to and with the said party of the first part hereto [common grantor] its successors and assigns, not to violate nor fail to comply with any or all of the above-mentioned conditions, restrictions, regulations or provisions, but faithfully to keep and perform the same."

This embraces the complainants. They, and all other purchasers of lots, are assigns, in the true sense of the word. No one, other than the grantees of the Gardens Company, come within that category. So, we have in expressed terms the defendant's agreement that his undertakings should vest beneficially in the complainants.

[4] The remaining point is that the complainants are not damaged. In support of this, it is contended that facing the defendant's houses on, and erecting them four feet from, North street obstructs neither the light, air nor view to the complainant's premises.

which are on Bay road, "around the corner" from the defendant's houses. The answer to this is that the interdependent covenant of the defendant casts an equitable burden on his land, or raises an equity, in favor of each of the owners of lots on the tract, and this, no matter how remote may be his location. And in this instance there is a very cogent reason for the application of this doctrine. Ocean City Gardens is essentially residential, and broad avenues, from house line to house line, inviting, if not insuring, floral decorations in front of homes, are obviously important factors in its exploitation, the advantage of which redounds to the whole community, especially in the enhancement of the value of lands within its limits. Can it then be said that a lot owner, however distinctly situate, is not materially injured by an infraction of this feature of the general scheme? Equity courts will not refuse relief in cases of this kind unless it clearly appears that the violation complained of will be so harmless that the maxim *de minimis* applies. *Kirkpatrick v. Peshine*, 24 N. J. Eq. (9 C. E. Green) 206; *Morrow v. Hasselman*, *supra*; *Lignot v. Jaekle*, 72 N. J. Eq. (2 Buch.) 233, 65 Atl. 221.

We will therefore consider whether the erection of the defendant's houses four feet from North street is a violation of that portion of the covenant which provides that no building shall be erected within 12 feet "of the lot line facing the street." The side lines of the defendant's lots, as shown on the map, are undoubtedly those which run at right angles to Bay road and Simpson road and parallel with North street, and, while the exterior longitudinal line of lots 901 and 944, bounded by North street, is a side line of these two lots, it is also "the lot line facing the street" and within the prohibition of the covenant forbidding buildings within 12 feet. The primary object to the parties, to be inferred from the covenant, as has already been observed, was to keep all buildings and structures that distance away from the highway, and the restriction in that respect in no wise conflicts with nor is it modified or qualified by the provision that buildings should not be erected within four feet of the side lines, because it clearly appears that the purpose of the side line restriction was solely for the benefit of adjoining lot owners. This was the view of Vice Chancellor Reed in the case of *Waters v. Collins*, 70 Atl. 984 (Docket 19, p. 426), referred to by Vice Chancellor Bergen in *Chelsea Land & Improvement Co. v. Adams*, 71 N. J. Eq. (1 Buch.) 771, 66 Atl. 180, 14 Ann. Cas. 758, in enforcing a covenant "that no building shall at any time be erected within twenty feet of the front property line of any street or avenue," which, as will be noted, was couched in language much less definite in application than the one now considered. And this, after reflection, seems to have been the construction placed upon his covenant by the defendant himself, for, after

the bill was filed he moved his houses back from North street a distance of 12 feet, and on the argument claimed immunity from further prosecution. With this altered situation the complainants are not content. They contend that the general scheme, deducible from the covenants in the deeds and the plan to which the deeds refer, contemplates that buildings should be erected with the façade exposed to the street upon which the lot fronts. All that need be said on this score is that I find in neither one anything to this effect binding upon lot owners. The only limitations in the deeds as to buildings relate to their location and a minimum cost. The map, it is true, shows front and side lines of lots, but nothing to indicate that purchasers are required to erect their buildings fronting on the street. The division lines of the lots, as laid down on the plan, point to no such exactions. Rather, the impression gathered from the map is that it was intended as an illustration of the scheme of improvement and for the more convenient identification of the location of the lots by numbers. The side line restriction in the deeds is, as I have said, for the benefit of adjoining owners, who alone have the right to enforce, or relieve from, its observance. This is manifested by the exception contained in the covenant, which provides that in case of the ownership of two or more contiguous lots by one person, the intervening side lines may be disregarded and a building erected over them, from which follows that if one person purchased all of the 44 lots in block 9, and erected a hotel covering the block, he could face it in a court, with rears to the four streets, or face it upon any one or more streets with the back to the remaining streets, without breaking his covenant, provided he remained beyond the inhibited 12 feet. And logically, if he owns but one lot, he may build the style of house or as many houses as his land will permit, facing them to suit his convenience or fancy, so long as they are of the minimum cost and not within the restricted area.

[8] The utmost that can be said in favor of the complainants' contention on this phase of the case is that their right to enforce the covenant is doubtful, which leads to a denial of the relief they pray. *Howland v. Andrus*, 81 N. J. Eq. (11 Buch.) 175, 86 Atl. 391.

A decree may be entered granting an injunction restraining the defendant from building on his land, within 12 feet of North street, but issuance of the writ will be withheld until the further order of the court, motion for which may be made whenever the exigency of the case requires. This course is taken because of the insistence of the defendant at the hearing that he has the right to build on each of his six lots now fronting on North street, to within four feet of that street, notwithstanding that he forestalled the complainants by removing the two already built to their present location. The complainants are entitled to costs.

**WEIDMAN SILK DYEING CO. v. MAYOR  
AND COMMON COUNCIL OF CITY  
OF NEWARK.**

(Supreme Court of New Jersey. June 3, 1913.)

**1. COURTS (§ 99\*)—PREVIOUS DECISIONS—LAW  
OF CASE.**

The decision of the Supreme Court on rule to show cause made absolute is properly adopted by the trial court on a second trial, and must be followed on rule to show cause why the verdict in the second trial should not be set aside.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 340; Dec. Dig. § 99.\*]

**2. WATERS AND WATER COURSES (§ 86\*)—DI-  
VERSION—DAMAGES.**

One suing for the wrongful diversion of water from a river may not recover the cost of permanent improvements to his plant to secure a water supply from another source, but may recover the value of the use thereof to the commencement of the suit, and for the wear and tear, provided it was necessary to procure a new water supply.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 82; Dec. Dig. § 86.\*]

**3. WATERS AND WATER COURSES (§ 84\*)—DI-  
VERSION—DAMAGES—DEFENSE.**

One wrongfully diverting water from a stream to the injury of another may not defeat an action by the latter for the damage sustained on the theory that the wrongdoer in time of low water, restored to the stream a quantity equal to the normal flow at such times.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 76; Dec. Dig. § 84.\*]

Action by the Weidman Silk Dyeing Company against the Mayor and Common Council of the City of Newark. On rule to show cause why verdict for plaintiff should not be set aside, and a new trial ordered. Verdict reduced conditionally.

See, also, 83 N. J. Law, 50, 84 Atl. 273.

Argued at February term, 1913, before GUMMERE, C. J., and BERGEN and KALISCH, JJ.

Griggs & Harding, of Paterson, for plaintiff. Herbert Boggs, of Newark, for defendant.

**PER CURIAM.** This suit was instituted by the plaintiff to recover damages which it claims it suffered because of a diminution in the flow of the Passaic river, caused by diversions of the water therefrom by the Jersey City Water Company from the Rockaway river, by the defendant from the Pequannock river, and by the East Jersey Water Company from the Passaic river below the confluence of the two streams first above mentioned, which thereafter form the Passaic river. The verdict in favor of the plaintiff was \$17,800, the legal propriety of which is the subject of this rule to show cause.

The plaintiff's dyeing works are located on the bank of the Passaic below the several points of diversion by the parties above named. This is the second trial of this cause; the verdict in the former case having been

set aside by this court in accordance with the opinion of Mr. Justice Swayze, which is reported, under the title of the present cause, in 83 N. J. Law, 50, 84 Atl. 273, the court there holding that the true basis for the apportionment of damages between the three wrongdoers was the proportion of the current flow diverted by each from the Passaic river and its two tributaries in times of low water, when the plaintiff could not obtain its supply by pumping, but that this basis related only to the question of apportionment, and not to the total loss of the plaintiff, because it had to make a contract for a continuous supply, although it might only be needed during low water, and that the plaintiff was entitled to be repaid what it cost. Under this determination, the basis of complainant's loss would be the total amount it paid for a continuous supply of water, although at times it might have been able to supply its wants from the river, and that the apportionment of the total loss, between the different diverters, should be rested upon the proportion of the current flow diverted by each in times of low water.

Plaintiff's Exhibit 18 shows the natural flow of the Pequannock at Macopin Dam per week; but the figures vary to such an extent that it is not easy to estimate what would be the unimpeded flow of the river at that point, but we conclude that, under the testimony, the best obtainable result would be between 5,000,000 or 6,000,000 gallons per day during ordinary low flow. It also appears that the average natural flow of the Rockaway river at the point of diversion by Jersey City is about 10,000,000 gallons per day, so that, as between these two diverters, the average flow from which Jersey City draws is approximately double the amount of the current flow at the point where the defendant diverts water for its use.

The defendant argues that, as it appears that at Little Falls the East Jersey Water Company and allied corporations actually divert 25,000,000 gallons per day, the total flow of the Passaic is 40,000,000 gallons per day, and it is therefore claimed that the defendant is chargeable only with one-eighth of the plaintiff's loss. This manifestly is not correct, if the respective liabilities are to be based upon average current flow, because if the total flow of the tributary streams is but 15,000,000 gallons per day, part of which is withdrawn, there could not be 25,000,000 gallons per day left. The difficulty in dealing with this branch of the case arises from the fact that the testimony was largely directed to the amount diverted in ascertaining a basis for estimating respective liabilities, which is contrary to the previous opinion in this case above referred to. We are not able to ascertain with accuracy, from the testimony, what the actual flow, if unimpeded, would be in the Pequannock and Rockaway rivers, or



in the Passaic, after these streams join it. All the proof we have relates to the flow of the Passaic at Little Falls, which appears to be based upon the entire abstraction of the stream, and that is said to be 25,000,000 gallons; but, assuming this to be true, there is diverted for the city of Paterson, as we understand it, about 10,000,000 gallons, so that the best result we can arrive at is that the average current flow, if there was no diversion by these parties, would be, in the Pequannock, 5,000,000 gallons, in the Rockaway, 10,000,000 gallons, and in the Passaic, at Little Falls, 15,000,000 gallons.

The proportion of damage therefore, based upon the current flow, in front of plaintiff's property, if none of the water was diverted, chargeable to this defendant, would be one-sixth. The total damages which the plaintiff claims to have sustained, and which are not seriously disputed, except in certain particulars hereinafter to be mentioned, amount to \$57,541.02, one-sixth of which is so much below the verdict in this case that it is manifestly based upon some erroneous principle. We are therefore of opinion that the present verdict is excessive, if it is to be justified upon the ground that the damage must be apportioned upon the basis of the ordinary flow of the river, because the plaintiff does not, in its brief, undertake to justify the verdict upon any such theory. Its argument upon this point is based largely upon the case of *Jenkins v. Penn. R. R. Co.*, 67 N. J. Law, 331, 51 Atl. 704, 57 L. R. A. 309; but in that case there was no proof upon which a calculation or estimation of the proportion which each wrongdoer contributed to the injury could be based, whereas, in this case this court has laid down a rule under which an apportionment is to be made, and that is that it shall be according to the natural flow of the stream at ordinary times, and as the natural flow is ascertainable, or approximately so, if this verdict was substantially consistent with such an apportionment, we would not require that it be absolutely accurate, because in the nature of things that would not be possible. In all of the other cases cited by the plaintiff on this point, it appears that there was no method of ascertaining the relative proportion of the injury attributable to joint wrongdoers, and in such cases the jury were not held to absolute accuracy, but were sustained in a reasonable result not inconsistent with the evidence.

So in the case of *Harper et al. v. Mountain Water Co.*, 43 Atl. 984, cited by the plaintiff, there was proof of an injurious diminution in flow by abstractions of water from a stream, the amount of which could not be ascertained with mathematical precision, but the defendant was held liable, although the amount abstracted was difficult to prove; but in that case no question of apportionment between several wrongdoers was involved.

[1] The second reason urged in support of this rule is, as stated in the brief of the defendant:

"The item of \$4,120.60, for depreciation and use of these filters, should not have been considered by the jury in estimating the plaintiff's total damages, and the court should have so charged as requested by the defendant."

The request to charge was:

"They should not allow for use or depreciation of the filters, as the evidence of the plaintiff shows that they were in addition to, and an improvement of, plaintiff's plant. We think the refusal to charge this request was not error, for this court said, in making the former rule to show cause in this case absolute, that 'the true rule is to allow for the value of the use of the permanent improvement up to the time of beginning suit.' This may properly include an allowance for loss due to wear and tear and depreciation."

That, being the rule laid down by this court upon the precise question at issue, was properly adopted by the trial court, and must be followed by us.

[2] The third reason challenges the correctness of the charge concerning the pipe which the defendant installed for the purpose of connecting its works with the Passaic Water Company's main, from which company plaintiff claims it was required to procure water because of the several diversions of water from the Passaic river by the respective parties hereinbefore mentioned. The part of the charge complained of was in response to the tenth request, which was:

"That in estimating the damages, if they find plaintiff entitled to substantial damages, they should not allow for use or depreciation of the pipe laid for Passaic Water Company's main, because there is no evidence from which they could find the value for the use of the pipe for the period sued for, or the depreciation in value during that period, or any part thereof."

To this the court responded:

"If you find that it was an improvement to the plant, why then of course you will not allow it. If you find, however, that it was reasonably necessary, then of course you may allow it, if you find for the plaintiff. If you find that it was an addition to the plaintiff's plant, then you will apply the rule of the Supreme Court which I have twice read to you, and which I will read once more: The true rule is to allow for the value of its use to the time of beginning of the suit, which may properly include the allowance due to the wear and tear and depreciation, provided you find that it was a permanent improvement. If you find that it was necessary for the obtaining of a new supply, of course the plaintiff is entitled to have it allowed."

This, we think, was a proper instruction, under the rule laid down by this court. The jury were instructed that if it was a permanent improvement, and necessary, then they should allow for the depreciation according to the rule laid down by this court. We see no error in this.

[3] The fourth reason urged is that it was undisputed that the defendant restored to the Pequannock river, in times of low water, a quantity equal to the normal flow at such times, and therefore that the plaintiff's damages were nominal. This we do not consider



sound, for, as was said by the Supreme Court in determining the former rule to show cause, the plaintiff was bound to contract for a continuous supply, and therefore it was not required to depend upon the good will of the defendant in supplying water which it had abstracted.

The fifth reason is rested upon a question of fact; that is, that the plaintiff could obtain an ample supply from the river even during low flow. We think the preponderance of the evidence is against this contention.

The sixth reason presents the same question in a different form, and is subject to the same criticism.

The seventh reason is that the injuries suffered were incidental; but this is based upon a question of fact which we do not think so preponderates as to justify the defendant's claim.

In a case of this kind, certainty to a mathematical demonstration is not possible, and we are of opinion that the evidence fairly demonstrates that the total loss or damage which the plaintiff has suffered by reason of the respective abstractions of water from the stream flowing in front of plaintiff's property amounts to the sum shown by the plaintiff, which is \$57,541.02, of which the defendant should pay one-sixth, \$9,590.17, and, if the plaintiff will consent to a reduction of the verdict to that amount, judgment may be entered therefor. If not, then the rule will be made absolute.

#### WEIDMAN SILK DYEING CO. v. JERSEY CITY WATER SUPPLY CO.

(Supreme Court of New Jersey. June 8, 1913.)

#### 1. WATERS AND WATER COURSES (§ 86\*)—DIVERSION OF WATER COURSE—EXCESSIVE DAMAGES.

In an action for diversion of water from streams above plaintiff's dyeworks, a verdict for plaintiff was not excessive, where the total amount with which defendant would be chargeable, measured by the total flow of water in times of low water, exceeded the verdict.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 82; Dec. Dig. § 86.\*]

#### 2. WATERS AND WATER COURSES (§ 78\*)—RIPARIAN RIGHTS—USE.

A riparian owner has a right to use the stream as it comes to his land, without unreasonable diminution by upper riparian owners, and subject to the rights of lower riparian owners.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 67-69; Dec. Dig. § 78.\*]

#### 3. WATERS AND WATER COURSES (§ 86\*)—DIVERSION—ELEMENTS OF DAMAGE.

In an action for diversion of water from streams above plaintiff's dyeworks, in consequence of which plaintiff was obliged to contract for water, the cost of such contract incidentally covering portions when the stream did not permit plaintiff to have at all times the supply

of water required, was a proper element of damages.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 82; Dec. Dig. § 86.\*]

#### 4. WATERS AND WATER COURSES (§ 79\*)—RIPARIAN RIGHTS—EXTENT OF USE.

An upper riparian owner has no right to divert from the stream water to such an extent that the lower riparian owner is deprived of its use, since it is not a reasonable use of water running through one's land to permanently divert it and use it for commercial purposes.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 70, 71; Dec. Dig. § 79.\*]

Action by the Weidman Silk Dyeing Company against the Jersey City Water Supply Company. On rule to show cause why a verdict for the plaintiff should not be set aside, and a new trial ordered. Rule discharged.

Argued February term, 1913, before GUMMERE, C. J., and BERGEN and KALISCH, JJ.

Griggs & Harding, of Paterson, for plaintiff. Michael Dunn, of Paterson, and Gilbert Collins, of Jersey City, for defendant.

PER CURIAM. [1] This litigation is similar in character to that dealt with and disposed of at this term in the case of this plaintiff against the mayor and common council of the city of Newark, 91 Atl. 335. In this case the plaintiff's total damage, with interest, amounted to \$65,153.32, and the amount of the verdict was \$21,503.36. Upon the basis arrived at in the other case, that is, assuming that the flow of the Pequannock was 5,000,000 gallons per day, and that of the Rockaway 10,000,000 gallons per day, and that of the Passaic 15,000,000 gallons per day, making a total flow, in times of low water, of 30,000,000 gallons per day, this defendant would be chargeable with two-fifths of the total amount of damage shown; and, as this amounts to more than the verdict, we do not think that it is excessive.

[2] It is further argued in support of this rule that the user made by the plaintiff was not within the right of a riparian owner. So far as we can ascertain from an examination of the record, this question was not raised in the court below; but, assuming that it was, we do not consider the argument sound, for a riparian owner manifestly has a right to use the stream as it comes to his land, without unreasonable diminution by riparian owners on the stream above his property, subject, of course, to any proper complaint by a lower riparian owner, if his rights are being interfered with.

[3] It is further urged that the verdict is contrary to the charge of the court, which was, in substance, that if the jury should find that the plaintiff could have obtained water from the river, necessary for its use, by a change or alteration in its pipe, the defendant would only be liable for such portion

of the expense of making the alteration as was caused by its diversion; and it is argued that the evidence establishes, first, that there was a sufficient quantity of water, second, that a slight or inexpensive alteration in its pipes would have made it available to the plaintiff. On this branch of the case we think it sufficient to say that, while the evidence was contradictory, its preponderance is in favor of the fact that the plaintiff could not at all times secure from the river the quantity of water required, and therefore was justified in seeking it elsewhere, and in so doing it had to make a contract which incidentally covered periods when the river did not permit the plaintiff to have at all times the supply required.

[4] The next point is that the verdict is contrary to law, and is not supported by the evidence, in that the defendant had the right to appropriate and make a just and reasonable use of water passing through its land. We do not think that this principle permits the upper riparian owner to divert and abstract from the stream water to such an extent that the lower riparian owner is deprived of its use. It is not a reasonable use of water running through one's land to permanently abstract the water and use it for commercial purposes.

After carefully considering this record, we are inclined to the opinion that the rule to show cause should be discharged.

### WEIDMAN SILK DYEING CO. v. EAST JERSEY WATER CO.

(Supreme Court of New Jersey. March 4, 1914.)

#### 1. WATERS AND WATER COURSES (§ 79\*)—DIVERSION—PROXIMATE CAUSE.

Where the injury to plaintiff company resulted from the contributing negligence, not only of defendant in taking the water, but of other parties in polluting what was left so as to make it unfit for use, but plaintiff, notwithstanding the pollution, could still have used it but for defendant's diversion, such diversion was a direct and proximate cause of the injury, though alone it would not have caused it, so as to render defendant liable for the whole resulting injury.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 70, 71; Dec. Dig. § 79.\*]

#### 2. WATERS AND WATER COURSES (§ 86\*)—DIVERSION—DAMAGES.

Where plaintiff dyeing company, because of excessive diversion of water by defendant, an upper riparian owner, was obliged to contract for a minimum consumption of water throughout the year, all of which at times it did not need, and to pay extra for more than the minimum, the agreement was only another form of paying for the privilege of taking such water as plaintiff needed up to the minimum, and was entirely distinct from the charges in excess of that minimum, so that the minimum cost, plus the extra charge, was a legitimate element of damage.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 82; Dec. Dig. § 86.\*]

#### 3. WATERS AND WATER COURSES (§ 86\*)—DIVERSION—MEASURE OF DAMAGES—INTEREST.

Interest on the amount actually expended in making good the damage, and recoverable in the suit, was a fair element of compensation.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. § 82; Dec. Dig. § 86.\*]

#### 4. WATERS AND WATER COURSES (§ 87\*)—QUESTION FOR JURY—PRESCRIPTIVE RIGHT.

The question whether defendant, in an action for excessive diversion of water, had acquired a prescriptive right to take water by over 20 years' user of the stream for purposes of water supply was for the court.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 77-81, 83, 89, 90; Dec. Dig. § 87.\*]

#### 5. APPEAL AND ERROR (§ 1062\*)—HARMLESS ERROR—QUESTION FOR JURY.

In an action for damages for excessive diversion of water by an upper riparian owner, where the jury found against defendant on the issue of its prescriptive right, error in submitting the question of such right to the jury was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4212-4218; Dec. Dig. § 1062.\*]

#### 6. WATERS AND WATER COURSES (§ 78\*)—PRESCRIPTION—PERSONS ENTITLED.

A water company incorporated under the general corporation act to supply water, and with whom, under P. L. 1888, p. 366 (3 Comp. St. 1910, p. 3647, § 669), municipalities were authorized to contract for a water supply, was not an aqueduct company affected by a public interest, since the permission to buy water bestowed no franchise upon it, and hence had no private right to divert water incidental to any franchise.

[Ed. Note.—For other cases, see *Waters and Water Courses*, Cent. Dig. §§ 67-69; Dec. Dig. § 78.\*]

Action by the Weidman Silk Dyeing Company against the East Jersey Water Company. On rule to show cause why a verdict for the plaintiff should not be set aside, and a new trial ordered. Rule discharged.

Argued June term, 1913, before GUMMERE, C. J., and PARKER and KALLISCH, JJ.

Griggs & Harding, of Paterson, N. J., for plaintiff. Michael Dunn, of Paterson, and Gilbert Collins, of Jersey City, for defendant.

PER CURIAM. [1] This case is similar in theory and in its main aspects to the case of *Weidman Silk Dyeing Co. v. Newark*, 83 N. J. Law, 50, 84 Atl. 273, and two other suits by the same plaintiff argued at February term 1913, 91 Atl. 335, 337, but not yet officially reported. Damages are claimed for excessive abstraction of water from the Passaic river or its watershed, above plaintiff's works, which as alleged, and as the jury evidently found, was a contributing cause of plaintiff's being obliged to make new arrangements for the supply that it formerly obtained directly from the river. Suits were brought against several abstracters of water, and the damages apportioned

according to plaintiff's theory that the several defendants should be held responsible for the same proportion of the total damage as their respective takings of water bore to the total taking.

It is now argued that the verdict was excessive, because it appeared that the injury resulted from the contributing negligence, not only of defendant in taking the water, but of other parties in polluting what was left with sewage, waste, etc., in such quantities as to make it unfit for the plaintiff's use. It was open to the jury to find that, notwithstanding the pollution, plaintiff could have still used the water but for the abstraction by the defendant and the defendants in the other suits, which collectively absorbed a large proportion of the entire flow for municipal water supply. Consequently the abstraction was a direct and proximate cause of the injury, though alone it would not have caused it. The argument is that the defendant should be held for only a portion of the verdict as rendered, and the remainder left to be recovered if possible against the various polluters. But this is not the law. The rule as stated in 38 Cyc. 488, is as follows:

"Where, although concert is lacking, the separate and independent acts or negligence of several combine to produce directly a single injury, each is responsible for its entire result, even though his act or neglect alone might not have caused it."

This rule is adopted and applied in such decisions as *Newman v. Fowler*, 37 N. J. Law, 89, and *Matthews v. D., L. & W. R. R. Co.*, 56 N. J. Law, 34, 27 Atl. 919, 22 L. R. A. 261.

[2] When the plaintiff had to turn elsewhere for its main supply, it was obliged to contract for a minimum consumption throughout the year. At times it did not need this; but it still had to pay for it. At other times it used and paid for more than the minimum. It is now claimed that (as we understand the argument) no more than the minimum annual charge should be made, because the excess amounts in low water should be offset against the unused minimum in times of high water. We fail to see the force of this argument. The agreement to pay for a minimum the year round was only another form of paying for the privilege of taking such water as plaintiff needed up to the minimum, and was entirely distinct from the supercharge in excess of that minimum. So, as plaintiff to get water at all had to take it on those terms, the actual cost of getting what water it needed (which was the minimum plus supercharge) was a legitimate element of damage.

[3] We consider that interest on amounts actually expended in making good the damage and recoverable in the suit was under the circumstances a fair element of compensation

We are unable to see that the amount of the verdict is inconsistent with the theory that allowance was made for the more valuable rights acquired under the new contract.

[4-6] A new point is made, viz.: That defendant had acquired a prescriptive right to take water by over 20 years' user of the river for purposes of water supply. The trial judge left this question to the jury. We think he went too far and should have decided against such prescriptive right as a court question; but, as the jury evidently found against the defendant on this score, no harm is done, and the verdict is justified. Counsel practically concede that such a right cannot be acquired in gross, but rely on the remark of Mr. Justice Pitney, speaking for the Court of Errors and Appeals in *Mitchell v. D'Olier*, 68 N. J. Law, 380, 53 Atl. 468, 59 L. R. A. 949, as follows:

"The English rule seems to be well founded both in reason and authority. It forbids, in ordinary circumstances, the existence of a private easement in gross. The 'rights of way' of a railroad company and the right to divert water, as held by an aqueduct company, stand upon a footing of their own; such rights being, by express legislative sanction, annexed to the franchise in whose aid they are held."

The answer to this is that the East Jersey Water Company is not an "aqueduct company" affected by a public interest, but a corporation organized under the general corporation act, and which trades in water, so it is not within the rule. Counsel, realizing this difficulty, cite the act of 1888, authorizing municipalities to contract for water supply with any water company or other company, contractor, or contractors. P. L. 1888, p. 366; 3 Comp. St. 1910, p. 3647, § 669. This is merely a legislative permission to buy water, and bestows no franchise of any kind upon the seller.

Upon the whole we do not find the damages plainly excessive, nor do we see anything in any of the points discussed that calls for a retrial.

The rule to show cause will be discharged.

(123 Md. 310)

MAYOR AND CITY COUNCIL OF BALTIMORE et al. v. WOLLMAN et al.  
(No. 21.)

(Court of Appeals of Maryland. May 6, 1914.  
Rehearing Denied June 26, 1914.)

1. MUNICIPAL CORPORATIONS (§ 112\*)—ORDINANCES—TITLE—SUFFICIENCY.

The title of an ordinance of the city of Baltimore entitled "An ordinance to repeal sections 4, 13, 16, 17, 112 and 113 of the Baltimore City Code of 1906, art. 23, title 'Markets' and reordain the same with amendments" sufficiently enumerates the sections of the Code to be repealed and re-enacted.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 258-262; Dec. Dig. § 112.\*]

2. MUNICIPAL CORPORATIONS (§ 112\*)—ORDINANCES—TITLE—SUFFICIENCY.

It is only the subject-matter of an ordinance that need be described in its title, which

need not indicate the details, agency, or means by which the subject of the ordinance is to be carried into effect.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 258-262; Dec. Dig. § 112.\*]

#### 8. MUNICIPAL CORPORATIONS (§ 62\*)—DELEGATION OF POWER.

Legislative or discretionary powers, devolved by law or charter on the council or governing body of a municipality, cannot be delegated, but ministerial or administrative functions may be delegated.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 153, 154; Dec. Dig. § 62.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 62\*)—DELEGATION OF POWER.

The state may expressly authorize delegation of powers by a municipal corporation, but, in the absence of such express authority, the council of a municipality must itself exercise all discretionary powers.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 153, 154; Dec. Dig. § 62.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 720\*)—MARKET STALLS—FIXING RENT—DELEGATION OF POWER.

The fixing of the rent of market stalls in the city of Baltimore is an administrative function, which may be delegated to the clerks of the markets, as provided by an ordinance of the city.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1536-1541; Dec. Dig. § 720.\*]

#### 6. CONSTITUTIONAL LAW (§ 121\*)—MUNICIPAL CORPORATIONS (§ 720\*)—IMPAIRING OBLIGATION OF CONTRACTS—MUNICIPAL ORDINANCES—CONSTRUCTION.

An ordinance of the city of Baltimore relating to markets which authorizes the clerks of the several markets, with the approval of the board of estimates, to fix the rent of all stalls or places in any market, providing that no rent shall be charged for street stalls, the occupants of which shall pay an annual license fee and an annual charge in lieu of the per diem previously provided for, must be construed to apply only to stalls as to which the rent is not fixed by contract, and, so construed, its enforcement will not impair the obligation of any contract.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 285, 304-311. 342-348; Dec. Dig. § 121.\* *Municipal Corporations*, Cent. Dig. §§ 1536-1541; Dec. Dig. § 720.\*]

#### 7. MUNICIPAL CORPORATIONS (§ 720\*)—MARKETS—ORDINANCES—VALIDITY.

An ordinance of the city of Baltimore regulating markets, and providing that license fees shall be due as of May 1, 1913, can only operate prospectively, and, when so construed, it is not invalid on the ground that license fees provided for are made payable as of May 1st, while the ordinance was passed on July 25th following.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1536-1541; Dec. Dig. § 720.\*]

#### 8. MUNICIPAL CORPORATIONS (§ 720\*)—MARKETS—ORDINANCES—VALIDITY.

Baltimore City Charter, § 59, providing that all licenses imposed by ordinance shall be due and payable the first week of January in each year, applies only to license taxes, and not to market licenses imposed by ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1536-1541; Dec. Dig. § 720.\*]

#### 9. MUNICIPAL CORPORATIONS (§ 63\*)—ORDINANCES—VALIDITY.

The necessity and reasonableness of an ordinance, passed in pursuance of charter powers, are primarily committed to the council, and, unless an ordinance is purely arbitrary, oppressive, or capricious, the courts will not prevent its enforcement.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 155, 1378, 1879; Dec. Dig. § 63.\*]

#### 10. MUNICIPAL CORPORATIONS (§ 720\*)—ORDINANCES—VALIDITY.

An ordinance of the city of Baltimore regulating markets and authorizing the clerks of the several markets, with the approval of the board of estimates, to fix the rent of all stalls, the occupants of which do not pay an annual license and charge, and which imposes an annual charge amounting to a little more than the ten cents per day formerly charged, and fixing an annual license of \$10, is not invalid as excessive, arbitrary, or unreasonable.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1536-1541; Dec. Dig. § 720.\*]

Appeal from Circuit Court No. 2 of Baltimore City; James P. Gorter, Judge.

"To be officially reported."

Suit by Edward C. Wollman and others against the Mayor and City Council of Baltimore and another. From a decree granting relief, defendants appeal. Reversed, and bill dismissed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

S. S. Field, City Sol., of Baltimore (Robert F. Leach, Jr., Asst. City Sol., of Baltimore, on the brief), for appellants. Isaac Lobe Straus, of Baltimore (Robert H. Carr, of Baltimore, on the brief), for appellees.

BRISCOE, J. The present appeal involves the validity and the construction of Ordinance No. 332, passed by the mayor and city council of Baltimore city, approved July 25, 1913, and the several provisions thereof, prescribing certain regulations of the markets in Baltimore city.

The ordinance in question is set out in the record as Plaintiff's Exhibit No. 1, and its title is as follows:

"An ordinance to repeal sections 4, 13, 16, 17, 112 and 113, of the Baltimore City Code of 1908, article 23, title 'Markets,' and reordain the same with amendments."

The plaintiffs below are owners, tenants, and licensees of certain stalls in the markets of the city, and seek by this proceeding to enjoin and restrain by injunction the defendants below from in any way enforcing the ordinance, upon the ground that it is unconstitutional, illegal, and void.

The case was heard upon bill, answer, and proof, and the court below held certain sections of the ordinance to be invalid, null, and void, and from its decree, dated the 1st day of December, 1913, directing an injunction to issue restraining the defendants from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

enforcing the provisions of the sections of the ordinance which were declared invalid, this appeal has been taken.

The court below, by the decree appealed against, held and declared that section 1 of the ordinance, in so far as it repealed and reordained, with amendments, sections 13, 16, and 17 of article 23 of the Baltimore City Code of 1906, title 'Markets,' to be invalid, and that said sections 13, 16, and 17 of article 23 of the Baltimore City Code of 1906, as ordained or attempted to be ordained or be reordained by said section 1 of the ordinance, was invalid, null, and void. Section 3 of the ordinance was also declared to be invalid and void.

The validity of the ordinance is assailed upon a number of grounds, and these objections are set out at considerable length in the plaintiffs' bill. The bill, in substance, charges, as stated by the appellants in their brief: (1) That the title of the ordinance is insufficient; (2) that the fixing of rents for the market stalls is a legislative function, which could not be delegated to the clerk, with the approval of the board of estimates; (3) that the ordinance impairs the obligations of contracts; (4) that said ordinance will produce revenue in excess of the expenses of the markets; (5) that section 3, requiring the license year to date from May 1, 1913, which was prior to the passage of the ordinance, renders the ordinance void; (6) that the charges are arbitrary and unreasonable; and (7) that the ordinance is void because it makes the license date from May 1st instead of January 1st, under section 59 of the charter.

We shall consider these objections in the order as named, and as set out in the bill, in so far as it may be necessary, for the purposes of the conclusion we have reached in the case. Some of them have been settled by previous decisions of this court, and need but a passing comment.

[1] As to the title of the ordinance in question, we need only say, that we think its subject-matter is sufficiently set out and described in the title to answer the requirements of the charter and of the Constitution. It will be seen that sections 4, 13, 16, and 17 are Code sections of the Baltimore City Code of 1906, and they are codified under the head of, part 1, "General Provisions Relating to Markets," as article 23 of the Code. Ordinance No. 332, now under consideration, repeals and reordains these Code sections with amendments, and it is difficult to see how any one could be misled by the title in this ordinance as to the sections of the Baltimore City Code dealt with, and intended to be repealed and the amendments thereto.

[2] It is well settled by the numerous cases dealing with this subject that it is only the subject-matter of the act that need be described in the title, and the title need not

indicate or disclose the details, agency, or means by which the subject of the act is to be carried into effect. *Bond v. Baltimore*, 116 Md. 689, 82 Atl. 978; *Levin v. Hewes*, 118 Md. 626, 86 Atl. 233; *Worcester Co. v. School Comm'rs*, 113 Md. 307, 77 Atl. 605; *Gould v. Baltimore*, 120 Md. 534, 87 Atl. 818.

The object and purpose of the ordinance in question, as its title disclosed, was to repeal certain sections of the Baltimore City Code of 1906, article 23, title "Markets," and to reordain them, with certain amendments.

The amendment to section 4 of article 23 of the City Code transfers the duty of cleaning the market from the clerks of the market to the Commissioner of Street Cleaning and provides as follows:

"4. It shall be the duty of the commissioner of street cleaning to see that all of the markets of Baltimore city are kept well cleaned and free from dirt, filth, snow and rubbish. He shall perform such duties and obey such rules and regulations in respect to keeping the markets clean as may be prescribed from time to time by the board of estimates."

The amendment to section 13 of article 23 of the City Code provides that the market clerks, with the approval of the board of estimates, shall have power to fix the rent of all stalls in any market of Baltimore city, instead of the clerks of the several markets with the consent of the mayor.

Code, art. 23, § 13, was as follows:

"13. The clerks of the several markets, with the consent of the mayor, shall have power to fix the rent of all stalls, stands and benches, not enumerated in this article, provided, that the rent for all street stalls in all markets shall be five dollars (\$5) per annum, including license."

Code, § 13, as amended, reads as follows:

"13. The clerks of the several markets, with the approval of the board of estimates, shall have power to fix the rent of all stalls, stands, shambles, benches or places in any market of Baltimore city; provided that no rent shall be charged for street stalls, the occupants of which shall pay an annual license, and an annual charge in lieu of per diem, hereafter provided for. But nothing in this section shall prevent the mayor and city council of Baltimore, at any time hereafter, from fixing by ordinance, the rent of all stalls, stands, shambles, benches or places in any market of Baltimore city."

It is contended upon the part of the plaintiffs below that "the fixing of rent" of market stalls is a legislative, and not an administrative, power and duty, and cannot be lawfully delegated by the mayor and city council of Baltimore to the clerks of the markets, with the approval of the board of estimates, as provided by the ordinance.

The court below held that the delegation of power or duty as contained in the amendment to section 4 of the ordinance was a ministerial or administrative function, and that this amendment was valid, but struck down the amendment to section 13, as a legislative function which could not be delegated.

By section 6 of the city charter (Acts 1898, c. 123) the mayor and city council of Balti-

more is given very broad powers "to license, tax, and regulate all businesses, trades, avocations or professions;" "to erect, regulate, control and maintain markets and stalls, within the city of Baltimore;" "to lease, sell or dispose of any stalls or stands in any market in such manner and upon such terms as it may think proper."

[3, 4] The rule is plain and well established that legislative or discretionary powers or trusts devolved by law or charter on a council or governing body cannot be delegated to others, but ministerial or administrative functions may be delegated to subordinate officials.

In 28 Cyc. 277, it is said the general rule seems to be that powers which are not imperative may be delegated by the common council to some subordinate body or officer. It is now the recognized rule that the state may expressly authorize delegation of certain powers by the corporation. In the absence of such express authority, the council must itself exercise all discretionary powers, but this does not forbid the delegation of ministerial or administrative functions to subordinate officials.

In *Hitchcock v. Galveston*, 96 U. S. 341, 24 L. Ed. 659, the Supreme Court, in dealing with a delegation of power by ordinance, said:

"If the city council had lawful authority to construct the sidewalks, involved in it was the right to direct the mayor and the chairman of the committee on streets and alleys to make a contract on behalf of the city doing the work. \* \* \* It is true the council could not delegate all the power conferred upon it by the Legislature, but, like every other corporation, it could do its ministerial work by agents. Nothing more was done in this case," and "there was therefore no unlawful delegation of power."

The right to delegate power by municipal authorities rests upon the same principle and is controlled in the same way as the delegation of legislative power by the state. *Jacksonville v. Ledwith*, 26 Fla. 193, 7 South. 885, 9 L. R. A. 69, 23 Am. St. Rep. 558; *Coolley on Constitutional Limitations*, 294; *Gregg v. Laird*, 121 Md. 1, 87 Atl. 1111; *People v. Trunk Ry. Co.*, 232 Ill. 292, 83 N. E. 839; *Charleston v. Goldsmith*, 2 Speers (S. C.) 428; *Baltimore City v. Gahan*, 104 Md. 152, 64 Atl. 716.

[5] We think that fixing the rent of market stalls in the city of Baltimore is an administrative, and not a legislative, function, and may be delegated to the clerks of the markets, as provided by the ordinance in question. The power to rent the stalls in the markets of Baltimore city was delegated by ordinance approved April 11, 1797, to the clerks of the several markets, and the power has been continued in some form by subsequent city legislation. City Code, 1869, 1879, 1893, and 1906.

In *Jacksonville v. Ledwith*, 26 Fla. 193, 7 South. 885, 9 L. R. A. 69, 23 Am. St. Rep. 558, a public market ordinance containing somewhat similar provisions as those in section

13 of this ordinance was sustained and held valid. The ordinance contained the following provision:

"That stalls, tables or space in this market shall be rented to butchers or others desiring to hire the same by the month or such longer period as may be desirable, upon such terms and for such sums as the board of public works shall determine." *Kramrath v. City of Albany*, 127 N. Y. 575, 28 N. E. 400.

[6] We come now to Code, §§ 16, 17, as amended by the ordinance. Section 16, as amended, deals with the per diem charge, and, as stated, imposes an annual charge in lieu of the ten cents per day formerly collected, or supposed to be collected, by the market clerk, the annual charge to be payable either all at once or monthly to the comptroller, this annual charge amounting to a little less than the per diem formerly chargeable; but the amended ordinance puts this charge on all the stall owners, not excepting the butchers, heretofore excepted in the prior provision.

Section 17, as amended, deals with the license charge, and fixes the amount of the annual license at \$10 instead of \$5, and substitutes the board of estimates for the mayor. It is a copy of Code, § 17, with the exception that the license is made \$10 per annum instead of \$5, and the board of estimates is substituted for the comptroller.

These sections, we think, are free from the objections urged against them, and the court below committed an error in holding them invalid.

The mayor and council could not by ordinance authorize the clerks of the markets, with the approval of the board of estimates, to increase the rent of any stall, where the annual rent had been fixed by the contract of sale and purchase. It is admitted by the appellants that the ordinance only empowers the fixing of the rent of all stalls not fixed by contract. The ordinance as thus construed—that is, as applying only to stalls as to which the rent is not fixed by contract—would not be open to the contention that its enforcement would impair the obligation of a contract, and with this construction it will not be necessary for us to discuss further this objection to the ordinance.

As was said by this court, in *Bond v. M. & C. C. of Baltimore*, 116 Md. 690, 82 Atl. 978, it cannot be assumed in this case that the city will undertake to condemn or take property for purposes other than those authorized by law. The presumption is that the city will act within its rights, and not beyond them.

[7] Section 3 of the ordinance provides that the license fees hereinbefore provided for shall be due and payable as of May 1, 1913. The ordinance was approved on July 25, 1913.

It is earnestly insisted that this section is invalid: First, because it retroactively changes vested rights conferred by existing laws; and, secondly, because it is in con-

sist with section 59 of the city charter, which provides:

"That all licenses imposed by ordinances shall be due and collectible in the first week in January in each year, and it shall be the duty of said collector of water rents and licenses to see that said licenses were paid at that time."

While we do not think that the market license fees provided for by the ordinance can be payable and collectible as of May 1, 1913, under an ordinance passed and approved on July 25, 1913, there can be no difficulty, however, in holding that the ordinance would take effect and operate prospectively. At least this objection would not be a ground or reason for holding the ordinance as invalid in this case and thus declaring it void.

[8] Nor do we think that section 59 of the charter, set out herein, applies to market licenses. In *Meushaw v. State*, 109 Md. 92, 71 Atl. 457, we held that this section applies to purely license taxes. The license fee, as provided by the ordinance, is for the use of a stall \* \* \* for a definite period, and the license is also evidence of title in the grantee or assignee thereof to the stall, \* \* \* and does not fall within the provisions of section 59 of the city charter. The section provides that it shall be the duty of the collector of water rents and licenses to see that the licenses are paid at that time, and it appears, therefore, that this section applies to licenses to be collected by the collector of water rents and licenses, and not to market license. Market licenses in the city of Baltimore have been collected for many years by the comptroller, and have been dated as of May 1st: City Code 1906, art. 23, §§ 71, 101; sections 82, 91, and 92, as amended by Ordinance 283, May 20, 1907.

[9] The fourth and sixth objections are clearly without force. The necessity and reasonableness of an ordinance when passed in pursuance of the charter powers of a municipality is primarily committed to the council, and, unless the ordinance is purely arbitrary, oppressive, or capricious, the courts will not interfere to prevent its enforcement. *Gould v. Baltimore*, 120 Md. 534, 87 Atl. 818; *Richmond R. R. v. City of Richmond*, 96 U. S. 521, 24 L. Ed. 734; *Meushaw v. State*, 109 Md. 91, 71 Atl. 457; *Etchison v. Mayor of Frederick*, 123 Md. 283, 91 Atl. 161.

[10] We find nothing in the terms or provisions of the ordinance here in question that would authorize a court to declare the charges as fixed as excessive, arbitrary, or unreasonable. It appears that, as to all the eave stalls and the permanent stalls, they are only \$5 a year more than they were before; as to the butchers, who pay the most, the highest that any one pays is only \$48 a year altogether, or 16 cents per day.

It therefore follows, for the reasons we have stated, that the court below committed an error in holding sections 1 and 3 of the ordinance here in question as invalid, and

in granting an injunction to restrain its execution and enforcement.

The decree will be reversed, and the bill dismissed.

Decree reversed, and bill dismissed, with costs.

(123 Md. 249)

WEILBACHER v. J. W. PUTTS CO. (No. 29.)  
(Court of Appeals of Maryland. April 8, 1914.)

1. MASTER AND SERVANT (§ 316\*)—LIABILITY TO THIRD PERSONS—INDEPENDENT CONTRACTOR.

The owner of a building contracted with a painter to paint it, he to furnish the appliances and employ the labor therefor, the owner not retaining any supervision of the work or any control over the men, and the contractor used a stage fastened by guy lines which were not tight enough, and which allowed the stage to slip, so that he fell therefrom and struck plaintiff as she was passing on the sidewalk below. *Held*, that the negligence was the negligence of an independent contractor, for which the owner was not liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.\*]

2. MASTER AND SERVANT (§ 316\*)—INDEPENDENT CONTRACTORS—PUBLIC NUISANCE—ENDANGERING PUBLIC STREET.

The owner of a building employed an independent contractor to paint it, and the contractor negligently fastened the guy ropes so that the stage on which he was painting slipped, and he fell and struck plaintiff on the sidewalk below. It appeared that the work was done in the usual way, and there was no evidence that it was customary to erect guards over sidewalks above which men were painting from a suspended stage during the work. *Held* that, while an abutting owner causing a nuisance to be erected on his property, is not excused from liability for an injury therefrom to a person using the street because he employs an independent contractor to do the work, yet, as the suspension of the stage above the sidewalk was not such a menace to the safety of those using it as to amount to a nuisance, the owner was not liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1242, 1243; Dec. Dig. § 316.\*]

3. MASTER AND SERVANT (§ 321\*)—INDEPENDENT CONTRACTORS—USE OF BUILDING—ENDANGERING PUBLIC STREETS.

Such conditions were not such that the injury might have been anticipated by the owner as the probable consequence of the work if he failed to take proper precaution to prevent it, and hence the owner was not liable; although, if the injury had been such that he should have anticipated it, he would have been liable.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1262; Dec. Dig. § 321.\*]

4. MASTER AND SERVANT (§ 321\*)—INDEPENDENT CONTRACTORS—PUBLIC NUISANCE—ENDANGERING PUBLIC STREET.

The duty of the owner of property abutting on a highway not to create a nuisance on the highway endangering the public use thereof does not make him an insurer against injury to the public or require him to provide against all possible injury, and did not require him, on employing an independent contractor to paint the building, to see that the guy ropes used by the contractor to fasten a stage were properly tied.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 1262; Dec. Dig. § 321.\*]

**5. MASTER AND SERVANT (§ 332\*)—INDEPENDENT CONTRACTORS—ACTIONS AGAINST—QUESTION FOR JURY—USE OF PROPERTY—INJURY REASONABLY ANTICIPATED.**

The question whether an injury might reasonably have been anticipated by the owner of a building abutting on a public street as a probable consequence of work, such as painting and repairing, which he has done by an independent contractor is generally a question of fact for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.\*]

**6. MASTER AND SERVANT (§ 330\*)—ACTION FOR INJURY — PRESUMPTION AND BURDEN OF PROOF.**

Plaintiff, in an action for injury from being struck by an independent contractor who fell from a painter's stage suspended from defendant's building over the sidewalk, by reason of his negligent fastening of the guy ropes, had the burden of showing that defendant owner was guilty of negligence; and the mere fact that the contractor fell and injured him would not justify an inference of defendant's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.\*]

**7. MASTER AND SERVANT (§ 330\*)—ACTION FOR INJURY — PRESUMPTION AND BURDEN OF PROOF—"RES IPSA LOQUITUR."**

The maxim "res ipsa loquitur," meaning that, although there must be reasonable evidence of negligence, yet where the thing is shown to be under the management of defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those in control use proper care, affords reasonable evidence, in the absence of explanation, that the accident arose from want of care, could not apply to the owner of a building who had no control over a contractor engaged in painting it, through whose negligence plaintiff was injured.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6136-6139; vol. 8, p. 7787.]

**8. MASTER AND SERVANT (§ 330\*)—ACTION FOR INJURY—EVIDENCE.**

In an action for damages by being struck by an independent contractor who fell from a staging suspended over the sidewalk by reason of his own negligence in fastening the guy ropes, where the president of the defendant owner testified for plaintiff that the contract for painting was given to the contractor and that the owner had nothing to do with the work, did not employ the men engaged in it, or control the methods, the plaintiff had a right to ask on redirect who owned the appliances used in the work, but not to inquire whether defendant took any precaution to safeguard travel on the sidewalk below; since the latter question did not relate to any matter covered by the cross-examination.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.\*]

**9. MASTER AND SERVANT (§ 330\*)—ACTION FOR INJURY — EVIDENCE — RELEVANCY — SIMILAR OCCURRENCE.**

Evidence as to whether witness had ever known paint buckets, brushes, or ropes to fall from ladders or scaffolds used in painting buildings was irrelevant and inadmissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1270-1272; Dec. Dig. § 330.\*]

**10. EVIDENCE (§ 472\*)—OPINION EVIDENCE—ENDANGERING USE OF SIDEWALK.**

Where witnesses stated that it was not generally necessary to erect barriers on the sidewalk to prevent persons from using it when painting from a suspended stage, and that he had never seen a man fall from a stage, his opinion as to whether the suspension of the stage above the sidewalk made the sidewalk dangerous or more dangerous was incompetent, since it was the very question the jury had to decide on all the evidence in the case.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2186-2195, 2248; Dec. Dig. § 472.\*]

**11. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.**

The exclusion of such opinion, if error, was harmless, where it appeared that the witness had seen a man fall from a different kind of scaffold, which fact would not have aided the jury in determining whether there was any reason for defendant to anticipate injury from the falling of a man from a staging such as was used in the present case.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

Appeal from Baltimore City Court; Henry D. Harlan, Judge.

"To be officially reported."

Action by Carrie P. Wellbacher against the J. W. Putts Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

R. Lee Shingluff and Thomas Foley Hisky, both of Baltimore, for appellant. Clarence A. Tucker, of Baltimore (Samuel J. Harman, Charles H. Knapp, and Joseph N. Ulman, all of Baltimore, on the brief), for appellee.

THOMAS, J. This suit was brought to recover for injuries alleged to have been caused by the negligence of the J. W. Putts Company, a corporation, the defendant below and appellee in this court, and, as the case was withdrawn from the jury at the close of the plaintiff's testimony, on the ground that there was no "evidence in the case legally sufficient to entitle the plaintiff to recover under the pleadings," it will be necessary to refer to the pleadings and evidence.

The declaration contained three counts, each one of which was demurred to. The court below overruled the demurrers to the first and third counts, and sustained the demurrer to the second count. The second count was amended, and the case was tried on the issues joined on the first, third, and amended second counts, with the result stated.

The first count alleges that the defendant was, on the 25th of September, 1911, the owner and in possession of the store and premises on the northwest corner of Park avenue and Fayette street, two of the public streets of Baltimore city, and, for the purpose of repairing and painting the building, caused "a large ladder or scaffold to be suspended from



the roof of said building, over and above the sidewalk along said building on Park avenue, in a negligent and unskillful manner, in that the defendant, its servants and agents, neglected to make said scaffold fast by proper guy lines," and that, as a result of such neglect, the ladder or scaffold slipped, and one of the defendant's servants, who was working on the ladder, was precipitated to the sidewalk, and, in falling, struck the plaintiff, who was passing along the sidewalk, and seriously and permanently injured her.

The amended second count charges that the injury to the plaintiff was caused by the negligence of the defendant, "its agents and servants, in erecting, using, and operating said ladder or scaffold, in that the defendant, its agents and servants, in charge thereof negligently failed and omitted to properly fasten said ladder or scaffold with guy lines," by reason of which negligence the defendant's servant "slipped and fell from said ladder" to the sidewalk, and struck the plaintiff.

The third count avers that the defendant caused the ladder or scaffold to be suspended from the roof of the building over and above the sidewalk for the purpose of painting the building; that the erection and use of the ladder or scaffold "endangered the travel" on the sidewalk, and that it became the duty of the defendant to "guard said work" and sidewalk for the protection and safety of persons using the sidewalk, which the defendant failed to do, and that by reason of said failure on the part of the defendant, the plaintiff, while passing along the sidewalk, "was struck by the defendant's servant in falling from said ladder," and seriously injured.

It appears from the evidence in the case that the appellee owned, and was conducting, a store in the building on the northwest corner of Park avenue and Fayette street, two of the public streets of Baltimore city, and in August, 1911, contracted with Crooks, Zick & Co. for the painting of the outside or exterior wood and metal work of the building. Crooks, Zick & Co. submitted a bid for the work in writing on the 24th of August, and the bid was accepted by the defendant verbally. The building was six stories high, and the painting was done in the usual way from a "stage" or scaffold about 24 by 30 feet long (which resembles a ladder in a horizontal position with boards on it), suspended on the outside of the building above the sidewalk by ropes fastened to each end of the stage and attached to L-shaped hooks, which were hooked to the cornice of the building and kept in place by guy lines extending over the roof and tied to a chimney. On the day of the accident Zick, a member of the firm of Crooks, Zick & Co., the contractors, and two employes of the firm were engaged in doing the painting. After working in the morning they changed the position of the stage, so that at the time of the accident the stage,

was at the top of the fourth floor of the building, just outside of and about on a level with the cornice of a bay window which extended beyond the building line and over the sidewalk. Zick and one of the employes of the firm were on the stage, and Zick was kneeling with one knee on the stage and the other knee on the top of the bay window, when the rope slipped, one end of the stage was slightly lowered, and Zick lost his balance and fell to the sidewalk. The man on the stage with Zick did not fall, nor did anything fall from the stage, and the other employe of Crooks, Zick & Co., who was painting from the cornice above, testified that the lowering of one end of the stage, which caused Zick to lose his balance, was due to the fact that the guy rope was "not tied tight enough"—that is, it was not taut—and that as soon as it was "stretched tight enough" the stage stopped; that shortly before the accident he was on the roof of the building and noticed that the guy line was not "tied tight enough"; and that when he went down he told Mr. Zick so. In falling from the stage Zick struck the plaintiff's foot as she was walking along the sidewalk, and seriously injured her. The evidence further shows that the stage extended beyond the building line and over the sidewalk; that the defendant knew of the position of the stage, and did not erect any barrier on the street or "rope the street off" to prevent persons walking on the pavement under the stage; that defendant did not employ the men engaged in painting the building, had nothing to do with the methods used in the performance of the work, did not exercise any control "over the appliances, methods or men used or engaged in the work," and that the appliances belonged to Crooks, Zick & Co.

As we have said, the case was withdrawn from the jury at the close of the testimony offered by the plaintiff, so that in reviewing that ruling we are dealing with the case as presented by the pleadings and the plaintiff's evidence.

[1] The first and amended second counts of the declaration declare that the injury complained of was caused by the negligence of the defendant's servants in failing to make the stage or scaffold fast by "proper guy lines," and in neglecting to "properly fasten" the scaffold "with guy lines." The evidence shows that the accident was, as alleged, due to the fact that the guy lines were not properly fastened, or, as the witness expressed it, were not "tied tight enough," but it also shows that the work was not done by the defendant, but by Crooks, Zick & Co., who contracted to do it and furnish the appliances and employed the labor for that purpose, and that the defendant did not have supervision of the work or any control over the men engaged in it. The negligence of which the plaintiff complains in the first two counts was not, therefore, the negligence of the defendant or its servants, but the negligence

of the servants of an independent contractor, for which the defendant is not liable, unless the injury to the plaintiff resulted from its disregard or neglect of some duty that it owed to her and other persons using the sidewalk on which she was injured. *Deford v. State, Use of Keyser*, 30 Md. 179; *City & S. Ry. Co. v. Moores*, 80 Md. 348, 30 Atl. 643, 45 Am. St. Rep. 345; *Smith v. Benick*, 87 Md. 10, 41 Atl. 56, 42 L. R. A. 277; *Decola v. Cowan*, 102 Md. 551, 62 Atl. 1026; *P. & W. R. R. Co. v. Mitchell*, 107 Md. 600, 69 Atl. 412, 17 L. R. A. (N. S.) 974.

[2, 3] The free and unobstructed use of the public streets is a right that belongs to the public, and it is the duty of those owning and occupying property abutting on a highway to so use their property and keep it in repair as not to endanger the public while in the exercise of that right. If, therefore, an abutting owner causes a nuisance to be erected on his property and injury to a person using the street follows as the result of the *existence* of the nuisance, the owner is not absolved from liability because of the fact that he employed an independent contractor to do the work. In other words, if the injury be caused by the thing contracted to be done, the owner is responsible, but he is not liable for the negligence of the employés of the contractor in a matter collateral to the contract. Again, the person for whom work is done will be liable when the injury is such as might have been anticipated by him, as the probable consequence of the work, and he failed to take the proper precaution to prevent it, or where it results from his neglect to discharge a duty that he owes to third persons or the public in the execution of the work.

In *Deford's Case*, according to the evidence offered by the plaintiff, the wall on the defendant's property, fronting on a public street, was erected in such a defective and dangerous manner that it constituted a nuisance, and Judge Alvey said:

"If this be so, it [the wall] certainly constituted a nuisance, for which the defendant would be liable. And the fact that the wall was erected by others, under contract, and to whom he did not bear the relation of master, will not excuse him; for, as was said by Lord Campbell, in *Ellis v. Gas Consumers' Co.*, 2 E. & B. 767, it is a proposition absolutely untenable that in no case can a man be responsible for the act of a person with whom he has made a contract. If the contractor does the thing which he is employed to do, the employer is responsible for that thing as if he did it himself."

Judge Alvey then adopts the statement of Baron Wilde in *Hole v. R. R. Co.*, 6 Hurl. & Nor. 488:

"The distinction appears to me to be that, when work is being done under a contract, if an accident happens, and an injury is caused by negligence in a matter entirely collateral to the contract, the liability turns on the question whether the relation of master and servant exists."

In *City & S. Ry. Co. v. Moores*, supra, the court, speaking through Judge Boyd, said:

"Even if the relation of principal and agent, or master and servant, do not, strictly speaking,

exist, yet the person for whom the work was done may still be liable if the injury is such as might have been anticipated by him as a probable consequence of the work let out to the contractor, or if it be of such character as must result in creating a nuisance, or if he owes a duty to third persons or the public in the execution of the work."

In *Mitchell's Case* the late Judge Schmuckler, after referring to *Deford's Case* and others, said:

"As a result of these cases it may now be said to be settled in this state that although, when the work is being done by an independent contractor, the employer will not be liable for an injury caused by negligence in a matter collateral to the contract, he will be liable if the injury be caused by the thing contracted to be done, or if it be such as might have been anticipated by him as a probable consequence of the work let out to the contractor, and he took no precaution to prevent it."

And in the case of *Baltimore v. O'Donnell*, 53 Md. 110, 36 Am. Rep. 395, where the appellee was injured by reason of the fact that there was no light or signal to warn persons of the dangerous condition of the street, the court held that the primary obligation was upon the city to keep the street in a safe condition, and that it could not commit that duty to a contractor so as to avoid liability for injury resulting from a failure to maintain a proper warning of danger.

Now, applying these well-established rules to the facts of this case, it is apparent that the plaintiff, much as her painful and serious injury is to be regretted, is not entitled to recover from the defendant, unless we are to hold that the suspension of the stage or scaffold above the sidewalk was such a menace to the safety of those using the street as to amount to a nuisance, or that the injury was one that might have been anticipated by the defendant as a probable consequence of having its building painted from a suspended stage or scaffold.

The evidence shows that the work was done in the usual way in which buildings located on public streets are painted; that the stage or scaffold was a "good" one; and that the accident was due entirely to the negligence of the servant of Crooks, Zick & Co. in not tying the guy line tight enough. There was no evidence to show that it was a common occurrence for a painter to fall from a suspended stage, or that it was customary to erect guards or covers over sidewalks above which men are engaged in painting a building from a suspended stage, or to "rope" the street so as to prevent persons from using the sidewalk during the progress of the work. On the contrary, the only evidence reflecting upon this feature of the case was the testimony of the witness Israel, who was engaged in painting the building at the time of the accident, and who testified that he had had 43 years' experience in such work, and that he had never seen a man fall from a painter's stage, and had never seen a stage fall to the sidewalk, that it was not necessary, as a general thing, to

erect barriers to prevent people from walking under the stage, and that after the accident he went back to work and used the same stage and same guy lines; and the testimony of James L. Thomas, who stated that he was a member of a firm engaged in house painting and decorating, and that the firm employed from 25 to 65 men, that he had been engaged in the business for 83 years, and that he had seen one man fall from a scaffold, but had never seen a painter fall from a swinging scaffold. This evidence not only tends to show that the suspended stage was not a nuisance, but also shows that there was no reason why the defendant should have anticipated or provided against injury to persons using the sidewalk.

In Deford's Case the plaintiff was injured by the falling of the wall of a house which was in course of erection by an independent contractor for Deford. There was no suggestion in that case that the erection of a building fronting on the sidewalk of a public street was a nuisance, but Deford's liability was based by the court upon the evidence that the particular wall in question was constructed in such a *dangerous* and defective manner that it became and was a nuisance. And in Decola's Case the plaintiff was injured by a brick that fell from a house which Cowan, the contractor, was erecting for and on the property of the North Baltimore Construction Company. The suit was abandoned as to the owner of the property, and this court said that there was no evidence in the case to make the company liable for the injury. The court could not have decided as it did in those cases if the erection of a house fronting on the sidewalk of a public street is a nuisance; yet it is a matter of common knowledge that the erection of such buildings is attended with *some risk*, and that appliances extending over and above the sidewalk are employed in the execution of the work. In the case of Boomer v. Wilbur et al., 176 Mass. 482, 57 N. E. 1004, 53 L. R. A. 172, the owner of a house employed a contractor to repair a chimney, and the plaintiff was injured by the falling of a brick during the performance of the contract. The court there said:

"The instructions to the jury allowed them to find a verdict for the plaintiff, \* \* \* upon the ground, that the work of repair called for by the contract was necessarily a nuisance within the rule stated in Woodman v. Railroad Co. [149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427], ubi supra, and other similar cases. The work called for was the repair of chimneys. At most, the brick were to be taken off for a few feet and relaid. The work which was to be done was not such as would necessarily endanger persons in the street. It did not involve throwing the brick into the street, or causing or allowing them to fall so as to endanger persons traveling therein. It is plain that, unless there was negligence in the actual handling of the brick, there could be no injury to the passing traveler. \* \* \* This is not a case where the work, if properly done, creates a peril, unless guarded against as in the cases re-

lied upon by the plaintiff. The accident was caused by the act of the contractor in doing what it was not necessary for him to do, what he was not expected to do, and what he did not intend to do. If it had been necessary for him to topple the chimney over into the street, or to remove the bricks by letting them fall into it, or the contract had contemplated such action, the instructions would not have been objectionable; but, as this was not necessary or intended, the work could not be classed as work which, if properly done, was ordinarily attended with danger to the public. The negligence, if any, was in the mere detail of the work. The contract did not contemplate such negligence, and the negligent party is the only one to be held."

In the case of Laffery v. Gypsum Co., 83 Kan. 349, 111 Pac. 498, 45 L. R. A. (N. S.) 930, Ann. Cas. 1912A, 590, the court, after referring to the general rule which exempts the employer from liability where the work is done by an independent contractor, and to the exception to that rule in cases where the work is intrinsically dangerous, however skillfully performed, said:

"No effort will be made to define precisely the expressions 'intrinsically dangerous' or 'inherently dangerous,' or like phraseology, as used in the authorities. Regard must be had to the reason of the principle and the consequences flowing from its application in the given situation. The mere liability to injury from doing the work cannot be the test, for injuries may happen in any undertaking, and many are attended with great danger if carelessly managed, although with proper care they are not specially hazardous."

After stating further that, although the erection of buildings in cities is attended with hazards, such work has not been regarded as coming within the rule applicable to work intrinsically dangerous, the court quotes with approval the statement of Mr. Chief Justice Cockburn in Bower v. Peate, L. R. (1876) 1 Q. B. Div. 321, that:

"There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted."

In the case of Geist v. Rothschild Co., 90 Ill. App. 324, the defendant employed a contractor to paint the wall of his store. The painting was done from a scaffold suspended from the top of the building, and the scaffold was lowered and raised by ropes at the end of the scaffold. The plaintiff was injured by the falling of the ropes, the slack ends of which were coiled on the scaffold, and were in some way knocked off and struck the plaintiff. The court there said that it was a daily occurrence in large cities like Chicago for the walls of buildings on its streets to be painted, and that the fact that it was necessary to suspend a scaffold over the street in order to do it did not make it a nuisance, if the scaffold was securely suspended; that there was nothing inherently dangerous in doing the work, provided it was done by competent persons in the usual and ordinary way; and that there

was no question of fact for submission to the jury in that connection. In the case of *Sartirana v. N. Y. County Nat. Bank*, 139 App. Div. 597, 124 N. Y. Supp. 197, the plaintiff was struck by a platform which was being lowered by means of a derrick on a building in course of construction by an independent contractor. The court held that the bank, the owner of the property, was not liable, and said:

"The work to be done here was no more intrinsically dangerous than the construction of a building along a public street usually is. \* \* \* The building was not of extraordinary height or at all out of the ordinary, so far as exterior construction was concerned, and, unless the owner is in every case bound to guard against possible injuries to passers-by, which is not the law, the bank could not be held liable for the negligence of a contractor."

See, also, *Mehler v. Fisch*, 65 Misc. Rep. 549, 120 N. Y. Supp. 807.

Without meaning to go to the full extent of some of the authorities cited in the application of the rules announced, applying the principles they established to the facts of this case, we cannot hold that the suspension of the stage or scaffold from the cornice of the defendant's building created a nuisance, or that the use of the stage in painting the building rendered the work so dangerous as to require the defendant to erect covers or guards over the sidewalk in order to protect persons walking thereon, or to erect barriers to prevent persons from using the sidewalk during the progress of the work. To do so would impose a useless burden upon property owners in cities, and subject the public to unnecessary inconvenience. Of course there is *some risk* incident to the projection of any object over a highway, but the duty of the owner of abutting property does not require him to provide against all *possible* injury, and it is only such injury as may be reasonably anticipated that he is bound to take precautions to prevent.

The appellant relies largely upon *Mitchell's Case* and the cases of *Doll v. Ribetti*, 203 Fed. 593, 121 C. C. A. 621, and *McHarge v. Newcomer*, 117 Tenn. 595, 100 S. W. 700, 9 L. R. A. (N. S.) 298. In *Mitchell's Case* the alleged injury was inflicted by a hammer which fell from a bridge being erected over one of the public streets of Havre de Grace, and struck the plaintiff's umbrella as she was passing along the street under the bridge, and the court said:

"There is evidence in the record tending to show that in the construction of such bridges, when the workmen are engaged in riveting the ties and braces between the girders composing the span, they are compelled to work with great rapidity in order to put the rivets in place and clench them while at a white or red heat, and as a result rivets, tools, and other articles handled with such rapidity frequently fall to the ground beneath and render it unsafe for travel, unless properly guarded. There is like evidence that in the construction of the bridge now in question such objects did, in fact, frequently fall upon the street below it, and that no precautions were taken to hinder the

public from passing under the bridge or to prevent the falling of the objects from it."

In the case of *McHarge v. Newcomer*, supra, the plaintiff, while passing along the street, was struck by a heavy awning roller which was "allowed by a party repairing the awning in some way shown to suddenly fall upon her." The defendants offered no evidence explaining the falling of the roller, but introduced proof to show that the awning was being repaired by an independent contractor. The Supreme Court of Tennessee held that the awning was a nuisance, and held further "that the work contracted for involved a thing intrinsically dangerous to the public, from which injuries to those using the street were probable and might reasonably be anticipated by the proprietor," and in conclusion said:

"The awning of the defendants, so far as it appears from this record, was being repaired by that contractor, over a much frequented street, in a populous city, and at a place where persons were constantly coming and going and standing, upon the invitation of the defendants, for the purpose of trading with them and taking the street cars, without any precautions taken to prevent portions of the awning, material, or tools from falling on those below."

In the case of *Doll v. Ribetti*, supra, the syllabus contains the following statement:

"Where defendant, a tenant of a building erected flush with the sidewalk, permitted the servant of an independent contractor to stand on the window ledges to clean windows on the outside without providing scaffolding or other safety appliances, and the servant fell and injured plaintiff, who was walking past the building, whether the tenant was negligent in not providing scaffolds or safety appliances was for the jury."

The statement of claim in that case charged:

"That in the said city of Pittsburg it had been a custom to have the windows of such buildings cleaned by persons standing outside of the sash and on the sills of the windows, secured from falling by a stout belt worn about the waist, with a strap on each side thereof, fastened to a hook or other fixture set for the purpose in the side frames or casing of each window."

It further averred "that the building occupied by the defendant was not, and never had been, provided with such hooks, or with any other fit or appropriate fixtures for the purpose stated," and that the defendant, long prior to the day of the accident, "knew, or, by the exercise of reasonable care, should have known, that the windows of the building were not equipped with the customary hooks or other appropriate fixtures," etc., and that, while the servant of the contractor was engaged in cleaning the window on the fourth floor of the building, he accidentally lost his balance and fell upon the plaintiff, who was walking upon the sidewalk below. The court said that the facts alleged in the statement of claim were for the most part undisputed, "and that there was evidence tending to support all of the allegations of fact upon which were based the charge of negligence of the defendant." In that case

therefore, the negligence of the defendant alleged and shown by the evidence was his failure to furnish the appliances and safeguards usually provided by the owner or occupier of a building to prevent those engaged in washing the windows from falling.

The distinction between those cases and the case at bar is obvious. Here the evidence shows that the accident was due to the failure of the servants of Crooks, Zick & Co. to properly fasten or tie the guy lines. There is no evidence to show that the defendant neglected to provide any safety appliance that was customarily supplied by the owner of the building, or that it was a common occurrence for painters to fall from a suspended stage or scaffold.

[4] The appellant contends that the defendant owed an absolute duty to the public not to interfere "with their right to the safe and unimpeded use of the sidewalk." The duty that the owner of property on a highway owes to the public is not to create a nuisance on the highway, and to take proper precautions to prevent injuries that may be anticipated as a *probable* consequence of work in which he, or his contractor, is engaged. But that duty did not make the defendant an insurer against injury to the public, or require him to provide against all possible injury, however remote, nor did it require the defendant to go on the top of its building to see that the guy lines used by the contractor were properly tied. In *City & S. Ry. Co. v. Moores*, supra, the plaintiff was injured by reason of her horse becoming frightened at a steam engine which was being used by White, an independent contractor, in the execution of certain work on a turnpike. After referring to the rule stated in *O'Donnell's Case*, supra, and *Ware's Case*, 16 Wall. 566, 21 L. Ed. 485, Judge Boyd said:

"But the evidence shows that the injury was sustained by the negligent use of the engine in not stopping it and in blowing the whistle as she [the plaintiff] approached. It would be carrying the obligation of the turnpike company beyond that required or authorized by the authorities to hold that its duty to the public required it to see that the servants of White were not thus negligent, although the use of the steam engine was not a nuisance per se, and could be operated so as not likely to do any injury to any one using the road. It would be requiring too much of it to make it take such precautions against accidents when letting out lawful work to an independent contractor. It must be admitted that the work to be done was lawful, and the company had the right to assume that there would not be such negligence as that complained of, which was entirely collateral to, and not a probable consequence of, the work contracted for. To hold the company to such a strict liability would practically forbid it from having such work done by contractors, as it would have to keep its own agents on engines to see that there was no negligence on the part of the contractors or their servants."

This statement of Judge Boyd's was quoted at length and approved in the later case of *Symons v. Road Directors*, 105 Md. 254, 65 Atl. 1067.

[6, 6] It is also urged on behalf of the ap-

pellant that the question whether the injury might reasonably have been anticipated by the defendant as a probable consequence of the work contracted to be done was one of fact for the jury. That, of course, is the general rule (*Bonaparte v. Wiseman*, 89 Md. 12, 42 Atl. 918, 44 L. R. A. 482; *P. B. & W. R. Co. v. Mitchell*, supra), but here we are considering the legal sufficiency of the plaintiff's evidence; the burden being upon her to show that the defendant was guilty of negligence. There was no evidence to show that the injury might have been anticipated as a probable consequence of the work in which the contractor was engaged. On the contrary, as we have said, the work was done in the usual way, and all the evidence tends to show that there was no reason why the defendant should have anticipated any injury to persons using the sidewalk. The mere fact that the servant of the contractor fell and injured the plaintiff would not justify an inference that the injury was caused by the negligence of the defendant, especially as it was shown to have been due entirely to the negligence of the contractor's servant, which the defendant had no reason to anticipate. *Joyce v. Flanigan*, 111 Md. 481, 74 Atl. 818.

[7] The maxim "*res ipsa loquitur*" cannot aid the plaintiff in this case. The man who fell and injured her did not fall from the defendant's building, but from the stage or scaffold, which was not under its management or control. The case most frequently referred to in this state as containing the true statement of the rule is the case of *Scott v. London Dock Co.*, 3 Hurl. & Colt. 596, where it is said:

"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or its servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." *Howser v. C. & P. R. R. Co.*, 80 Md. 146, 30 Atl. 906, 27 L. R. A. 154, 45 Am. St. Rep. 332; *Decola v. Cowan*, supra; *Walter v. Baltimore Elec. Co.*, 109 Md. 513, 71 Atl. 953, 22 L. R. A. (N. S.) 1178; *Ches. Iron Works v. Hochschild*, 119 Md. 303, 86 Atl. 345.

[8] Albert C. Putts, the president of the defendant, was called as a witness for the plaintiff, and was asked if the painting that was done on the defendant's building was not done by the defendant, and he answered, "Yes." He was then asked, "Your company was having the building painted?" To which he replied, "Yes we gave the contract to have it painted." On cross-examination he was asked by counsel for the defendant to whom the appliances used in connection with the painting belonged. The plaintiff objected to the question, but the court overruled the objection, and the witness answered that they belonged to Crooks, Zick & Co. After stating further that the defendant had nothing to do with the work, did not employ the

men engaged in it, and had no control over them or the appliances and methods used in doing the work, the witness was asked on redirect examination by counsel for the plaintiff if the defendant took "any precaution to safeguard the travel on the sidewalk," or did anything "to protect the pedestrians walking along the street under the ladder," which questions were objected to by the defendant, and the court refused to permit the witness to answer them. These rulings formed the subject of the first three exceptions. The witness having stated in his examination in chief that the painting "was done by" the defendant, and that the defendant "gave the contract to have it painted," the defendant had a right to have him explain, and to interrogate him as to the extent of the defendant's connection with the work. The questions asked in the second and third exceptions did not relate to any matter referred to in the cross-examination, and there was, therefore, no error in either of those rulings.

[9] The fourth, fifth, sixth, and tenth exceptions are to the refusal of the court below to permit the witness to say whether they had ever known paint buckets, brushes, or ropes to fall from ladders or scaffolds used in painting buildings. We see no error in these rulings. The plaintiff was not injured by the falling of a paint bucket or brush, and, even if proper care required the defendant to provide against injuries from such causes, it would not follow that it was its duty to anticipate injury from the falling of a man from the scaffold.

[10] Mr. Israel stated that it was not necessary as a general thing to erect barriers on the sidewalk to warn persons against using it when a building is being painted from a suspended stage, and that with 43 years' experience he had never known a man to fall from a stage. Mr. Thomas, who had been a painter for 33 years, testified that he had never seen a man fall from a swinging scaffold. They were asked by the plaintiff's counsel whether, in their opinion, the suspension of a stage above a sidewalk "made the use of" the sidewalk more dangerous or dangerous, and the seventh, eighth, and ninth exceptions are to the refusal of the court to permit those questions to be answered. The burden was on the plaintiff to show that the injury was such as might reasonably have been anticipated as a probable result of the work that was being done, and that could not be shown by the opinion of the witnesses that the suspended stage rendered the use of the sidewalk more dangerous or dangerous. That was the very question the jury had to decide upon all the evidence in the case, and it was incumbent upon the plaintiff to produce evidence from which the jury could infer that the suspension of the stage made the "use of" the sidewalk dangerous. There was nothing in the conditions surrounding

the scene of the accident that would suggest the propriety of allowing a witness who was familiar with those conditions to express an opinion as to whether the suspension of the stage rendered the use of the sidewalk unsafe, and the rule that allows a witness to state that a particular road with which he is familiar is in a dangerous condition should not, for obvious reasons, be applied in this case.

[11] But even if this is not so, it is not probable that the plaintiff was prejudiced by the rulings, for the witnesses had already stated that they had never known a man to fall from a swinging scaffold. Mr. Thomas was asked in the examination in chief if he had ever known a man to fall from a painter's scaffold, and he answered, "Yes." On cross-examination it developed that he did not mean that he had seen a man fall from a suspended scaffold, but that he had seen one fall from a different kind of scaffold, and the defendant then moved that his statement that he had seen a man fall from scaffold be stricken out, and the eleventh exception is to the granting of that motion. The question in the case was whether there was any reason to anticipate injury from the falling of a man from a ladder such as was used in painting the defendant's building, and the fact that a man had been known to fall from a different kind of scaffold would not have aided the jury in determining that question. It would not follow because a man had been known to fall from a different kind of ladder that a painter would likely fall from one of the kind referred to in this case. It might very well be that one could be used without any risk of injury to persons on the sidewalk while the other could not.

Finding no error in the rulings of the court below, the judgment will be affirmed.

Judgment affirmed, with costs to the appellee.

(245 Pa. 164)

#### CHAMBERS v. FOLEY.

(Supreme Court of Pennsylvania. April 27, 1914.)

#### DEEDS (§ 171\*)—COVENANTS—BUILDING RESTRICTIONS—VIOLATION.

The erection of a theater fronting on a certain street and covering the entire front of a lot is a violation of a restriction in a deed, providing that no building other than dwelling houses shall be erected on the lot, fronting on such street.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 450, 537-542; Dec. Dig. § 171.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by William W. Chambers against Walter C. Foley for an injunction to enforce a building restriction. From a decree awarding injunction, defendant appeals. Affirmed.

On final hearing, Ralston, J., filed the following opinion in the court below:

The restriction in the deed for defendant's lot provides "that no building shall be erected

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

thereon fronting on said Chester or Springfield avenues or on Fifty-Second street other than dwelling houses." It appears from the bill and answer and the evidence that the defendant proposes to erect on his lot a theater, fronting on Fifty-Second street, covering the entire Fifty-Second street front of the lot. This is in direct violation of the terms of the restrictions that no buildings shall be erected fronting on Fifty-Second street other than dwelling houses. The proposed building of the defendant is to extend along Chester avenue as far as Paxon street. The defendant claims that the building comes within the exception to the restriction which is in the following words: "This restriction shall not apply to so much of the ground as fronts on Chester avenue from Fifty-Second street to Paxon street, where other buildings of at least the same height and similar architecture to said dwelling houses may be erected."

It is not necessary to consider whether the theater proposed to be built would be contrary to this restriction as not being of similar architecture in the dwelling houses. The theater is on the ground fronting on Fifty-Second street and therefore within the words of the restriction, and its building would be a violation of the restriction in the defendant's deed.

The court awarded the relief prayed for. Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

E. Clinton Rhoads and Samuel R. Lazowick, both of Philadelphia, for appellant. John G. Johnson and Sidney E. Smith, both of Philadelphia, for appellee.

PER CURIAM. The decree is affirmed on the opinion of Judge Ralston.

(245 Pa. 206)

### In re ROGERS' ESTATE.

(Supreme Court of Pennsylvania. May 4, 1914.)

#### 1. WILLS (§ 612\*) — CONSTRUCTION — VESTING OF ESTATE.

A will giving the residue of testator's estate, real, personal, and mixed, "to my beloved wife \* \* \* for and during her natural life, with full power to sell or dispose of any of my real estate, securities of any and all kinds, in such manner as she may desire, with the request, however, that care be taken in the investment or reinvestment of any money that may not be actually required for living expenses, or other necessities, with the wish that she may at any and all times be liberal in regard to her own comforts, and not feel that it is necessary to be unduly economical, \* \* \*" vested the wife with an absolute estate in the personality and not merely with an estate for life with power to consume.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1387-1392, 1608; Dec. Dig. § 612.\*]

#### 2. WILLS (§ 610\*) — CONSTRUCTION — GIFT OF PERSONALTY.

The rule that a gift of personality for life without gift over, passes the whole estate is a mere rule of construction in aid of discovering testator's intention, and not a rule of law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1379-1385; Dec. Dig. § 610.\*]

Appeal from Orphans' Court, Montgomery County.

In the matter of the estate of Edward L. Rogers, deceased. From a decree dismissing

exceptions to the adjudication, Harriet M. Rogers appeals. Reversed.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and MOSCHZISKER, JJ.

James W. Laws, of Philadelphia, for appellant. H. Gordon McCouch, of Philadelphia, for appellee.

POTTER, J. [1] This is an appeal from the decree of the orphans' court of Montgomery county, dismissing exceptions to the adjudication in the estate of Edward L. Rogers, deceased. In his will the testator gave legacies of \$10,000 to each of his three children and provided as follows:

"And as to all the rest, residue and remainder of my estate, real, personal or mixed, of whatever nature or kind, or wheresoever situate at the time of my decease, I do hereby give, devise and bequeath to my beloved wife, Harriet M. Rogers, for and during her natural life, with full power to sell or dispose of any of my real estate, securities of any and all kinds, in such a manner as she may desire, with the request however that care be taken in the investment or reinvestment of any money that may not be actually required for living expenses, or other necessities, with the wish that she may at any and all times be liberal in regard to her own comforts and not feel that it is necessary to be unduly economical, especially so if my estate so warrants it."

There was no gift over of the estate.

[2] Upon the audit of the executor's account, the widow who had elected to take under the will, claimed that she was entitled to the residuary estate absolutely. The auditing judge, however, held that she was given only a life estate, with power of sale and the right to consume as much as may be actually required for living expenses and necessities. Exceptions filed by the widow were dismissed and the adjudication was confirmed. The widow has appealed. The general rule is that a gift for life without a gift over passes the whole estate. This is not a rule of law, but a rule of construction in aid of discovery of the testator's intention. *Tyson's Estate*, 191 Pa. 218, 43 Atl. 131. In that case, however, there was an absolute devise over, and the residue after the life estate passed under the will. In *Brownfield's Estate*, 8 Watts, 465, 469, the testator gave his wife "one-third of my personal estate, during her life, after my just debts paid," without any disposition over. Mr. Justice Kennedy said:

"The widow was entitled to receive it to dispose of as she pleased, there being no limitation over of it after her death."

In *Diehl's Appeal*, 36 Pa. 120, a testator gave to his wife a tract of land during her lifetime, "together with all my bonds and notes, to have and to hold the same. Also, all my personal estate, whatsoever will be left after my decease, to have and to hold the same during her natural lifetime"—without making any disposition over. It was held that the bonds and notes became the absolute property of the testator's widow.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



In *Shower's Estate*, 211 Pa. 297, 303, 60 Atl. 789, 791, our Brother *Mestrezat* said:

"We concede the rule invoked by the appellants that a gift of the income of an estate with no limitation over of the principal is an absolute gift of the property or fund itself."

In *Merkel's Appeal*, 109 Pa. 235, a testator gave to his wife "my remaining personal property, it may be money, or whatsoever kind it will to her full ownership as long as she doth live." He also provided:

"I recommend that my hereinafter named executor shall see after that her money does not become lost."

In disposing of this case Mr. Justice Paxson said:

"The language of the will above quoted is ample to vest the personal estate of the testator absolutely in his widow. It is a gift for life, without any limitation over, and without the intervention of a trustee. \* \* \* The recommendation to his executor to see that his widow's money 'does not become lost' are precatory words, and since *Pennock's Estate*, 20 Pa. 268, [59 Am. Dec. 718], have never been held sufficient to convert a devise or bequest into a trust."

In the present case the request that care be taken in the investment of the money is merely precatory, and the provision giving to the wife full power to sell or dispose of the estate is the controlling language of the residuary clause of the will. In *Freeman's Estate*, 220 Pa. 343, 69 Atl. 816, there was a provision which relieved the wife as life tenant from giving security, and it was held that if it had been intended to give an absolute estate, these words would be meaningless. Therefore they were regarded as sufficient to take the case out of the general rule.

In the present case, in a former clause of the will, after speaking of bequests which he had made to his two daughters, the testator makes further reference to "any other interest that may eventually come to them from my estate." We do not, however, regard these words as necessarily having the effect of limiting the wife to an estate for life. They may apply to real estate of which testator died seized, which would descend to the daughters if not consumed by the wife. These words might also apply to any portion of the personal estate which the daughters might eventually receive from their mother. The testator evidently contemplated the possibility that the widow would not consume the entire principal of the estate, in which event she would naturally bequeath part of it to her children, or in the event of her dying intestate they would inherit from her. There is also a presumption of the first taker having a fee, in spite of subsequent words which appear to be repugnant. See language of Mr. Chief Justice Mitchell, in *Allen v. Hirlinger*, 219 Pa. 56, 58, 67 Atl. 907, 13 L. R. A. 458, 123 Am. St. Rep. 617. At any rate, we are not satisfied that the language used indicates a clear intention on the part of the testator to restrict the gift to the widow to a life estate only, nor do we re-

gard it as sufficient to overcome the established rules of construction that would give to her the personal property, absolutely. In many of our cases language much stronger has been held not to have the effect of cutting down the wife's interest to a life estate. Thus in *Follweiler's Appeal*, 102 Pa. 581, testator gave and bequeathed "all the rest, residue and remainder of my goods, chattels, debts, ready money, effects and other of my estate whatsoever and wheresoever, both real and personal, every part and parcel thereof unto my wife Mary, to keep and enjoy during her lifetime, and after her death what shall be left shall be divided equally, my heirs and her heirs, share and share alike." It was held that the widow would take any personal property absolutely, but took a life estate only in the realty. Mr. Justice Trunkley said (102 Pa. 583):

"If there were any personalty, the appellant (widow) would take it absolutely. But the realty is not subject to the same rule."

The principle of this decision was recognized and followed in *Cox v. Sims*, 125 Pa. 522, 17 Atl. 465, and the same principle was again cited and approved in *Taylor v. Bell*, 158 Pa. 651, 655, 28 Atl. 208, 209 (38 Am. St. Rep. 857), where Mr. Justice Green said:

"In the present case the widow has the right to use the residuary estate as she may deem best for her own advantage. This would entitle her to an absolute estate in the personalty because it includes the power of disposition."

In that case, however, as to the real estate, there was no power of sale. While in the case now before us the wife was given power to dispose of the real estate, if necessary. In *Boyle v. Boyle*, 152 Pa. 108, 25 Atl. 494, 34 Am. St. Rep. 629, it appeared, as set forth in the syllabus, that a will provided as follows:

"As to my worldly goods, after my just debts are paid, I give and bequeath to my beloved wife, all my property, real and personal, for her support, during her natural lifetime; any remainder at her decease to be disposed of by her as she may think just and right among my children."

It was held that the words of the will imported an absolute gift, and gave a fee with all its incidents. In *Hardaker's Estate*, 204 Pa. 181, 53 Atl. 761, the wife was given the estate during her natural life with power of disposition by will. It was held that she took an absolute and not merely a life estate in all the property possessed by the husband at the time of his death.

In the case now under consideration the residue of the estate was given to the wife "for and during her natural life, with full power to sell or dispose of any of my real estate, securities of any and all kinds in such a manner as she may desire." This was followed by the precatory words as to care in investment of money not actually required for living expenses or other necessities. We cannot under the authorities above cited regard these latter words, nor the words in the former clause of the will, re-



ferring to any interest that may eventually come to his daughters from his estate, as expressing a clear intent upon the part of the testator to limit the interest of the wife to a life estate. We think an absolute estate in the personality passed to the wife.

The first, third, fourth, fifth, seventh, eighth, ninth, and tenth assignments of error are sustained. The decree of the orphans' court is reversed, and it is ordered that the record be remitted to the court below, that distribution may be made in accordance with this opinion.

(244 Pa. 310)

**WAGNER v. STANDARD SANITARY MFG. CO.**

(Supreme Court of Pennsylvania. March 2, 1914.)

**1. MASTER AND SERVANT (§ 121\*)—SAFE APPLIANCES—PURPOSE OF STATUTE.**

The purpose of Factory Act May 2, 1906 (P. L. 352), is to protect working people by requiring dangerous machines to be properly guarded when in operation, and not to prohibit their use or to make every manufacturer an insurer of employes working about dangerous machinery which cannot be guarded by any known device.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*]

**2. MASTER AND SERVANT (§ 121\*)—SAFE APPLIANCES—"PROPERLY GUARDED."**

As used in Factory Act May 2, 1906 (P. L. 352), requiring that dangerous machines be properly guarded when in operation, the phrase "properly guarded" means suitably guarded according to the circumstances and possibilities of the particular case. Hence, if a machine cannot be protected in any manner without rendering it useless, there is no suitable guard for it and it cannot be "properly guarded."

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*]

**3. MASTER AND SERVANT (§ 264\*)—INJURY TO SERVANT—PLEADING—VARIANCE.**

In an employe's action for injuries due to an unguarded wheel, there was no material variance between an allegation in plaintiff's statement that the wheel was revolving from 1,800 to 2,000 revolutions per minute, whereas it should not have been operated more than 1,200 revolutions, and proof that it was being operated at the rate of 1,912 revolutions per minute and that it could not be safely driven in excess of 1,175 revolutions.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.\*]

**4. MASTER AND SERVANT (§§ 285, 286\*)—INJURIES TO SERVANT—QUESTIONS FOR JURY—CONFLICTING EVIDENCE.**

Under conflicting evidence in an employe's action for injuries from an unguarded wheel, the questions whether the wheel was run at an excessive speed and whether its speed contributed to the accident were for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001-1003, 1006-1008, 1010-1033, 1035-1044, 1046-1050, 1053; Dec. Dig. §§ 285, 286.\*]

**5. APPEAL AND ERROR (§ 522\*)—PRESENTATION FOR REVIEW—RECORD—EVIDENCE.**

Where a witness in an employe's action for injuries from an unguarded wheel, pointed

out a mark on the wheel, and this constituted a material part of the testimony, the counsel eliciting such testimony should have seen that a proper description was brought out in the evidence and placed in the record so that the matter could be understood by the appellate court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2367-2371; Dec. Dig. § 522.\*]

**6. MASTER AND SERVANT (§ 270\*)—INJURY TO SERVANT—EVIDENCE.**

Where, in an employe's action for injuries from an unguarded wheel, plaintiff's evidence tended to show that the wheel could have been effectively guarded without interfering with its use, evidence of the kind of guards available and regularly employed by others using such wheels was properly admitted, though defendant's evidence tended to show that it was not practicable to guard the wheel.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 913-927, 932; Dec. Dig. § 270.\*]

**7. MASTER AND SERVANT (§ 121\*)—INJURIES TO SERVANT—DEFECTIVE APPLIANCES—NOTICE.**

Where injuries resulted to an employe from a wheel at which he was working outside his own department not being properly guarded as required by Factory Act May 2, 1906 (P. L. 352), it was not essential to the liability of the company employing him that its officers have express knowledge that he was in the habit of using tools and appliances outside his particular department; implied notice being sufficient.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*]

**8. JUDGMENT (§ 199\*)—NON OBSTANTE VEREDICTO—EVIDENCE.**

Where, in an employe's action for injuries from an unguarded wheel, the evidence, though conflicting, did not establish contributory negligence as a matter of law, but presented a case for the jury, which was submitted under proper instructions, the court properly refused to enter judgment non obstante veredicto for defendant.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 367-375; Dec. Dig. § 199.\*]

Brown, J., dissenting.

Appeal from Court of Common Pleas, Allegheny County.

Trespass by Frank Wagner against the Standard Sanitary Manufacturing Company, for personal injuries. From judgment for plaintiff, defendant appeals. Affirmed.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Walter Lyon, of Pittsburgh, for appellant. Thomas M. Marshall, Jr., A. H. & H. H. Rowand, and Thomas M. Marshall, all of Pittsburgh, for appellee.

**MOSCHZISKER, J.** The defendant company is a manufacturer of tubs and bathroom utensils. The plaintiff had been in the defendant's employ for nine years, and during the last five months of that period acted as foreman of its enameling department; on November 1, 1909, he was severely and permanently injured by the breaking of a swiftly moving, unguarded emery wheel, technically

called a carborundum wheel, at which he was working; he sued and recovered a verdict, upon which judgment was entered, and the defendant has appealed.

[1] The controlling facts in the case and the view of the court below upon the applicable rules of law are tersely and plainly stated in the following excerpts from its opinion refusing a new trial:

"Plaintiff's contention was that he was directed by the assistant manager to make repairs to an appliance used in defendant's department for enameling bathtubs and other fixtures, known as a hammer, that to do so he was obliged to go to the cleaning department, where carborundum wheels were used, to grind down a brass rod, and that while engaged in reducing the size of the rod the wheel exploded, resulting in the injury complained of. The negligence \* \* \* upon which the plaintiff based his right to recover was: (1) Defendant's failure properly to guard the carborundum wheel at which plaintiff was working; (2) that the wheel was being driven, without plaintiff's knowledge, at an excessive speed. The eleventh section of the Factory Act of May 2, 1905 (P. L. 352), requires that, \* \* \* all \* \* \* grindstones, emery wheels, flywheels and machinery of every description shall be properly guarded. \* \* \* Any failure to comply with the requirements of the statute on the part of the employer is negligence from which he cannot be excused unless the employé was guilty of contributory negligence. *Lanahan v. Arasapha Mfg. Co.*, 240 Pa. 292 [87 Atl. 236]. Whether the employé is chargeable with contributory negligence is a question always for the jury where the testimony, as in this case, is conflicting. The question of plaintiff's contributory negligence was fairly submitted, and the jury told that if he was assuming to do work that he had no right to do and was not ordered to do, he was guilty of contributory negligence and could not recover. This question we think was fully and fairly discussed in our charge. Whether or not the carborundum wheel should have been guarded, in our opinion, depends upon whether or not it was practicable to do so, considering the purpose for which it was installed and used. In view of the conflicting testimony upon this point the question, in our opinion, was for the determination of the jury. In our instructions the jury were told \* \* \* that the statute was not intended to prohibit the use of dangerous machinery, and that it did not require carborundum wheels to be guarded if it was not reasonably practicable to guard them, considering the purpose for which they were being used; and as to whether it was practicable to do so the testimony was conflicting. \* \* \* The testimony being conflicting as to whether or not the carborundum wheel could be guarded and used for the purposes for which it was intended, the speed at which it was being revolved, and also if plaintiff was directed by the assistant manager to make repairs to the hammer, these questions were for the jury."

[2] So far as the construction of the statute is concerned, this case might well be affirmed on the views of the court below, without more, for we agree with the learned trial judge that under the act of 1905, supra, it was for the jury to say whether or not it was reasonably possible properly to guard the wheel which caused the injury to the plaintiff. Statutes of this character ought to be given a reasonable construction (*Honor v. Albrighton*, 93 Pa. 475, 478), and the present act does not require an interpretation which

would practically prohibit the use of machinery possessing unavoidable elements of danger.

"The phrase, 'properly guarded,' is a relative term or expression, and whether the statutory requirement in that respect has been complied with necessarily depends upon the facts of the particular case. \* \* \* The necessity for an artificial guard depends upon the existence of certain conditions, and is a question of fact for the jury." *Booth v. Stokes*, 241 Pa. 349, 351, 88 Atl. 490; *Izzo v. Finn*, 238 Pa. 602, 604, 86 Atl. 486; *McCoy v. Wolf*, 235 Pa. 571, 574, 84 Atl. 581.

We interpret the words "properly guarded" to mean suitably guarded, and if a piece of machinery cannot be protected in any manner whatsoever, without rendering it useless for the service which it usually performs, then it is plain that there is no guard suitable to that particular machine, and therefore it cannot be "properly guarded"; for a guard which would prevent a machine from performing its functions is not in any sense a proper guard. The apparent purpose of the act in question is to protect working people by requiring dangerous mechanical appliances to be properly guarded when in operation, not to prohibit their use altogether, or to make every manufacturer in this great industrial state an insurer of all persons engaged around machinery which possesses inherent possibilities of danger, against which, owing to the nature of the work to be performed, an operator cannot be protected by any known device. When a departure of that character is intended the Legislature will, no doubt, express it in unmistakable language; we do not conceive that the lawmakers contemplated such an idea in the act before us, nor do we feel that the language there employed calls for or warrants that construction. If, however, a machine can be guarded and used, then the act requires that proper protection shall be provided. In connection with some of the assignments of error, it is important to keep in mind that the case at bar was tried upon the view of the act here indicated, and that the trial judge instructed the jury accordingly. The question of the sufficiency of the evidence to sustain a finding that in this particular case it was reasonably possible to protect the operator of the machine by a proper guard is a point which will be duly considered when reached in turn; but we shall dispose of the several assignments in their order.

[3] The first specification complains because the trial judge refused to give binding instructions for the defendant. The appellant contends that the allegata and probata did not agree, in that the declaration stated the wheel was revolving "from 1,800 to 2,000 revolutions per minute, whereas it should not have been run or operated more than 1,200 revolutions per minute," while the proofs fail to show more than 956 revolutions per minute, and in that the declaration averred a wheel of slightly larger dimensions than

the proofs actually showed the one that caused the injury to be. This point does not seem to have been pressed at trial, and we feel that it is without substantial merit. The jury could justifiably have found from the testimony of the plaintiff concerning the wheel and its appliances, as supplemented by his experts, that it was operated at the rate of 1,912 revolutions per minute, and that an unguarded wheel of the character of the one in question could not safely be driven above 1,175 revolutions per minute. The difference in the dimensions averred and those proved caused the defendant no apparent embarrassment, and, under the circumstances of this case, constituted no such departure from the declaration as calls for relief at our hands.

[4, 5] The second assignment complains of the refusal of a point for charge to the effect that there was "no evidence" that the wheel was run at an excessive rate of speed, or that its rapidity in any wise contributed to the accident. In view of the proofs, the matters covered by this request were issues for the jury, and they were properly submitted. Under this specification, the appellant contends that the testimony of one of the experts called by the plaintiff shows that the accident was caused by the latter's permitting the piece of brass he was grinding to come between the wheel and the rest upon which he was holding it, thus causing the space to be clogged and the wheel to break; the contention is based on a reference in the testimony to a mark upon the wheel, and a statement by the witness that the mark and the accident might have been caused in that way. Should we accept the defendant's construction of this item of testimony, it would not be sufficient, in view of the other proofs, to take the case from the jury; but the real value of the evidence does not appear, for the notes fail to show what particular mark the expert referred to, and counsel, at argument, disagreed as to this. The transcript of the testimony simply gives the question, "Show where the mark is?" and the reply, "Here's the mark, here [indicating]." When a witness indicates anything that is important to the decision of an issue, counsel should see that a proper description is placed upon the record at the time, showing not merely the bare fact that the witness indicated something, but exactly what he pointed out, so that the notes may be properly understood by one not present at the trial. For instance, in this case, instead of simply the word "indicating," the notes ought to have been made to read, "indicating a mark on the wheel (giving its location as nearly and clearly as possible)." When this course is not pursued, we must always assume the fact indicated most strongly against the appellant; that is that the matter undisclosed was such as to support the verdict rather than otherwise.

[6] The next two specifications complain of the admission of testimony concerning the propriety of safety guards and showing the kind that could be applied to the wheel in question. The appellant contends that, owing to the use made of the wheel, external guards of any character were impracticable, and that to sustain this verdict would in effect be to rule that the wheels employed by the defendant must be abandoned and a different kind installed. If the testimony of the witnesses for the defendant be accepted as verity, the verdict is susceptible of that construction; but when one looks at the proofs as a whole, it is apparent that, under the testimony of the plaintiff and some of his witnesses, the use made of the wheel was not as contended by defendant, and, further, that it was perfectly practicable to guard the wheel, without changing its character or construction, and at the same time to continue its regular, customary use. In other words, according to the testimony presented by the plaintiff, the defendant could put effective guards on this wheel, and it would continue to perform the same service as theretofore. If the customary use made of the wheel permitted guarding, it was competent to introduce testimony to show the kind of guards that were available to the defendant and regularly employed by others using such wheels; and this was the character of evidence objected to. The issues were for the jury, and the proofs were relevant and competent.

[7] The fifth assignment complains of the refusal to charge that there was "no evidence" of knowledge on the part of the officers of defendant company that the plaintiff was in the habit of using tools and appliances outside of his particular department. Express knowledge on this point was not necessary, and the proofs were sufficient to show implied notice.

[8] The last assignment complains of the refusal to enter judgment n. o. v. for the defendant. In view of what we have already written, this alleged error does not require any special consideration. From no aspect is this an instance where the possible danger from the breaking of the wheel was so obvious and imminent that the rule of assumption of risk could properly be applied by the court, or where it could be said as a matter of law that the plaintiff was guilty of contributory negligence, any more than under the evidence it could be ruled that the defendant was per se negligent; the testimony as to many of the controlling facts was conflicting, and the inferences to be drawn therefrom were not always certain—all of which tended to make the case one for the jury. The issues were submitted in a charge which fairly marshaled the evidence and stated the questions involved with clearness and absolute impartiality. It may be that we should not have found some of the

facts as did the triers in this case, but we cannot say that the proofs are not sufficient in law to sustain the verdict.

The assignments of error are all overruled and the judgment is affirmed.

BROWN, J. (dissenting from the construction by majority of Court of Act of 1905). In passing the act of May 2, 1905 (P. L. 352) the Legislature acted within its conceded police powers. In enumerating the machinery and appliances which it declared shall be guarded in industrial establishments it specifically named emery wheels. No condition of any kind is annexed to the statutory duty imposed upon employers to guard these wheels. The duty to guard them is absolute. In the case at bar the plaintiff below was injured by the breaking of a swiftly moving, unguarded emery wheel, and, while I concur in the affirmance of the judgment in his favor, I cannot withhold my dissent from the construction which the majority of the court have placed upon the act of 1905. In approving what the court below said in its opinion refusing a new trial, they read into the sentence specifically enumerating the machinery and appliances which the Legislature has declared shall be properly guarded the words "whenever practicable," or "if practicable." It seems to me that the words which are thus read into the sentence were intentionally omitted from it by the Legislature. Nothing is said about the practicability of guarding the enumerated machinery; but, in the sentence immediately preceding, it is provided that, "whenever practicable, all machinery shall be provided with loose pulleys." The Legislature thus declared that practicability in guarding machinery shall be limited to loose pulleys. "*Expressio unius est exclusio alterius*." In the independent sentence immediately following, and now under consideration, no such provision appears, and its words, which are free from all ambiguity, are susceptible of but one meaning, and that is that there rests upon the employer the absolute duty of properly guarding all the machinery and appliances enumerating in it. I much regret that my Brethren have felt themselves compelled to construe the act of 1905 as it was construed by the court below. If the machinery and appliances which the Legislature explicitly says must be guarded cannot be guarded, they ought not to be used until the Legislature lifts the inhibition. It is not for us to permit that which the Legislature, in the valid exercise of its police powers, has prohibited. If such prohibition be harsh, "its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written, unless it is clearly beyond the constitutional power of the lawmaking body." *St. Louis & Iron Mountain Ry. Co. v. Taylor*, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061.

True, we have said of an act similar to the act of 1905 that it is to be reasonably construed, but, in so holding, the question was not one of not guarding at all, but was whether machinery had been properly guarded, because "properly fenced off" or "properly guarded" is a relative term of expression. *McCoy v. Wolf*, 235 Pa. 571, 84 Atl. 581. This was just the situation in *Honor v. Albrighton*, 93 Pa. 475, cited in the majority opinion in support of the construction given to the act of 1905. Not until now has this court ever held that machinery, which the Legislature in unequivocal words has declared shall be properly guarded, may be unguarded if it be impracticable to guard it. By St. of 7 & 8 Vict. c. 15, s. 21, certain machinery was required to be fenced. In *Doel v. Sheppard et al.*, 5 E. & B. 856, the plaintiff's cause of action, as laid in the declaration, was the failure of the defendants to fence the machinery which caused the injury. The third plea of the defendants was that the machinery was not required to be guarded, for reasons specifically set forth in the plea. In holding that no excuse could be heard for evading the plain requirement of the statute, Coleridge, J., said:

"What your plea, in effect, states is that the Legislature ought not to have required this particular machinery to be fenced."

And the Lord Chief Justice added:

"I think the construction of the act which is contended for by the defendants is most erroneous; it would, in fact, amount to a repeal of the act. The act does not merely provide that machinery in factories is to be fenced where it is dangerous. All mill gearing, while in motion for a manufacturing purpose, is to be fenced. The Legislature did not intend to leave it to be decided, upon the circumstances of each case, whether the machinery was dangerous and required fencing. On the third plea our judgment will be for the plaintiff."

The Court of Queen's Bench felt itself bound by the act of Parliament as it was written.

In construing a statute passed by the state of Wisconsin, similar to our act of 1905, the Supreme Court of that state, in holding that the plea of impracticability of compliance with the statute was unavailing, said what I feel this court ought now to say:

"The intent of the statute is that, if an employer maintains a situation within it which as an ordinarily prudent man he ought reasonably to apprehend may cause a personal injury to any of his employés in the discharge of his duty, he must hold himself responsible for the consequences proximately produced thereby to any such employé without his contributory negligence. In that situation the rule of the statute is inexorable. The charity of the law as to the employer has been exhausted. There are only left its penalties from which there is no escape under the law as it stands. It is no defense or excuse as regards civil remedies that it is not practicable to guard against the danger or to efficiently do so without some particular instrumentality. \* \* \* It is no answer to a case satisfying the statutory conditions that it was impracticable to comply with the statute. The police power, as the statute has been construed, was not exceeded in passing

it. Therefore the duty to comply therewith is absolute." *Willette v. Rhinelander Paper Company*, 145 Wis. 537, 130 N. W. 853.

(244 Pa. 346)

# SHANNON v. CARNEGIE STEEL CO.

(Supreme Court of Pennsylvania. March 9, 1914.)

## 1. MASTER AND SERVANT (§ 121\*)—DUTY TO GUARD MACHINERY—"PROPERLY GUARDED."

The words "properly guarded," in Act May 2, 1905 (P. L. 352), mean suitably guarded, and the act does not apply where it is impracticable to guard the machine without rendering it useless for its purposes.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*]

## 2. MASTER AND SERVANT (§ 121\*)—INJURIES TO SERVANT—GUARDING MACHINERY.

In an action for injuries from alleged failure to guard a dangerous machine, the verdict for defendant will be sustained where it was not practicable to safeguard the machine against such accidents without impairing its efficiency, and no device was known by which to protect the operator against danger.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*]

Appeal from Court of Common Pleas, Allegheny County.

Action by Robert L. Shannon against the Carnegie Steel Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and STEWART, JJ.

W. H. S. Thomson, T. Mercer Morton, and Frank Thomson, all of Pittsburgh, for appellant. David A. Reed, of Pittsburgh, for appellee.

STEWART, J. The plaintiff, an employé of the defendant company, was injured while engaged at work on what is known as a Betz turning machine. This machine is used for the purpose of turning the flange on cold steel car wheels. The steel is placed on a revolving table, and the flange is cut by two stationary steel chisels as the wheel revolves, one operated by a lever at the right, the other by a lever at the left. In the process it frequently, perhaps ordinarily, happens that the small steel cuttings from the wheel are thrown out with more or less violence, those cut by the chisel on the right are thrown forwards toward the operator, those cut by the chisel on the left take the opposite direction. The plaintiff was operating such machine when some of these small cuttings thrown from the wheel struck him in his left eye, permanently destroying its sight. The machine, though adequately guarded in other respects, was without artificial guard to protect against such accident as here occurred. Did the absence of such guard render the employer liable for damages for this unfortunate injury? Whether the machine was one of those spe-

cifically catalogued by name in the Factory Act of May 2, 1905 (P. L. 352), need not be discussed; the act requires that "machinery of every description shall be properly guarded," and it can make no difference whether it was one of those machines specifically mentioned in the act, or whether or not it is included in the general class of "machinery." On the trial of the case the plaintiff, making no attempt to show that this particular machine at which he worked differed with respect to its guards from like machines in general use, voluntarily assumed the burden of showing that it was reasonably practicable to guard such machines against the happening of such accident as here befell. He testified that not only was it reasonably practicable to so guard the machine, but that since the accident he himself had invented and applied successfully a contrivance efficient to that end. He called a number of other witnesses, who testified to the same effect, not one of them, however, testified that he had ever seen a guard applied except that invented by the plaintiff, and that only experimentally. On the other hand, the defendant called an equal, if not greater, number of witnesses who testified that the use of any artificial guard yet invented would destroy the efficiency of the machine, and that none could be used without rendering the machine incapable of doing that for which it was intended; and that it was wholly impracticable in the use of the machine to guard against such accidents as this by any artificial contrivance. In submitting the case to the jury the trial judge gave the following instruction:

"Was this, in its ordinary operation, a dangerous machine to the person who was operating it, or others who came, in the course of their employment, in proximity to it? If you find that question in the negative, that it was not, then there was no occasion to guard it, and your verdict should be for the defendant. If you find that it was a dangerous machine, then the next question for your determination is: Was it practicable in 1908, by the exercise of ordinary care, to safeguard the machine so as to not seriously interfere with its operation, and should the employer have known of a guard which would perform that service? If you find that question in the negative; that is, if you find that it was not practicable to safeguard this machine so as to prevent these particles of metal being thrown off; or, if you find that in the light of the present day, it is practicable, but that it was not known to the trade in 1908, and by the exercise of reasonable care the employer would not know that, then your verdict should be for the defendant."

This instruction is specifically made the subject of the fourth assignment of error. The other assignments are merely corollaries, and need not be separately considered. The case presents no other issue than that indicated in the fourth assignment. The verdict was a clear finding that, at the time the accident to plaintiff occurred, it was not practicable for the employer to safeguard

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the machine against such accidents without seriously impairing the efficiency of the machine; that no device was then known by the use of which the one operating such machine could be protected against the danger to which the operator was exposed, and from which this plaintiff suffered his injury.

[1, 2] In the very recent case of *Wagner v. Standard Manufacturing Company*, 91 Atl. 353, not yet officially reported, the question here raised was fully considered and decided adversely to the present appellant's contention. In that case we held that, consistent with the purpose of the act of May 2, 1905, in requiring all machines to be properly guarded, the necessity for an artificial guard in such cases depends on the existence of certain conditions, one of which must be the practicability of furnishing such guard; the words "properly guarded" in the act mean suitably guarded, and, quoting from the opinion in that case:

"If a piece of machinery cannot be protected in any manner whatsoever, without rendering it useless for the service which it usually performs, then it is plain that there is no guard suitable to that particular machine, and therefore it would not be 'properly guarded'; for a guard which would prevent the machine from performing its functions is not in any sense a proper guard. The apparent purpose of the act in question is to protect working people by requiring dangerous mechanical appliances to be properly guarded while in operation, not to prohibit their use altogether, or to make every manufacturer in this great industrial state an insurer of all persons who may work around machinery which possesses inherent possibilities of danger, against which, owing to the nature of the work to be performed, an operator cannot be protected by any known device."

The instructions of the learned trial judge in the present case accord in every respect with the views of this court as expressed in the opinion referred to. The case calls for no further discussion.

The assignments of error are overruled, and the judgment is affirmed.

(244 Pa. 463)

**OAKDALE BAKING CO. v. PHILADELPHIA & R. RY. CO.**

**MAYERS-MALLORY CO. v. SAME.**

(Supreme Court of Pennsylvania. March 23, 1914.)

**1. RAILROADS (§ 481\*)—FIRES—EVIDENCE OF OTHER FIRES.**

In an action for the destruction of property by fire caused by the negligent emission of sparks from defendant's locomotive, evidence that within two or three weeks before and after the fire defendant's locomotives frequently emitted sparks and burning coals, which fell into plaintiffs' yard, in some instances starting a fire therein, was properly admitted.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1717-1729; Dec. Dig. § 481.\*]

**2. RAILROADS (§ 481\*)—FIRES—EVIDENCE OF OTHER FIRES.**

In an action for the destruction of property by fire caused by the negligent emission of

sparks from defendant's locomotive, it was error to admit evidence of other fires in the neighborhood, where the witnesses were unable to say that such fires were caused by defendant's negligence.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1717-1729; Dec. Dig. § 481.\*]

**3. RAILROADS (§ 481\*)—FIRES—EVIDENCE.**

In an action for the destruction of property by a fire caused by defendant's negligence, evidence to show the direction and velocity of the wind at the time of the fire was admissible, to show that everything in the air above the defendant's track would probably be carried upon plaintiff's premises.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1717-1729; Dec. Dig. § 481.\*]

**4. TRIAL (§ 251\*) — FIRES — INSTRUCTIONS — VARIANCE.**

Where, in an action against a railroad company for the destruction of property by fire, plaintiff's statement alleged that the negligent throwing of sparks causing the fire occurred between 2:30 and 3:15 p. m., it was error to instruct the jury that they could find that the spark causing the fire might have fallen on the premises "at any time prior to 2 o'clock."

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

**5. RAILROADS (§ 465\*) — FIRES — PROXIMATE CAUSE.**

Where a fire is started along the retaining wall in plaintiff's yard by a spark from a locomotive, and from thence is communicated to sheds, stables, and the main building in such a way that the burning is a continuous succession of events, so linked together as to be one continuous conflagration, such spark is the proximate cause of the damage.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1690-1693; Dec. Dig. § 465.\*]

**6. RAILROADS (§ 484\*) — FIRES — EVIDENCE — QUESTIONS FOR JURY.**

Where, in an action for the destruction of property from fire caused by sparks negligently emitted from locomotives, plaintiff's evidence made out a prima facie case of defendant's negligence, the case was for the jury, though defendant's evidence presented a complete defense.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1740-1746; Dec. Dig. § 484.\*]

Appeal from Court of Common Pleas, Allegheny County.

Two actions to recover damages for the destruction of property by fire, one by the Oakdale Baking Company, the other by the Mayers-Mallory Company, both against the Philadelphia & Reading Railway Company. From judgments for plaintiffs, defendant appeals. Reversed.

Verdict for plaintiff in case of Oakdale Baking Company v. Philadelphia & Reading Railway Company for \$16,090.67, and for plaintiff in case of Mayers-Mallory Company v. Philadelphia & Reading Railway Company, for \$8,090.50. Defendant subsequently moved for a new trial and for judgment n. o. v. in each case, which motions were overruled by the court, and judgments entered on the verdicts.

Argued before FELL, C. J., and BROWN, MESTREZAT, STEWART, and MOSCHIS-KER, JJ.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Wm. Clarke Mason, of Philadelphia, for appellant. Maxwell H. Kratz, Horace Michener Schell, Frank R. Shattuck, and Henry R. Edmunds, all of Philadelphia, for appellees.

**BROWN, J.** These two actions, which were tried together, were brought to recover damages for the destruction by fire of real and personal property belonging to the plaintiffs below. The fire is alleged to have been caused by the negligent emission of sparks and burning coals from an engine belonging to or operated by the defendant company. The averment upon which recoveries are sought is that on September 5, 1909, between 2:30 and 3:15 p. m., in the city of Philadelphia, sparks, cinders, and living coals were negligently permitted to escape from an engine of the defendant, setting fire to and burning the buildings and other property set forth in plaintiffs' statements. The issue on the question of the time when the fire was thus started was limited by the plaintiffs themselves to the 45 minutes stated. This conclusively appears in the stipulation in the Oakdale Baking Company Case.

In support of their averment of negligence the plaintiffs proved that, between the hours named, nine locomotives and two shifting engines passed over the tracks of the defendant in close proximity to plaintiffs' yard. The nine locomotives were clearly identified by a telegraph operator in the employ of the defendant company, called as a witness by the plaintiffs. He gave the number of each locomotive. The shifting engines were only partially identified by the plaintiffs, as is admitted by counsel for appellant. There was no testimony that, between 2:30 and 3:15 p. m. on the day of the fire, or at any other time that day, any engine operated by the defendant was seen to emit sparks, cinders, or burning coals at any point in the vicinity of plaintiffs' premises; and there was no proof, nor offer to prove, that any one of the nine identified engines was without an approved spark arrester or had a spark arrester in bad condition or was in any respect operated in a negligent manner.

[1] Nothing was shown in connection with the operation of any of the said eleven engines on the day of the fire from which an inference of negligence could have been drawn; but the plaintiffs were permitted to show that on other days, both before and after the fire, sparks and burning coals were seen to pass from engines of the defendant, in some instances starting fires on the premises of the plaintiffs. Complaint is made of the admission of this testimony, but that it was properly received, under the circumstances, is not to be questioned. Two of the engines which passed the premises during the time stated were not fully identified by any witness called by the plaintiffs. The

fire may have resulted from sparks or cinders negligently emitted or thrown from them. Under the testimony submitted by the plaintiff, no cause for it existed on the premises.

In support of their averment that the fire had been caused by sparks emitted from an engine negligently operated by the defendant, the plaintiffs were not confined to affirmative proof of the negligent operation of the engine, but were permitted to show such operation by circumstantial evidence. It was therefore competent for them to show, in support of their allegation that the fire was caused by defendant's negligence, that at or about the time of the fire, before and after—within reasonable latitude—its engines had been negligently operated. *Henderson v. Philadelphia & Reading Railroad Co.*, 144 Pa. 461, 22 Atl. 851, 16 L. R. A. 299, 27 Am. St. Rep. 652; *American Ice Co. v. Pennsylvania Railroad Co.*, 224 Pa. 439, 73 Atl. 873. In the case at bar the learned trial judge confined the plaintiffs within a reasonable latitude—two or three weeks before and after the fire—in submitting testimony to show defendant's negligent operation of its engines, and that testimony justified an inference of such operation. It was shown that, during that period—in some instances within two or three days of the fire—as the engines of the defendant company passed by the premises of the plaintiffs, on an elevated track, sparks an inch in diameter and nearly as large as a hen's egg, and burning coals as large as a man's fist, fell from the engines of the defendant down into the yard of plaintiffs. This emission of sparks of large size was of frequent occurrence, and in some instances they started fires on plaintiffs' grounds. From the testimony submitted by them the conclusion could hardly have been avoided that, shortly before and after the fire, the engines of the defendant were being negligently operated as they passed the premises of plaintiffs, and, under *Henderson v. Railroad Co.*, supra, the question of the defendant's negligence as the cause of the fire was for the jury.

In that case plaintiffs' watchman testified on their behalf that one of his duties was to watch passing trains, to see whether they threw any sparks in the vicinity of the mill; that he came to the mill on the day in question about a quarter of an hour before it shut down for the night, the shutting down being at 5:15 p. m., railroad time; that after his arrival he went out to watch a coal train going north, the engine of which he was unable to identify; that he saw nothing unusual in the working of the engine and saw no sparks thrown; that about a quarter of an hour afterwards he went out to watch another train, drawn by engine No. 72, and saw no sparks thrown by that engine or anything unusual in its operation. The fire was discovered soon after the passage of

engine No. 72. Plaintiffs' counsel made the following offer:

"Plaintiffs offer to prove that the property of persons along the line of defendant's road, which passed the property of the plaintiffs destroyed by the fire in question on August 10, 1898, and within 12 miles of plaintiffs' said property, was repeatedly set on fire by unknown and unidentified engines of the defendant, and that the sparks, causing the said fires, emitted by the said engines, exceeded a hickory nut in size, to be accompanied by evidence of experts showing that engines throwing sparks of the size of hickory nuts either did not use the most approved spark arresters in general use, or, if they did, the spark arresters used were permitted to become defective and out of repair, or were negligently managed by those in charge of them."

On appeal from a judgment in favor of the plaintiffs it was held that the foregoing offer was improperly admitted, but solely on the ground that it was wholly without limit as to time. In reversing the judgment and awarding a new trial, we said:

"This offer, it will be seen, was wholly without limit as to time. The testimony received under it was, in some instances, confined to two or three months, in some to six months, and in some the testimony was general, and in such form as not to indicate to what period of time it referred. \* \* \* The examination should be confined to the negligent operation of the engines of the company at or about the time of the fire, with such reasonable latitude, before and after the occurrence, as is sufficient to enable such proofs to be practicable."

The thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and twentieth assignments are overruled.

[2] The eighteenth, nineteenth, twenty-first, and twenty-second assignments complain of the admission of testimony as to fires which the witnesses evidently thought had been caused by sparks or cinders from defendant's engines; but, as they were unable to say that the fires had been so caused, the inclination of the trial judge to exclude their testimony ought to have prevailed. The said assignments are therefore sustained.

[3] The twenty-fourth assignment alleges error in permitting the plaintiffs to show the direction and velocity of the wind at the time of the fire. We find nothing in the printed brief of counsel for appellant in support of this assignment, and have, therefore, concluded that it was abandoned. It was entirely proper for the plaintiffs to show by competent testimony that, at the time the fire was discovered, the wind was blowing at great velocity from the northwest, likely to carry everything in the air above the tracks of the defendant company over onto plaintiffs' premises.

[4] In the first six assignments, complaining of portions of the charge, there is nothing calling for reversal, except that portion which is the subject of the third assignment. As already stated, the issue as to the time of the fire and of the defendant's alleged negligent operation of its engines was expressly

limited by the plaintiffs themselves to the three-quarters of an hour between 2:30 and 3:15 p. m.; but, under the instruction complained of in the third assignment, the jury were given to understand that they were at liberty to find that the spark which caused the fire may have fallen upon the premises "at any time prior to 2 o'clock." Under the issue as made up and tried by the plaintiffs, the jury were not at liberty to so find, and the third assignment is sustained.

[5] Finally it is urged that, under *Pennsylvania Railroad Co. v. Kerr*, 62 Pa. 353, 1 Am. Rep. 431, there can be no recovery, as the spark which may have started the fire along the retaining wall in plaintiff's yard was not the proximate cause of the general conflagration. What we said of the above case, in *Montgomery v. Southern Mutual Insurance Co.*, 242 Pa. 86, 88 Atl. 924, was that it "applied the correct rule to the facts in the case." In the present case the burning was a continuous succession of events, so linked together that they became one natural whole. There were, as counsel for appellee well contend, no separate and distinct burnings, but one continuous conflagration, from the time the fire started at the base of the retaining wall and spread thence to the sheds, the stable, and the main building. The *Kerr* Case is without application.

[6] Upon the case as presented by the plaintiffs the question of the defendant's liability was for the jury, and, but for the errors which are the subjects of the sustained assignments, the judgment would be affirmed. To its alleged liability the defendant presented a complete defense, and, if the jury believed the testimony of its witnesses as to the condition of every engine that passed by the premises of the plaintiffs between 2:30 and 3:15 p. m., September 5, 1909, the charge of negligence was utterly disproved. Whether that oral testimony ought to have been accepted as truth was not, however, for the court.

Judgments reversed, and a *venire facias de novo* awarded in each case.

(244 Pa. 506)

EBLING et al. v. BOROUGH OF SCHUYLKILL HAVEN.

(Supreme Court of Pennsylvania. March 23, 1914.)

1. EQUITY (§ 371\*)—PRACTICE—JURISDICTION. Where the question of equity jurisdiction is raised by demurrer or in the answer and not withdrawn by a proper entry on the record, the chancellor should dispose of it in limine, as required by act of June 7, 1907 (P. L. 440).

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 782; Dec. Dig. § 371.\*]

2. EQUITY (§ 386\*)—PRACTICE—JURISDICTION. Where defendant in a suit in equity abandons, at the argument, the question of jurisdiction raised by demurrer or in his answer, the chancellor should require counsel for de-



fendant to withdraw so much of the demurrer or answer as denies the court's jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 825; Dec. Dig. § 386.\*]

### 3. APPEAL AND ERROR (§ 248\*)—PRESENTATION BELOW—EQUITY.

On appeal from the final decree entered in a suit in equity, only such matters as have been excepted to below and finally passed upon are assignable for error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1432, 1435-1439, 1443, 1447-1452, 1454-1459, 1462, 1464-1468; Dec. Dig. § 248.\*]

### 4. APPEAL AND ERROR (§ 1009\*)—FINDINGS—EVIDENCE.

Findings of the court in a suit of equity will not be disturbed on appeal, when sustained by the evidence, though the appellate court might have found differently.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3970-3978; Dec. Dig. § 1009.\*]

### 5. EQUITY (§ 423\*)—DECISION.

Where, in a suit in equity, the court in banc finds the facts against the plaintiffs on the controlling questions, it may, under act of June 7, 1907 (P. L. 440), enter a decree finally disposing of the issues raised by the pleadings.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 986-990, 992-998, 1009-1014; Dec. Dig. § 423.\*]

### 6. COURTS (§ 101\*)—DECREE—CONCURRENCE OF JUDGES.

In a suit in equity, it is improper for the chancellor who hears the case to enter a decree "by the court," concurred in by the other two members of the court, who did not hear the case; the two judges not sitting being incompetent to give any opinion on the facts or law until after the case has been heard on exceptions by the judges sitting in banc.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 344-350, 629; Dec. Dig. § 101.\*]

### 7. EQUITY (§ 389\*)—PRACTICE—FINDINGS.

A suit in equity at issue upon answer should be heard and conducted in court in the same manner as an action at law wherein trial by jury has been waived, and requests for findings and the findings made should be filed in the office of the prothonotary, who should then enter a decree nisi pursuant thereto and give notice to the parties or their counsel.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 830; Dec. Dig. § 389.\*]

Appeal from Court of Common Pleas, Schuylkill County.

Bill for injunction, by John M. Ebling and others against the Borough of Schuylkill Haven. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

C. E. Berger, Otto E. Farquhar, and J. H. Filbert, all of Pottsville, for appellants. J. B. Reilly and J. A. Noecker, both of Pottsville, for appellee.

MESTREZAT, J. We have examined this record with care and are not convinced of any reversible error. There are irregularities in the procedure arising from the disregard by the court and counsel of the equity rules, but we will not impose additional ex-

pense on the litigants and longer delay the adjudication of their rights, as the evidence and the manner of the submission of the case warrant the final decree entered by the learned court in banc.

This was a bill filed by the plaintiffs to restrain the borough of Schuylkill Haven from entering into contracts for grading and paving Dock street in said borough and from collecting assessments and entering liens against the land of the plaintiffs under the authority of the ordinance authorizing the improvement. The plaintiffs are residents of the borough and owners of real estate abutting on the street. The facts averred in the bill as grounds of relief are: (1) That the ordinance was enacted without a petition of the property owners; (2) that the street had been graded and macadamized many years ago and had been kept up, repaired, and macadamized at public expense for at least 60 years, and the pavements and curbs maintained by the property owners; and (3) that the expense of the work will increase the indebtedness of the borough above 2 per centum of the assessed valuation of the taxable property therein. The answer admitted the facts averred as the first and denied the facts averred as the second and third grounds of relief. The answer also averred that the court had no jurisdiction, for want of equity, and that plaintiffs have an adequate remedy at law.

The learned president judge of the court below, sitting as chancellor, heard the case, found the facts, stated his conclusions of law, answered numerous requests of both parties for findings of fact and law, and entered a decree restraining the borough from collecting any assessment and entering any lien against the land of the plaintiffs under the authority of the ordinance providing for the improvement. The learned chancellor found that the street had been previously paved, and that therefore the borough could not pave it again partly at the expense of the abutting property owners. As this finding was controlling against the defendant, the other questions raised by the pleadings were not determined. Numerous exceptions to the findings of the chancellor were filed by both parties and were disposed of in an opinion and decree by the other two judges of the common pleas; the president judge who sat as chancellor being absent. The decree sustained the defendant's first and sixty-eighth exceptions, set aside and revoked the chancellor's decree, and dismissed the bill for want of jurisdiction. Subsequently a reargument was had before the three judges sitting in banc, and a decree was entered by the court sustaining certain exceptions and dismissing the bill without prejudice to plaintiffs' right to defend at law. The chancellor who first heard the case dissented. The plaintiffs have taken this appeal.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In disposing of the exceptions to the chancellor's decree, the two judges filed an opinion in which they only considered and disposed of the question of jurisdiction. In the subsequent hearing before the full bench, the parties were heard on all the questions raised by the exceptions to the chancellor's decree and his findings of fact and law, and the majority of the court filed an exhaustive opinion in which they dealt with both the merits of the case and the question of jurisdiction. The decree entered by the court permits the plaintiffs to assert their rights at law in any proceeding by the borough to pave and grade Dock street in pursuance of the ordinance.

[1] The question of the jurisdiction of his court having been raised by the answer, the act of June 7, 1907 (P. L. 440), required the learned chancellor to decide the issue in limine. This was not done; the chancellor in his opinion stating as a reason that the point had not been argued and was not pressed at any time during the hearing of the case. He was evidently misled as to the defendant borough's intention to question the jurisdiction, as it filed an exception to the decree alleging the chancellor had erred in not dismissing the bill for want of jurisdiction. Where the question of jurisdiction is raised by demurrer or in the answer, and it is not withdrawn by a proper entry on the record, the chancellor should dispose of it as required by the act.

[2] In the present case, if the defendant borough did not insist on the decision of the question of jurisdiction, the learned chancellor should have required its counsel to formally withdraw that paragraph of the answer denying the jurisdiction of the court. This would have prevented the misunderstanding between the judge and counsel, and also prevented counsel from again raising the question by exceptions to the chancellor's decree. As a matter of practice, the record should disclose the withdrawal of the objections to the jurisdiction when the question has been raised by a demurrer or answer.

[3] It was conceded that the ordinance was enacted without a petition of the property owners, but the defendant claimed that this was authorized by the act of May 12, 1911 (P. L. 288). The plaintiffs' contention is that this act was repealed by the act of June 12, 1911 (P. L. 887), and hence the ordinance was defective unless supported by a petition of the owners. The court in banc understood the question to have been abandoned and did not consider it; the court saying in its opinion:

"The first ground was not pressed by the plaintiffs and was not considered."

This seems to be denied by the appellants, but the briefs of both parties sustain the court. The appellees say:

"The validity of the ordinance was entirely a legal question and was abandoned by the appellants during the course of the trial."

It is true that the plaintiffs in their thirteenth request for findings of law requested the chancellor to find that the earlier was repealed by the later statute, but the request was not answered, and of course was not before the court in banc. In their printed brief the plaintiffs say that if the chancellor, in handing down his decision, had not stated that his colleagues concurred in his findings, "the plaintiffs would have insisted on a disposition of the question raised by the thirteenth request for findings of law." We therefore cannot convict the learned court below of error for not considering and deciding the question, and it must be considered out of the case.

By the tenth paragraph of their bill, the plaintiffs allege that, if the contract authorized by the ordinance is let by the defendant borough, the indebtedness of the borough will be increased above the constitutional limit. This is the third question which the court below considered and ruled against plaintiffs on the facts. In its opinion the court says:

"The plaintiffs presented no conclusive evidence on the third ground (for relief), and the evidence on the part of the defendant shows clearly that the indebtedness of the borough will not be increased above 2 per centum of the assessed valuation of all taxable property in the borough."

The evidence warrants this finding of fact, and therefore we cannot reverse it.

[4] Of the other and second ground on which the plaintiffs rest their right to relief, to wit, the street was graded and macadamized many years ago and has been kept up, repaired, and macadamized at public expense for at least 60 years and the pavements and curbs maintained by the property owners, the learned court says:

"The second ground is the only one left for consideration, and it was the only one urged by the plaintiffs and rests entirely upon the facts in the case."

The court then reviews at great length the evidence submitted on this question, and concludes against the contention of the plaintiffs that Dock street had hitherto been paved or macadamized within the meaning of the law which prohibits the borough from again grading and paving a street partly at the expense of the abutting property owners. We have examined the evidence and think it sustains the court's conclusion. At least it is sufficient to support the court's findings, and, under the well-settled rule, this court, though it might have found differently, will not reverse.

[5] The court in banc, having found the facts against the plaintiffs on the controlling questions in the case, might have entered a decree finally disposing of the issues raised by the pleadings. This is authorized by the act of 1907, where the question of jurisdiction has not been decided against the plaintiff in limine. The facts found by the court did not warrant the relief prayed for in the bill. The decree, however, fully protects the

plaintiffs by permitting them to defend at law against any invasion of their rights in grading and paving the streets under the ordinance in question.

The irregular procedure in the court below in this case requires us to direct attention to the proper practice in such cases. The record here is burdened with unnecessary exceptions, and the procedure is at variance with the plain words of the act of assembly which, no doubt, is attributable in great part to a disregard of the rules of equity practice, and the failure to observe a distinction in such cases between the duties of a judge, sitting as chancellor, and the court sitting in banc.

[6] The chancellor filed an opinion and entered a decree "by the court," instead of filing his findings and by a proper order directing the prothonotary to enter a decree nisi in accordance with the findings. The court in banc and counsel dealt with the first decree as if made "by the court." The printed record discloses the findings of fact and law "made by the chancellor, joined in by the court," which, in itself, is unintelligible, but, as explained in appellant's brief, means that the learned chancellor in handing down his opinion stated that his colleagues concurred in his findings. The two nonsitting judges had not heard the case, and could give no opinion on the facts or law until after it was heard on exceptions by the judges sitting in banc. The decree thereafter entered is the decree of the court. Schuylkill county is a separate judicial district and has "three judges learned in the law in the common pleas." The three judges constitute one court and not three courts, and appeals lie to the proper appellate court from the judgment or decrees, not of the judge, but of the court. The equity rules provide that the hearing of cases in equity shall be conducted before the judge sitting as chancellor.

[7] When a case is at issue upon answer, it is to be heard and conducted in court in the same manner as an action at law wherein trial by jury has been waived. The requests for findings of fact and law with the answers thereto, and the findings of the judge, both of law and fact, must be filed in the prothonotary's office, whereupon the "prothonotary shall enter a decree nisi in accordance therewith, and give notice to the parties or their counsel." If no exceptions are filed within ten days, the prothonotary enters a final decree as of course. If exceptions are filed, they are heard upon the argument list as upon a rule for a new trial, and the judge (if alone composing the court) or the court (if composed of more than one judge) in banc may sustain or dismiss any of such exceptions and confirm, modify, or change the decree; and upon appeal such matters only as have been so excepted to and finally passed upon by the court are assignable for error. This

is the orderly mode of procedure in such cases required by the equity rules and should have been followed in disposing of the present case. We had occasion to call attention to the proper practice in equity cases in *Myers v. Consumers' Coal Co.*, 212 Pa. 193, 200, 61 Atl. 825.

The decree is affirmed.

(244 Pa. 373)

SCHMID et al. v. LANCASTER AVE.  
THEATER CO. et al.

(Supreme Court of Pennsylvania. March 9, 1914.)

1. EQUITY (§ 327\*)—FRAUD—VARIANCE—DISMISSAL.

Failure of complainant, in a bill in equity to sustain by evidence a positive averment of fraud, will not entitle defendant to dismissal where there is proof of constructive fraud.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 651, 652; Dec. Dig. § 327.\*]

2. CORPORATIONS (§ 310\*)—DIRECTORS—DUTY TO SHAREHOLDERS.

The directors of a corporation are bound to administer its affairs with strict impartiality in the interest of all the shareholders alike.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1352-1362; Dec. Dig. § 310.\*]

3. CORPORATIONS (§ 320\*)—LEASE OF PROPERTY—FRAUD.

The action of the directors of a corporation in leasing the entire corporate property to another corporation is presumably fraudulent where another equally responsible party offers, with their knowledge, to pay a much greater rental, especially where the directors voting for the lease are financially interested in the lessee corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.\*]

4. CORPORATIONS (§ 317\*)—FRAUDULENT CONTRACTS—RATIFICATION.

The act of the majority stockholders of a corporation, in subservience to whose interests the directors made a fraudulent contract, in subsequently voting to approve such contract against the protest of the minority did not constitute a ratification of the contract.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1401-1414; Dec. Dig. § 317.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Mathew Schmid and another against the Lancaster Avenue Theater Company and others to enjoin the execution of a lease. From a decree dismissing the bill, plaintiffs appeal. Reversed.

Argued before MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZIS-KER, JJ.

John G. Johnson and Benjamin O. Frick, both of Philadelphia, for appellants. Alex. Simpson, Jr., and Ehrlich & Archbald, all of Philadelphia, for appellees.

STEWART, J. The bill in this case was filed to restrain a proposed renewal of the lease of the William Penn Theater on Lancaster avenue, Philadelphia, by the William Penn Theater Company to the Penn Charter

Amusement Company, Incorporated, for a period of five years from October 1, 1914, at an annual rental of \$22,500. The bill averred that the renewal of the existing lease as proposed would be a fraud on plaintiffs' rights as minority stockholders, inasmuch as at a meeting of the board of directors at which a renewal of the lease was decided on, and before such action was taken, a written offer from a responsible and equally capable party was submitted, agreeing to accept a lease of the theater for a like term paying therefor an annual rental of \$30,000, giving satisfactory security therefor, which offer was rejected, and the lease to the Penn Charter Amusement Company ordered by a vote of three to two; the three parties voting in the affirmative being interested in the Penn Charter Amusement Company. The answer filed raised but few questions of fact; it denied that the three directors who voted in favor of the lease to the amusement company were interested financially in said company, and, without assigning any reasons for the rejection of the higher rental offered, denied all fraudulent design or effect. Upon hearing plaintiffs' bill was dismissed. The appeal is from the decree dismissing the bill. We excerpt from the findings of fact by the learned chancellor such as we regard important to a correct understanding of the case and the termination of the question here raised.

The Lancaster Avenue Theater Company was incorporated in March, 1909, for the purpose of building, maintaining, and managing theaters, etc., with a capital stock of 500 shares of the par value of \$100. Within a few months thereafter the capital stock was increased to \$150,000, consisting of 1,500 shares. Of these, 1,120 of the par value of \$100 were issued in return for cash payment as follows: 339 shares to W. W. Miller; 392 shares to Gustavus A. Muller; and 389 shares to Mathew Schmid. On December 8, 1911, the holding of these shares was as follows: W. W. Miller 338; Joseph S. Miller, son of W. W. Miller, 1; Gustavus A. Muller 131; Gustavus C. Muller 130; Walter H. Muller 131; Mathew Schmid 333; and William A. Schmid, son of the latter, 56. The Lancaster Avenue Theater Company was thus practically a close corporation. Three families or interests were engaged in it. Out of the total number of shares, the Miller family held 339, the Muller family 392, and the Schmid family 389. In August, 1909, the above-named W. W. Miller organized the Penn Charter Amusement Company, with a capital stock of 50 shares of the par value of \$100 each. These shares were issued as follows: 5 to Metzel, secretary of the company; 7½ to Gustavus A. Miller; and 37½ to W. W. Miller. The company has no other assets. Upon the completion of its building the William Penn Theater Company leased it to the Penn Charter Amusement Company, then and now controlled by the said W. W. Miller, who is the president of both companies, for a term of

five years from September, 1909, at a yearly rental of \$20,000; the plaintiffs in the present bill assenting. Before one-half of the term of this lease had expired, 8th December, 1911, at a meeting of the board of directors of the William Penn Theater Company, a renewal of the lease to the Penn Charter Amusement Company for a period of five years from the expiration of the existing lease at a rental of \$22,500 per annum was ordered. The consideration of the matter was postponed until the meeting of 5th March, 1912. At the meeting held on this latter date all the directors (comprising all the stockholders, with the exception of Gustavus A. Muller, the were present; W. W. Miller presiding. After other business had been finished, Miller called to the chair Gustavus C. Muller, and then personally submitted the proposition of the Penn Charter Amusement Company for renewal of its lease of the theater, and asked that it be accepted upon the terms therein indicated. Before the vote was taken, a written offer was submitted by Mathew Schmid from Fred G. Nixon-Nirdlinger, a successful lessee and manager of theaters, and a man of financial responsibility, to lease the theater at the end of the current term for a term of ten or five years, as might be desired, at an annual rental of \$30,000, in which offer it was stated that "they [himself and parties associated] were prepared to secure the lease with any reasonable security your company may elect." Both Nirdlinger and Schmid testified that the latter was not a party to the offer, and this testimony was not contradicted in any way. Miller resuming the chair, two resolutions were proposed and passed; one accepting the offer of the Penn Charter Amusement Company for renewal of its lease at a rental of \$22,500 per annum, the other directing that the lease be executed. Though all the directors were present, excepting Gustavus A. Muller, there were but five votes; those voting in the affirmative were Gustavus C. Muller, Walter H. Muller, and Joseph S. Miller, neither of whom had financial interest in the Penn Charter Amusement Company; those voting in the negative were the two Schmid. Within a few days after this action was taken the plaintiffs filed their present bill. Thereupon a stockholders' meeting of the Lancaster Avenue Theater Company was called. At this meeting a resolution approving the action taken at the directors' meeting was adopted; the Miller and the Muller interests voting 730 shares in support of the action of the directors, and the Schmid interests 389 shares in the negative.

[1] Such are the general findings of fact. While several of them are challenged as incorrect by the assignments of error, there is but one of sufficient materiality to call for discussion, and that only because the learned chancellor has derived from it his governing conclusion, that the action of the directors in voting the lease to the Penn Charter

Amusement Company stands clear of fraudulent design or effect. The finding is that neither of the directors who so voted, Gustavus C. Muller, Walter H. Muller, and Joseph B. Miller, was financially interested in the amusement company. While it is true that plaintiffs aver in their bill that the parties named were financially interested in the amusement company, it by no means follows that they are entitled to the relief prayed for only as they have succeeded in establishing this particular fact. What the bill specifically charges is that the execution of the proposed lease to the amusement company would be a fraud on plaintiffs' rights as minority stockholders in the Lancaster Avenue Theater Company, for the reason that it is a lease of the entire property of the theater company at a rental of \$22,500 per annum, when another equally responsible party stood ready and offered to pay an annual rental of \$30,000 for the same property, a fact known to the directors at the time. If this result was reached by the votes of directors financially interested in the amusement company, except as otherwise explained, the law would refer it to the fact stated and condemn it as an actual fraud; if, by the votes of directors not financially interested in the amusement company, unexplained, the law would condemn it none the less, but, as a constructive fraud, one not depending on fraudulent intent, but one arising by legal implication. The failure of a complainant to sustain the positive averment of actual fraud will not entitle the defendant to the dismissal of the bill, when there is proof of constructive fraud. *Ricketts' Appeal*, 9 Sadler, 247, 12 Atl. 60. So, if the finding that the directors named were without financial interest in the amusement company were to be sustained, it would not by any means be conclusive of the controversy. So much with respect to the legal conclusion derived by the chancellor. Now as to the finding itself. Certainly it cannot be said that the evidence supports it except as the finding is to be understood in a very qualified sense. If all that it means is that neither of these parties was the owner of stock in his own name in the amusement company, it is correct; but, understood in the larger sense as indicating that neither was in position to be individually advantaged by the financial success of the amusement company, it would be manifest error. Of the parties here involved, Joseph S. Miller was the son of W. W. Miller, the owner of a very decided majority of the stock of the amusement company; the two Mullers were sons of Gustavus A. Muller, the only person holding any considerable part of the remainder of that stock. These were the only directors voting affirmatively for the lease at a meeting where every director and stockholder of the theater company were present, excepting Gustavus A. Muller. Joseph S. Miller was the holder of one share of stock in the theater company given him by his father, W. W. Miller; one

of the Mullers held 130 shares, given him by his father; the other, 131 shares, acquired in the same way. With the status of the parties thus fixed with respect to their several holdings in the theater company, another distinct finding by the chancellor, which we here quote at length, enables us to understand fully what the vote cast by each of these directors represented:

"(19) Gustavus C. Muller, Walter H. Muller, and Joseph S. Miller had no financial interest in the Penn Charter Amusement Company, and each of them owned absolutely the stock in the Lancaster Avenue Theater Company, standing in his name. It is a fact, however, that these sons of their fathers look upon the several interest in this transaction as composed of three family interests, and that the members of each family regard the interest of its head as their own interest. This view, though not merely financial, and in some respects perhaps sentimental, undoubtedly colors the relations of the parties concerned. Gustavus C. Muller and Walter H. Muller look upon the interest of their father, Gustavus A. Muller, as their own; Joseph S. Miller looks in the same manner upon the interest of his father, Wm. W. Miller; and William A. Schmid does the like as regards the interest of his father, Mathew Schmid."

[2] This finding either means a community of financial interests between the membership of each family group according to its stockholding, or it means nothing. As we read it, it means even more than a community of interest; it is a clear finding that the determining power in each group was in its head, and that the collective power of the group in the management of the affairs of the theater company was always directed to the attainment of ends which met the views and better secured the interest of its head. This finds appropriate illustration in the vote by which the resolution was passed giving the lease to the amusement company. The meeting that was called to take action on the proposed lease was presided over by W. W. Miller, the largest stockholder both in the theater company and in the amusement company. He was actively urging that the lease be given to the latter company—virtually to himself, since in his testimony he speaks of it as his own—but refrained from voting, allowing his son Joseph S., the holder of but one share, to cast for the family group the determining vote, for without that vote in the affirmative the resolution would have failed of adoption. Gustavus A. Muller was absent but was represented by his two sons; these voting in the affirmative with Joseph S. Miller to give the lease to the amusement company, in which the head of this particular group was a stockholder. The disguise attempted at the meeting of having those only vote who were not involved stockholders of the amusement company does not and cannot conceal the fact that the interests which these votes represented and expressed were the same interests that owned and controlled the amusement company. In the very qualified sense we have above indicated the finding of the chancellor

that these directors were without financial interests in the amusement company may be sustained; but so qualified it is without effect. In any larger sense it could not be sustained. Our own finding is that, while these directors were not individual shareholders in the amusement company, each is shown to have had such a substantial interest in the subject as disqualified him from voting on the question. It is further apparent that these men were directors if not by the direct selection of W. W. Miller and Gustavus A. Miller, certainly by their grace and sufferance; and it is manifest from the chancellor's finding above that they were there to act consistently with the views and wishes of those who gave them their tenure of office.

"Nothing can be more unjustifiable and dishonorable than an attempt on the part of those holding a majority of the shares in a corporation to place their nominees in control of the company and then use their control for the purpose of obtaining advantages to themselves at the expense of the minority; it would be a conspiracy to commit a breach of trust. The directors of a company are bound to administer its affairs with strict impartiality, in the interest of all the shareholders alike, and the inability of the minority to protect themselves against unauthorized acts performed with the connivance of the majority, renders their right to the protection of the courts the more clear." *Morawetz on Private Corporations*, § 529.

We need not stop to point out the applicability of this rule to the determining vote of Joseph S. Miller, the holder of a single share of stock, the gift of his father.

[3] But even were we to admit entire exoneration of these directors from the charge that they were financially interested in the amusement company, how would the case then stand? Here was a transaction begun and ended by these directors which on its face shows an acceptance by the directors of an annual rental for the company's property of \$22,500 for a term of five years, and the rejection of an offer by an admittedly responsible party to rent the same, under the same terms, for the same period, at an annual rental of \$30,000 involving a total loss to the company of \$37,500. The good faith of the parties responsible for the transaction is questioned in a legal proceeding begun by dissatisfied stockholders. Unexplained, the transaction, so manifestly and seriously prejudicial to the rights of the minority, might well give rise in the mind of the questioning party to something stronger than mere suspicion that the interest of the shareholders had for some reason been improperly sacrificed, if not for reasons of private gain, through favoritism or some other equally reprehensible consideration involving gross dereliction of duty. It is too clear for discussion that under such conditions as we have here, with the rejection of the higher bid and the acceptance of the lower admitted in the pleadings, the onus rested upon the parties responsible for the fact to show the

fairness of the transaction. Except as explained so as to make it consist with good faith the legal inference would be that, either through design or by willful neglect on the part of the directors, it was in effect an appropriation of corporate assets to other than corporate purposes. The answer filed contained no explanation whatever. We have to look to the testimony of these directors to ascertain the reasons for their votes. Each asserts that he voted in good faith; but that is a matter to be judged of by the sufficiency of the reasons given. First, Gustavus C. Muller thus states his reasons:

"I voted that day for the continuance of the lease to Mr. Miller, for this reason: When the proposition was first spoken of, the purchase of the building and operating the William Penn theater, Mr. Miller, Mr. Schmid, and my father had a talk. That talk was that they would go in on thirds and complete the house, and Mr. Miller should be lessee. I don't believe he would have gone in if it hadn't been for the promise. I also voted because I thought the house had been successful and was operating in a successful manner. Everybody seemed pleased with it. People came to me and complimented me on the conduct of the house, and everything else, and, as I stated before, it makes no difference to our side, one way or another, whether the lease would be held by Mr. Miller, or whether it would be held by Mr. Nixon, financially."

He was asked the following question: "Just give us all the reasons why, acting out of a high regard for good faith, you voted to turn down a proposition to take \$30,000 rent, and accepted one to pay but \$22,500. Without characterizing your action at all, give us the reason for it." His answer was, "Because, financially, it didn't make any difference one way or another." This question followed: "And therefore, inasmuch as it didn't make any difference to you, owing to this balance of interest, you voted in favor of the lower rental, and disregarded the fact that it did make a difference to another stockholder. Is that so?" To this he answered, "That is so."

Walter H. Muller's explanation was as follows:

"I done that in good faith, and the reason of voting that way was I thought, as long as Mr. Miller had had the lease for five years and carried the theater on in a successful way, that it was better to take a chance on him than on some new party we didn't know anything about."

On cross-examination he was asked, "Why did you vote to take \$7,500 a year less rent, and so throw away your one-third of it, or \$2,500?" His answer was, "As my brother testified, it didn't make any difference which way the lease went." This question followed, "And that is the reason you gave it?" "No; I voted that way because I thought Mr. Miller the most responsible party." Then to the question, "You didn't make any inquiry about the other?" the answer was, "No; only from what we heard."

Joseph S. Miller's explanation was:

"My main reason was a continuance of the successful tenancy of the house, the continuing of the policy of the house along successful lines, which meant the enhancing of the value of the property, and a further reason was I didn't consider the offer of Mr. Fred G. Nixon-Nirdlinger as having been made in good faith. \* \* \* I was influenced by the fact that he was a successful tenant of the house and wanted to continue the lease of the theater."

The united testimony of these witnesses, giving it the most favorable construction, is to the effect that, in voting for a resolution which virtually gave to W. W. Miller, a stockholder with themselves—we say Miller rather than the amusement company for the reason that he himself testifies, and so do the other witnesses, that, while the lease was in the name of the amusement company as lessee, the lease was virtually to himself—a bonus of \$7,500 a year for five years in connection with the lease of the company's theater, they were governed solely by the consideration that it would be to the advantage of the company to continue Miller's management even at such a cost. The explanation would not have been so absolutely destitute of merit, however much it might have reflected on the business judgment of the parties, had not the lease agreed upon provided that the lessee could assign it at any time to any person acceptable to the lessor. The lease, therefore, did not secure Miller's management of the theater, and this fact must have been known to the directors. There was nothing in the lease to prevent Miller from immediately assigning it to Nirdlinger, whose bid had been rejected, for the rental the latter had proposed to give, and in so doing Miller would have been appropriating to himself the amount that the theater company had sacrificed in its lease to him. With the board constituted as it was, he could very confidently have counted upon a ratification of the assignment because if, for no other reason, Nirdlinger, as shown by this record, is a successful theater manager, of large experience and financial ability. The case on this branch of it admits of but one conclusion, namely: That the interests of the minority stockholders were designedly sacrificed by men into whose charge the entire corporate affairs had been committed upon the trust and confidence that they should be cared for and managed for the interest of all the stockholders.

[4] But one thing remains to be considered: The ratification of the lease by the stockholders. At the meeting at which this was done the Miller and the Muller stock was voted in affirmance, and the Schmid in the negative. That a voidable contract entered into by the directors of a corporation may be ratified by the stockholders is not open to question, but the contract here as expressed in this proposed lease was more than this, as we have attempted to show;

it was in itself a fraud upon the minority rights, and the admitted ratification was by the same stock majority that passed the lease. Moreover, we have found the lease to be seriously prejudicial and detrimental to corporate interests. It is only when the transaction is not in fact fraudulent or detrimental to the corporate rights that it is susceptible of ratification. Morawetz on Private Corporations, § 626. In the present case it was both.

We are of the opinion upon a careful review of the case that complainants were entitled to the relief they sought, and it is now ordered that the decree dismissing the bill filed be reversed, that the bill be reinstated, and that an injunction issue as prayed for in plaintiffs' bill.

(245 Pa. 268)

# CONSOLIDATED DRESSED BEEF CO. v. CITY OF PHILADELPHIA.

(Supreme Court of Pennsylvania. May 4, 1914.)

## 1. ANIMALS—"STEER."

A "steer" is a male member of the bovine family which has been castrated prior to his arriving at the age of four years.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 7, pp. 6656, 6657.]

## 2. MUNICIPAL CORPORATIONS (§ 253\*)—ACTION ON CONTRACT—DIRECTION OF VERDICT.

Where, in an action by a meat supplying company against a municipality for the contract price of meat, it appeared that plaintiff had refused to perform the contract according to its specifications, and sought to excuse its default on the sole ground that it and others had for many years been allowed, by former officers, to overlook similar specifications, and it further appeared that the city suffered loss by such failure to perform, the court properly directed a verdict for defendant.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 695; Dec. Dig. § 253.\*]

## 3. MUNICIPAL CORPORATIONS (§ 253\*)—CONTRACT—ESTOPPEL.

That a contractor, who, for many years, has supplied the municipality with meat, has been allowed by the city officials to supply meat of inferior grade to that contracted for, will not estop the city from setting up the contractor's default as a defense in an action against it for the price of meat delivered.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 695; Dec. Dig. § 253.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by the Consolidated Dressed Beef Company against the City of Philadelphia for meat sold and delivered under a duly authorized contract. From judgment on directed verdict for defendant, plaintiff appeals. Affirmed.

Hall, P. J., specially presiding, delivered the following charge in the court below:

This is an action brought by the Consolidated Dressed Beef Company, a corporation doing business in this city, against the city of Philadelphia, to recover the sum of \$9,263.11 for

beef sold and delivered to the city of Philadelphia in the year 1912, under the provisions of a certain contract which was entered into between these parties on the 9th day of January, 1912, in pursuance of a proposal and bid which had been made by the plaintiff company and accepted by the city shortly before. The specifications which were contained in this contract provided that all beef which was to be furnished the city by the contractor should be steer beef.

[1,2] A "steer" is a male member of the bovine family which has been castrated young in life, that is, prior to his arriving at the age of four years, and none of the witnesses who have been upon the stand claim that there is anything ambiguous in this word, but they testify that this is a meaning which is general and is recognized by all members of the trade, and it is not claimed that the word "steer" was used in this contract in any other manner except in its ordinary and usually accepted sense, or that it had in this locality any special trade signification. It appears that the contractor, in carrying out the terms of the contract, instead of furnishing steer meat, proceeded to furnish the almshouse with the meat of bulls, cows, and stags, and in some instances oxen, and that when this was called to his attention by the proper official of the city he did not deny it, but, upon the contrary, admitted that he was furnishing this other meat, which appears to have been healthful and fit for eating, but of an inferior and cheaper quality than steer meat, and he informed the director that that was the kind of meat that he proposed to furnish, and said that he had no intention of furnishing steer meat under the contract, and that if he did so it would cost him at least \$50,000. The city thereupon annulled this contract, or rescinded this contract, bought meat in the open market, and finally readvertised and relet the contract, all of which they had a perfect right to do under the terms of the contract which had been entered into between the city and the plaintiff company, and the result of this was that it cost the city \$18,015.90 more for their meat during the balance of that year than it would have cost them if this plaintiff had furnished it at the price at which he had agreed to furnish it. The expense of readvertising was \$116.10, which they would also have the right to collect under the terms of the contract. The expense arising to the city therefore from the plaintiff's neglect and refusal to carry out his contract in accordance with the specifications amounted to \$18,132, and, deducting from that the \$9,268.11 which the city admits they owe to the contractor for beef which he had delivered and they had accepted, he would owe the city the sum of \$8,868.89 by reason of his breach of the contract.

[3] The facts in this case are not in dis-

pute, and the only answer or defense which the contractor makes is that for many years before he had been contracting with the city, that both he and the other people had been contracting with the city for meat, and that they had been allowed by former officials to overlook the clear provisions of this specification, and, instead of furnishing this higher priced meat called for by the contract, to furnish a lower priced and inferior quality, and for that reason he said he had a right to think that, while he entered into this contract, the contract would not be enforced by the city. That might be a good defense if this were an action between individuals or firms; but it is no defense in an action against the city, because the city of Philadelphia is a municipality, and therefore a constituent part of the commonwealth and clothed with its sovereign power. The city cannot be estopped by the illegal, neglectful, or dishonest acts of its former officials, and the city had the right to expect and to require that any contract which they entered into with a contractor should be fulfilled and carried out in accordance with its plain terms.

For these reasons we have concluded that it is our duty to dispose of this case from the bench, and we will direct you to find a certificate in this action in favor of the defendant, the city of Philadelphia, for the sum of \$8,868.89.

Verdict for the defendant with a certificate for \$8,868.89 and judgment thereon.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Theodore F. Jenkins, of Philadelphia, for appellant. Edgar W. Lank, Asst. City. Sol., and Michael J. Ryan, City Sol., both of Philadelphia, for appellee.

PER CURIAM. The undisputed facts in this case appear in the charge to the jury, in which the learned trial judge directed them to return a certificate in favor of the defendant. It was clearly entitled to that certificate, and the basis for the same was competent testimony, the admission of which is the subject of the first assignment of error. The second, third, fourth, and fifth complain of the disallowance of certain offers of testimony. If all of it had been admitted, it would not have helped the appellant, which was bound by the plain, self-construing terms of its written contract with the city.

The judgment on the verdict directed in its favor is affirmed.



(88 Conn. 500)

## BELDEN v. HUGO, Sheriff.

(Supreme Court of Errors of Connecticut. July 17, 1914.)

## 1. CRIMINAL LAW (§§ 982, 1001\*)—SENTENCE—SUSPENSION OF SENTENCE.

Pub. Acts 1905, c. 142, § 4, as amended by Pub. Acts 1911, c. 106, § 1, providing that any criminal court may suspend sentence and commit the accused to the custody of a probation officer, authorizes the courts to either suspend sentence by not pronouncing sentence or to suspend the execution of a sentence which has been pronounced, especially in view of Pub. Acts 1905, c. 142, § 5, which provides that on failure of any person placed on probation to observe the rules of conduct prescribed by the court or to report to the probation officer, the officer prior to the final disposition of the case may bring him before the court, and the court may revoke the suspension of the execution of his sentence, whereupon the sentence shall be in full force or the court may continue the suspension.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2500, 2501, 2554-2559; Dec. Dig. §§ 982, 1001.\*]

## 2. CRIMINAL LAW (§ 1001\*)—SENTENCE—SUSPENSION OF SENTENCE.

Under Pub. Acts 1905, c. 142, § 4, as amended by Pub. Acts 1911, c. 106, § 1, relative to the suspension of sentence, and Pub. Acts 1905, c. 142, § 5, relative to the revocation of such suspension, where sentence is suspended after being pronounced, the period during which a convicted person is in the custody of the probation officer is not a part of the term of his sentence, and, where the suspension is revoked, the term of the sentence runs from the time of such revocation and not from the time of the commitment to the probation officer.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2554-2559; Dec. Dig. § 1001.\*]

## 3. CONSTITUTIONAL LAW (§ 74\*) — JUDICIAL POWERS — ENCROACHMENT ON EXECUTIVE — SUSPENSION OF SENTENCE.

Pub. Acts 1905, c. 142, § 4, as amended by Pub. Acts 1911, c. 106, § 1, relative to the suspension of sentence, construed as suspending the execution of a sentence pronounced so that in case of revocation the term thereof runs from the time of the revocation is not invalid as conferring on the courts the pardoning power.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 124; Dec. Dig. § 74.\*]

Beach and Roraback, JJ., dissenting.

Case Reserved from Court of Common Pleas, New Haven County; Earnest C. Simpson, Judge.

Habeas corpus by George W. Belden against Philip Hugo, Sheriff, to determine the legality of the petitioner's imprisonment. Reserved upon the facts alleged in the pleadings for the advice of the Supreme Court of Errors. Trial court advised to remand the petitioner to the custody of the sheriff.

The petitioner, having been convicted of the crime of abortion at the April term of the superior court in New Haven county, was, on April 24, 1913, sentenced to be imprisoned in the common jail in New Haven for and during the term of one year, and to pay a fine of \$400, together with the costs of prosecution, and to stand committed to jail until the sentence be fully complied with. He thereupon

paid the fine and costs, and the court ordered that execution of that part of the sentence which directed that the petitioner be imprisoned in jail for the term of one year be suspended, and that the petitioner be committed to the custody of a probation officer designated for the term of one year and until further order of court, and ordered the case continued on the docket. A mittimus was then issued committing the petitioner to the care and custody of the probation officer as stated. The case came by continuance to the January term, 1914, when the petitioner was brought before the court by the probation officer on the 14th of January, 1914. At that time the court revoked the order of suspension recited, and ordered that the accused be committed to jail to serve the term of his sentence; the same to begin on that day. A mittimus was thereupon issued to the respondent to keep him in jail for the term of one year from January 14, 1914. These proceedings were begun April 27, 1914, more than one year after the imposition of the sentence upon the petitioner.

Samuel E. Hoyt, of New Haven, for petitioner. Arnon A. Alling, State's Atty., and Walter M. Pickett, Asst. State's Atty., both of New Haven, for respondent.

PRENTICE, C. J. (after stating the facts as above). [1] Section 4 of chapter 142 of the Public Acts of 1905, as subsequently amended, provides that any criminal court in any case within its jurisdiction, or the judge who held such court upon a hearing after the adjournment of the term, may adjourn the case or suspend sentence and commit the accused to the custody of a probation officer, either regularly appointed or specially designated, for such time not exceeding one year as might be fixed. P. A. 1911, c. 106, § 1. The plaintiff's conviction, sentence to imprisonment for one year and payment of fine, immediately paid, and commitment to the custody of the probation officer for the term of one year, after an order of suspension of execution of the sentence of imprisonment had been entered, took place while this statute was in effect.

[2] Although the provision referred to is inartificially framed, it is apparent from the context, and especially that contained in section 5, that, interpreted according to its true meaning and intent, it confers upon the courts power to either suspend sentence in the strict meaning of that phrase, which implies that sentence is not pronounced, or to suspend the execution of a sentence pronounced. This counsel for the petitioner does not question. He does not complain of any irregularity in the judicial proceedings. His sole contention is that the judgment of the court had been satisfied before the commencement of these proceedings by the passage of one year from the date of imposition of sentence, during all of which period he was

either in the custody of the probation officer or in jail, so that his client was and is entitled to his enlargement. The state's attorney, representing the respondent, insists that the plaintiff will not have satisfied the sentence of imprisonment imposed upon him until one year from the time that the order of suspension of execution was revoked and the mittimus to the respondent issued, and he shall have spent one year thereafter in jail.

These conflicting claims arise from a fundamental difference of view as to the meaning and intent of our probation law, of which the section referred to forms a part. In the view of the petitioner, the secondary commitment to the custody of the probation officer provided for by the statute, where sentence to imprisonment is pronounced, is a substitute or alternative for the primary commitment to jail or to prison embodied in the sentence, so that the period of the former counts in reckoning the period of the latter. The view of the state's attorney is that the probation period stands wholly unrelated to a satisfaction of the sentence as such, and can have no effect upon the sentence save as it may, if its purpose is fulfilled by reform of life, lead to an exemption from its operation.

One of the difficulties with the plaintiff's view is that it ignores the purpose of the probation commitment and mistakes its true character. It is not ordered for the purpose of punishment for the wrong for which there has been a conviction, or for general wrongdoing. Its aim is reformatory and not punitive. It is to bring one who has fallen into evil ways under oversight and influences which may lead him to a better living. The end sought is the good of the individual wrongdoer, and not his punishment. Underlying the act of commitment is the hope that it may prove that punishment will be unnecessary, and that its stigma may be avoided. A sentence partakes of an essentially different character. It is the judgment of the court formally pronounced "awarding the punishment to be inflicted." Black's Law Dictionary, 1071. It deals out punishment, and one of its underlying aims is to cause its subject to suffer for the wrong he has done.

The suggestion that the probation commitment partakes of a penal character because it involves an award of custody, a restraint of liberty of conduct by the necessity of observance of prescribed rules and regulations, and the creation of a right and power of supervision in another is one which overlooks the end sought and the fundamental character of the limitations upon personal independence which are involved. Restraints upon individual freedom of action are not by any means all penal. The youth at school is under restraint. He comes under the duty of obedience to the rules prescribed for his well-being and wholesome development. He is subject to the supervision of a superior, and yet his school life is not one of punishment. There are limitations upon the right of in-

dividual freedom of action born of social conditions which are constantly recognized. Their character is not penal where the purpose of their imposition is not punitive.

The nonpenal character of the probation commitment under our law is plainly recognized in its provisions wherein a suspension of the execution of the sentence imposed is provided for where a commitment to the custody of a probation officer is made, and a revocation of the suspension provided for when imprisonment in conformity to the sentence is to begin. The sentence, to use the words of the statute, does not come to have full force and effect until this revocation is made. A sentence unexecuted entails no punishment upon the offender. It is only a judicial pronouncement. It is the carrying into effect of the sentence by process providing for its execution which results in punishment. A suspension of execution necessarily involves a suspension of the penal consequences of the judgment. Suspension is altogether inconsistent with operation. It implies a stay—a cessation of operation. The position of a person under sentence, but committed to the care of a probation officer, as described in the language of the statute, involves the conception of a ceasing of the operation of the sentence, and not operation of the sentence proceeding simultaneously with or by means of the probation process. The statute plainly contemplates nothing of the latter sort. It as plainly contemplates that proceedings to secure punishment shall not be in force during the period when the probation process is in operation, and that execution of sentence will not run unless and until that process shall have failed to accomplish the desired results.

It is suggestive of the law's conception of the relation of a probationer to the probation officer that in section 9 of the statute it is provided that the former be considered as the latter's ward. The officer is thus represented as standing in the eye of the law in the position of a guardian, and not that of a keeper.

[3] The appellant, in support of his prayer for release, claims that the action of the court in committing him to the care of the probation officer, if the period of such commitment was not to be reckoned as in satisfaction pro tanto of the sentence of imprisonment, was in excess of its authority as being in its essence an exercise of the pardoning power. In aid of this contention, we are referred to several cases, of which *State v. Sturgis*, 110 Me. 96, 85 Atl. 474, 43 L. R. A. (N. S.) 443, is a good example, wherein it has been held, in substance, that courts are powerless after sentence to interfere with the execution of the sentence by way of its commutation, the exoneration of the prisoner therefrom, or modification of its terms.

These cases all dealt with the inherent power of courts in the absence of enabling legislation. Here the superior court acted in

conformity with legislation which expressly confided to it the authority it exercised. The question presented to us is therefore in no sense that passed upon in the cases referred to. It does not concern the inherent power of the superior court, but its power under the statute. The terms of the statute are, as we have seen adequate to justify the action taken. If that action was unlawful, it could be for no other cause than that the General Assembly was powerless to legislate as it did. The question for our determination is thus carried back to the statute, and concerns the competency of the General Assembly to enact it.

In passing upon this question it is important that we gain a correct conception of the character of that which the statute authorizes the courts to do in the matter of stays of execution. In no true sense is it an exercise of the pardoning power. The provisions of the statute like those authorizing releases from imprisonment on parole merely prescribe conditions attaching to the punishment authorized and inflicted. The General Assembly defines the punishments which may be imposed and it may gather around those punishments such incidents or conditions as it may deem wise. Statutes which prescribe these incidents or conditions, although general in their application, are dealing with the punishment, and their provisions enter into and form a part of it. So it is that every sentence to imprisonment for a term carries with it and has incorporated into it by necessary implication those provisions whose operation may result in a modification of its letter. When some such provision results in a release on parole or stay of execution with a probation commitment, that result does not have its source in an exercise of the pardoning power. It comes in the due course of the operation of the sentence under the provisions of law which prescribe what it may be and its incidents. In this view of the matter there can be no doubt as to the competency of the General Assembly to legislate as it did in the probation statute and to attach to or incorporate into punishments authorized to be imposed the conditions it embodies.

We need not stop here. Let it be assumed that there exists, in a stay of execution which may be made permanent, the essence of a remission of sentence. We are then unable to discover good reason, constitutional or otherwise, why courts of criminal jurisdiction may not by legislation be given control over their own judgments for the period of one year so that within that period they may be modified or erased. That at most is all that the stays provided for in the statute amount to. The power exercised even in that aspect of it does not constitute a pardon or commutation. It is in effect only a change of judgment, and for that reason a radically different thing from a pardon or commutation, which import that the sen-

tence stands while the sentenced person is relieved from its operation upon him. The gist of that which the statute authorizes is that the pronouncement of the court may be changed, not that a way of escape from it is provided.

We have no occasion to consider the further question suggested by the argument in favor of the plaintiff whether it is not competent for the General Assembly to confer upon the courts a power of pardon.

We are of the opinion that the period during which the petitioner was under commitment to the custody of the probation officer is not to be counted as time during which he was undergoing the punishment imposed in the sentence. Execution of the sentence did not come into operation until revocation of the suspension of execution was made on January 14, 1914, and the year for which he was sentenced to imprisonment began to run from that date. It follows that he has not served out his sentence, and is not entitled to enlargement from the respondent's custody under the mittimus in his hands.

Judge Simpson is advised to render judgment remanding the petitioner to the custody of the respondent. Costs in this court will be taxed in favor of the respondent.

THAYER and WHEELER, JJ., concurred.  
RORABACK, J., dissented.

BEACH, J. (dissenting). This is not a case where the imposition of sentence was suspended, so as to create an interregnum between the conviction and the final judgment of the court. In this case final judgment and sentence of fine and imprisonment in the common jail for one year was pronounced, on April 24, 1913. The fine was paid, and, except for the probation act of 1905 as amended, nothing would have remained except to do execution of the jail sentence. This statute authorizes the criminal courts to commit a convicted criminal to the charge of a probation officer upon conditions which contemplate his absolute release in case he observes the terms of his probation and conducts himself to the satisfaction of the court. The act has been practically construed as authorizing the court to commit on probation either before or after the sentence. If done before the imposition of the sentence which would otherwise have been required by law, the probation commitment is in the nature of an interlocutory order specially authorized by the act, and there is no logical or constitutional reason why such an order may not thereafter be revoked and a final judgment entered. But when the court first pronounces a final judgment and sentence including imprisonment, and then suspends the execution of the jail sentence and commits the convicted and sentenced criminal to a probation officer on conditions which contemplate that, at the pleasure of the court, the original sentence may never be enforced at all, very important

questions arise as to the character of such an order of commitment. Is it an authorized alternative execution of the sentence? Or is it, as the opinion holds, no execution at all, because not a punishment? And if the statute purports to authorize the criminal courts to let a convicted and sentenced criminal go free of any execution of his sentence upon condition of his good behavior while in the custody of a probation officer, is it not then in violation of article 2 of the Constitution of Connecticut, as an attempt to confer the pardoning power on the courts?

I think the probation commitment is in alternative execution of the jail sentence already pronounced and is a punishment for the offense committed. It is founded on the conviction and in practice is evidenced by a formal mittimus. From the standpoint of the probationer there can be no question but that it is penal in character. He is under the surveillance and in the custody of an officer of the law, under such regulations as the court sees fit to impose. He is required to observe these regulations, report to the officer as directed, and to maintain a correct life, being all the while subject to arrest without warrant for failure to do so. His description, sufficient for identification, and his history while under probation, are part of the records of the criminal court in which he was convicted, and of the Connecticut prison association. Chapter 142, P. A. of 1905; chapter 161, P. A. of 1909. This amounts to a restraint of personal liberty imposed by the judgment of a court for the commission of a criminal offense. It is a "penalty for transgressing the law," which is our Connecticut definition of punishment in criminal law. *State v. Smith*, 7 Conn. 428.

It does not quite meet the issue to point out that the purpose of the act is the good of the wrongdoer and not his punishment; as if these two purposes were inconsistent. They are not inconsistent. On the contrary, they are two of the five main objects of penal justice as laid down by Bentham, namely, example, reformation, incapacitation, satisfaction to the person injured, and economy to the state. Modern penology emphasizes the second and fifth of these purposes, and the act in question aims at these results in the same general way as the indeterminate sentence; the act authorizing the commitment of persons convicted of certain state's prison offenses to the state reformatory, and the parole of prisoners in these institutions after serving a minimum term. In particular it enables the courts to discriminate between degrees of criminality which cannot be distinguished by statute, and to place a convicted criminal either before or after sentence in a situation not very different from that of a convict on parole. If the probation commitment comes after a jail sentence, it must necessarily operate as a stay of execution conditional on the good behavior of the con-

vict. But it is not, as the court treats it, a complete stay of all execution of the sentence, for it is accompanied by the imposition of a less severe restraint of liberty. The element of reformation is emphasized, and those of example and incapacitation are minimized though still present, and the result is a punishment exhibiting every essential purpose of penal justice. On this ground alone, I think that the act, so far as it permits a convicted offender to be committed to a probation officer after sentence to jail, should be construed as authorizing an alternative execution of the sentence during good behavior, and not as authorizing a complete and possibly permanent stay of execution of such sentence.

Such a construction has, moreover, the advantage of being consistent with the policy of our criminal law as evidenced by other statutes relating to the same general subject-matter. The situation of a probationer under an unexpired sentence of imprisonment in jail is not unlike that of a paroled convict, although the paroled convict is less restrained of his liberty, for he is released, conditionally, on his own recognizance, while the probationer remains in charge of an officer of the law. Yet our statutes treat the sentences of paroled convicts as still in process of alternative execution while they are out on parole, and provide that, if returned to prison for violation of parole, they may be imprisoned for the unexpired terms only of their sentences. Gen. Stat. § 1539; section 12, c. 162, P. A. of 1909.

We also think that the construction adopted by the opinion would make the statute unconstitutional as purporting to authorize the criminal courts, after final judgment and sentence, to completely suspend the execution of the sentence with a view to never enforcing it, in case the criminal observed the conditions of his probation. Our views on this branch of the case cannot be better expressed than in the following quotation from a recent decision of the Supreme Court of Maine:

"Again, it is a well-recognized principle that, after a sentence has been imposed, the court has no authority to relieve the convict from its execution. The authorities draw a clear distinction between the suspension of the imposition of a sentence and the indefinite suspension or remission of its enforcement. There is a conflict of authority as to the power of the court after a conviction to indefinitely postpone the imposition of the punishment \* \* \* prescribed by law; but, however the courts may differ as to such power, it is well established that the court cannot, after the judgment in a criminal case is rendered and the sentence pronounced, indefinitely postpone the execution of that sentence, or commute the punishment, and release the prisoner therefrom in whole or in part. Of course, it is not to be understood that the court has not the power to temporarily postpone the execution of its sentence pending an appeal and other proceedings to obtain a new trial or review of the judgment, and in cases where cumulative sentences are imposed, and perhaps in some cases of great necessity or emergency. And the power of the court to cor-

rect errors in its judgment, and to change its sentence during the term at which it is imposed and before its execution has begun, is another and different matter. The act which the authorities hold that the court has not the power to do is \* \* \* the act done for the purpose of exonerating the convict, in whole or in part, from the final and lawful judgment and sentence of the law which has been imposed upon him. That is the power to pardon, to commute penalties, to relieve from the sentences of the law imposed as punishments for offenses against the state, which power has not been given to the courts, but confided exclusively to the Governor of the state, with the advice and consent of the council." *State v. Sturgis*, 110 Me. 96, 85 Atl. 474, 43 L. R. A. (N. S.) 443.

See, also, *Tuttle v. Lang*, 100 Me. 123, 60 Atl. 892; *Ex parte Clendenning*, 22 Okl. 108, 97 Pac. 650, 19 L. R. A. (N. S.) 1041, 132 Am. St. Rep. 628; *In re Webb*, 89 Wis. 359, 62 N. W. 177, 27 L. R. A. 358, 46 Am. St. Rep. 846; *In re Strickler*, 51 Kan. 700, 33 Pac. 620. In all of these cases the sentence of imprisonment was first pronounced and then its execution suspended either with or without a time limit and upon a condition of good behavior such that it might be the pleasure of the court never to direct execution, so that the suspension had the practical effect of a conditional pardon. In every case it was held that such an order of suspension was void as beyond the power of the court, that the period of imprisonment commenced in contemplation of law at the date of the sentence, and that the prisoner could not be detained after it expired. It seems clear that if our probation act must be construed as authorizing our criminal courts to grant conditional pardons, by completely suspending execution of jail sentences, upon terms such that the convict may go free in case he observes the conditions of his probation, then the act is unconstitutional under the doctrine of *Norwalk Street Railway's Appeal*, 69 Conn. 576, 37 Atl. 1080, 38 Atl. 708, 39 L. R. A. 794, and many other cases, as attempting to delegate to the courts a nonjudicial function. The pardoning power is historically and in principle the antithesis of legal justice. It is an act of grace, and a negation of the sentence of the law.

"The pardoning power is essentially of a political nature. Judicial officers are to do justice. Mercy is an act of policy or grace." Baldwin, *American Judiciary*, p. 52.

For the reasons indicated we think that the commitment to the probation officer after jail sentence is in the nature of an execution of the original sentence by a mitigated punishment, and that the statute cannot be otherwise construed consistently with our Constitution.

We agree that the Legislature may by statute annex implied conditions to the penal sentences of the courts; if so, the sentence in this case may be in effect, though not in form, a sentence to one year in jail, or to commitment to the probation officer, if the court should so order. But there must be

some relation of time between the jail sentence and the commitment. Evidently the Legislature did not intend that one sentenced to jail for 30 days should be committed to a probation officer for 11 months and then sentenced to jail for 30 days, or that one sentenced to jail for a year should be committed to a probation officer for one month only, and then set free. Yet if the time spent in the custody of the probation officer is not in execution of the original sentence, either of these results is permissible.

(88 Conn. 332)

# ASSOCIATED HAT MFRS. v. BAIRD-UNTEIDT CO.

(Supreme Court of Errors of Connecticut. July 13, 1914.)

## 1. ASSOCIATIONS (§ 5\*)—VALIDITY—BY-LAWS.

An association of employers may lawfully enact a by-law giving it the right to order a shutdown of the factories of its members, if the object sought to be accomplished thereby is within its lawful purposes, and the means used are lawful.

[Ed. Note.—For other cases, see *Associations*, Cent. Dig. §§ 4-6; Dec. Dig. § 5.\*]

## 2. ASSOCIATIONS (§ 5\*)—VALIDITY—BY-LAWS.

A by-law of an employers' or a laborers' association providing for a fine upon the members for disobedience of the lawful orders of the association is not unlawful.

[Ed. Note.—For other cases, see *Associations*, Cent. Dig. §§ 4-6; Dec. Dig. § 5.\*]

## 3. ASSOCIATIONS (§ 13\*) — VALIDITY — BY-LAWS.

A resolution adopted by an association of manufacturers who had previously employed members of a labor organization exclusively, but whose employes had quit work, that each member should offer situations to operatives as individuals, understood by all of the members as meaning that they should maintain "open shops," attacked by a member as unlawful, on the theory that its real purpose and object was to order a suspension of work by its members, did not amount to such an order for a cessation of work, though the members of the association in certain territory were unable to obtain employes, because the labor organization in question controlled the industry in that locality, and were therefore compelled to keep their factories closed.

[Ed. Note.—For other cases, see *Associations*, Cent. Dig. § 16; Dec. Dig. § 13.\*]

## 4. ASSOCIATIONS (§ 5\*) — VALIDITY OF BY-LAWS—PENALTY OR LIQUIDATED DAMAGES.

A provision of the by-laws of a manufacturers' association, that each member would pay to the association \$5,000 as liquidated damages for the violation or failure to comply with any of the decisions, orders, prohibitions, and regulations of the association sought to be enforced against a member for its violation of a resolution of the association that all members should maintain "open shops" was not a provision for a penalty; the damages from such breach being uncertain and incapable of exact estimate in advance of a breach, and neither readily susceptible of proof nor of precise appraisal after a breach, and it not appearing that the amount specified was greatly disproportionate to the presumable loss.

[Ed. Note.—For other cases, see *Associations*, Cent. Dig. §§ 4-6; Dec. Dig. § 5.\*]

### 5. ASSOCIATIONS (§ 9\*) — WITHDRAWAL OF MEMBERS—RIGHT TO RESIGN.

An association of manufacturers whose by-laws provided that no member's resignation should be accepted during a suspension of work ordered by the association adopted a resolution following a strike, requiring its members to offer situations to operatives as individuals, understood as meaning that they should maintain "open shops." The members of the association, other than those in certain territory, successfully operated their factories as "open shops," but the members in such territory, though they advertised for employes as individuals and opened their factories for the purpose of receiving applications for employment as individuals were unable to obtain employes, because of a labor organization's control of the industry in that territory. *Held*, that the resolution in question did not order a shutdown of the factories of the members, and the resignation of the members in the territory in question became effective, though made while their factories were closed, because of their inability to obtain employes.

[Ed. Note.—For other cases, see Associations, Cent. Dig. § 9; Dec. Dig. § 9.\*]

### 6. ASSOCIATIONS (§ 9\*) — WITHDRAWAL OF MEMBERS—ACCEPTANCE OF RESIGNATION—NECESSITY.

The resignation of a member of a non-stock corporation becomes effective upon presentation and compliance with the rules of the association without acceptance, unless acceptance is made a prerequisite to resignation by the rules or laws of the association or of the land.

[Ed. Note.—For other cases, see Associations, Cent. Dig. § 9; Dec. Dig. § 9.\*]

### 7. ASSOCIATIONS (§ 5\*)—VIOLATIONS OF REGULATIONS BY MEMBERS.

The employes of the members of an association of manufacturers who had previously employed members of a labor organization exclusively quit work because of a dispute, and the association adopted a resolution requiring its members to maintain their factories as "open shops." The members in certain territory were unable to maintain employes to operate their factories as "open shops," and were compelled to keep their factories closed. Certain parties endeavored to bring about a settlement of the strike, and procured an agreement to be signed by such members of the association and the officers of such labor organization. By the by-laws of the association it was provided that no member might resign until 90 days notice in writing should have been given, and the agreement provided that such members should file their resignations from the association and that during such 90 days the members of the labor organization should return to work as individuals; the prices for labor to remain as before until the resignations became effective and a new agreement to be made through arbitration, and the union label, employed only in "closed shops," not to be the subject of the future arbitration. Pursuant thereto the members of the labor organization returned to work, retaining their membership in the union and paying the regular union dues, though their membership cards were taken up and returned after the resignations became effective. *Held* that the agreement was one, in effect, to hire union laborers exclusively, and was a violation of the resolution as to maintaining "open shops" within a provision of the by-laws of the association for the payment of a specified sum as liquidated damages for the violation of, or failure to comply with, any of the regulations of the association.

[Ed. Note.—For other cases, see Associations, Cent. Dig. §§ 4-6; Dec. Dig. § 5.\*]

### 8. ASSOCIATIONS (§ 5\*)—ACTIONS—AUTHORITY TO BEING.

Under the by-laws of an association of manufacturers by which each member agreed to pay a specified sum as liquidated damages for any violation of, or failure to comply with, any of the prohibitions and regulations of the association, and which further provided that at least three-fourths of all the members of the association must concur in order to carry any motion or pass any regulation relative to proceedings concerning any fine or assessment, an action to recover the stipulated liquidated damages from a member violating a resolution requiring members to maintain "open shops" was not one for the collection of a fine or assessment, but was an incident of the ordinary business affairs of the association, as to which its directors had complete authority, in the absence of any limitation by law, charter, or by-laws, and the directors' authority was not affected by the adoption of a resolution by the association authorizing the bringing of such action by less than a three-fourths vote.

[Ed. Note.—For other cases, see Associations, Cent. Dig. §§ 4-6; Dec. Dig. § 5.\*]

Case Reserved from Superior Court, Fairfield County; Howard J. Curtis, Judge.

Action by the Associated Hat Manufacturers against the Baird-Unteldt Company to recover \$5,000 liquidated damages for violation of certain resolutions of the plaintiff association passed under section 2 of article 8 of its by-laws by the defendant member of the association. Reserved by stipulation of the parties upon a finding of facts for the advice of the Supreme Court of Errors. Judgment advised for plaintiff.

The plaintiff is a nonstock corporation of the state of New York, comprised of 56 companies, corporations, and individuals engaged in the manufacture of fur felt hats, with places of business in the states of Connecticut, New York, New Jersey, Massachusetts, and Pennsylvania. The defendant was a corporation located at Bethel, Conn., and was a member of the association. The plaintiff was the successor of the Wholesale Fur Felt Hat Manufacturers' Association, whose assets, property, rights, agreements, and contracts had been transferred to the plaintiff.

The purposes and objects of the association, as recited in its certificate of incorporation, were to improve business conditions of its members, to maintain harmonious relations between them, and to promote, subserve, and encourage social intercourse between them.

The preamble to its by-laws recites that:

"The objects of this association, in addition to those set forth in its certificate of incorporation, are to foster the interests of those engaged in the manufacture and sale of fur felt hats, to reform abuses relating to the business of persons so engaged, to secure freedom from unjust and unlawful exactions, to obtain and diffuse accurate and reliable information as to all matters affecting members of this association, to procure uniformity and certainty in the relations existing between employees and employers, and in all lawful ways to promote and protect the business interests of this association."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**Its by-laws provide:**

Section 1. The decisions, prohibitions, orders and regulations of this association and its board of directors, shall be obligatory upon, and shall be complied with and observed in good faith by each and every member of this association.

Sec. 2. In order to insure the compliance with and obedience in good faith to the decisions, orders, prohibitions and regulations of this association, all members hereby agree to pay to the association the sum of five thousand dollars (\$5,000) as liquidated damages, for the violation of or failure to comply with any of the decisions, prohibitions, and regulations passed or made by the association, in accordance with these by-laws and its certificate of incorporation. The said sum of five thousand dollars (\$5,000) is not a penalty, but is to be construed as the damages which this association and the members thereof have suffered, by reason of the failure of any member to comply with the decisions, orders, prohibitions and regulations of this association, and in any action which may be brought to recover the said sum, it shall not be necessary or incumbent upon this association to prove any special damage whatsoever.

Article XIX. Sec. 1. Not less than one-third of all the members of this association must be present in person in order to constitute a quorum for business, provided, however, that any business before the meeting (a) involving the cessation or resumption of work by any or all of the members of this association, (b) any regulations regarding the union label and (c) proceedings relative to any fine or assessment, no less than two-thirds of all the members of this association must be present in person in order to constitute a quorum, and at least three-fourths of all members of this Association must concur in order to carry any motion or pass any regulation regarding these three questions.

Article VII. Sec. 1. No member may resign from this association until after ninety days' notice in writing to the secretary shall have been given, and no resignation shall be accepted or become operative until all dues, fines, assessments or other moneys due this association shall have been paid, nor shall any resignation be accepted during a suspension of work ordered by the association.

Article VI. Sec. 10. The board of directors shall have power to settle all the controversies and difficulties arising between the members of this association and their employees, and to decide all disputes and disagreements that may arise, except that they shall not order a cessation or resumption of work, make any regulations regarding the union label, or proceedings relative to the forfeiture of any bond, contract, penalty or fine of any member of this association.

The United Hatters of North America is an unincorporated association of journey-men hatters having over 9,000 members, and owning a union label, which it permits to be placed in hats manufactured in factories employing its members solely and commonly called "union or closed shops."

From July 1, 1907, to January 14, 1909, the members of the plaintiff and its predecessor employed exclusively in their factories members of the United Hatters' Association.

The plaintiff's predecessor entered into an agreement, to which the plaintiff succeeded, with the United Hatters that any disagreement between employer and employé should be submitted to arbitration. Prior to this agreement, in case of difference, the United Hatters withdrew the use of its label, and

compelled its members to discontinue work until the difference was settled, thus frequently coercing the employer to accept unfair conditions, and one of the purposes of the arbitration agreement was to avoid the stoppage of work and the removal of the union label pending the adjustment of differences. The United Hatters continued to act under this agreement until the difficulty with the Guyer Company arose.

The Guyer Hat Company was a member of the plaintiff, and located in Boston, Mass. The prices charged by the members of the United Hatters for piece work was less in Philadelphia than in Boston. On July 1, 1908, the Guyer Company opened a factory in Philadelphia, and entered into an agreement with the members of the United Hatters for a bill of prices for piece-work for hats manufactured in Philadelphia.

In August, 1908, negotiations between the Guyer Company and the United Hatters having failed, the United Hatters refused to permit their members to work in the Guyer factory unless the Guyer Company paid the same scale of prices as in its Boston factory. The Guyer Company referred the settlement of the dispute to the plaintiff. The plaintiff insisted that, pending arbitration, the union label should be restored and the members put back to work. The plaintiff and the United Hatters continued negotiations until about January 1, 1909, but the United Hatters refused to restore the label or put the men back to work, and insisted upon the Guyer Company performing its contract with them upon the Boston scale of prices to its members.

On January 12, 1909, the board of directors of the plaintiff passed a resolution that it recommend to the association:

"That the use of the union label to be discontinued in every factory of every member of this association one hour subsequent to the passage of this resolution, unless during the said period of one hour the association receives official notice that the label will be restored to and the men immediately placed to work in the factory of the Guyer Company, located in Philadelphia, Pa., under the conditions existing at the time of the withdrawal of the label and men."

On January 14, 1909, the association passed unanimously, all members including defendant being present, the resolution recommended and recited therein the arbitration agreement.

On January 15, 1909, the association communicated to all of its members the substance of this resolution, and the defendant and the other members of the plaintiff informed their employes that the union label would no longer be permitted to be used in their factories. Whereupon the employes who were members of the United Hatters, pursuant to its order, quit work, and all of the factories, including the defendant's, on January 16, 1909, ceased to manufacture hats, which condition continued until January 29, 1909.



The members of the plaintiff knew that a large proportion of the members desired to resume the operation of factories as open shops, and on January 28, 1909, the board of directors of the plaintiff passed the following resolution:

"That the board of directors recommend to the association that each member offer situations to operatives as individuals, in their respective factories on February 9, 1909."

The treasurer of the defendant was present at this meeting. Immediately thereafter a meeting of the association, duly called, passed a vote in accordance with this recommendation. The defendant was present at this meeting.

All of the members of the plaintiff, including the defendant, understood the resolution of January 28, 1909, to mean the hiring of their employes as individuals in an open shop. The defendant and other members of the plaintiff in the Danbury district opened their factories for the purpose of receiving applications from all who desired employment as individuals, but none such were received owing to the control of the hatting industry in this locality by the United Hatters.

Because of this condition, and of their inability to secure employes, the defendant was unable to operate its factory until June 8, 1909, and no hats were manufactured in the factories of the members of the plaintiff in the Danbury district during this period, while the members in other localities were able to operate their factories as open shops.

Shortly after January 28, 1909, the defendant and a majority of the members of the plaintiff in Danbury and Bethel became dissatisfied with the resolution of January 24th, and desired the same rescinded as unfair to them. Efforts were made by disinterested persons to settle the dispute between the hat manufacturers in the Danbury district who were members of the plaintiff and the United Hatters, which resulted in the execution by these parties of the so-called Father Kennedy's agreement, the substance of which is set forth in the opinion.

Simultaneously with the execution of this agreement, the said members of the plaintiff agreed to indemnify and save harmless each other from any loss or liability, if any, which they or any of them may have or incur by making the aforesaid agreements, by reason of the obligations imposed on them as members of the plaintiff. The members of plaintiff, parties to this agreement, carried it out by hiring directly the employes, members of the United Hatters, whereas under former conditions the shop steward, an employe of the United Hatters, employed them.

The members of plaintiff, through Father Kennedy, about July 9, 1909, forwarded to the plaintiff written notice of their intention to resign, and the plaintiff received these. The United Hatters took from its members their union card, which a member of the union seeking employment must possess, and

these cards were retained until September 20, 1909.

The members of the United Hatters in the Danbury district voted on June 9, 1909, to accept the "Father Kennedy proposition" and to return to work in the manner set forth therein. On June 9, 1909, the factories in the Danbury district resumed operations, and so continued until September 20, 1909. The workmen employed were former union workmen, and most of them were compelled to pay their union dues based upon their wages, but all were hired as individuals. Several members of the union who did not pay these dues were expelled from the union.

On September 9, 1909, the defendant and the other members of the plaintiff in this district duly forwarded their resignations to the plaintiff, and these were on the same day received.

The defendant was not, on this date, indebted to plaintiff in any way for any sum, unless for the said \$5,000. Except as heretofore recited, the defendant observed in good faith all the decisions, orders, prohibitions, and regulations of the plaintiff.

On June 16, 1909, the board of directors of plaintiff passed the following resolution:

"Be it resolved that the president be authorized and directed to institute actions against the aforementioned members to enforce liability under section 2, art. VIII, of the by-laws, and to enforce liability under the terms of the agreement made January the 14th, 1909, between the association and all of its members, and to employ attorneys and counselors at law for the purpose thereof, and the action of the president thus far in the preparation for the institution of such actions and in all other respects is hereby ratified and confirmed."

And pursuant to this resolution this action was begun.

On September 15, 1909, the association passed a similar resolution, and ratified the said action of the board of directors in all respects. This action was not authorized by a three-fourths vote of the members of the association.

On September 20, 1909, the defendant used the union label in its factory, and operated a union or closed factory, and the United Hatters exercised open authority over the journeymen hatters employed in defendant's factory.

The plaintiff offered no evidence of special damage, but claimed that the damages for the breach of the resolution of January 28th were liquidated and fixed at \$5,000.

Milton Dammann, of New York City, and Spotswood D. Bowers, of Bridgeport, for plaintiff. Martin J. Cunningham and Eugene C. Dempsey, both of Danbury, for defendant.

WHEELER, J. (after stating the facts as above). The defendant claims this action must fail, since the plaintiff association is, because of its organization and its by-laws, illegal, and therefore its resolution, whose



violation is the basis of the action, was invalid. The foundation of this claim is threefold, because: (1) The real purpose and object of the association was to permit it to order a suspension of work by its members; (2) to make agreements relative to the use of the union label; and (3) because the members of the plaintiff were engaged in interstate commerce, the association was a violation of the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]), as its purposes were in restraint of trade.

Employers, as well as employes, may form associations for mutual protection and benefit. Each member of such an association submits his freedom to contract, to a greater or less extent, to the will of the association. The consideration of submission is the benefit presumed to flow from the action of members bound together for common ends. Unity of action of the members gives strength to the association, without which it cannot serve its purposes or accomplish its ends. By-laws and regulations are a part of the machinery by which the association operates. Members must therefore submit, while membership continues, to all lawful by-laws and regulations enacted by the association for its government.

The objects of this association, as stated in the articles of association and by-laws, are most worthy. Neither they nor the finding show that the purpose of the association was to permit it to order a suspension of work and to agree in reference to the use of the union label. It is too late to question the right of a labor union to make by-laws providing for strikes and to issue its order for a strike in an effort to secure lawful objects by lawful means. *Reynolds et al. v. Davis et al.*, 198 Mass. 294, 84 N. E. 457, 17 L. R. A. (N. S.) 162. And it may prosecute the strike by any means neither illegal nor in violation of the equal or superior rights of others.

[1] So, too, the association of employers may enact a by-law giving it the right to order a shutdown of the factories of its members, provided the objects sought be within its lawful purposes and the means used be lawful. And the employer has the right freely to hire his labor in the market without denial or unfair restriction of this right. The order of the association to stop work may curtail this right, but it is not, for this reason, illegal.

[2] A by-law providing for a fine upon the members of either an employers' or a laborers' association for disobedience of its lawful orders is not unlawful. Each may involve coercion of its members; it may temporarily take away the livelihood of the employe, and it may injure, and, if continued, ruin, the business of the employer. Each member has agreed to this species of coercion in the belief that the common interest of all will best be served by the united action of many. Obedience to the lawful orders of the as-

sociation is the condition of membership voluntarily encountered by previous assent to the by-laws. If the defendant intended to claim that this part of the by-laws was illegal, we have already answered that a by-law of this character was not illegal.

[3] The argument of the defendant rests upon the premise that this resolution "that each member offer situations to operatives as individuals" amounted to an order for a cessation of work. If the employes accepted employment as individuals, it is said they would forfeit their membership in the union. If they maintained their membership, the employers could not run their factories.

As the Hatters' Union dominated this industry in the Danbury district, enforcement of the vote would mean, it is said, a lockout and suspension of work. Therefore it is argued the vote was equivalent to a lockout. The argument assumes these consequences. The facts of record show that consequences of this character were not intended. The vote is not to be read in the light of possible consequences. Its meaning is undoubted. A vote that each member offer situations to operatives as individuals is a declaration for the open shop. Its purpose was to preserve to employers the right to contract for their labor regardless of its membership in the union. The right to so contract is one of the inalienable rights of every employer of labor. Every employer and employe has, under the law, such freedom of contract. The law will not take it from him, much less declare illegal his effort to establish his right to it.

We see nothing in the record upon which to found the argument that the use of the union label was the object of the plaintiff. So far as appears, the label had nothing whatever to do with the resolution in question.

We do not think it necessary to discuss the proposition that a vote by employers to conduct their factories as open shops and to exercise their right to hire their labor as individuals, and not as members of a labor union, is a restraint of trade within the Sherman Act. Nor do we think the proposition tenable that the object of the association was the making of the arbitration agreement which the plaintiff had with the United Hatters, and that it was void because it involved the exclusive employment by the members of the plaintiff of union labor. The arbitration agreement does not bear this construction, and its making was a mere incident of the business of the plaintiff. Moreover, it did not relate to, or enter into, the vote for the open shop.

[4] The recovery is sought for the violation of a resolution of the plaintiff, under section 2 of article VIII of the by-laws that:

"All members agree to pay to the association the sum of \$5,000 as liquidated damages for the violation of, or failure to comply with, any of the decisions, orders, prohibitions, and regulations, passed or made by the association, in accordance with these by-laws."

The defendant urges that the action is instituted for the enforcement of a penalty. The association intended—if the language used means what it says—this sum to be regarded as liquidated damages upon a breach. Its intention, so definitely expressed, should be given due weight, but it is not controlling; for the law regards the substance of things rather than its form. It will “look at the entire agreement, its scope, purpose, and subject-matter, and may consider the result of a breach thereof, and the reasonableness of the sum agreed to be paid therefor, under all the circumstances of the case.” So viewing this by-law in its proper setting—of the facts surrounding its making and its breach—we see that there is no standard furnished for ascertaining the damages for the breach of a resolution of the plaintiff.

We see, too, that the damages from a breach must be uncertain and incapable of exact estimate in advance of breach, and after breach are neither readily susceptible of proof, nor of precise appraisal. It is obvious the breach of the resolution might result in the breaking up of the association, or in projecting it in a long and expensive fight with the United Hatters, a most powerful organization of union labor. The strength of the association lay in the maintenance of a united membership. Weakness, perhaps disintegration, might follow the secession of the members in the Danbury district.

We cannot say, and we know of no one who could have said, exactly what loss the defendant's breach might or will entail. The record does not show that the amount specified as liquidated damages is greatly disproportionate to the presumable loss. The members of this association knew their own situation and objects, and were in a far better position to appreciate and make provision for the breach of their own resolution under this by-law than a court can possibly be. Under these circumstances, the rule of law is that the expressed intention of the parties will be carried out, and the damages regarded, as the parties regarded them, as liquidated. *New Britain v. New Britain Tel. Co.*, 74 Conn. 326, 333, 50 Atl. 881, 1015; *Chase v. Allen*, 13 Gray (Mass.) 42; *Bilz v. Powell*, 50 Colo. 482, 117 Pac. 344, 38 L. R. A. (N. S.) 847; note to *Bilz v. Powell*, 38 L. R. A. (N. S.) 847.

The by-laws of the plaintiff required each member to comply in good faith with its decisions. Unless the defendant while a member failed to observe one or more of its decisions, it is not liable in this action.

[6] The defendant, on and after September 20th, ran its factory as a union shop contrary to the terms of the resolution of January 28th that the factories of the members should be run as open shops, and if at this time it was a member of plaintiff, all agree it thereby violated this resolution. The defendant claims it had resigned its membership on September 8th; the plaintiff claims

the attempt to resign was nugatory. The defendant had at this time complied with all by-laws and regulations, unless it had before this time violated the January 28th resolution. Acceptance of the resolution was not had, nor was it necessary.

[6] A member of a nonstock corporation is in the same position as the member of the association, whose resignation becomes effective upon presentation and compliance with the rules of the association, unless acceptance is made a prerequisite to resignation by the rules or laws of the association or of the land. A similar rule obtains in the case of the resignation of an officer of a corporation. *Bacon, Benefit Societies* (3d Ed.) § 111; 4 Cyc. 302; *Com. on Corporations*, Thompson, vol. 7, § 8729; *Will of McNaughton*, 138 Wis. 208, 118 N. W. 997, 120 N. W. 288; *Morawetz on Corp.* § 563.

The by-laws (article VII, section 1) provide that a resignation shall not be accepted during a suspension of work ordered by the association. These resolutions did mean that the members of the plaintiff should thereafter hire their employes as individuals in an open shop. They did not mean that the plaintiff had ordered a general shutdown of the factories of its members. The finding shows this. All of its members outside the Danbury district were successful in operating their factories as open shops.

The resolution of January 28th became effective on February 9th, in order to give the members time to prepare for a change and their former employes the opportunity to consider the advisability of returning to work as individuals.

The defendant, with other Danbury members, advertised for employes as individuals, and on February 9th opened their factories for the purpose of receiving applications for employment as individuals. All this indicates that they were hopeful of resuming, not intent upon discontinuing, work.

The resolutions, as phrased, do not mean a compulsory lockout; as read in the light of what preceded and followed their making, it is clear that the members did not understand that their action would bring about a lock-out, even in the Danbury district.

The resignation of the defendant became effective upon its receipt by the plaintiff on September 9th.

[7] The only other violation of which the plaintiff complains is the entering into the so-called Father Kennedy agreement and the opening of its factory in pursuance thereof.

The open shop resolution of January 28th, if enforced, would deprive the United Hatters of the jurisdiction and control of all employes of the members, and would prohibit the employment of exclusively union labor. That it would precipitate a contest with a powerful labor organization was self-evident. United co-operation by each member in carrying out their attempt to secure to all the freedom to make their own contracts of hir-

ing was an indispensable condition of success. The defection or disloyalty of the few would bring complete or partial disaster to the plan of the many. The utmost good faith in carrying out the plan was the duty of each member. The first resolution, that of January 14th, voting to discontinue the use of the union label, was voted for by the defendant. The finding does not show whether the resolution of January 28th was, in fact, voted for by the defendant or not. It matters not; it was duly adopted, and bound all members, the non-acquiescent as well as the acquiescent.

All of the factories of the Danbury district, except the two open shop factories, remained closed after the United Hatters withdrew their men on the day following the January 28th resolution. Many efforts were made to settle the strike. Finally two of the clergy, acting as self-appointed mediators, brought about an agreement signed by all the members of the plaintiff in the Danbury district and by the officers of the United Hatters. This was an agreement in which each of the contracting parties agreed, in consideration of the promises of the other, to do certain things. It was an evident attempt to devise a plan under which work could be resumed pending the 90 days' notice of intent to resign of the members of the plaintiff and upon the resignations becoming effective, securing the return of these members to the closed shop, and to the complete resumption of the jurisdiction of the United Hatters over the employes of each member. The plan was designed to avoid the liability which this action seeks to enforce. The very fact that these members entered into an agreement with the United Hatters concerning the opening of their shops and the conditions under which the members of the Hatters' Association should resume work was a breach by these members of the open shop resolution.

An analysis of the agreement deepens our conviction. The members of the plaintiff, in consideration of the agreements of the United Hatters and with the understanding that the agreement included a settlement of all present difficulties with the United Hatters and that future controversies should be settled by arbitration, the method of which should be determined as soon as they should sever the relations with the plaintiff, agreed to file the 90 days' notice of their intention to resign from the plaintiff as required by the by-laws of the plaintiff, and to file with one of the mediators their resignations, to be delivered to plaintiff upon the expiration of the 90-day period.

And in consideration of these promises and of the agreement, the United Hatters agreed to declare the strike off as to these members of plaintiff and to permit their own members to return to work as individuals until the members of the plaintiff were relieved by resignation or release of their obligation to the plaintiff. The parties mutually agreed that

the prices for labor should remain as they had been until after the resignation and a new agreement had been made through arbitration; that new machines should have a fair trial at a named price to operators thereof; and that the union label should not be the subject of the future arbitration.

Upon execution of the agreement, the strike was declared off, the members of the union returned to work as individuals, but retained their membership in the union and paid to it the regular union dues, based upon the wages earned, and the union disciplined some of its members for the nonpayment of these dues. Upon its face the agreement was an attempt to evade the liability which all the parties to it believed might arise in case the members violated the resolution of January 28th.

The agreement was a cover, so manifest that it needs no argument to demonstrate it, for the purpose of having the factories of the members ostensibly run as open shops, but in reality run as closed shops under the jurisdiction of the United Hatters. When these members opened their factories to union labor exclusively, they were not complying in good faith with their obligation to open their shops to employes, nonunion, as well as union, employes. By this agreement the United Hatters dictated the scale of prices to be paid its members who were outwardly hired as individuals by these employers. They limited the period when they were to work as individuals; they assumed control over their members who returned to work by providing for an arbitration of all differences between the employers and their employes; they provided for an arbitration to determine the conditions of employment subsequent to the resignations; and they expressly prohibited from such arbitration the subject of the union label.

Had the intent been that their members should return to work as individuals, holding the same relation to their employers as ordinarily exists between employer and employe, these conditions would not have been a part of the agreement. The purpose of the agreement was to make the shops as effectively union shops as they became after the resignations. The membership cards were taken up, and after the resignations returned, although at no time had these employes ceased to be members of the United Hatters.

The open shop resolution meant that the employers should be free to hire where they pleased and at such wage as the market for labor fixed, and that the employe should be free to choose his employer and to make his own conditions of employment. The agreement took from each the right to freedom of contract. These employers knew what they were engaged upon, for, simultaneously with this agreement, they agreed with each other to indemnify against any liability which might arise to the plaintiff. Had they in good faith intended to run an open shop,

would they have felt it essential to make provision for the contingency of their agreement being held to be a violation of their obligation to the plaintiff? In fact, the agreement was to hire exclusively union labor. The contracting employers included all the manufacturers with two exceptions in the chief industry of the Danbury district.

We held in *Connors v. Connolly et al.*, 86 Conn. 641, 86 Atl. 600, 45 L. R. A. (N. S.) 564, such an agreement against public policy and void. Meritorious as the effort of these mediators to settle a strike of fatal consequence to large communities was, we cannot let our sympathy for the peacemaker cause us to forget that the security of society depends in great measure upon the preservation, inviolable, of the obligations of men.

We think this agreement a plain violation of the resolution of January 28th.

[8] Finally the defendant claims the plaintiff had no authority to institute this action, since it was not authorized by a three-fourths vote of all the members of the plaintiff, as is required by article IX, section 1, of the by-laws in proceedings relative to any fine or assessment.

We have expressed the opinion that the recovery of the \$5,000 under section 2 of article VIII is not an action brought to recover a fine or assessment, but a sum determined as liquidated damages for a breach of any of the lawful decisions, orders, prohibitions, and regulations of the plaintiff, and hence section 1 of article IX has no relation to an action to prosecute the collection of this sum. Such an action is an incident of the business of the plaintiff, and committed, as are the ordinary business affairs of every corporation, to its directors, whose authority is complete, except as curtailed by charter, by-laws, or the law. In this case there was no such curtailment. The plaintiff ratified the action of the directors, but we think this did not add to the powers already vested in them by virtue of their office.

The superior court is advised to render its judgment in favor of the plaintiff for \$5,000, with interest from June 14, 1909.

Costs in this court will be taxed in favor of the plaintiff. In this opinion the other judges concur.

(88 Conn. 480)

#### CHAMBERLAIN v. CITY OF BRIDGEPORT.

(Supreme Court of Errors of Connecticut. July 17, 1914.)

#### 1. MUNICIPAL CORPORATIONS (§ 966\*)—FISCAL MANAGEMENT—CHARTER PROVISIONS—CONSTRUCTION—AMENDMENT.

Act March 26, 1889 (10 Sp. Laws, p. 854), consolidated the town and city of Bridgeport, imposing on the city the burden of meeting all expenses theretofore imposed on the town. These burdens were specified in section 4 of the act, and section 7 declared that the city should have power to levy taxes on the polls and estate within the limits of the city for purposes

authorized by law. For the purposes of taxation, the territory of the new city was divided into two districts, the first comprising the entire city and the second all the territory lying within the old city limits. Section 6 declared that all inhabitants and property within the first district should be liable to taxation to defray the expenses imposed by the act to the same extent as they would be liable if the burdens had not been transferred from the town to the city, and in addition certain other expenses, "and that all other burdens and expenses of said city should be met by taxation levied upon the inhabitants and property within the limits of the second district." These provisions were carried forward in subsequent amendments until the passage of Act June 5, 1913 (16 Sp. Laws, pt. 2, p. 1203), which repealed the revisory act of Aug. 1, 1907 (15 Sp. Laws, pt. 1, p. 493), dividing the city into two districts, and provided that all the inhabitants and property within the limits of the city should be liable to taxation to defray the burdens and expenses imposed on the city by the act to the same extent as they would be liable if the burdens and expenses had not been transferred from the town to the city, and in addition thereto for the expense of maintaining a public library and reading room. Held, that the act of 1913, eliminating the two districts, did not repeal the limitation of the taxing power, and that such amendment did not confer on the city the right to tax the outlying property contained in what was previously the first district for burdens and expenses, other than the maintenance of the library, for which taxes could not previously have been levied.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2045-2061; Dec. Dig. § 966.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 956\*)—FISCAL MANAGEMENT—TAXATION—POWER TO TAX.

Municipalities have no powers of taxation other than those specifically conferred by statute.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2010-2013; Dec. Dig. § 956.\*]

Beach, J., dissenting.

Appeal from Superior Court, Fairfield County; Howard J. Curtis, Judge.

Suit by John C. Chamberlain against the City of Bridgeport to restrain defendant from levying a tax. From an order sustaining a demurrer to the bill, and directing a judgment in favor of defendant, plaintiff appeals. Reversed, judgment set aside, and cause remanded for further proceedings.

John C. Chamberlain and Thomas M. Cullinan, both of Bridgeport, for appellant. William H. Comley, Jr., of Bridgeport, for appellee.

WHEELER, J. The complaint alleges that the plaintiff is the owner of upwards of 250 acres of farm land in the town of Bridgeport, most of which is rough pasture, swamp, and woodland, and all of which lies outside the bounds of the city as they existed prior to the passage of the act consolidating the town and city of Bridgeport, and after the act within the limits of the first district. (The act divided the city into two taxing districts.) It alleges that the land is without

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the benefit of sewers, lights, fire and police protection, and much of it is above the water supply of the city, and none of it can be benefited by the expenditures made for the second district as designated by that act, and that the benefits for which the city of Bridgeport proper, or the second district, has been bonded have not been enjoyed by this land, or the first district in which it lies, and that the bonded indebtedness of the city comprising the second district was not incurred by or for the benefit of the first district. The plaintiff further alleges that the defendant purposes raising a revenue by taxation upon this land, which it purposes expending in the second district, and prays for an injunction restraining the defendant from levying a tax upon his land for the purpose of raising money to meet any expense except for such as said land would have borne prior to consolidation and for the support and care of the public library. The defendant demurs to the complaint; its grounds are in reality two: (1) The defendant is authorized by its charter and under the law to levy such taxes; (2) the plaintiff has a complete remedy at law.

The town and city of Bridgeport prior to the consolidation act of 1889 were independent political entities, charged with independent duties and burdens. The tax levy of town and city covered different territories, and of necessity each had a different grand list and tax levy. This act (10 Sp. Laws, p. 854) transferred to the city control of the annexed territory, and imposed upon it the duties, burdens, and expenses formerly borne by the town. The city assumed the debt of the town, whose rights and property were vested in the city.

[1] The first charter of the city of Bridgeport (Sp. Laws 1836, § 5 [2 Priv. Laws 1789-1836, p. 355]) gave it power to levy taxes within its limits "for such purposes as it shall think proper." This identical provision is found in the several Revisions up to 1895. It was in the charter as revised in 1887 (S. L. 1887, p. 510), and existed at the time of the passage of the consolidation act. That act amended the charter by imposing upon the city the additional burden of meeting all burdens and expenses theretofore imposed by law upon the town. These several burdens were specified in section 4.

By section 7 of this act:

"Said city in legal meeting assembled shall have power to levy taxes on the polls and estate within the limits of said city for such purposes as said city is by law authorized."

The city had had the power to levy taxes for its own purposes of government, and these of necessity included without detailed specification all powers of government committed to it. This section reaffirmed that power. For all such the levy of taxes was "authorized by law." The act imposed the burdens and expenses of the town upon the city. The city meeting was thus empowered

to levy taxes within the limits of the city, and these now comprised the entire town, for the governmental purposes of the city as its limits had been, which may be called the old city limits, and for the burdens and expenses theretofore imposed upon the town. Neither from its terms nor by implication can the burdens and expenses referred to in section 4 be construed to include those of the old city as distinguished from those of the town. For purposes of taxation the territory of the new city was divided into two districts; the first district comprised the entire city, the second, all the territory that lay within the limits of the city on January 1, 1889. The power of the city meeting to levy taxes was limited by the act.

Appropriations must be made for each district of the city from the revenues of that district, and taxes levied therefor upon the grand list of that district. This was effected by section 6. "All the inhabitants, and property within the limits of the first district shall be liable to taxation to defray the burdens and expenses imposed upon said city by this act, to the same extent as they would be liable if said burdens, expenses, duties, and powers had not been transferred from said town to said city," and in addition certain other expenses; "and all other burdens and expenses of said city shall be met by taxation levied upon the inhabitants and property within the limits of the second district." Moneys raised by taxation in the first district could only be used for purposes which prior to consolidation were within the corporate authority of the town. The inhabitants and property of the first district outside the bounds of the city as they existed prior to consolidation could be taxed only for purposes for which the town could be taxed prior to consolidation. These could not be taxed for purposes which were within the corporate authority of the city prior to consolidation. For purposes of taxation the inhabitants and property within the limits of the new city, and those of the city as it existed before consolidation were two independent entities.

By section 7 the grand list of the town for 1888 is made the grand list of said city for said first district, and the grand list of the city is made the grand list for the second district.

The burdens and expenses referred to in section 6 were those transferred from the town to the new city, and were the same burdens and expenses imposed upon the town by, and specifically described in, section 4.

In section 6 is also a specific provision that all other burdens and expenses of said city shall be met by taxation levied upon the inhabitants and property within the limits of the second district. These provisions clearly define the limitation upon the right of taxation as to each district.

The burdens and expenses which must be met by the second district would have been

necessarily implied without particular specification from the power of the city to levy taxes contained in section 7, and from the limitation of liability of the first district to the town burdens and expenses. The reasons which led the framers of the act to make this limitation are not hidden. More of the territory of the town lay outside the city, as it was, than within it. Agricultural and waste land ought not to bear a rate of taxation identical with city property having the advantages of municipal improvements and benefits. The General Assembly were familiar with this principle of taxation and its acts not infrequently had recognized it. A part consideration of this transfer of the territory of the town to the city may well have been the provisions for exemption from the city debt and for freedom from liability to be taxed for purposes serving the city and not imposed by law upon the town.

In 1893 (11 Sp. Laws, p. 278) the General Assembly created a board of apportionment for the city of Bridgeport, and invested it with power "to levy taxes on the polls and estate within the limits of said city, for such purposes as said city is by law authorized." In this board was vested the power to levy taxes and make appropriations theretofore exercised by the city in legal meeting assembled under section 7 of the consolidation act. Its power to levy taxes was subject to certain limitations just as the action of the city meeting had been. It must make appropriations for each district from the revenues of that district, and levy the tax therefor upon the grand list of that district. This limitation upon its power was as definite as those providing that appropriations must be made for lawful purposes and in the method prescribed by law, that the expenditures of the city in any year could not exceed its revenues, and that no appropriation could be made unless funds for the same were provided by tax, or from revenues on hand, and not otherwise disposed of, or from both. The board was thus vested with power to levy taxes to meet the burdens and expenses imposed by law, including those theretofore imposed upon the town which were as they had been, and as specified in section 4.

The consolidation act was, we incline to believe, in its method of treatment a piece of constructive legislation, for we have not discovered an exactly similar treatment of this governmental problem in any jurisdiction. Its framers have had their handiwork either copied or its main features adopted in every one of the numerous acts of consolidation passed by our General Assembly since its enactment. These several acts have in many cases adopted the language of sections 4 and 6 of the Bridgeport consolidation act, or else limited the rate of taxation of the districts outlying the limits of the city. In every instance called to our attention, with a single exception, a distinction has been made between the land outside the city proper, and constituting the territory outside the

city subject to town government, and that within the city limits. Agricultural and waste lands are placed upon a different basis of taxation from land and premises within the limits of the city proper. So universal has been this practice that we are justified in assuming it to be the settled course of Connecticut legislation and to represent its fixed legislative intent. The limitation contained in section 6 has thus been repeatedly enacted in many of the consolidation acts passed since the Bridgeport consolidation. Its meaning has become settled, and each enactment was made with this meaning in view. It would be difficult to find an example of legislative language more frequently used in municipal charters.

The consolidation act of Bridgeport was amended in S. L. 1889, p. 1285, by adding to the burdens and expenses of taxation imposed upon the inhabitants and property within the limits of the first district the maintenance of the public library. This act reiterated the legislative intent as expressed in section 6. The charter of Bridgeport was revised in 1895 (S. L. 1895, p. 515). The bounds of the second district were, as we understand, somewhat extended over the city limits as they existed on January 1, 1889, and the consolidation act with the amendment relating to the public library was incorporated therein, and sections 4 and 5 of the charter were identical in language with sections 4 and 6 of the consolidation act as amended. Again, the provision imposing upon the city the burdens and expenses placed upon the town prior to consolidation was reenacted in section 4. The draftsman in making use of the very language of section 6 did not express with clearness the idea intended. In imposing liability for taxation upon the first district to the same extent as if "the burdens, expenses, duties and powers had not been transferred from said town to said city," he failed to take cognizance of the fact that these burdens and powers had, by the consolidation act, been transferred from said town to said city, and hence could not be transferred in the act revising the charter. But the intent of section 5 was clearly that of section 6 of the consolidation act. It was intended as a reiteration of the limitation imposed by that section. This is conceded; and all taxes have been laid under this revision of the charter as they had been laid after consolidation. Separate taxes have been levied on each district upon the grand list of that district.

In Special Laws 1901, p. 827, the boundaries of the districts were, we understand, changed, but the other features of the consolidation act were unchanged. In the Special Laws of 1907, p. 493, the charter was again revised, and the bounds of the districts changed. This is the latest revision. The power of the board of apportionment to levy taxes remained (section 96), and section 5 continued to be identical with section 5 of the Revision of 1895, and with section 6 of

the consolidation act, with the addition of the burden of maintenance of the public library. Again the language of the section was inartificially drawn, but the intent was clear. The right of the board of apportionment to make appropriation for each district was limited to the revenues of that district, and their right to lay a tax therefor was limited to the grand list of that district. The board could not appropriate the moneys of the second district to build a sewer in the first district, neither could it appropriate the moneys of the first district to build a sewer in the second district. It could not levy a tax upon the first district to help meet the burdens which were imposed upon the second district by section 4 of this Revised Charter.

Our review of this legislation shows that from the consolidation act down to the passage of the amendment of 1913 (S. L. 1913) taxes could not be laid upon the inhabitants and property of the first district save for the purposes for which they would have been liable prior to the consolidation. And these burdens and expenses still remain those imposed upon the town prior to consolidation which are those specified in section 4. The first district was only liable for town taxes, so-called. In 1913 the area of the first district outside the second district was, as appears by the standard maps, about as large, if not larger, than the area within the bounds of the second district. The same reasons then apparently existed for continuing the limitation upon the taxation of the part of the first district lying outside the second district as existed at the time of the consolidation act and the revisions of the charter to which we have referred.

The charter of Bridgeport was amended in 1913 by an act approved June 5 (S. L. 1913, p. 1203) as follows:

"Sec. 1. Section two of an act revising the charter of the city of Bridgeport, approved Aug. 1, 1907, dividing the city into two districts, is hereby repealed.

"Sec. 2. Section five of said act is hereby amended to read as follows: All the inhabitants and property within the limits of said city shall be liable to taxation to defray the burdens and expenses imposed upon said city by this act to the same extent as they would be liable if said burdens and expenses had not been transferred from said town to said city, and in addition thereto for the expense of maintaining the public library and reading room of said city.

"Sec. 3. Wherever in said act the words, 'both districts of,' the words 'either district of,' the words 'in each of its districts,' the words 'districts of,' or the words 'of either district' appear, said words are hereby struck out."

The act abolished the two taxing districts. But it reenacted substantially the first part of section 5 of the Revision of 1907, merely striking out the words "first district" and substituting the word "city in line 2."

[2] The city contends that with the elimination of the two districts, the necessity for limitation of the taxing power also disappeared. Manifestly this act does not ex-

pressly so provide. If this be its intent, it is one to be implied, for it is not stated.

"Municipalities have no powers of taxation other than specifically given by the statutes." *New Britain v. Mariners' Savings Bank*, 67 Conn. 529, 532, 35 Atl. 505, 506; *O'Connor v. Waterbury*, 69 Conn. 203, 211, 37 Atl. 499.

This amendment should be construed with reference to existing provisions of the charter and in the light of the history and progress of this legislation.

In reality, "the question is not what the Legislature actually meant to say, but what is the meaning of what" it did say. *State v. Faatz*, 83 Conn. 300, 305, 76 Atl. 295, 297.

In the act consolidating the town and city of Meriden, approved June 5, 1913 (S. L. 1913, p. 1174), we find in section 65 a division of the territory into two districts, for purposes of taxation and a similar imposition of town burdens (section 3) and a similar limitation of taxation upon the inhabitants and property lying outside the bounds of the then city (section 66).

In the act consolidating the town and city of Norwalk (S. L. 1913, p. 1038) the territory is divided into districts for purposes of taxation, and in sections 6 and 10 a similar imposition of town burdens and a limitation upon the right of taxation of the outlying territory in practically the language of sections 4 and 6 of the Bridgeport consolidation act. The territory comprised within the first district was the entire territory of the city. With the change of terms the amendment has not changed the territory affected, nor the meaning of the part of section 5 which it reenacts. "All the inhabitants and property within the limits of the city" includes precisely the same inhabitants and property as the phrase of section 5 of the Revision of 1907, "All the inhabitants and property within the limits of the first district."

The town burdens and expenses imposed upon the city by the consolidation act remained as they then were and as they had been enumerated in section 4 of the consolidation act and the several charter revisions. These and these only were the burdens and expenses imposed upon the inhabitants of the first district by section 6 of the consolidation act and section 5 of the charter of 1907.

The amendment of section 5 leaves the part re-enacted in the same form, and its language refers to no other than the town burdens and expenses referred to in section 4, which are the same burdens and expenses this language has always referred to. This the city concedes has been the construction placed upon this language in the several revisions. The amendment (section 2) further provides that the inhabitants and property within the city shall be liable to taxation to defray these burdens and expenses which are the town burdens and expenses "to the same extent as they would be liable if said burdens and expenses had not been

transferred from said town to said city." This provision as found in the consolidation act and in the several charters constituted a limitation upon the power of the city meeting and of the board of apportionment to levy taxes upon the inhabitants and property of the first district except to defray the so-called town burdens and expenses. And the amendment imposed a similar limitation upon the inhabitants and property of the city which were the same as those of the first district. And it provided that the levy to defray these town burdens and expenses could not be greater than the inhabitants and property would have been subjected to had the town burdens and expenses not been transferred to the city by the consolidation act.

This language of limitation as we have pointed out has a definite meaning fixed by repeated legislative enactments, by a settled course of construction and action taken thereunder. We are now asked to hold that the language of the amendment, which is that of the consolidation act, does not have the meaning which it concededly has had from 1889. This conclusion will compel a holding that the General Assembly, while reenacting in the charters of Meriden and Norwalk this principle of limitation from which no departure has ever been made, intended to repudiate the principle in the Bridgeport amendment passed at the same session. Indeed the conclusion involves the holding that the General Assembly in an act approved June 5th used language with one meaning, and on June 7th used practically the same language with a different meaning. This limitation upon the right of taxation is not dependent upon the division into districts. It was created in order to limit the liability of the inhabitants and property of the former town to town burdens and expenses. The amendment has not altered the tax obligations of the inhabitants and property of the entire city. This is another name for the first district.

The amendment omitted the latter part of section 5 of the revision of 1907, wherein was described the burdens and expenses of the city to be met by taxation of the inhabitants and property within the limits of the second district, or the city proper. That omission did not tend to enlarge the meaning of the first half by making it apply to all the burdens and expense of the entire city. Nor did it take from the city the authority to levy taxes for the purposes of the city, as its limits existed and which comprised the second district. The authority to levy taxes for city or second district purposes is found in section 96, giving the power to levy taxes for purposes by law authorized, among which are provision for the governmental functions vested in the municipal government by the charter. When the specification relating to the city proper, or second district, was removed it did not change the legislative pur-

pose or the power of the board to levy taxes. The general power to levy taxes for purposes authorized by law (section 96) is limited by confining the levy for the town burdens and expenses to the inhabitants and property of the entire city. Section 96 has never authorized a levy except for city purposes upon the city proper, or second district, and upon the entire city or first district for town purposes. The amendment did not change this section.

If the framers of this amendment sought by it to make all of the property and inhabitants of the outlying district liable to taxation in the same degree as if its location were in the heart of the city, their purpose as to the land of the plaintiff was an unjust one. We do not consider whether an act of that character and effect would be legal. The authorities are in conflict upon that point, and this case does not require its answer. It is certain such an act would run counter to the long-established legislative policy of the state.

It may be that some property in this outlying district should, in justice, pay taxes at the city proper rate. This would support a plea that such property should be included within the limits of the city proper. It would not support a plea that all property in the outlying district, including farm and waste land, should be taxed at this rate.

We have sufficiently answered the argument of the city attorney that if section 5 is held to impose a general limitation upon the entire taxing power of the city to the meeting of the town burdens and expenses, the municipality will be unable to maintain its government.

The amendment bears upon its face indications of haste and crudeness. Whatever the framers intended they have not, as we think a study of the legislation shows, succeeded in changing the burdens and expenses for which and for which only the inhabitants and property of the entire city were liable to taxation under the consolidation act and the several revisions of the charter.

The decision of this demurrer does not require, but we think the municipal exigency does require, that we advise that under the charter of 1907, as amended in 1913, taxes should be levied upon the grand list of the city proper or second district as it was before the amendment to defray its burdens and expenses, and upon the entire city, or first district as it was before the amendment, to defray the burdens and expenses as specified in section 4 of the charter. In short, the method of levying taxes theretofore adopted should be continued.

There is error, the judgment is set aside, and the cause remanded for further proceedings according to law. In this opinion the other judges concurred, except BEACH, J., who dissented.



**GREENBERG v. BOARD OF EXCISE  
COM'RS OF CITY OF BAYONNE**  
et al.

(Supreme Court of New Jersey. Feb. Term, 1914.)

**INTOXICATING LIQUORS (§ 103\*)—TRANSFER  
OF LICENSE—POWER OF BOARD OF EXCISE—  
PUBLICATION OF NOTICE.**

Where the board of excise of a city after public notice required by ordinance and a hearing refused to transfer a license, it exhausted its power, and it could not, without the required notice, reconsidered at a subsequent meeting its action and resolve to transfer the license.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 108-112; Dec. Dig. § 103.\*]

Certiorari by Samuel Greenberg against the Board of Excise Commissioners of the City of Bayonne and others to remove a resolution of the Excise Commissioners ordering a transfer of the license in the city of Bayonne. Resolution attempting to transfer the license set aside, with costs.

Argued February term, 1914, before TRENCHARD and MINTURN, JJ.

A. A. Melniker, of Jersey City, for prosecutor. Peter Stillwell and Daniel J. Murray, both of Bayonne, for defendants.

**PER CURIAM.** We think that when in this case the board of excise, by resolution on November 10, 1913, after due public notice, and a hearing, decided to refuse the transfer of license, their power in the premises was exhausted, and that they could not, at a subsequent meeting, without the notice prescribed by the ordinance, reconsider their former action and resolve to transfer the license.

The policy of the law upon the subject of licenses is one which recognizes a public interest therein, by affording to the public an opportunity to remonstrate and to be heard after proper notice.

The city ordinance requires the publication of such a notice to the end that the matter may be then legally disposed of or properly continued to another meeting, to be then regularly disposed of. All the considerations of policy and expediency which moved this court in *Kendall v. Camden* to vacate a resolution involving a city office exist in this proceeding, in some degree at least, to warrant the setting aside of this resolution. *Kendall v. Camden*, 47 N. J. Law, 64, 54 Am. Rep. 117.

Having disposed of this matter by resolution after due notice and hearing, the matter was at an end, and the power of the board to act upon the subject *de novo* was conditioned upon the presentation of another petition and a publication of the notice required by the city ordinance, which was not attempted to be given prior to the passage of the resolution in controversy.

The resolution attempting to transfer the license of November 17, 1913, and again of January 5, 1914, must therefore be set aside, with costs.

(4 Boyce, 578)

**VAN WINKLE v. STATE.**

(Supreme Court of Delaware. June 16, 1914.)

**1. STATUTES (§ 114\*)—TITLE OF ACT—SHIPMENT  
OF LIQUORS.**

The Hazel Law (27 Del. Laws, c. 139), entitled "An act regulating the shipment or carrying of spirituous, vinous, or malt liquor into local option territory or the delivery of same in such territory," by section 1 prohibits common carriers from accepting such liquor for shipment into local option territory, by section 2 prohibits any person engaged in the manufacture or sale of such liquor from delivering it in local option territory, by section 5 excepts shipments to physicians and druggists in limited quantities, and by section 6 prohibits any person from bringing from any point within the state into local option territory more than one gallon of whisky in 24 hours. *Held* that, while sections 1 and 2, standing alone, established prohibition, and not a regulation, yet the act, construed as a whole, was a regulation of shipments, and the subject of the act was properly expressed in its title, as required by Const. Del. art. 2, § 16.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 145, 147-149; Dec. Dig. § 114.\*]

**2. CONSTITUTIONAL LAW (§ 206\*)—INTOXICATING  
LIQUORS (§ 14\*)—PRIVILEGES OF CITIZENS—SHIPMENT OF LIQUORS.**

The provision of Hazel Law (27 Del. Laws, c. 139) § 6, that no person, in quantities greater than one gallon in 24 hours, shall bring intoxicating liquors into local option territory from any point within the state, bears a substantial relation to the sale of intoxicating liquor in prohibited territory, and therefore is a proper exercise of the police power of the state, and not an abridgment of the privileges of citizens, guaranteed by Const. U. S. Amend. 14.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 625-648; Dec. Dig. § 206; \* *Intoxicating Liquors*, Cent. Dig. § 16; Dec. Dig. § 14.\*]

**3. CONSTITUTIONAL LAW (§ 240\*) — EQUAL  
PROTECTION OF THE LAWS — INTOXICATING  
LIQUORS.**

The Hazel Law (27 Del. Laws, c. 139) provides by section 5 that it shall not apply to the shipment or delivery to physicians or druggists of such liquors in unbroken packages not exceeding five gallons at any one time, and by section 6 prohibits any person from bringing into local option territory any liquor greater than one gallon within 24 hours. Const. Del. art. 13, § 1, provides for an election to determine whether the sale of liquors in certain districts shall be licensed or prohibited, and that, after a vote against license, no person shall thereafter manufacture or sell liquors except for medicinal or sacramental purposes. The Prescription Act (26 Del. Laws, c. 147) requires all prescriptions for intoxicating liquors for medicinal purposes to be written by practicing physicians. *Held*, in view of the recognized necessity of liquor as a drug, and therefore readily to be obtained by those authorized to prescribe or sell it, that the discrimination in favor of physicians and druggists was reasonable, and that the Hazel Law did not deny the equal protection of the laws.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. §§ 688, 692, 693, 697-699; Dec. Dig. § 240.\*]

#### 4. CONSTITUTIONAL LAW (§ 209\*) — "EQUAL PROTECTION OF THE LAWS"—CLASS LEGISLATION.

The provision of the federal Constitution guaranteeing to all persons the "equal protection of the laws," does not mean broadly that all persons, however situated, shall have the same rights and be protected in doing the same things, but means that all persons in like situations shall have an equal protection of the law; the test in ascertaining whether equal protection of the laws is denied to any person, or to any class of persons, is whether the classification adopted is an arbitrary one, or is a reasonable one in view of the purposes and objects of the act.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 678; Dec. Dig. § 209.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2423-2426.]

#### 5. INTOXICATING LIQUORS (§ 126\*)—SALE OF LIQUORS—PHYSICIANS.

The Hazel Law (27 Del. Laws, c. 139), providing by section 5 that it shall not apply to the shipment or delivery to physicians of liquors in unbroken packages not exceeding five gallons at any one time, does not permit liquor to be sold by physicians.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. § 135; Dec. Dig. § 126.\*]

#### 6. CONSTITUTIONAL LAW (§ 81\*) — "POLICE POWER."

The "police power" of the state is an attribute of sovereignty, and when exercised within its scope is supreme, to the exclusion of the power of the general government. It is the power of government inherent in every sovereignty—that is, the power to govern men and things—and, when exercised by a state sovereignty, extends to such restraints and regulations as are reasonable and proper to protect the lives and property of its citizens and to promote the order and welfare of society.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 148; Dec. Dig. § 81.\*]

For other definitions, see Words and Phrases, vol. 6, pp. 5424-5438; vol. 8, p. 7756.]

#### 7. COMMERCE (§ 8\*)—REGULATION—RIGHTS OF STATES.

The power to regulate commerce between states, delegated to the federal government, makes its exercise of such power supreme, to the exclusion of the powers of state governments.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.\*]

#### 8. COURTS (§ 97\*) — DECISIONS OF UNITED STATES SUPREME COURT — AUTHORITY IN STATE COURTS—"SUPREME LAW."

The decisions of the Supreme Court of the United States, respecting the powers delegated to the general government and those reserved to the state governments, constitute the "supreme law," and are controlling on the state courts.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 329-333; Dec. Dig. § 97.\*]

For other definitions, see Words and Phrases, vol. 8, p. 6808.]

#### 9. CONSTITUTIONAL LAW (§ 70\*) — JUDICIAL DEPARTMENT—ENCROACHMENT ON LEGISLATIVE.

In the division of powers, it is the function of the legislative department to make the laws, and the function of the judicial department to enforce them; and the courts are no more responsible for what a law may contain, so long as it is a valid enactment, than is the Legislature responsible for the manner in which the courts may enforce the law. The

responsibilities of the two departments are as separate as their functions.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.\*]

#### 10. STATUTES (§ 190\*)—CONSTRUCTION—NECESSITY.

When a statute is validly enacted, and its language is plain, and conveys a clear and definite meaning, the sole duty of the courts is to give to it the exact meaning conveyed by its language, adding nothing thereto and taking nothing therefrom. It is only when the meaning of a statute is in doubt that courts are required first to construe it, in order to know how to enforce it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 266, 269; Dec. Dig. § 190.\*]

#### 11. COMMERCE (§ 14\*)—REGULATION—INTOXICATING LIQUORS—WEBB-KENYON ACT—HAZEL LAW.

The Webb-Kenyon Act (Act March 1, 1913, c. 90, 37 Stat. 699), by its title purporting to divest liquor of its interstate character only "in certain cases," and prohibiting transportation of intoxicating liquors from one state into another, to be received, possessed, sold, or used in violation of any law of such state, does not divest liquor of its interstate character in all cases, but removes the protection of the commerce clause only when the liquor is to be used in violation of any law of the state; and hence the Hazel Law (27 Del. Laws, c. 139), enacted thereunder, prohibiting the shipment or delivery of liquor in a prohibition district of the state for any purpose, except to physicians and druggists, is invalid as to a shipment and delivery of liquor from another state into a prohibition district of this state for the receiver's personal consumption, a purpose recognized by the act itself to be lawful.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 30, 92; Dec. Dig. § 14.\*]

#### 12. STATUTES (§ 64\*)—PARTIAL INVALIDITY—EFFECT.

The Hazel Law (27 Del. Laws, c. 139), regulating shipments of intoxicating liquors into local option territory of the state for any purpose, except to physicians and druggists, though invalid as to an interstate shipment intended for the receiver's personal consumption, recognized by the act itself to be lawful, is a valid enactment in so far as it regulates, limits, or prohibits the shipment of liquor from one part of the state into a prohibition district in another part of the state.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66, 195; Dec. Dig. § 64.\*]

Error to Court of General Sessions, Kent County.

Benjamin F. Van Winkle was convicted of bringing intoxicating liquor into local option territory (88 Atl. 807), and he brings error. Reversed.

Argued before CURTIS, Ch., and WOOLLEY and RICE, JJ.

John Biggs, Richard S. Rodney, Herbert H. Ward, and Daniel O. Hastings, all of Wilmington, and Lawrence Maxwell and Joseph S. Graydon, both of Cincinnati, Ohio, for plaintiff in error. Josiah O. Wolcott, Atty. Gen., and Armon D. Chaytor, Jr., John B. Hutton, and Frank M. Jones, Deputy Attys. Gen., for the State.

Indictment for violation of chapter 139, volume 27, Laws of Delaware, known as the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"Hazel Law," and conviction under the law as announced upon an agreed state of facts.

On the 1st day of March, 1913, the Congress of the United States enacted a statute which has become generally known as the "Webb-Kenyon Act," the title and text of which are as follows:

"An act divesting intoxicating liquors of their interstate character in certain cases.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled:

"That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

37 Stat. 690.

Following the enactment of this federal statute, the General Assembly of the state of Delaware enacted a statute now commonly known as the "Hazel law," approved April 8, 1913, which is in the following language:

"An act regulating the shipment or carrying of spirituous, vinous or malt liquor into local option territory, or the delivery of same in such territory.

"Be it enacted by the Senate and House of Representatives of the state of Delaware in General Assembly met:

"Section 1. That it shall be unlawful for any common carrier, knowingly to accept or receive for shipment, transportation or delivery to any person or place within local option territory, or to carry, bring into, transfer to any other person, carrier or agent, handle, deliver or distribute in local option territory, any spirituous, vinous or malt liquor, regardless of the name by which it may be called.

"Section 2. That it shall be unlawful for any person, firm or corporation engaged in the manufacture or sale of spirituous, vinous or malt liquor, or the agent, servant or employee of any such person, firm or corporation, to carry, convey or bring into local option territory, spirituous, vinous or malt liquor, regardless of the name by which it may be called, by any conveyance or means of transportation whatsoever.

"Section 3. That any person, whether as principal, or agent, clerk or servant of another, who shall knowingly violate any of the provisions of this act, shall upon conviction thereof be fined not less than fifty dollars, nor more than five hundred dollars for the first offense; and upon conviction for any subsequent offense, in addition to such fine shall be imprisoned for a period of not less than thirty days, nor more than six months.

"Section 4. This act shall apply to all packages of spirituous, vinous or malt liquor, whether broken or unbroken. Each package of spirituous, vinous, or malt liquor, regardless of the name by which it may be called, accepted, received, carried, transferred, handled, delivered or distributed in violation of the provisions of this act, shall constitute a separate offense. And the false or fictitious naming or labeling

of any spirituous, vinous, or malt liquor for shipment or delivery into local option territory, shall work a forfeiture of such liquor.

"Section 5. Nothing in this act shall be construed to apply to the shipment or delivery to physicians or druggists, of spirituous, vinous or malt liquor, in unbroken packages in quantity not to exceed five gallons at any one time, nor to the delivery to churches, or the proper officers thereof, of wine in unbroken packages for sacramental purposes.

"Section 6. That it shall be unlawful for any person to carry, bring or have brought any quantity of spirituous, vinous or malt liquor from any point within the state of Delaware into local option territory within said state greater than one gallon within the space of twenty-four hours."

Chapter 139, volume 27, Laws of Delaware.

In the Court of General Sessions of the state of Delaware, in and for Sussex county, at its June term, 1913, the grand jury indicted one William Grier for a violation of certain of the provisions of the last recited act, charging that as the agent of a liquor dealer in the city of Philadelphia and state of Pennsylvania, William Grier brought into local option territory, within the state of Delaware, to wit, in Sussex county, a certain quantity of liquor purchased by a resident of the said county and there delivered the same to him. The case was heard and the law decided by the court upon an agreed state of facts and the defendant was convicted under the law as stated in the opinion of the court and reported under the title of *State v. Grier*, in 88 Atl. 579.

In the Court of General Sessions of the state of Delaware, in and for Kent county, at its October term, 1913, the grand jury found a true bill against one Benjamin F. Van Winkle, who is the plaintiff in error in this case, charging that in violation of the said Hazel law, he, as agent of the Adams Express Company, a common carrier doing business in the state of Delaware, transported and delivered liquor to a resident of Kent county, which is a local option district in the state of Delaware.

The case was presented to the Court of General Sessions, upon the following agreed state of facts:

"And now, to wit, this 10th day of November, A. D. 1913, it is agreed by and between Josiah O. Wolcott, Attorney General of the state of Delaware, and Daniel O. Hastings, Herbert H. Ward and John Biggs, attorneys for Benjamin F. Van Winkle, the defendant in the above stated case, that the following case be stated for the opinion of the court.

"That Benjamin F. Van Winkle was on the 9th day of August, A. D. 1913, and for a long time prior thereto the agent of the Adams Express Company at the town of Smyrna, located in Duck Creek hundred, Kent county, state of Delaware; that the said Adams Express Company was on the said 9th day of August and for a long time prior thereto a common carrier of goods, wares and merchandise, and now is and then was authorized to do business as a common carrier in all parts of the state of Delaware, and in other states, including the state of Pennsylvania; that it was within the scope of the employment of the said Benjamin F. Van Winkle, as agent as aforesaid, to deliver as agent aforesaid, goods, wares and merchandise transported and carried by

said Adams Express Company and consigned to persons in the town of Smyrna, aforesaid; that on the 9th day of August, A. D. 1913, Consumers' Brewing Company, a corporation doing business in the city of Philadelphia, state of Pennsylvania, pursuant to the direction of one Henry M. Smith, delivered to said Adams Express Company, a common carrier as aforesaid, in the said city of Philadelphia, one crate of malt liquor, to wit, beer in bottles, consigned to and to be transported, carried and delivered to said Henry M. Smith of the town of Smyrna, in Duck Creek hundred, state of Delaware; that the said malt liquor was known to be such and was so received by said Adams Express Company and promptly transported and carried by it as common carrier aforesaid by means of a continuous and unbroken transportation from the said city of Philadelphia in the state of Pennsylvania through New Castle county in the state of Delaware to the town of Smyrna in Kent county, state of Delaware, where it was received by the said Benjamin F. Van Winkle in the course of his employment as agent as aforesaid, for delivery to the said Henry M. Smith, and was delivered by the said Benjamin F. Van Winkle in the course of his employment as agent as aforesaid, to the said Henry M. Smith; that at the time the said malt liquor was so delivered by the said Benjamin F. Van Winkle, the said Benjamin F. Van Winkle knew that it was malt liquor, to wit, beer, that he was delivering in manner aforesaid; that the said malt liquor was intended by the said Henry M. Smith to be used by him for his own consumption, and he did not intend to sell or otherwise unlawfully dispose of the same; that the purpose for which the said liquor was to be used was known to the said Adams Express Company, and to its agent the said Benjamin F. Van Winkle; that the said malt liquor had been theretofore purchased by the said Henry M. Smith from the said Consumers' Brewing Company by sending a written order therefor from the town of Smyrna aforesaid, to the said Consumers' Brewing Company at the city of Philadelphia aforesaid, together with the purchase price therefor through the mail, directing that the said beer be shipped to him, the said Henry M. Smith, by the said Adams Express Company; that the said Consumers' Brewing Company was authorized under the laws of the state of Pennsylvania to sell the said malt liquor; that the said Adams Express Company intended at the time the said malt liquor was so received by it to transport, carry and have the same delivered by its agent in the manner aforesaid, and the said Benjamin F. Van Winkle intended when the said malt liquor was so received by him to deliver the same as aforesaid as agent as aforesaid; that the said Henry M. Smith was not then and there a physician or druggist or a proper officer of a church receiving said liquor for sacramental purposes; that the said Kent county was then and there a district where under the provisions of article 13 of the Constitution of the state of Delaware known as the 'Local Option Article,' the majority of the qualified voters had voted against the license and in favor of the prohibition of the manufacture and sale of spirituous, vinous, and malt liquors, except for medicinal and sacramental purposes.

"If the court shall be of the opinion upon the facts aforesaid that, under the laws of the state of Delaware and of the United States of America, a crime punishable under the laws of the state of Delaware is stated or shown to have been committed, then judgment shall be entered against said defendant upon the verdict of the jury charged accordingly by the court, upon the said admitted facts; and if the court shall be of the opinion, upon the facts aforesaid, that under the laws of the state of Delaware and of the United States of America a crime punishable under the laws of the state of Delaware is not stated or shown to have been committed,

then judgment shall be entered accordingly upon a verdict of 'not guilty.' The said defendant, in case of a judgment against him as aforesaid, reserves the right to except to the charge of the court upon the law."

The defendant, through his counsel, prayed the court to find the law and to charge the jury in accordance with the prayers they submitted, the substance of which will appear later in this statement. The state asked that the prayers of the defendant be refused and that on authority of the case of *State v. Grier* the jury be instructed to return a verdict of guilty.

The charge of the court was in accordance with the prayer of the state, and is as follows:

"Gentlemen of the jury: The court decline to instruct the jury to return a verdict of not guilty. The court think this case is controlled by *State v. Grier* (recently decided in Sussex county) 88 Atl. 579, inasmuch as all questions raised in the present case were raised and determined in the *Grier* Case. For the reasons given in the opinion delivered in the *Grier* Case, which are applicable to the questions now raised, we hold that the statute of this state, known as the 'Hazel Law' is constitutional, and that the federal act known as the 'Webb-Kenyon Law' is also constitutional, and applicable to the present case, if the facts raise the same questions of law as to its applicability, as contended by the defendant, as would be raised if the indictment were against the express company of which the defendant was agent; which is the contention made by the defendant.

"The court are therefore of the opinion, upon the agreed statement of facts, that under the laws of the state of Delaware, and of the United States of America, a crime punishable under the laws of the state of Delaware is stated or shown to have been committed by the defendant. Being of such opinion the jury is charged and directed to return a verdict of guilty against the defendant; and it is ordered that judgment be entered against the defendant upon such verdict in conformity with the terms and stipulations of the case stated."

The defendant excepted to the charge of the court and the jury rendered a verdict of guilty, whereupon the defendant sued out of the court the writ of error upon which this case has been heard.

The assignments of error, when classified, present the following propositions of law:

"1. That the act of the Legislature under which the defendant is indicted, being chapter 139, volume 27, Laws of Delaware, is unconstitutional in that it violates section 16, article 2, of the state Constitution, which provides that the subject of every bill shall be expressed in its title.

"2. That the said act, being chapter 139, volume 27, Laws of Delaware, is unconstitutional in that section 5 thereof violates the fourteenth amendment of the federal Constitution, which provides that no state shall \* \* \* deny to any person within its jurisdiction equal protection of the laws.

"3. That the said act is unconstitutional in that a portion of it abridges the privileges of citizens, which are guaranteed by the fourteenth amendment of the federal Constitution.

"4. That beer, being an intoxicating liquor, is an article of commerce, and in this case is a lawful article of interstate commerce, and as such cannot be subject to state law as to its transportation, and delivery as a part of such transportation, in Kent county.

"5. That the federal law of March 1, 1913, known as the 'Webb-Kenyon Law,' entitled, 'An

act divesting intoxicating liquors of their interstate character in certain cases,' does not deprive the shipment in question of the protection of the Interstate Commerce Law, in that the shipment in question was intended to be used for a lawful purpose.

"6. That if the said federal statute, known as the 'Webb-Kenyon Law,' is applicable by its terms to the case charged in the indictment in this case, yet that the said federal statute is unconstitutional.

"7. That the act of Congress of March 1, 1913, known as the 'Webb-Kenyon Law,' has no bearing on this case; that the indictment in this case was not based on that law and could not be, because a state court cannot punish the violation of a federal statute.

"8. That the shipment of beer referred to in the indictment in this case was an interstate shipment from the state of Pennsylvania into the county of Kent in the state of Delaware, said county being local option or dry territory in the last mentioned state; that the indictment should, therefore, have charged that the beer, being intoxicating liquor, in question was intended to be possessed, sold, or in some manner used by the consignee in the violation of the laws of the state of Delaware."

WOOLLEY, J., after making the foregoing statement of the case, delivered the opinion of the court.

[1] Upon the first proposition suggested by the assignments of error, "that the act of the Legislature under which the defendant is indicted, being chapter 139, volume 27, Laws of Delaware, is unconstitutional in that it violates section 16, article 2, of the state Constitution, which provides that the subject of every bill shall be expressed in its title," we hold that the act in question is not unconstitutional for the reason urged, and in doing so we adopt the reasoning and approve the decision of the Court of General Sessions in the case of *State v. Grier*, in disposing of the same question.

[2] The third proposition, "that said act is unconstitutional in that a portion of it abridges the privileges of citizens which are guaranteed by the fourteenth amendment of the federal Constitution," relates specially to section 6 of the act, which reads:

"That it shall be unlawful for any person to carry, bring, or have brought, any quantity of spirituous, vinous or malt liquor from any point within the state of Delaware into local option territory within said state greater than one gallon within the space of twenty-four hours."

We hold that the act does not amount to an abridgment of those privileges guaranteed to citizens by the fourteenth amendment of the federal Constitution, for the reasons given in that part of the opinion of the Court of General Sessions, in *State v. Grier*, 88 Atl. 579, in disposing of the same subject.

Propositions of law numbered 7 and 8 were not seriously urged at the argument and are therefore decided against the contention of the plaintiff in error without an opinion.

[3-5] The second proposition, "that the said act, being chapter 139, volume 27, Laws of Delaware, is unconstitutional in that" it "violates the fourteenth amendment of the federal Constitution, which provides that no state shall \* \* \* deny to any person

within its jurisdiction equal protection of the laws," is directed to the classifications and the discrimination in the classifications made by sections 5 and 6 of the act.

Section 5 provides that:

"Nothing in this act shall be construed to apply to the shipment or delivery to physicians or druggists, of spirituous, vinous or malt liquor, in unbroken packages in quantity not to exceed five gallons at any one time, nor to the delivery to churches, or the proper officers thereof, of wine in unbroken packages for sacramental purposes."

Section 6 provides:

"That it shall be unlawful for any person to carry, bring or have brought any quantity of spirituous, vinous or malt liquor from any point within the state of Delaware into local option territory within said state greater than one gallon within the space of twenty-four hours."

The contention of the plaintiff in error is that these two provisions of the statute constitute class legislation, favoring some and discriminating against others, in that the shipment of liquor to physicians in five gallon quantities is allowed while the shipment of liquor to others in any quantity is prohibited; that the exception in favor of physicians is not made to enable them to have liquor for medicinal purposes, for the reason that physicians cannot sell liquor, and as physicians are thus allowed to have liquor shipped to them for their own personal use to the extent of five gallons at a time, while other people may not have any liquor shipped to them at all, the classification is unreasonable and arbitrary. Pretty much the same argument is made as to druggists, excepting with respect to them the law provides a method of sale. We understand that no contention is made that the classification with respect to the right of shipment of liquor to churches or to their proper officers for sacramental purposes is a classification violative of the amendment to the federal Constitution.

The provision of the federal Constitution guaranteeing to all persons the equal protection of the laws, does not mean broadly that all persons howsoever situated shall have the same rights and be protected in doing the same things, but it means that all persons in like situations shall in those situations have an equal protection of the law. To this end governments may legislate with respect to people in their different relations one to another and to the things that are the subjects of government. If such legislation amounts to class legislation as it is generally termed—that is, legislation that discriminates against some and favors others—it is prohibited by the amendment; but legislation, which in carrying out a public purpose is limited in its application, and within the sphere of its operation, affects alike all persons similarly situated, is not within the amendment. The test to be applied in ascertaining whether equal protection of the laws is denied to any person or to any class of persons, as stated by the court in

the case of *State v. Wickenhoefer*, 6 Pennewill, 120, 64 Atl. 273, "is whether or not the classification adopted by the Legislature is an arbitrary one or whether it is a reasonable classification in view of the purposes and objects of the act," resting upon some difference which bears a reasonable and just relation to the thing in respect to which the classification is made.

In order to determine whether the classifications made by sections 5 and 6 of the act are reasonable or unreasonable, just or arbitrary, and therefore constitutional or unconstitutional, we must consider the law as it existed and the conditions that prevailed at the time the statute was enacted, and the purposes and objects sought to be attained thereby.

It has long been the policy of this state to restrict the right to sell liquor to those licensed to sell it. It was enacted by the statute of March 22, 1867:

"That no person \* \* \* *without having first obtained a proper license therefor*, \* \* \* shall, within the limits of this state, be engaged in \* \* \* any business \* \* \* in this section hereafter next mentioned, that is to say, \* \* \* selling vinous, spirituous, or malt liquors." Chapter 117, volume 13, Laws of Delaware.

This statute, in so far as it related to the business of selling liquor, was repealed and its general provision superseded by the more specific provisions of the act of April 10, 1873 (chapter 418, volume 14, Laws of Delaware; Rev. Code, p. 410), and the acts amendatory thereto, by the first section of which a sweeping declaration is made as to who shall *not* sell liquor in the state of Delaware. The act says:

"No person, by himself, his agent, or servant, directly or indirectly, shall sell any intoxicating liquors except as herein provided."

Following these words of general exclusion, the statute provides for the sale of liquor in any and in all cases under a system of licenses, which have a relation to the quantity to be sold and the place upon which the liquor is to be drunk, and designates and classifies the persons to whom licenses for the sale of liquor in different ways, may be granted. In these classifications, physicians are neither included nor in any way mentioned, but druggists are mentioned and included.

By this statute, druggists were allowed to procure licenses for the sale of liquor limited to certain quantities but apparently not limited to medicinal purposes. Chapter 418, volume 14, Laws of Delaware; chapter 384, volume 16, Laws of Delaware; chapter 125, volume 25, Laws of Delaware.

Under the act of April 24, 1889 (chapter 555, volume 18, Laws of Delaware), the right of sale of liquor by druggists was further restricted by a provision that:

"It shall \* \* \* be unlawful for any druggist licensed to sell intoxicating liquors, to sell the same otherwise than upon the written order or prescription of a regular practicing physician, which order or prescription shall state

that such liquor is necessary for medicinal purposes."

Under this statute a druggist had a right to sell liquor only when licensed, and then only upon prescription and for one defined purpose.

Thus stood the law with respect to the sale of liquor for medicinal purposes, at the time of the adoption of the Constitution of 1897.

The Constitution of 1897 (section 1, art. 13) provides for the submission to the qualified voters of certain districts in the state of Delaware the question whether the manufacture and sale of liquors therein shall be licensed or prohibited, and directs that when upon such submission a majority is against license:

"No person, firm or corporation shall thereafter manufacture or sell spirituous, vinous or malt liquors, *except for medicinal or sacramental purposes*, within said district."

The question contemplated by the provision of the Constitution quoted was submitted to the voters of Kent and Sussex counties in 1907, by authority of chapter 65, volume 24, Laws of Delaware, resulting in a majority against license and establishing Kent and Sussex counties as districts in which the manufacture and sale of liquor is forbidden, except for the purposes designated.

In harmony with the exception in the Constitution and the act of submission respecting the sale of liquors for medicinal and sacramental purposes in prohibition territories, the General Assembly of 1911, by chapter 147, volume 26, Laws of Delaware, passed an act entitled "An act regulating the sale of intoxicating liquors for medicinal purposes" (applicable only to Kent and Sussex counties), which provides:

"Section 1. That from and after the approval of this act all prescriptions for intoxicating liquors for medicinal purposes shall be written by regular practicing physicians in blank prescription books. \* \* \* Such prescriptions shall set forth the kind and quantity of liquors prescribed, the name of the person for whom prescribed, the date on which the prescription is written and the directions for use, and shall be signed by the full name of the physician issuing the same, and no physician shall write any prescription for intoxicating liquors except the person for whom it is issued is actually sick and such liquor is required as a medicine for such illness. \* \* \*

"Section 3. Every druggist in this state *who holds a license* for the sale of intoxicating liquors shall keep in good faith in a book which he shall provide for the purpose, an exact and true record of all prescriptions filled by him," etc.

This act is known as the "Prescription Act" and repeals only those acts and parts of acts inconsistent with it and supplements those acts not inconsistent with it, the manifest purpose of the act being to provide a method of sale of intoxicating liquor for medicinal purposes in prohibition districts, to meet the exception made by the Constitution.

Such is the history of the legislation upon the subject until the enactment of the Hazel Law in 1913.

It is admitted that the provision of the Hazel Law allowing the shipment and delivery of wine to church officers "for sacramental purposes" is in harmony with the exception of the Constitution, and as the *purpose* for which the wine is to be used is expressed in the permissive words of the statute, it is a lawful classification and does not amount to a discrimination against the equal rights of other citizens. It is maintained, however, that as physicians and druggists are given the right to have shipped to them in prohibition districts five gallons of liquor at a time for no specified purpose, and therefore *for any purpose*, and as from other individuals within those districts is withheld the right to have shipped to them any liquor for any purpose, though they may carry therein one gallon a day *for their own use*, the statute makes a discrimination in favor of physicians and druggists that amounts to a denial of equal rights guaranteed to others by the federal Constitution.

It must be conceded that in permitting druggists and physicians to receive liquor by shipment in such large quantities, when other individuals not in their occupations are forbidden to have liquor shipped to them in any quantity, the Legislature had some reason for making the classification and establishing the difference. If the exception had been in favor of shoemakers and sailors, no reason could have been discovered for the discrimination, but when the discrimination is in favor of two classes, which of all classes are recognized by common acceptance, and specifically by law as well, to have a special and professional use for the particular commodity, the discrimination is understood. The fact that the purpose for which imported liquor may be used by persons in these professional classes is not designated by the statute, detracts nothing from the necessary inference that liquor may be shipped to them, by permission of the statute, because of the recognized necessity of liquor as a drug to be used and administered and therefore readily to be obtained by those who under the law are authorized either to administer or sell it. In making the exception of physicians and druggists, the statute undoubtedly makes a discrimination in their favor. Such a discrimination is permitted or prohibited and therefore lawful or unlawful only as the discrimination is reasonable or arbitrary. We think the discrimination may even amount to a privilege, yet the privilege is based upon the peculiar professional character of those to whom it is extended, the especial purposes for which they are permitted by the Constitution to use the liquor, and as a public recognition of their occupations in relation to the sick and as bearing upon the health of the community. These may have been the reasons why the words "for medicinal purposes" were omitted from the statute, and if so, they are good reasons, and do not render the discrimination unjust.

When Kent and Sussex counties decided against license, only so much of the old license law was repealed by that decision as was inconsistent with the new situation, leaving portions of the old law existing. The law as it existed, after the submission, and as it now exists, so far as it relates to the right of druggists to sell liquor, is positive. No druggist shall sell liquor in Kent or Sussex county except he be licensed as required by law; no druggist so licensed, shall sell liquor except for medicinal purposes; and no druggist shall sell liquor even for medicinal purposes, except in the quantities and by prescription of physicians, likewise required by law.

With this much law relating to the sale of intoxicating liquor by druggists surviving on the statute books and alive, the Legislature in discriminating in the Hazel Law in favor of druggists must have only intended to recognize a class dealing in liquor for medicinal purposes, and by providing a means by which that class could get a supply of liquor, endeavored to carry out the meaning of the Constitution which expressly allowed the manufacture and sale of liquor for *medicinal* purposes in prohibition territory.

There is not now nor has there ever been a statute of the state of Delaware which confers upon physicians a right to sell liquor, and the early law, which denies the right to all persons not licensed, excluded physicians and excludes them yet, unless, indeed, the contention of the state in this case be maintained.

The state contends that the discrimination of the fifth section of the Hazel Law in favor of physicians is a reasonable one, upon the ground that the Constitution preserves the right of the sale of liquor for medicinal purposes in territory where the sale of liquor for other purposes is prohibited, and that as the Legislature has by no statute (other than the Prescription Act) enacted legislation for the regulation of the sale of liquor for medicinal purposes in prohibition territory, the sale of liquor for medicinal purposes must be made and should be made only by those who deal in liquors for those purposes, and, of those, physicians form one class. And of this opinion was the court below.

With the contention of the state and ruling of the court below, that liquor may be *sold* by physicians, we do not concur. In the first place, the Hazel Law is not a law regulating the *sale* of liquor. It is a law regulating the shipment and delivery of liquor. This law neither confers upon nor withholds from any one the right to sell liquor in prohibition territory, and in this respect it makes no exception of physicians or druggists. A physician not having a right to sell liquor in Kent county before the enactment of the Hazel Law, has no right to sell the liquor in that county after the enactment of that law.

There is a law against the sale of liquor in



a prohibition territory (chapter 65, volume 24, Laws of Delaware) and this law makes it "unlawful for any person \* \* \* to sell \* \* \* liquors, except for medicinal or sacramental purposes, within said districts." There is nothing in this law or in any law of the state of Delaware that by expression confers upon physicians the right to sell liquor either with or without a license, for any purpose. Now, is it necessary to hold, by implication of the Constitution preserving the right of the sale of liquor for medicinal purposes, that physicians because of the importance of the commodity to their profession, have the right to sell it? We think not, for we believe the existing law with respect to a legal method of selling liquor by druggists for medicinal purposes, satisfies the exception of the Constitution, whether it satisfies a popular demand for liquor or not.

Although physicians are not authorized by the expression or the implication of any law of this state to sell liquor in any place, in any quantity, for any purpose, they are not prohibited from using it for medicinal purposes. In general opinion, it is considered an important and by the framers of the Constitution it was thought to be a necessary thing to be used in the practice of medicine. Against its use as a medicine, there is no law, in fact its use as a medicine is recognized and protected by law, and a physician may use and administer it in his practice, just as he may use and administer cocaine or any habit-forming drug. The provision of the Hazel Law permitting shipment of liquor to physicians, as an excepted class, is but a recognition by the Legislature of this use of liquor, and of the exemption by the Constitution respecting the sale of it for this use, and therefore constitutes not an unreasonable, but to our minds a perfectly reasonable, discrimination, and other people not similarly situated cannot complain that the same privilege is withheld from them.

We are of opinion that, upon the contention made, the act does not violate the fourteenth amendment of the federal Constitution, and is not therefore unconstitutional.

Propositions 4, 5 and 6 are as follows:

"That beer, being an intoxicating liquor, is an article of commerce, and in this case is a lawful article of interstate commerce, and as such cannot be subject to state law as to its transportation, and delivery as a part of such transportation, in Kent county.

"That the federal law of March 1, 1913, known as the 'Webb-Kenyon Law,' entitled, 'An act divesting intoxicating liquors of their interstate character in certain cases,' does not deprive the shipment in question of the protection of the Interstate Commerce Law, in that the shipment in question was intended to be used for a lawful purpose.

"That if the said federal statute, known as the 'Webb-Kenyon Law,' is applicable by its terms to the case charged in the indictment in this case, yet that the said federal statute is unconstitutional."

These propositions are nearly related in principle and present in different phases the

same questions of law, and will therefore be considered together. They involve questions of the validity of a state law regulating or attempting to regulate and restrict commerce between the states in a specified commodity, and the validity of a federal law delegating, permitting or acquiescing in the exercise of such a power by a state, in view of the provision of the federal Constitution conferring upon the Congress of the United States supreme power to regulate commerce between the states, and thus present in new forms old questions which have been the bases of legislative and judicial conflicts between the state and federal governments almost since their foundation.

In our scheme of government, which contemplates the delegation of certain and defined powers to national control and the reservation of equally certain powers to state or local control, there is with respect to the existence and location of those powers no conflict between state and federal sovereignties. But in a complicated system such as ours, wherein exist two governments over the same people, in which in different ways the laws first of one and then the other are supreme, according to the authority under which they are enacted and with reference to the subjects to which they are addressed, conflicts in the exercise of those powers are inevitable.

[6] Among the powers reserved to each of the separate governments, which together form the general government of the United States, is what is termed the "police power" of the state. This power is an attribute of sovereignty, and when exercised within its scope is supreme, to the exclusion of the power of the general government. Police power "is the power of government inherent in every sovereignty, that is to say, the power to govern men and things" (License Cases, 5 How. 504, 583, 12 L. Ed. 256), and when exercised by a state sovereignty extends to such restraints and regulations as are reasonable and proper to protect the lives, health, comfort and property of its citizens and to promote the order, morals, safety, and welfare of society.

[7] On the other hand, among the powers delegated to the federal government is the power to regulate commerce between the states, and in the exercise of that power the authority of the federal government is supreme to the exclusion of the powers of state governments.

When between these extremes of sovereignty there comes a thing, which from its nature as property is a subject of ownership, traffic and interstate commerce and over it the federal government assumes supreme control, and which because of its nature is a menace to the health, morals and safety of society, and over it the state likewise attempts supreme control, there occurs a collision of powers, and from that collision one only can emerge supreme.



[§] In such a conflict it devolves upon the courts to determine which sovereignty has been invaded and which power is supreme. To arrive at such a determination it is necessary for the courts to revert to the early laws, examine and ascertain the powers originally partitioned between the governments of the states and the United States, and seek the foundation of the laws out of which such a controversy has arisen, by progressively following the legislative and judicial history of the matter down to the point of conflict. This is not merely a wise policy but it is a necessary one, as the only guides to a decision of a case like this, are those afforded first by the language of the Constitution, and then the legal meaning of that language, and the legal effect of the statutes enacted thereunder, as determined and illuminated by the judicial pronouncements upon the subject by the judicial tribunal having authority finally to decide the law. A decision by the court in this case that involves anything beyond this would be a decision without authority, for by the decisions of the Supreme Court of the United States, respecting the powers delegated to the general government and those reserved to the state governments, are we not only guided but controlled, and until those decisions are modified or altered, or the language of the Constitution itself is changed, they constitute the supreme law, and we are bound by them.

The conflict between the state and federal governments for control and regulation of the sale and transportation of liquor has been waged since early times, and revolves around what is known as the commerce clause of the federal Constitution (article 1, § 8), and the meaning and legal effect of that clause as a supreme federal power, taken in connection with or in opposition to the police powers of the states, which, when existing and defined, are in turn supreme in the states.

The Constitution declares that the Congress has power "to regulate commerce with foreign nations, among the several states, and with the Indian tribes." These words give all the authority which the United States has over commerce. The police powers of the states are not conferred by statute, but are powers reserved to the states, for the regulation of their internal affairs, and are rather elastic in their scope and definition.

The power to regulate commerce among the several states is granted to the Congress in the same clause and by the same words as the power to regulate commerce with foreign nations, and is coextensive with it. The first judicial pronouncement by the Supreme Court of the United States upon the commerce clause of the Constitution, which has a bearing upon the matter now before us, was in the celebrated case of *Brown v. State of Maryland*, 12 Wheat. 419, 6 L. Ed. 678, and related to the right of the state of Maryland to levy a tax upon a commodity (not

liquor) imported into that state from a foreign country. The question of the right of a state to enact a law that either in purpose or effect, directly or indirectly, regulates or restricts commerce with a foreign country, was fully presented to the Supreme Court for the first time by that case. The court held that an article authorized by a law of Congress to be imported continued to be a part of the foreign commerce of the country while it remained in the hands of the importer for sale in the original bale, package, or vessel in which it was imported; that the authority given to import necessarily carried with it the right to sell the imported article in the form and shape in which it was imported, and that no state, either by direct assessment or by requiring a license from the importer before he was permitted to sell, could impose any burden upon him or the property imported beyond what the law of Congress had itself imposed; but that when the original package was broken up for use or for retail by the importer, and also when the commodity had passed from his hands into the hands of a purchaser, it ceased to be an import, or a part of foreign commerce, and became subject to the laws of the state, and might be taxed for state purposes, and the sale regulated by the state, like any other property. This was substantially the decision in the case of *Brown v. State of Maryland*, drawing the line between foreign commerce, which is subject to the regulation by the Congress to the exclusion of the states, and internal or domestic commerce within each state, the regulation of which belongs to the state, to the exclusion of the Congress.

The case of *Brown v. State of Maryland* forms the basis of the subsequent decisions of the Supreme Court upon the matter of federal regulation of commerce between the states with respect to the commodity of liquor. The first important cases before the Supreme Court of the United States, which bore directly upon the subject, were several cases thereafter known by the general name of the License Cases, 5 How. 504-633, 12 L. Ed. 256, heard and decided in 1847. In these cases the abstract question of law was: Is a state law, prohibiting the resale of imported spirits, except by license, on the ground that, for moral, medical, economical, or other reasons, the public good will not be promoted by such sale, repugnant to the acts of Congress, and to treaties authorizing the importation of such spirits?

On the part of those attacking the right of a state to regulate the resale of liquor authorized by the laws of Congress to be imported into the state, and thereby ultimately to prohibit the resale thereof, it was contended that a congressional act authorizing importation of spirits is a legislative determination that the foreign article may properly, and shall, enter into consumption of the state, and be sold in the interior market

thereof; and that a state statute, limiting or restricting the resale, amounts to an interception in the hands of the first buyer, shuts the importer from the country as really as if he were prohibited to import, and therefore contravenes the determination of the federal legislation, upon a directly opposite policy.

On the other hand, the state contended that the requirement that a purchaser of imported spirits be licensed under a state law, before resale, is a regulation of the internal commerce of the state, having for its object the preservation of order, morals and health and intended to discourage intemperance and to promote sobriety, and therefore falls within the class of laws, enacted under the powers reserved to the state, and generally called "police regulations."

The court held that a state could not by statute prohibit the importation of foreign spirits, as such a law would be repugnant to the commercial power of the federal government, but the matter of the resale by the consignee of imported spirits in the original package, was one over which the Congress and the states had concurrent jurisdiction, to the extent that in the *absence* of regulation by act of Congress, under the power conferred by the commerce clause of the Constitution, a state within its police power might regulate and thereby prohibit the sale of spirits in the original package in which they were imported, or in the presence of some regulating act of Congress, a state might in turn regulate such a sale under a state law, if such state law was not inconsistent with or repugnant to the act of Congress.

The law as decided by the License Cases in 1847 was little disturbed by judicial decisions until the decade of 1880-1890, in which period the case of *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205, was heard. In that case the Supreme Court held valid a statute of the state of Kansas, which prohibited the *manufacture and sale* of intoxicating liquors within the limits of that state, except for medical, scientific or mechanical purposes, but expressly avoided an opinion upon the power of a state to prohibit the sale of imported liquor within its limits, when such liquor was authorized by Congress to be imported, intimating, against the decision in the License Cases, that when the liquor is authorized to be imported from one state to another, the right of sale of the liquor would seem to follow the right to import it. The decision in this case has a relation to the matter under discussion only because it was an early expression of doubt by the Supreme Court of the right of a state to regulate or prohibit the resale of liquor after the importation, as decided in the License Cases.

The point in the judgment of the License Cases was strictly confined to the right of

the states to regulate or prohibit the *sale* of intoxicating liquor by the consignee after it had been brought within state limits. The right to transport liquor into the states was not questioned in those cases. Indeed, the reasoning which justified the right of a state to prohibit sales of imported liquor, admitted by implication, the right to transport liquor from one state into another as a commodity of lawful commerce, free from the control of the several states and subject to the exclusive power of Congress over commerce.

The case of *Bowman v. Chicago, etc., Railway Co.*, 125 U. S. 465, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700, decided in 1888, represents the next important step in the progress of judicial interpretations of state and federal powers over commerce that is interstate in character. This case involved the validity of a law of the state of Iowa, which prohibited the *importation* of liquor into Iowa from another state by common carriers, excepting under certain circumstances.

With respect to the right of a state to act upon matters of commerce in the absence of action by the federal Congress, the decision in this case did not go quite to the extent of the decision in the License Cases, but held that the right of a state to regulate commerce by a state law, in the absence of a law of Congress upon the same subject, is a right to be determined from the circumstances of each case as it arises; deciding that the statute of Iowa forbidding common carriers to transport intoxicating liquors into that state from another state, excepting under certain conditions, although adopted without a purpose of affecting interstate commerce, and while intended as a part of a general system designed to protect the health and morals of the people against the evils resulting from the unrestricted manufacture and sale of intoxicating liquors within the state, was neither an inspection law, nor a quarantine law, nor a law confined to the regulation of purely internal and domestic commerce of the state, over which a state may properly exercise control, but was essentially a regulation of commerce among the states, affecting interstate commerce in an essential and vital part, and not being sanctioned by the authority of Congress, either expressed or implied, was repugnant to the Constitution of the United States; and concluding with a *quære* as to the main point decided in the License Cases and questioned in *Mugler v. Kansas*, namely, whether the right of transportation of an article of commerce from one state to another includes by necessary implication the right of the consignee to sell it in the unbroken package at the place where the transportation ends.

The question adverted to and not decided in the opinions of the Supreme Court in *Mugler v. Kansas* and *Bowman v. Chicago, etc., Railway Co.*, *supra*, whether a state may withhold, from a consignee of imported liq-

uor, the right to sell the same in the original package, as an essential and constituent part of commerce in that article, was presented to the Supreme Court for decision in the case of *Lelsy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, decided April 28, 1890.

The court cited numerous decisions made by it in recognition of the undoubted right of the states to control their purely internal affairs, under the exercise of powers not surrendered to the national government; but held that "wherever the law of a state amounts essentially to a regulation of commerce among the states, by prohibiting commerce with other states in an article recognized by the laws of Congress as a subject of interstate commerce, before the article has ceased to be an article of commerce between one state and another, it comes in conflict with a power which, in this particular, has been exclusively vested in the general government, and is therefore void. Fully admitting the police powers of the states, the court expressed itself to the effect that to extend the police power of a state over the subjects of commerce, nation-wide in character, not purely local and of minor concern, like dams, harbor and pilot regulations, bridges over navigable rivers, piers, docks, etc., would make commerce subordinate to that power and would enable a state to bring within its police power any article of consumption that a state might wish to exclude, whether it belonged to that which was drunk, or to food which was eaten, or to clothing which was worn; that while a state under its police powers may by law resist and prevent the introduction of disease, pestilence or pauperism from abroad, yet disease, pestilence and pauperism are not subjects of commerce, although sometimes among its attendant evils. They are not things to be regulated and trafficked in, but to be prevented, and as long as liquors are the subject of ownership and property and therefore the lawful subjects of exchange, barter, and traffic, not made by law unlike any other commodity in which a right of property and a right to traffic exist, then importation cannot be prevented by a state law; and as sale thereof by the consignee in the destination state is a constituent of commerce itself, the sale cannot be prevented by a state under claim of its control over the commodity under its police power. The court reviewed the position taken in the *License Cases* with respect to the *silence* of Congress, and in opposition thereto held, as it had previously held in the *Bowman Case*, that:

"The absence of any law of Congress on the subject is equivalent to its declaration that commerce in that matter shall be free. Thus the absence of regulations as to interstate commerce with reference to any particular subject is taken as a declaration that the importation of that article into the states shall be unrestricted."

The court overruled the decision in *Peirce v. New Hampshire (License Cases)* 5 How. 504, 12 L. Ed. 256, and held that liquor is a legitimate article of commerce, that an interstate commercial transaction in liquor is not complete upon delivery to the consignee, but extends to and includes the subsequent sale thereof by the consignee, and that, even when Congress is silent upon the subject, a statute of a state, prohibiting the sale of imported liquor by the consignee in an interstate transaction, where the sale is made in the unbroken original package, is unconstitutional and void, as repugnant to the commerce clause of the Constitution, granting to Congress alone the power to regulate commerce among the states.

In this and in the preceding cases of the same decisional trend were vigorous dissenting opinions, delivered in maintenance of the principle that the regulation of the sale and traffic in liquor is within the police power of a state, even to the prevention of sale after arrival and to the exclusion of liquor by importation.

The decision in the *Lelsy Case*, extending to an interstate commercial transaction in liquor the right of sale in the original package by the consignee in the destination state, regardless of the laws of such state prohibiting such sale, was rendered April 28, 1890, and there was immediately introduced in Congress a bill to meet that decision and to annul its force, which was enacted into law on August 8, 1890, and is known as the "Wilson Law."

The Wilson Act provides:

"That all fermented, distilled or other intoxicating liquors or liquids transported into any state or territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise." Act Aug. 8, 1890, c. 728, 26 Stat. 313 (U. S. Comp. St. 1901, p. 3177).

It thus appears that the power which the Supreme Court in the *License Cases* conceded to the states, in regulating or preventing a resale by a consignee of an imported article in the original package, was denied to the states by the Supreme Court in the *Lelsy Case*, and that the right thus first conceded, and then denied, was determined by the Wilson Law. The point of decision in the two named cases and the matter contemplated as the subject of the Wilson Law, as finally defined, was restricted to the right of a state to regulate or prevent a *resale* of liquor upon delivery, and did not extend to the right of a state to regulate or prohibit the *importation* of liquor, the law upon the latter point remaining as decided in *Bowman v. Chicago, etc., Railway Co.*, *supra*.

Upon the enactment of the Wilson Law, two questions immediately arose: First, the

constitutionality of the law in depriving the consignee of liquor in an interstate transaction of his theretofore recognized right to sell the liquor in the original package in the destination state, as an ingredient or constituent element of commerce; and, second, if constitutional, when and at what point in the interstate transaction did liquor lose its interstate characteristic and become "subject to the operation and effect of the laws" of the destination state, under the terms of the statute that "liquors transported into any state \* \* \* shall upon arrival in such state be subject to the operation and effect of the laws of such state."

These questions and such others as were related to them have been considered and decided by the Supreme Court in a number of cases, to the leading ones of which reference will be made, showing the law as it stood from the date of the enactment of the Wilson Law in 1890 to the year 1913.

By these decisions, the sovereign powers of the states and of the United States over matters exclusively their own were again defined and asserted. In *Re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572, the court said:

(a) "The power of the state to impose restraints and burdens upon persons and property, in conservation and promotion of the public health, good order and prosperity, is a power originally and always belonging to the states, not surrendered by them to the general government nor directly restrained by the Constitution of the United States, and essentially exclusive."

(b) "The power of Congress to regulate commerce among the several states, when the subjects of that power are national in their nature, is also exclusive. The Constitution does not provide that interstate commerce shall be free, but, by the grant of this exclusive power to regulate it, it was left free except as Congress might impose restraint. Therefore, it has been determined that the failure of Congress to exercise this exclusive power in any case is an expression of its will that the subject shall be free from restrictions or impositions upon it by the several states. *Robbins v. Shelby Taxing District*, 120 U. S. 489 [7 Sup. Ct. 592, 30 L. Ed. 694]. And if a law passed by a state in the exercise of its acknowledged powers comes into conflict with that will, the Congress and the state cannot occupy the position of equal opposing sovereignties, because the Constitution declares its supremacy and that of the laws passed in pursuance thereof. *Gibbons v. Ogden*, 9 Wheat. 1, 210 [6 L. Ed. 23]. That which is not supreme must yield to that which is supreme. *Brown v. Maryland*, 12 Wheat. 419, 448 [6 L. Ed. 678]."

(c) That Congress can neither delegate its own powers to a state nor enlarge the powers that belong to a state.

Recognizing these as firmly established principles, susceptible of dispute only in their application to the given facts of a case or to the precise terms of a statute, it was decided:

(1) That the right to have and use intoxicating liquors for personal purposes is denied no one by either state or federal laws.

(2) That intoxicating liquors constitute a legitimate subject of interstate commerce. *Vance v. Vandercook Co.*, 170 U. S. 438, 444, 18 Sup. Ct. 674, 42 L. Ed. 1100; *L. & N. R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355.

(3) That liquor, as a designated subject of interstate commerce, may be governed by a regulation which divests it of that character, when that regulation is promulgated by a law of the federal government, prescribing one common rule, the uniformity of which is not affected or disturbed by variations in state laws dealing with the same subject. In *re Rahrer*, 140 U. S. 545, 561, 11 Sup. Ct. 865, 35 L. Ed. 572.

(4) That the right of a consignee to sell imported merchandise in the original package is not a right conferred or protected by the Constitution. In *re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, 35 L. Ed. 572.

(5) That by the Wilson Law Congress divested interstate commerce in liquor of one of its theretofore interstate characteristics, namely, the right of sale by the consignee, not by delegating the federal power over the subject to the states, nor by permitting the commerce in the commodity to be regulated by the states, but by bringing to bear directly upon interstate commerce itself, the force of its own rule applicable to all interstate transactions in liquor without regard to the local laws of the destination states, that the interstate commercial transaction in liquor shall terminate upon the arrival of the liquor in the destination state, and with the termination of the interstate transaction terminates the federal control, and thereafter begins the state control thereover. In *re Rahrer*, 140 U. S. 545, 564, 11 Sup. Ct. 865, 35 L. Ed. 572.

(6) That the Wilson Law, in so far as its purpose or operation is to divest liquor of its interstate commercial quality upon arrival in a destination state, and to prevent resale or other disposition thereof, except under the laws of the state in which it has arrived, is a valid exercise of the power conferred upon Congress by the commerce clause of the constitution. In *re Rahrer*, 140 U. S. 545, 564, 11 Sup. Ct. 865, 35 L. Ed. 572; *Rhodes v. Iowa*, 170 U. S. 412, 420, 18 Sup. Ct. 664, 42 L. Ed. 1088.

(7) That the expression of the Wilson Act, that liquor "shall upon arrival in [the destination] state be subject to the operation and effect of the laws of such state," did not mean arrival within state territory merely, but meant arrival at the point of completion of the interstate transaction, namely, in the hands of the consignee; that the Wilson Law conferred no right upon a state to forbid a common carrier to transport liquor from one state into another state, or to stop at the state line an interstate shipment of liquor, or otherwise to interfere with or apply its laws to such interstate shipment until the transportation was concluded by delivery to the consignee. *Rhodes v. Iowa*, 170 U. S. 412, 18 Sup. Ct. 664, 42 L. Ed. 1088; *Vance v. Vandercook Co.*, 170 U. S. 438, 18 Sup. Ct. 674, 42 L. Ed. 1100; *Heymann v. Southern Ry. Co.*, 203 U. S. 270, 27 Sup. Ct. 104, 51 L. Ed. 178, 7 Ann. Cas. 1130; *Adams Express Co. v. Kentucky*, 214 U. S. 218, 29 Sup. Ct. 633, 53 L. Ed. 972; *L. & N. R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355.

(8) That a common carrier is not forbidden by the Wilson Law to transport liquor from one state into another state, even when by the laws of the latter state the shipment as well as the sale of liquor is prohibited, and that, on the contrary, such shipment, when it constitutes an interstate commercial transaction, is not only protected, but may be compelled, by the commerce clause of the Constitution, notwithstanding such a shipment may be in open violation of the laws of the state into which the shipment is made, or notwithstanding the carrier might have notice that the consignee intended to sell the liquor, when received, or in some other way to dispose of it in violation of the state law. *L. & N. R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355; *Adams Express Co. v. Commonwealth*, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 842.

Thus stood the law with respect to state and federal control over the sale and shipment of liquor until the year 1913, when Congress enacted a statute known generally by the name of its authors as the "Webb-Kenyon Law."

The Webb-Kenyon Bill, after its introduction, was subjected to vigorous debate and important amendment, with the result that the popular impression of that legislation has been gathered more from the controversy that revolved about it than from knowledge of the measure itself. It is not unnatural, therefore, that the popular conception of the law is that it confers upon a state the power absolutely and totally to prohibit the importation of liquor for any purpose, while an examination of the precise terms of the law shows a very different purpose and a very different power.

The history of contemporaneous legislation, as well as legislative debates, may in rare instances be resorted to and considered by courts in searching for the meaning of a law when the meaning is obscure, and in discovering the evils intended to be remedied when those evils are in doubt or unknown. In view of the plain language and intent of the Webb-Kenyon Law, however, the court would not be justified in employing that means to aid it in reaching its conclusion, but in view of the popular misunderstanding of the law and of the purpose and extent of its provisions, entertained not by its authors and supporters in Congress, as disclosed by such of the debates as were presented to us in the briefs, but by those who have not studied and in some instances have not read the law, the court feels it to be within its province to correct this popular misconception, by adverting to the history of the legislation that surrounded the bill, and that resulted in its enactment.

The Webb-Kenyon Bill, as introduced into Congress, consisted of two sections. The first section of the bill provided, in substance, that the shipment or transportation of liquor from one state into any other, which liquor "is intended by any person interested therein, directly or indirectly, or in any manner connected with the transaction" to be received, possessed, or kept, or in any manner used, in violation of any law of such state, "enacted in the exercise of the police power of such state," is prohibited, and any "contracts pertaining to such transactions are declared to be null and void," and "no suit or action shall be maintained \* \* \* upon any such contract, or for the enforcement or protection of any alleged right" based upon such contract, "or for the protection in any manner whatsoever of such prohibited transactions."

The expression "by any person \* \* \* in any manner connected with the transaction" may have meant transaction of shipment, in which event the expression included common carriers; and the concluding ex-

pression, prohibiting the enforcement, by suit, of rights growing out of a contract and of "protection in any manner whatsoever of such prohibited transactions," manifestly contemplated the protection of the commerce clause of the Constitution.

The second section of the bill provided that any liquor transported into any state, or remaining therein for use, consumption, sale or storage, shall upon arrival *within the boundaries* of such state, and *before* delivery to the consignee, be subject to the operation and effect of the laws of such state enacted in the exercise of its reserved police powers, to the same extent and in the same manner as though such liquor had been produced in such state. H. R. 17,593, 62d Congress, Introduced January 10, 1912, Congressional Record, February 8, 10, 11, 14, 1913, p. 2919.

The effect of the last section, which represents the popular conception of the law, would have been to overcome the decision in *Bowman v. Chicago, etc., Ry. Co.*, and to prohibit the transportation of liquor into any state that prohibited such transportation, and stop the shipment at the frontier, as it were, or, if it got in, then to apply to it the law which the Supreme Court in *Mugler v. Kansas* established as to the right of a state, under its police powers, to regulate and prohibit the sale of liquor within its borders. This is the bill and the legal effect of its provisions as it started on its passage.

The first thing that was done was the offer and rejection of an amendment to make criminal the transportation of liquors in interstate commerce intended to be used contrary to the law of the destination state. Congressional Record, February 12, 1913, p. 3081.

The next step was to eliminate from the bill the second section thereof. This is the section that in effect conferred upon the states the right to prohibit the importation of liquor by subjecting imported liquors to the operation of state laws upon arrival at the state boundary. The last step was to withdraw from the last part of the first section that part of the section that avoided contracts of transportation of liquor and withheld protection for prohibited transactions, and to strike out in the middle of the section the broad language, by which common carriers might be included among those connected "with the transaction," leaving to be enacted into law the remainder of the first section of the bill. The law as enacted is as follows:

"That the shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any state, territory, or District of the United

States, or place noncontiguous to, but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state, territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is hereby prohibited."

The bill in its entirety was attacked in both houses of Congress, and upon its first passage was vetoed by the President of the United States, upon the ground that it was unconstitutional, and was passed over the President's veto on the 1st day of March, 1913.

Under authority of this act, the General Assembly of the state of Delaware enacted a statute, approved by the Governor on the 8th day of the following month, entitled "An act regulating the shipment or carrying of spirituous, vinous or malt liquor into local option territory, or the delivery of the same in such territory" (chapter 139, volume 27, Laws of Delaware), the provisions of which, so far as they relate to the phase of the case now under consideration, are:

"Section 1. That it shall be unlawful for any common carrier, knowingly to accept or receive for shipment, transportation or delivery to any person or place within local option territory, or to carry, bring into, transfer to any other person, carrier or agent, handle, deliver or distribute in local option territory, any spirituous, vinous or malt liquor, regardless of the name by which it may be called. \* \* \*

"Section 4. This act shall apply to all packages of spirituous, vinous or malt liquor, whether broken or unbroken. \* \* \*

"Section 6. That it shall be unlawful for any person to carry, bring or have brought any quantity of spirituous, vinous or malt liquor from any point within the state of Delaware into local option territory within said state greater than one gallon within the space of twenty-four hours."

In the case of *L. & N. R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 82, 32 Sup. Ct. 189, 56 L. Ed. 355, decided after the enactment of the Wilson Law and before the enactment of the Webb-Kenyon Law, Mr. Justice Lurton, in reasserting the law pertaining to the control of Congress over interstate commerce, said:

"By a long line of decisions, beginning even prior to *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128, it has been indisputably determined:

"(a) That beer and other intoxicating liquors are recognized and legitimate subjects of interstate commerce.

"(b) That it is not competent for any state to forbid any common carrier to transport such articles from a consignor in one state to a consignee in another.

"(c) That until such transportation is concluded by delivery to the consignee, such commodities do not become subject to state regulation, restraining their sale or disposition."

Before the enactment of the Webb-Kenyon Law, therefore, there was no question that the state of Delaware was without power to enact into law the provisions of the Hazel Act so far as they relate to and affect interstate commerce. After the enactment of the

Webb-Kenyon Law, and in the exercise of the power assumed to have been conferred upon it by that statute, the state of Delaware did what admittedly it could not have done before, and by the Hazel Law prohibited commerce in liquor between other states and prohibition districts in this state, when the liquor was to be used for any purpose, other than medicinal and sacramental.

Under this state of the law, the first question therefore is: How far and to what extent are the prohibitions of the Hazel Act authorized, aided or validated by the Webb-Kenyon Law, when considered with especial reference to the offense for which the defendant below was indicted? The defendant below, acting as agent for a common carrier, completed a shipment of liquor from the state of Pennsylvania to a prohibition district in the state of Delaware, by receiving the same and delivering it to the consignee in that district. It is admitted in the case stated that the liquor "was intended" by the consignee "to be used by him for his own consumption," and "he did not intend to sell or otherwise unlawfully dispose of the same." The Hazel Act prohibits the shipment of liquor into the prohibition districts of this state for any purpose (excepting the two designated), whether the liquor be intended to be used in violation of law or not. The Webb-Kenyon Law prohibits the shipment of liquor only when the liquor is intended to be used in violation of the law of the state. *There is thus presented a case of a shipment of liquor for a lawful purpose, in violation of a state statute prohibiting the shipment of liquor for any purpose, enacted under authority of a federal statute, prohibiting the shipment of liquor for an unlawful purpose.* The first question for our determination, therefore, is whether the Webb-Kenyon Law prohibits the act with which the defendant below is charged, or makes valid the prohibition of such an act by a state statute. In other words, does the Webb-Kenyon Law apply to this case, and, if not, is the Hazel Law valid in so far as it prohibits the act committed by the defendant below? The answer to this question depends upon the meaning of the Webb-Kenyon Law, and the meaning given to that law by the court below constitutes the chief ground of error upon which this case is brought before us for review.

[9] In the division of powers under our system of government, it is the function of the legislative department to make the laws and the function of the judicial department to enforce them. The courts are no more responsible for what a law may contain, so long as it is a valid enactment, than is the Legislature responsible for the manner in which the courts may enforce the law. The responsibilities of these departments are as separate as their functions.

[10] When a law is validly enacted and its meaning plainly expressed, the one duty of the courts with respect to it is to enforce

it. It is only when, by infirmity of expression, a statute is so framed that its meaning is in doubt, that courts are required first to construe a statute in order to know how to enforce it, and in so doing the one thing they seek is the intention of the Legislature, and when they have found it, they then enforce the law which the Legislature, and not the judiciary, has made.

In the judicial interpretation of laws, courts are guided by well-recognized rules. When the language of a statute is plain and conveys a clear and definite meaning, courts give to the statute the exact meaning conveyed by the language, adding nothing thereto and taking nothing therefrom. Another meaning, that by inference or implication might otherwise be gathered from it, is avoided. When the expression is confused and the meaning obscure, then the courts seek the intention of the Legislature by the light of the fundamental rule of looking for the purpose and object of the law, searching for the mischief intended to be abated and finding the remedy intended to be afforded.

Thus the Webb-Kenyon Law means exactly what its language conveys, and the meaning of the law fits precisely the situation it seems intended to remedy, and but for the fact that its meaning is questioned, it would receive from us neither interpretation nor exposition. But as the Webb-Kenyon Law was applied by the court below to the given facts of the case there tried, it becomes necessary on review to ascertain the meaning of the law in order to ascertain whether the law is applicable to this case.

Undoubtedly the purpose of the Webb-Kenyon Law, as finally enacted, was to enable the states more effectually to enforce their own laws in preventing and reducing the illicit sale of liquor, by restricting the supply to a point that discourages infractions of the law. Of this there is no doubt, but the question is how far in effectuating this purpose does the Webb-Kenyon Law go, namely, to the point of permitting a state to prohibit the importation of liquor for all purposes, or to the point of permitting a state to prohibit the importation when the liquor is intended for an unlawful purpose?

At the outset it is conceded that, before the enactment of the Webb-Kenyon Law, it was unlawful to sell liquor in certain prohibition districts in the state of Delaware; yet under the federal law as it then stood, notwithstanding the state law, a common carrier was protected by the commerce clause of the federal Constitution in transporting liquor into those districts, even when it had full knowledge that the liquor carried by it was intended to be used in violation of law.

It is fair to say that the plain intent of the Webb-Kenyon Law was to withdraw this protection from the carrier, and thereby aid the state in enforcing its law against the illegal sale of liquor, for the carefully chosen

language of the act fits precisely this interpretation.

So also it must be conceded that before the enactment of the Webb-Kenyon Law, it was (as it still is) lawful in any part of the state of Delaware to possess and use intoxicating liquors, in the sense of having and consuming them, and a common carrier was protected in transporting liquor into those districts for that lawful purpose. If it was the purpose of the Webb-Kenyon Law to meet this latter situation, change this law and withdraw this protection from the carrier, in face of the lawfulness of the use to which the liquor was to be put, as recognized by the laws of both the state and federal governments, then such purpose must be disclosed by the law.

The language of the law is:

"That the shipment or transportation [of liquor] from one state \* \* \* into any other state, \* \* \* which said \* \* \* liquor is intended, by any person interested therein, to be received, possessed, sold or in any manner used, \* \* \* in violation of any law of such state, \* \* \* is hereby prohibited."

By this language it is apparent, first, that the thing prohibited is the shipment or transportation of liquor; second, that such shipment or transportation of liquor is prohibited (a) when the liquor so shipped is intended to be received, possessed, sold or used in violation of the laws of a state, and (b) when that intention is entertained by any person interested in the liquor. From this analysis of the law it is likewise apparent, first, that all shipments of liquor are not by express language prohibited; and, second that the test of a shipment of the kind prohibited is the intent of a person, not interested in the shipment, but interested *in the liquor*, to receive, possess, sell or use the liquor in violation of the state law.

But it was urged at the argument, and it was held by the court below, that the effect of the Webb-Kenyon Law was to divest liquor of its interstate character in *all* cases and to prohibit *all* shipments of liquor into a state, when by state law all shipments for all purposes are prohibited; without regard to the lawfulness or unlawfulness of the purpose to which the liquor was intended to be put, upon the theory that the interest of the carrier in its contract and act of carriage of the liquor makes it a "person interested therein," within the language of the act, and being interested in the liquor it is transporting into a state against the laws of such state forbidding such transportation, it must intend by the shipment to violate the state law against shipment, and thereby does the act prohibited by the Webb-Kenyon Law; in other words, a carrier cannot ship liquor without being interested in the liquor, nor can it ship liquor without intending to ship it, and without thereby intending to violate the state law against such shipment.

[11] The Webb-Kenyon Law by its title purports to divest liquor of its interstate



character only "in certain cases," and the law prohibits shipments of liquor into prohibition territory only in certain cases.

The Webb-Kenyon Law makes unlawful the thing it prohibits, and conversely it is fair to say that a thing not by it prohibited is not by it made unlawful. The statute says.

"That the shipment or transportation" of liquor into a state, "which said \* \* \* liquor [meaning *when* said liquor] is intended by any person interested therein, to be received, possessed, sold or in any manner used, \* \* \* in violation of any law of such state, \* \* \* is hereby prohibited."

That is what the law prohibits. Then conversely the law must mean that the shipment or transportation of liquor into a state, when said liquor is *not* intended, by any person interested therein, to be received, possessed, sold or in any manner used, in violation of any law of such state, is *not* thereby prohibited. This seems to us a necessary deduction from the language used, for if the statute does not contemplate as an exception the shipment that might be lawful, then it prohibits all shipments, and if this is what was intended, it is hard to conceive why the intention was left to be deduced and construed from the language used, when simple and direct language might have been used, prohibiting outright any shipment for any purpose, as was used in the statutes of Kentucky, Tennessee, Iowa and Delaware. Before we could hold that Congress intended or attempted to part with any of its constitutional control over interstate commerce, Congress would have to grant or permit or otherwise validly confer upon the states such control by language that conveys a precise and unmistakable meaning to that effect, and not by language from which the meaning must be sought by argument, inference or deduction.

It was held by the court below that if the Webb-Kenyon Law did not enable a state absolutely to prohibit all shipments of liquor into its territory, when the liquor was intended for *any* purpose, the Webb-Kenyon Law was but a re-enactment of the Wilson Law. With this view we do not concur. By the Wilson Law the *resale* by the consignee was the only thing prohibited, leaving the carrier free to transport liquor into the territory of a prohibition state, either for purposes made lawful or unlawful by the laws of such state. The Wilson Law affected interstate commerce, and divested commerce in liquor of its interstate character only to the extent of subjecting it to the state law and of depriving it of its right of resale *after delivery to the consignee*, and left the carrier under the protection of the commerce clause of the Constitution for the rest of the interstate transaction. Under this protection the carrier could import liquor into a prohibition state, whether the intended use of the liquor was lawful or unlawful. In fact under this protection a carrier could import liquor into a prohibition state, with full knowledge that upon arrival at destina-

tion and delivery to the consignee it was intended by him to be received, possessed, sold or otherwise used in violation of the laws of that state. This was the mischief intended to be remedied by the Webb-Kenyon Law, as this was the state of the law after the enactment of the Wilson Law and after the decision of the Supreme Court in *L. & N. R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 32 Sup. Ct. 189, 56 L. Ed. 355, decided January 22, 1912, and the state of the law when the Webb-Kenyon Bill was introduced in Congress and finally enacted on March 1, 1913.

To remedy this evil and to aid the states in preventing the shipment of liquor for unlawful purposes, the Webb-Kenyon Law attempted a very different thing from what the Wilson Law did, and by clear expression withdrew or attempted to withdraw from the carrier of liquor intended for unlawful purposes the protection it theretofore had, and afforded the states a means by which they could more effectively reach and prevent the violation of their liquor laws, when liquors were imported for the purpose of the violation of those laws.

We find nothing in the law which affords a means to the states to prevent the transportation of liquor by a common carrier when the liquor is intended for a lawful purpose.

The state courts of last resort that have thus far given an interpretation to the provisions of the Webb-Kenyon Law are the Court of Appeals of Kentucky, the Supreme Court of Tennessee, the Supreme Court of Iowa, and the Supreme Court of Kansas. *Adams Express Co. v. Commonwealth*, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342; *Palmer v. Southern Express Co.* (Tenn.) 165 S. W. 236 (not officially reported); *Iowa v. U. S. Express Co.*, 145 N. W. 451 (not officially reported); *Kansas v. Columbia Brewing Co.* 139 Pac. 1169 (not officially reported).

These courts gave to the Webb-Kenyon Law the same interpretation and meaning, as applied to the particular and different cases before them, that this court has given it in the case under consideration.

The Court of Appeals of Kentucky and the Supreme Court of Tennessee each held that the Webb-Kenyon Act did not prohibit the shipment of liquor or authorize a state to prohibit the shipment of liquor when the liquor was intended by the consignee for a lawful purpose, which was the case before them, and declined to consider the act in its relation to facts in which the intention was to put the liquor to an unlawful use. The Supreme Court of Iowa and the Supreme Court of Kansas held, conversely, that the act prohibited an interstate shipment of liquor when the liquor was intended to be used by the consignee for an unlawful purpose, which was the case before each of them, and expressly declined to consider whether the act prohibited the shipment of liquor in cases like the Kentucky case, the Tennessee case,



and this case, in which the intention was to use the liquor for a lawful purpose. Neither one of the courts construed the act to prohibit interstate shipment of liquor for all purposes, that is, to be used for either a lawful or unlawful purpose, as neither court, of course, passed upon the phase of the act not raised by the case before it, but each court read the act with the meaning that left open a question of the applicability and constitutionality of the act with reference to the phase of the act not before it. The interpretation given the Webb-Kenyon Law by each of these four courts, considered with respect to the different cases before them, is in complete harmony one with the other, and discloses that each found the law to mean precisely what this court has found it to mean.

The Hazel Law of the state of Delaware, which, with certain exceptions, makes it unlawful for common carriers to transport liquor either by interstate or intrastate shipments, into prohibition territory, without regard to the purpose for which the liquor so imported is intended there to be used, was either copied from a similar law of the state of Kentucky or the two laws were taken from another law as a common source, for the provisions of each are essentially alike.

Under facts identical with the facts of this case, liquor was carried by an express company from a distant state into prohibition territory of the state of Kentucky, and there delivered to the consignee. For this offense the express company was proceeded against under the statute of Kentucky. In the case instituted against it, it appeared in an agreed state of facts that the—

"said liquors (so imported) were intended by said consignees, respectively, for their personal use, and were so used by them, and were not intended by them to be sold contrary to law, and were not sold by them."

The Court of Appeals of Kentucky (*Adams Express Co. v. Commonwealth*, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. [N. S.] 342) being the court first called upon to pass upon the Webb-Kenyon Law, in an opinion delivered June 17, 1913, held that the Webb-Kenyon Law did not apply to the facts of that case, deciding that the Webb-Kenyon Law prohibited the shipment of liquor intended to be received, used or sold in violation of a state law and did not prohibit the shipment of liquor when there was no intention by some one interested in the liquor to violate the state law. With respect to the applicability of the law, the court said:

"This law specifies with particularity the character of transaction designed to be taken from under the protection of the commerce clause, and manifestly it was not intended by it to remove this protection from any other character of shipment. In other words, if the transaction comes within the scope of the Webb-Kenyon Law, the commerce clause of the federal Constitution affords no protection from prosecution instituted under the laws of the state; but, if the transaction does not come within the scope of this law, then the commerce

cause of the federal Constitution is equally as effective in its protection of carriers as it was before the enactment of this law. \* \* \*

"The purpose, and the only purpose, of the Webb-Kenyon Law, \* \* \* was to withdraw from interstate shipments of intoxicating liquor the complete protection it had under the principle announced in the *Cook Brewing Company Case*, as well as in many other cases; and assuming, as we do, that the Webb-Kenyon Law is valid legislation, there can be no doubt that section 2569a, Ky. St., is operative when applied to intoxicating liquor that is shipped as an interstate transaction to a consignee living in local option territory in this state to be received, possessed, sold, or in any manner used in violation of any law of this state. If, however, the liquor is not intended by any person interested therein to be received, possessed, sold or in any manner used in violation of the laws of this state, then, notwithstanding the Webb-Kenyon Law, its carriage and delivery is as fully protected by the commerce clause of the federal Constitution as it was before the enactment of the Webb-Kenyon Law. \* \* \*

"It therefore appears that the issue in this case really comes down to this: Was the liquor involved in this transaction intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of any law of this state? It is shown by the agreed state of facts, when considered in the light of the Constitution and laws of the state, and the opinions of this court, that it was not. This being true, the aid of the Webb-Kenyon Law cannot be invoked to secure the punishment of the carrier, as it does not prohibit a common carrier from receiving, carrying, and delivering, as an interstate transaction, intoxicating liquor to the consignee when it is not intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of the laws of this state, or withhold from such a transaction the protection afforded by the commerce clause of the federal Constitution. As to this character of transaction, the Webb-Kenyon Law has no application, and, having no application, the law, as it existed before the enactment of this legislation, is in force, and, being in force, the carrier cannot be punished for receiving, carrying, and delivering, as an interstate transaction, intoxicating liquor in local option territory to a consignee who purchased it at a point in another state, and when it is not intended by any person interested therein to be received, possessed, sold, or in any manner used in violation of the law of this state. If, however, the liquor is intended to be received, possessed, sold, or in any manner used in violation of the law of this state, then the Webb-Kenyon Act applies, although the transaction may be an interstate one, and the carrier is not protected from the punishment imposed by section 2569a of the statute by the commerce clause of the federal Constitution, under which it would have been exempt from punishment before the enactment of the Webb-Kenyon Law, which was intended to and does withdraw from the character of shipments therein mentioned the protection theretofore afforded by the commerce clause.

"The result of our views on the whole case is that whether a carrier of an interstate shipment of liquor subjects itself to punishment or not depends on the use to which the person to whom it delivers liquor intends to put it. If this use violates a law of the state, then the carrier may be punished; if it does not, the carrier has not committed any offense."

*Adams Express Co. v. Commonwealth*, 154 Ky. 462, 157 S. W. 913, 48 L. R. A. (N. S.) 342.

The case of *Palmer v. Southern Express Co.*, 165 S. W. 236, decided by the Supreme Court

of Tennessee, at its December Term, 1913, and not yet officially reported, was the second case before a state court of last resort, involving the Webb-Kenyon Law. In that case the provisions of the statute of the state of Tennessee relating to interstate shipments of liquor into that state were held by the court to amount to an interference with interstate commerce and therefore repugnant to the commerce clause of the federal Constitution. It was contended however, that the various provisions of the Tennessee statute so held invalid were saved by the Webb-Kenyon Law. The Supreme Court of Tennessee disposed of this contention by giving to the Webb-Kenyon Law an interpretation that made it inapplicable to the case before it, and in doing so used the following language:

"It is perceived that the thing which the act (Webb-Kenyon Law) prohibits is the interstate shipment or transportation of the liquors mentioned therein, when 'intended by any person interested therein, to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of the state, etc., into which the shipment is made.

"It is enough to say for the disposition of the case before us that it does not appear that the liquors shipped were intended to be sold, or used in violation of any law of the state; and therefore the act does not apply to the present controversy. It appears from the facts stated in the bill, confessed by the demurrer, and agreed to on the record at the hearing in the court below, that the liquors were purchased for the personal use of complainant and his family. This was a lawful use, and indeed permitted by the statute in question. \* \* \* The act therefore does not apply to the present controversy. A vigorous attack is made on the constitutionality of the act, but we do not deem it essential or even proper, to go into this question, since the view already stated is sufficient to dispose of the case in so far as the Webb-Kenyon Act relates to it.

"But, before passing from this phase of the case, we desire to add, in order that the present opinion may not be misunderstood, that what we have just held as to the inapplicability of the Webb-Kenyon Act to the case before us, is not intended to cover those instances in which sales of liquors are made in a foreign state for shipment into this state to be sold or used in violation of the prohibition laws of this state. \* \* \* What we have said as to the certificates or statements or superscriptions on the packages, we apply in the present opinion only to intoxicating liquors shipped into this state for the personal use of the consignee and his family, that only being the nature of the case before us; nor do we desire to be understood as expressing any opinion as to whether there can be constitutionally withdrawn from the operation of the interstate commerce laws, an article otherwise of a commercial nature where an illegal intent is not found either directly or circumstantially to have existed at the time in the mind of the seller as well as in the mind of the buyer. \* \* \* In short, the present opinion is confined only to the cases wherein the shipment is for the personal use of the consignee or his family. It is our duty to so confine the decision."

The Supreme Court of Iowa next passed upon the Webb-Kenyon Law. The decision in the case of Iowa v. U. S. Express Co., 145 N. W. 451, rendered February 17, 1914 (not yet officially reported), was based upon a find-

ing of fact that the consignee received the shipment of beer with intent to resell the same in violation of a law of Iowa, under circumstances that charged the carrier, the United States Express Company, with knowledge of that intent, and "that in so far as this case is concerned, the question of purchase and shipment to a consignee for his own personal use is entirely eliminated."

The Supreme Court of Iowa interpreted the Webb-Kenyon Law to prohibit a shipment of liquor into a state contrary to the laws of that state when the liquor was intended by the consignee to be sold in violation of the law of that state. With respect to a case like ours, however, where liquor was shipped into the state not intended by the consignee to be sold in violation of the law of this state, but intended by him to be used in a manner lawful under the laws of the state, the Supreme Court of Iowa, in order to avoid an adjudication upon a state of facts not before it, said:

"Eliminating, as we must for the purposes of this case, the question as to an interstate shipment for the personal use of the buyer and the consignee, there is no room for doubt as to the proper interpretation of the act. It does just what the title says it was intended to do, to wit, divest intoxicating liquors of their interstate character in certain cases, and these cases are specifically set out in the act itself. This is to say the shipment or transportation of intoxicating liquor from one state to another when such shipment is intended by any person therein to be received, sold or used in violation of any law of such state (to which the shipment is made) is prohibited. This is the sum and substance of the act; and that it has reference to such shipments as are involved in this case clearly appears."

The case of State of Kansas v. Columbia Brewing Co., 139 Pac. 1169, decided by the Supreme Court of Kansas in April of this year (and not officially reported), is the last judicial pronouncement by a state court upon the Webb-Kenyon Law of which we have knowledge. From the statement of facts as contained in the opinion of the court in that case, it appears that the defendant, Columbia Brewing Company, shipped a car load of beer from the city of St. Louis, in the state of Missouri, to the town of Corona, in the state of Kansas, and that upon its arrival at its destination in Kansas, and before delivery to any one, it was seized by the sheriff. At the trial the beer was claimed by the brewing company, but the court found that "the beer was being used in violation of the laws" of the state of Kansas, and ordered it destroyed, and the brewing company appealed. It further appears that the beer was consigned to the shipper's order, with a direction on the waybill to notify one James Depoli. The shipment was made according to a practice that had prevailed between the brewing company and Depoli for over a year, during which time Depoli had received from the brewing company 72 car loads of beer, for which he had paid more than \$43,000. When a car would arrive, Depoli would be

notified. He would then find at the local bank a draft drawn on him by the brewing company for the price of the consignment, and upon taking up the draft, he would be handed a sealed envelope, which would contain the bill of lading of the consignment, with which Depoli would obtain possession of the beer from the carrier. It also appears as facts that:

"Depoli was engaged in the wholesale liquor business in Cherokee county in violation of law, and had ordered the car load of beer in question a few days before its arrival at Corona for use in his business."

The statutes of the state of Kansas—

"prohibit the sale of intoxicating liquors, except that certain wholesale druggists may sell alcohol in specified quantities to certain registered pharmacists for medicinal, mechanical and scientific purposes. Provision is made for the seizure and condemnation of intoxicating liquors kept or used in violation of law."

Before passing upon the question of law raised by the facts as stated, the court made allusion to the conditions that prevailed at the point of consignment, showing a population out of harmony with the restrictive features of the state law against the sale of liquor, and disclosing a situation in which the enforcement of those laws was attended with great difficulty, when violators of the laws were encouraged and aided by wholesale liquor dealers supplying liquors in large quantities. Reference was also made to the fact that:

"The Wilson Law, which permitted shipments of liquor to retain their interstate character until delivery to the consignee, \* \* \* left the state law subject to evasions embarrassing to its administration."

Thus stating local conditions and the limited effectiveness of the Wilson Law to meet them, the court makes clear its understanding of the purpose and effect of the Webb-Kenyon Law by saying:

"The act of March 1, 1913, by suffering the police power of the state to attach to interstate shipments of liquor intended for unlawful uses before delivery exactly meets the condition presented by this record, and permits the state effectually to enforce a policy deemed highly essential to its welfare."

"It is indeed true that the Supreme Court of the United States has many times declared that intoxicating liquors are recognized and legitimate subjects of interstate commerce. This declaration, however, has always been made in accordance with existing law. Congress has now spoken upon the subject in such a way that the declaration must be qualified. Intoxicating liquors are recognized and legitimate subjects of interstate commerce only when not intended for sale or use in violation of the laws of the destination state. The result is that the fact that the consignment in controversy was still in transit from the state of its origin did not protect it from condemnation consequent upon the finding of the court that it was intended for unlawful use in Kansas."

The rulings of the Supreme Court of Kansas and of the Supreme Court of Iowa are in entire harmony one with the other and are consistent with our understanding of the Webb-Kenyon Law as to its applicability to

cases similar to the cases before those two courts.

The rulings of the Court of Appeals of Kentucky and of the Supreme Court of Tennessee are likewise in accord one with the other and with our understanding of the inapplicability of the Webb-Kenyon Law to cases like the cases before those two courts and like the case before us, which in point of fact are precisely the converse of the cases heard in Kansas and Iowa. The rulings by these four state courts of last resort and the holding of this court in the case now under consideration disclose in so far as they were called upon to express their views, that each court read the Webb-Kenyon Law in the same way and gave to its language the same meaning.

The Webb-Kenyon Law has been submitted for consideration to two federal courts, before one of which its constitutionality was contested and before the other the question of its applicability was raised.

The first court was the United States District Court for the District of Oregon, and the case was the United States ex rel. F. Zimmerman & Co. v. Oregon-Washington Railroad & Navigation Co. et al. (D. O.) 210 Fed. 378. From the opinion of the District Judge in that case, the facts of the case and the point of decision seem to be substantially these: The law of the state of Idaho prohibits the shipment and delivery of liquor to any person at any place in that state where the sale of liquor is prohibited, except for certain specified purposes, and the Webb-Kenyon Act of the Congress of the United States in effect prohibits the shipment or transportation of liquor into the state of Idaho, which liquor is intended to be received, possessed, sold or used in violation of any law of the said state.

In conformity with their understanding of the statute of Idaho and the act of Congress, the defendant railroad companies promulgated a rule whereby they refused to receive liquor for shipment and to transport liquor from points outside of the state of Idaho to points within a prohibition unit of that state. The plaintiff prayed for a mandamus requiring the defendant railroad company to accept in Oregon for transportation, and to ship into Idaho, a gallon of whisky consigned to a resident of a prohibition district in that state and intended for his personal use.

The court held that the Idaho statute was broad enough to make unlawful all interstate shipments of intoxicating liquor, although intended for the personal use of the consignee, and that the District Court in Oregon sitting as a nisi prius court in another jurisdiction should so consider the Idaho law until it is otherwise interpreted by the courts of Idaho, and especially in a case where it is sought by mandamus to compel a defendant to violate the terms of a statute.

The question of whether the Webb-Kenyon

Law was applicable to the case does not appear from the opinion to have been considered. The constitutionality of the act, however, was raised; but the judge took the position that the constitutionality of the Webb-Kenyon Act can be determined only by the Supreme Court of the United States, and until that court has passed upon it he conceived it to be the duty of a court of original jurisdiction, such as his, to treat the legislation as valid, and held in dismissing the petition that:

"The law is not so clearly unconstitutional as to justify this court in compelling the defendant to violate it."

The United States District Court for the District of Minnesota is the other federal court in which questions under the Webb-Kenyon Law were submitted for consideration, and the case is *Theo. Hamm Brewing Co. v. Chicago, Rock Island & Pacific Railway Co.*, 215 Fed. 672. In this case, the procedure was in effect the same and the facts were in the main similar to those in the case before the District Court for the District of Oregon, but were sufficiently differentiated to enable the court before passing upon the constitutionality of the act to inquire into and determine its applicability.

From the opinion delivered and the decree entered by the United States District Court for the District of Minnesota, it appears that an association of railroads, describing themselves as "Western Trunk Lines," of which the defendant railway company was one, had promulgated a rule forbidding their employees to receive liquor in the state of Minnesota and to ship and transport it into the state of Iowa, even when the liquor was intended for personal use and private consumption, and that the plaintiff in the state of Minnesota offered to the defendant for shipment into the state of Iowa a gallon of whisky which the defendant railway company, through its agents, and acting in obedience to the rule before mentioned, refused to accept and to ship. A bill was filed by the plaintiff in the District Court, praying that the railway company be enjoined and restrained from refusing to accept, receive, transport, carry or deliver liquor sold in Minnesota by the plaintiff to persons residing in Iowa. In pursuance with the prayer of the plaintiff, the court decreed that the defendant railway company be permanently enjoined and restrained from refusing or failing to accept, receive, transport, carry or deliver liquors which may thereafter be sold in Minnesota by the plaintiff to persons residing in Iowa, who shall have purchased the same for their own personal use and private consumption, and who shall direct that the same be transported and delivered to them in Iowa, and that the defendant be commanded to accept, receive, transport and deliver all of the same, and that the defendant railway company be restrained and en-

joined from applying or putting into effect the said rule, being the circular of the Western Trunk Lines, in so far as the same forbids or relates to the shipment of liquors from Minnesota to Iowa intended for the personal use and private consumption of the consignee.

This decree was entered by the District Court upon the reasoning that was disclosed by the opinion of Charles A. Willard, Judge, which is as follows:

"The Webb-Kenyon Law declares unlawful the shipment of intoxicating liquor which 'is intended by any person interested therein to be received, possessed, sold or in any manner used, either in the original package or otherwise, in violation of any law of such state' into which it is shipped.

"The beer which Moss, a resident of Iowa, ordered from the plaintiff, whose brewery is established at St. Paul, Minn., and which was to be shipped over the defendant's line of railroad, was not intended by either Moss or the railroad company to be received, possessed, sold, or used in violation of any law of Iowa.

"The law of Iowa does, however, prohibit the transportation by any common carrier of intoxicating liquors, unless the person to whom the liquor is consigned has a permit. But the Webb-Kenyon Law while it says that the liquor must not be received, possessed, sold or used in violation of law, does not say that it shall not be transported in violation of law.

"If it had been the intention of Congress to prohibit the procurement from points outside of the state by a citizen of Iowa of intoxicating liquors for his own personal use, it would have been very easy to have indicated that by prohibiting the transportation of all interstate shipments.

"Assuming, as I do, that the law is valid, I hold that it does not apply to this case."

The great volume of cases that record the controversies that for nearly a century have revolved about the commerce clause of the federal Constitution disclose that, whatever deviation there may have been in some of its rulings, to one principle the Supreme Court of the United States has uniformly, consistently and steadfastly adhered, as a fixed and established principle of constitutional government, extending to and binding alike upon the governments of the states and of the United States, and that principle is that, under the commerce clause of the federal Constitution, the federal government has absolute and exclusive control over commerce between the states, that over interstate commerce the federal government is supreme, and that any interference by a state government, that amounts essentially to a regulation of commerce among the states, is repugnant to the federal Constitution and is void. In the exercise of its control over interstate commerce, the federal government, through Congress, may limit commerce between the states, which otherwise shall be free, or it may restrict it in certain features, or prohibit it altogether in certain commodities. When this is done by Congress it is valid. If attempted by a state, it is void. For these reasons it is admitted that, prior to the enactment of the Webb-Kenyon Law, the state of Delaware could not have validly enacted

a statute making it unlawful to ship liquor from another state into a prohibition district of this state for any purpose, such an act being beyond its own power and not being sanctioned by Congress either express or implied. But by the Webb-Kenyon Act, Congress expressed its sanction to such a law as the state of Delaware might desire to enact, prohibiting the shipment of liquor from other states into certain districts of this state when it was there to be received, possessed, sold or used in violation of the law of this state. Upon authority of this act the state of Delaware enacted the Hazel Law prohibiting with like intent the shipment of liquor from other states into prohibition districts of this state, there to be used for unlawful purposes. To this extent the Hazel Law is valid, if the Webb-Kenyon Law is valid. But the state of Delaware went further and by the same law prohibited the shipment of liquor from other states into prohibition districts of this state there to be used for purposes recognized by the act itself to be lawful. For this much of the Hazel Law the state of Delaware was without authority of its own and without the aid of the Webb-Kenyon Act, for the Webb-Kenyon Act did not prohibit, nor did it authorize a state to prohibit, the importation of liquor into a prohibition territory, when the liquor was intended for a lawful purpose. The Hazel Act, therefore, in so far as it prohibits the shipment of liquor from another state into a prohibition district of this state, when the liquor is not intended to be received, possessed, sold or in any manner used in violation of the laws of this state, but is intended for a lawful purpose, is an enactment without constitutional authority, and when invoked in such cases, amounts to an interference with interstate commerce, and is therefore void.

[12] The authority that confers upon the federal government its supreme control over commerce nation-wide in extent recognizes the supreme control by a state over commerce that is entirely within its own borders. The Hazel Law, therefore, is a valid enactment in so far as it regulates, limits or prohibits the shipment of liquor from one part of the state of Delaware into the prohibition districts in another part of the state. The validity of the Hazel Law and the obligation of all to conform to that law, so far as it prohibits intrastate shipments of liquor, is not open to dispute. *N. O. & T. R. R. Co. v. Commonwealth*, 126 Ky. 563, 104 S. W. 394; *L. & N. R. R. Co. v. Cook Brewing Co.*, 223 U. S. 70, 82, 32 Sup. Ct. 189, 56 L. Ed. 355; *Adams Express Co. v. Commonwealth*, 154 Ky. 462, 157 S. W. 908, 48 L. R. A. (N. S.) 342; *Bowman v. Chicago, etc., Ry. Co.*, 125 U. S. 465, 493, 501, 8 Sup. Ct. 689, 1062, 31 L. Ed. 700; *Mugler v. Kansas*, 123 U. S. 623, 8 Sup. Ct. 273, 31 L. Ed. 205.

Much was said in the argument touching the validity of the Webb-Kenyon Law, but as

we have reached the conclusion that the prosecution against the defendant below must fail because this legislation is not applicable under the agreed facts to the transaction for which he was indicted, there is for that reason no case before us calling for a consideration of, or justifying a decision upon, the constitutionality of that legislation. In disposing of this case, we are not called upon to assert or deny the constitutionality of the Webb-Kenyon Law. That is a subject for the consideration of this court and for determination by the court having authority to render final judgment, upon a proper case being presented.

We are of opinion that upon the facts of this case, and under the laws of the state of Delaware and of the United States of America, a crime punishable under the laws of the state of Delaware has not been stated or shown to have been committed by the defendant below, and that the charge to the jury by the court below, based upon a contrary opinion, constitutes error, and that the judgment entered upon the verdict rendered in pursuance therewith should be reversed.

(123 Md. 332)

UNITED RYS. & ELECTRIC CO. OF BALTIMORE v. CRAIN et al. (No. 42.)

(Court of Appeals of Maryland. April 24, 1914.)

1. RAILROADS (§ 301\*)—ACCIDENTS AT CROSSINGS—CARE REQUIRED OF PARTIES.

A railroad crossing of extraordinary danger requires the exercise of extraordinary care, both by the parties attempting to cross, and by the managers of passing trains, and, though the trains have the prior right to pass unobstructed, yet they must give all proper and sufficient signals of their approach.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 956; Dec. Dig. § 301.\*]

2. RAILROADS (§ 350\*)—ACTIONS FOR INJURY AT CROSSINGS—QUESTION FOR JURY—SIGNALS.

Where trainmen testify affirmatively that the whistle was blown for a crossing, the testimony of witnesses who merely state that they did not hear the whistle is not inconsistent therewith, and hence not sufficient to take the question to the jury, unless for some reason their attention was attracted thereto.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152–1192; Dec. Dig. § 350.\*]

3. RAILROADS (§ 350\*)—ACTIONS FOR INJURY AT CROSSINGS—QUESTION FOR JURY—SIGNALS.

In an action for an injury to plaintiff caused by an interurban car colliding with the automobile in which she was a passenger at a highway crossing, evidence held sufficient to take to the jury the question whether the whistle of the car was blown for the crossing.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152–1192; Dec. Dig. § 350.\*]

4. RAILROADS (§ 350\*)—ACTIONS FOR INJURY AT CROSSINGS—QUESTION FOR JURY—SIGNALS.

In an action for an injury to plaintiff caused by the automobile in which she was a passenger colliding with defendant's electric car at a highway crossing, held, under the evidence,

a question for the jury whether a whistle sounded for the crossing could have been heard by plaintiff.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

**5. TRIAL (§ 251\*)—ACCIDENTS AT CROSSING—ACTIONS — INSTRUCTIONS — APPLICATION TO PLEADINGS**

In an action for an injury to plaintiff caused by an interurban car colliding with her automobile at a highway crossing, where the only negligence alleged was the failure of defendant to blow the whistle for the crossing, a prayer referring only to want of ordinary care and prudence was too general.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

**6. NEGLIGENCE (§ 93\*)—CONTRIBUTORY NEGLIGENCE—IMPUTED NEGLIGENCE.**

A passenger in an automobile is not barred from recovering for an injury by the contributory negligence of the driver.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 147-150; Dec. Dig. § 93.\*]

**7. NEGLIGENCE (§ 82\*)—CONTRIBUTORY NEGLIGENCE—PASSENGER IN AUTOMOBILE.**

A person taking a pleasure ride with the owner of an automobile must exercise ordinary care to avoid injury as well as the driver.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 112-114; Dec. Dig. § 82.\*]

**8. RAILROADS (§ 350\*)—ACTION FOR INJURY AT CROSSING—QUESTION FOR JURY—CONTRIBUTORY NEGLIGENCE.**

In an action for an injury to a passenger in an automobile caused by a collision with defendant's interurban car, plaintiff's contributory negligence held, under the evidence, a question for the jury.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

**9. EVIDENCE (§ 500\*)—EXPERT TESTIMONY—ADMISSIBILITY.**

In a personal injury action, a physician was properly permitted to testify that he attributed plaintiff's "subsequent condition" (just before trial) to her injuries received at the time of the accident; it not being, when considered with the rest of his testimony, uncertain and indefinite as to the condition referred to.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2290, 2291; Dec. Dig. § 500.\*]

Appeal from Superior Court of Baltimore City; Walter I. Dawkins, Judge.

Action by Laura B. Crain and husband against the United Railways & Electric Company of Baltimore. Judgment for plaintiffs, and defendant appeals. Reversed, and new trial ordered.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Joseph C. France, of Baltimore (J. Pembroke Thom and Lee S. Meyer, both of Baltimore, on the brief), for appellant. William Colton, of Baltimore, for appellees.

**PATTISON, J.** This is an action brought by the appellee, plaintiff below, against the appellant company to recover for personal injuries received by the plaintiff in consequence of a collision between the car of the defendant and the automobile in which the plaintiff was riding as a passenger, resulting, as it

is alleged, from the negligence of the defendant in the operation and management of its car. The injury was received at a crossing of a public highway in Baltimore county known as the North Point Road.

The record discloses that Harvey L. Goodman, a resident of Baltimore City, invited the plaintiff and others to ride with him in his automobile. The party consisted of Goodman, his wife, Miss Akehurst, Adolph Prutz, and the plaintiff. The three women sat upon the back seat and the two men upon the front seat of the automobile. Goodman, the owner of the automobile and a competent chauffeur, had the control and management of it on the occasion of the accident. Neither Goodman nor the plaintiff was familiar with the road. Goodman had been upon it once before about a year prior to the accident and recalled that the defendant's road crossed it, but did not know the exact point. A short while before reaching the crossing, when about three-fourths of a mile from it, Goodman testified:

"I made mention to Mr. Prutz about this crossing being in the vicinity somewhere, I did not know just where, but we should look out, keep looking out, that we did not get into any danger of an approaching car; so we both were on the lookout, I will say possible three-fourths of a mile, maybe more than that, before we got to it, and we watched as close as we could watch for the railroad"; but they did not see the track until they were practically upon it.

As Goodman expresses it:

"At such time I heard the rumbling of a car coming at a high rate of speed, \* \* \* and I looked and saw the car practically within a few feet of me, and the only thing I could do, there was nothing more, the thought came to my mind to turn the wheel as short as possible and run with the car."

This he attempted to do, hoping, as he said, to avoid a collision, or, failing in this, that the car would so strike the automobile as to give it what he termed a "side swipe," and thereby avoid the danger of those in the automobile getting under the wheels of the car. He partially made the turn, but did not avoid the collision. The left wheel of the automobile came in contact with the front car at or near its front truck, as stated by plaintiff's witnesses, or at the middle of the car, as stated by the defendant's witnesses, which resulted in turning over the automobile and catching the plaintiff under it, inflicting upon her the injuries complained of.

At the time of the accident the automobile was moving southward on said public road, and the defendant's train, consisting of two cars, was moving westward towards the city. The road of the defendant company crosses the highway at nearly right angles. Its tracks are laid with T-rails spiked to cross-ties, with gravel and crushed stone ballast, which at the crossing was covered with dirt, bringing the surface between the rails to a level with the road. The plaintiff's witnesses testified, and they were not

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

contradicted, that the white sand of the road and the shell dust covering the space between the rails made it difficult to observe the crossing, and for this reason could not see it until they got practically upon it.

There is on the east side of the highway, both on the north and south sides of the railroad, at the crossing, a woods which extends within a few feet of the said public highway and also extends to the right of way of defendant's road, and on the north side of the crossing the land has an elevation of three or four feet above the bed of both the highway and the railroad, and a car approaching the said public road from the east cannot be seen from said highway until a point is reached thereon within a few feet of the crossing. This fact is shown by the testimony of the motorman of the car who testified:

"When I got about twelve feet from the North Point Road, I could see about 12 or 15 feet upon the North Point Road, and I seen the automobile coming at a high rate of speed. I saw he would hit me, and I tried to stop as soon as I could," and with the use of air brakes and the sand lever he stopped the car at a distance of 120 to 125 feet from the west side of the public road.

It would therefore follow that Goodman, in the automobile, at a point 12 or 15 feet from the track, could have seen only 12 or 15 feet eastward up the railroad. But upon the westward side of the highway the country is open, sloping towards the west, and the poles 15 to 18 inches in diameter, bearing the feed, trolley, and span wires, located on each side of the track at a distance of 100 to 110 feet apart, may be readily seen from the highway, extending for a distance of about a half mile to the westward.

As stated by the defendant in his brief:

"The special exceptions to the plaintiff's first and second prayers and the defendant's first, second, third, fourth, fifth, and sixth prayers, present the question of whether there was any legally sufficient evidence of causal negligence on the part of the defendant which resulted in the accident of which the plaintiffs complain."

The defendant contends:

"That the evidence shows that the recklessness of the driver was the only negligent act having any causal connection with the accident, and that there is no evidence that the accident was caused by any negligence on the part of the defendant or its employes."

[1] The evidence shows that the crossing was one of more than ordinary danger, and therefore required the exercise of more than ordinary care, both on the part of parties attempting to cross the tracks of the railroad, and of the managers of passing trains. This duty is mutual and reciprocal, and not confined to one party only. The railroad trains, from the nature of things, have the precedence of passing the crossings of public ways unobstructed; but it is the duty of those directing the trains to be careful to give all proper and sufficient signals of their approach, and to take all reasonable precaution, in view of the nature of the cross-

ings, to avoid collision. Failure in the strict performance of this duty to the public, whereby injury is inflicted upon individuals, will subject the company to liability to respond in damages to the injured party. *Philadelphia, Baltimore & Washington R. Co. v. Hogeland*, 66 Md. 160, 7 Atl. 105, 59 Am. Rep. 159.

The record in this case discloses no legally sufficient evidence of any negligent act of the defendant having any causal connection with the accident complained of, unless it be that it failed to give the required signal of its approach to the crossing:

[2, 3] The testimony of Anderson, the motorman, was that he first blew the whistle at a point 75 feet east of a private road that crosses the railroad 350 feet east of said public road; that he again blew the whistle at the green signal 75 feet east of the crossing upon said public road; and that at each of such times he gave two short blasts. In speaking of the whistle, he described it as a "screechy whistle" and made a loud noise.

William Webb, a passenger on defendant's car, stated that he was seated in the front car and heard "two small, short toots, a sort of toot-toot, as we were starting in through the woods; there is a little woods on both sides of the track just east of North Point Road."

Wilbert F. Parrill, another passenger in the rear car of the defendant, testified that he heard the whistle of the car just before reaching North Point Road, and upon looking out saw a green signal. He also heard the whistle blow several times before that, but did not exactly locate the places.

Elizabeth Krupp, a little girl, and her companion, Elizabeth Frede Meyer, on the occasion of the accident were upon the track of the defendant company at a point westward of the North Point Road. They were walking eastwardly upon the track, meeting the defendant's car, counting the ties on the road, as they said, when they heard the whistle of the car some distance ahead of them and before the car had reached North Point Road. It resulted in their getting off the track, but they still continued to walk beside it in the direction of the accident and saw it when it occurred.

William Hook, another passenger in the front car of the defendant, also testified that:

"Before they came to the crossing, the motorman blew his whistle, I took very particular notice to it too."

Goodman, the owner and chauffeur in charge of the automobile, when asked, "Was there any whistle that was sounded?" answered, "No whistles." "Q. Is your hearing good or bad? A. It is good."

Adolph Prutz, who was seated beside Goodman in the automobile, when asked, "Did you, or not, hear any sound or whistle?" replied, "No, sir; not until it got right on us and didn't have much time to think."



Miss Akehurst, who was upon the back seat of the automobile, testified:

"We never heard the car whistle, and we never heard nothing until we saw one end of the car come from behind the trees."

Mrs. Goodman, who was also upon the back seat of the automobile, when asked, "Did you, or not, hear any whistle?" replied, "I heard nothing at all."

The plaintiff, Mrs. Crain, did not say whether she heard or did not hear the whistle.

In the case of *Foley v. N. Y. Cent. & Hudson River R. Co.*, 197 N. Y. 430, 90 N. E. 1116, 18 Ann. Cas. 631:

"Various employes of the defendant, some of whom were charged with a duty in respect thereto, testified positively that the bell operated automatically and that it rang constantly as the engine approached the crossing. Several witnesses were sworn in behalf of the plaintiff for the purpose of establishing that it did not ring until after the accident and the witness in each case did testify that he did not hear the bell ring before the accident. Upon further examination, however, such witness invariably testified in substance that he did not listen for the bell, and that his attention was not in any way directed at the time to the question whether it was or was not ringing, and also made it clear that he was not in such a position that he probably must have heard the bell if it did ring. Thus each witness at the close of his examination made it appear that his failure to hear the bell ring did not occur under such circumstances as to fairly indicate that it did not in fact ring."

Under these circumstances, the evidence was regarded as insufficient.

In the case of *Culbane v. N. Y. Cent. & Hudson R. R. Co.*, 60 N. Y. 133, the court there said:

"The two witnesses for the plaintiff merely say they did not hear the bell, but they do not say that they listened or gave heed to the presence or absence of that signal. \* \* \* As against positive, affirmative evidence by credible witnesses to the ringing of a bell or the sounding of a whistle, there must be something more than the testimony of one or more that they did not hear it, to authorize the submission of the question to the jury. It must appear that they were looking, watching, and listening for it, that their attention was directed to the fact, so that the evidence will tend to some extent to prove the negative. A mere, 'I did not hear,' is entitled to no weight in the presence of affirmative evidence that the signal was given, and does not create a conflict of evidence justifying a submission of the question to the jury as one of fact."

In the case of *Menard et al. v. Boston & Maine R. Co.*, 150 Mass. 386, 23 N. E. 214, it is said:

"A witness may be in any conceivable attitude of attention or inattention, which will give his evidence value, or leave it with little or no weight. But where his position is such that the sound would have been likely to have attracted his attention, if the bell had been rung, his failure to hear it is some evidence that there was no ringing. In the case at bar there were six witnesses who testified that they heard no bell or whistle. \* \* \* All of these were in such positions that they easily might have heard, if the signals had been given; and three of them were riding at great risk to their lives, if they failed to notice such signals as they heard. These three would certainly be expected to at-

tend carefully, and to know whether there was any warning to apprise them of danger. We are of opinion that the jury should have been permitted to consider all the evidence in the case upon the question whether the defendant failed to ring the bell or sound the whistle, as required by law."

In the case of *Balto. & Ohio R. Co. v. Roming*, 96 Md. 67, 53 Atl. 672, the only evidence of any negligence on the part of the defendant was the testimony of two persons, Sykes and Phillips, who resided a short distance away from the station, that they heard at their residence "no whistle or bell from the engine prior to the danger signal which came simultaneously with the crash of the collision," as over against the distinct and circumstantial evidence of the engineer and the fireman and the operator in the block signal tower at the station that the customary signals of the approach of the train were exchanged between the engine, by whistling, and the tower, by moving the block signal, and that the bell was rung from the engine as usual. The court there held that such testimony of the defendant's alleged negligence was not sufficient to go to the jury. But it was not shown in that case that the attention of the witnesses Sykes and Phillips was in any way attracted to the whistle or bell of the engine. They were not charged with any duties in respect thereto and were not at the time in any situation of danger in connection therewith, nor did the record disclose any reason they might have had for giving heed to signals of danger from the engine as it approached the crossing.

In the case of *Northern Central Ry. Co. v. Gilmore*, 100 Md. 404, 60 Atl. 19, 108 Am. St. Rep. 439, 3 Ann. Cas. 445, the witness Kenny, who was standing in the door of a saloon near by, and Dean, a cart driver, who was also near by at the time of the accident, testified they heard no bell rung or signal given from the engine as it approached the crossing, and Henry Ruth, another cart driver, testified that:

"The engine didn't ring any bell or blow any whistle there. There was nothing at all done, only after the boy was in danger and could not get out of it, the gatekeeper tried to make him come back."

Against this was the evidence of the engineer, fireman, conductor, gatekeeper, and two brakemen who testified that the bell was ringing at such time. In that case the defendant asked the court to instruct the jury that:

"The testimony of witnesses that they did not hear the bell was not evidence that it was not rung and must be entirely disregarded by them."

And in their brief and argument the defendant's counsel relied upon the case of *Balto. & Potomac R. Co. v. Roming*, supra, as an authority for the granting of such instruction, but the court in refusing the instruction asked for said:

"That is pushing the doctrine of *Roming's* Case further than it was intended by us to go."



It may be safely stated from the above-cited authorities and others that where the attention of those testifying to a negative was not attracted to the occurrence which they say they did not see or hear, and where their situation was not such that they probably would have observed it, their testimony is not inconsistent with that of credible witnesses who were in a situation favorable for observation and who testify affirmatively and positively to the occurrence. *Chicago, etc., R. Co. v. Andrews*, 130 Fed. 65, 64 C. C. A. 399. But if it be shown that the witness could have observed the signal, had it been given, and that his attention was attracted thereto because of a duty imposed upon him in connection therewith, or because of the known position of danger in which he was at the time placed, naturally suggesting that he, for his own safety and protection, should look and listen for the warning or signal of danger; or if it be shown from the facts and circumstances of the case that for any cause or reason his attention was attracted thereto, and that he at such time was looking and listening for the ringing of the bell or the sounding of the whistle, the fact that he did not see or hear the signal is evidence sufficient to go to the jury tending to show that such warning or signal was not given.

It must be conceded that it is difficult at times to determine whether that which is termed negative testimony has sufficient probative value to warrant its submission to the jury.

"The opportunity of the witness for hearing the signals, the place where he was located at the time, whether he was on the lookout for the train and listening for the signals, are all important matters to be taken into consideration by the trial judge when he is called on to pass upon this question." *Winterbottom v. Phila., etc., R. Co.*, 217 Pa. 574, 66 Atl. 864.

In the case before us, Goodman, the owner and chauffeur in charge of the automobile at the time of the accident, testified he knew there was a crossing somewhere in the vicinity, but just where he did not know, and suggested to Prutz, who was sitting beside him, that they should look out, keep looking out, that they did not get in any danger from an approaching car; that they both looked out for about three-fourths of a mile before reaching the crossing. And Prutz testified:

"We had been looking out for the crossing, we were looking for it, and by the time we got there the car shot by."

What was said by Goodman concerning the crossing in that vicinity and the necessity for watchfulness to avoid danger from an approaching car was heard by those with him in the automobile, and all were fully aware of the dangerous position in which they were placed in respect to an approaching car, and such position would naturally suggest to them, looking to their own safety and protection, that they should look and listen for signals of warning from an approaching car, and they all, except the plaintiff, in-

cluding both Goodman and Prutz, testified that they heard no whistle or signal of warning as it approached the crossing, and Goodman testified there was "no signal" blown, not simply that he did not hear it, but as a matter of fact it was not blown. In this particular this case is unlike the *Roming Case*, but similar to the *Gilmore Case*. In the former case the witnesses testified they did not hear the signals, while in the latter case one of the witnesses for the plaintiff testified that "the engine did not ring any bell or blow any whistle."

[4] The evidence of the motorman and others in the car was that he (the motorman) blew the whistle when at the "green signal," 75 feet east of the crossing, at which time he was going 12 or 15 miles an hour. It is not shown exactly where upon the public road the automobile was at this time, nor does the evidence disclose how fast it was going. The only evidence in respect thereto is that of the motorman and Miss Akehurst. The former said it was going at a high rate of speed, while the latter said it was going "very slowly." Goodman, who could have spoken with more accurateness as to the speed of his automobile than the others, is silent in respect thereto, although his attention was called to it when asked if he had not stated to some one that he was running along the road at about fifteen miles an hour. But, in any event, the automobile could not have been very far from the crossing at the time the whistle was said to have been blown 75 feet therefrom. The whistle was a loud, screechy whistle, as testified to by the motorman, and the question whether it could have been heard by Goodman and those in the machine with him, who testified that it did not blow, or that they did not hear it, although listening, should have been submitted to the jury upon the evidence of said witnesses. Had the whistle been heard by Goodman or by any of those with him in the automobile and the fact communicated to him, he could have avoided the accident, and thus the failure of the defendant to give such signal, if that fact be shown, would, we think, have a close causal connection with the accident.

The evidence of Goodman, who testified that there was no whistle, and the evidence of Prutz, Mrs. Goodman, and Miss Akehurst, all of whom testified that they did not hear the whistle, we think, under the circumstances and facts of this case, should have gone to the jury. We are not called upon to determine the weight of the evidence that the whistle was not heard, as against the positive evidence of the defendant that the whistle was blown; that was for the jury, but we simply pass upon the question whether there was evidence legally sufficient to entitle the plaintiff to have her case considered by the jury, and, as we have just said, in our opinion the evidence referred to should have been submitted to the jury. P. B. & W.

R. R. Co. v. Hogeland, 66 Md. 160, 7 Atl. 105, 59 Am. Rep. 159.

[6] But in submitting this case to the jury, we think the reference in the first prayer of the plaintiff to the want of ordinary care and prudence on the part of the defendant was, under the facts and circumstances of the case, too generally stated. The attention of the jury should have been specifically directed in its findings to the alleged failure of the defendant to blow its whistle, inasmuch as that is the only negligence of the defendant, if it be shown to exist, that is found in this case. We do not mean to say that this is not ordinarily a good prayer in cases of this character, for it has been repeatedly held to be good in other cases; but in this case, where the alleged negligence of the defendant is confined solely to its alleged failure to blow the whistle as the train approached the crossing, we think, by the prayer, the mind of the jury should have been specifically directed to that question; but inasmuch as the lower court was not requested to be more specific, and as the prayer follows others which have been approved, we would not reverse the case on this ground.

[6, 7] By the second prayer of the plaintiff the court was asked to instruct the jury that, should they find the facts contained in the first prayer, and should further find that at the time of the accident the female plaintiff was an invited guest in the automobile, and that she exercised no control over the driving and management of the same, but that the same was owned by the witness Harvey L. Goodman, and that the said Harvey L. Goodman was driving and controlling the said automobile, that even if they find that the said Harvey L. Goodman was guilty of negligence in the manner in which he managed and drove the automobile, which contributed to the happening of the accident, that as a matter of law the negligence of Harvey L. Goodman cannot be imputed to the plaintiff and forms no bar to the right of recovery of the plaintiff in this case against the defendant; and further that there is no evidence in this case legally sufficient to show any negligence on the part of the plaintiff directly contributing to the happening of the injury complained of.

In the cases of P. B. & W. R. R. Co. v. Hogeland, 66 Md. 160, 7 Atl. 105, 59 Am. Rep. 159, B. & O. R. R. Co. v. State, Use of Strunz, 79 Md. 335, 29 Atl. 518, 47 Am. St. Rep. 415, and United R. R. Co. v. Biedler, 98 Md. 564, 56 Atl. 813, this court has held that:

"It may be stated as the general rule of the courts of this country, with but few exceptions, that the contributory negligence of a carrier, or of the driver of a public or private vehicle, not owned or controlled by the passenger, and who is himself without fault, will not constitute a bar to the right of the passenger to recover for injuries received. The only principle upon which such contributory negligence could bar the right of recovery is that the driver should

be regarded as the agent or servant of the passenger."

This is undoubtedly the established law of this state, and we have no inclination to depart from it.

In this case the question before us, as we view it, is not whether Goodman's negligence is to be imputed to the plaintiff, but whether she omitted that due care which under the circumstances she was bound to take, and whether there is evidence to be found in the record sufficient to go to the jury tending to show a want of such care on her part.

The case of Brommer v. Penn. R. R. Co., 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924, is very much like the case at bar. In that case Brommer was driving his automobile which collided with a train. With him were Mr. and Mrs. Henderson and Miss Blockson, all of whom Brommer had invited to ride with him. Mrs. Henderson was killed and the other three occupants injured. These three brought suit. The three cases were tried together and were so argued in the court above. In the trial court Brommer was held guilty of contributory negligence, and it directed a verdict against him; but verdicts and judgments were recovered by Henderson and Miss Blockson. Appeals were taken from each of these judgments. The judgment against Brommer was affirmed, the one in favor of Henderson was reversed, and the judgment received by Miss Blockson affirmed.

In discussing the Henderson Case, the court said:

"Brommer then being culpably negligent, was Henderson, who sat on the seat beside him, any less so? \* \* \* In our view the question before us is not whether Brommer's negligence is to be imputed to other occupants of the car, but whether they, or any of them, omitted that due care—and negligence is lack of due care—which under the circumstances, they were bound to take. \* \* \* Henderson was under obligation to take due care of his own safety. He was not a passenger for hire. He was engaged in a common purpose of a pleasure ride with the driver of the machine. He knew they were approaching a railroad crossing. Being free from the engrossing work of operating the machine, and occupying a seat beside the driver, he was in an even better situation than Brommer to look out for the safety of the machine. His own safety and the instinct of self-preservation should have led him to do so. Under the circumstances, his duty was well stated in Davis v. Chicago & R. I. & P. R. Co., 159 Fed. 18, 88 C. C. A. 496, 16 L. R. A. (N. S.) 424, where it was said: 'Under the facts of this case, the relation that the plaintiff sustained to his companion Pfeutze did not permit him to sit dumb and inert in the vehicle, taking no heed of a known danger, permitting Pfeutze to drive into a pitfall or on a deadly railroad track, implicitly trusting his life and limbs to the discretion of his companion without a word of warning or protest.' It is now the better recognized rule of law that as to such a person situated as was the plaintiff, riding in a vehicle in mere companionship with his friend, engaged upon mutual adventure, it is as much his duty as that of the driver to take observation of dangers and to avoid them if practicable, by suggestion and protest. In other words, he is required to exercise ordinary care to avoid injury. Mittelsdorfer v. West Jersey & S. R.

Co., 77 N. J. Law, 702, 73 Atl. 540; Wachemith v. B. & O. R. Co., 233 Pa. 466, 82 Atl. 755, Ann. Cas. 1913B, 679; Clarke v. Connecticut Co., 83 Conn. 219, 76 Atl. 523."

The court held in the Brommer Case that there was no escape from the conclusion that Henderson was equally culpable with Brommer. But in the case of Miss Blockson the judgment of the court below was affirmed, and the court in its opinion said:

"While holding her to a due measure of care in so far as her situation and surroundings enabled her to exercise it, we have no proof she did not exercise it, or that anything she saw or failed to see contributed in any way to the accident. \* \* \* She frankly admits that she did not look, for the reason that she was sitting in the back seat of the automobile, and, as it appears, on the opposite from that from which the train approached. \* \* \* There is no evidence to show she knew that they were approaching a railroad crossing, or from the position she occupied, sitting behind the men on the front seat, she could have known it by the exercise of ordinary care."

The court held in her case that they could not say, as a matter of law, that she was guilty of contributory negligence.

[8] Nor can we say in this case, upon the evidence produced, that the plaintiff, as a matter of law, was guilty of contributory negligence; but nevertheless we think the evidence tending to show a want of due care on her part—which under the circumstances she was bound to take—should have been submitted to the jury. The plaintiff testified that:

"Just before, hardly two minutes before the accident, I heard Mr. Goodman make a remark to Mr. Prutz: 'Now there is a crossing along here somewhere. Just where it is located I do not know.' He said that, I heard it plain, and it didn't seem hardly a minute before this car came. That is all I can say. That is all I remember."

As stated by Miss Akehurst, the plaintiff was enjoying the scenery along the public highway. The poles 15 or 18 inches in diameter upon each side of the railroad track at a distance not greater than 110 feet apart, with the wires strung upon them, extending for at least half a mile to the westward, locating the railroad and its crossing upon the highway, and thus pointing out the place of danger of which Goodman had given notice to those in the automobile, including the plaintiff, were plainly visible at a point upon the highway some distance from the crossing, and it would seem that said poles and wires would have been noticed and observed by the plaintiff in the exercise of ordinary care and caution on her part to avoid the threatened danger; but, if they were observed by her, she made no mention of them. With these facts in evidence, we think that the second prayer of the plaintiff, by which the jury was instructed that there was no evidence legally sufficient to show any negligence on the part of the plaintiff directly contributing to the happening of the injury complained of, should not have been granted.

The defendant's first, second, third, fourth, fifth, sixth, and B prayers we think were properly rejected, while in our opinion its A and D prayers should have been granted, as offered.

[9] This brings us to the exceptions upon the admission of testimony.

Dr. Tanner, a witness produced by the plaintiff, testified that he attended the plaintiff immediately after the alleged injuries were received by her in August, 1912, and that upon her return to Baltimore for the trial of this case in 1913 he examined her and found her "in an extremely nervous condition, typical traumatic neurasthenia," and that she was suffering at such time from said trouble more than she was at the time of leaving the city in September, 1912. After testifying that he had heard the testimony of all the witnesses in court, he was asked:

"Assuming that the testimony be true, her condition before as compared with her condition after the accident, to what do you attribute her subsequent condition? A. To the injuries received at the time of the accident. Q. In your opinion, is that permanent or otherwise?"

To this question the defendant objected, but the objection being overruled, he was permitted to answer that, "It is permanent and progressive." This ruling of the court forms the first exception.

It is urged against the admission of this testimony that it is uncertain and indefinite as to the condition referred to. The witness had previously testified that when he first saw her at the hospital she had a scalp wound on the left side of her head, and her shoulder, arms, back, and lower limbs were bruised and discolored. This is the extent of his description of her injuries at that time. There can be no doubt, we think, that the condition referred to was the nervous condition which he found at the time of the examination a few days before the trial of the case, and not to the wounds and bruises that he found immediately after the accident occurred.

The second, third, fourth, and fifth exceptions relate to the testimony of Holmes, the assistant engineer of the appellant company, who was asked as to the unobstructed view of the tracks of the railroad looking eastward from the different point upon the highway north of the crossing and within the lines of the right of way of the defendant company. We can discover no sufficient objection to the admission of this testimony, and, in our opinion, the court erred in excluding it.

As to the sixth and seventh exceptions, we think the witness Elizabeth Krupp should have been permitted to answer the questions propounded to her, although we would not regard the error as a reversible one.

The judgment of the court below will be reversed.

Judgment reversed, with costs to appellants, and new trial awarded.

(123 Md. 198)

**COUNTY COMMISSIONERS OF CARROLL COUNTY v. MAYOR AND COMMON COUNCIL OF WESTMINSTER. (No. 7.)**

(Court of Appeals of Maryland. March 19, and April 8, 1914. Rehearing Denied May 14, 1914.)

**1. HIGHWAYS (§ 130\*)—TAXATION—DISPOSITION OF PROCEEDS—REMEDY.**

A suit by a city for an accounting from the county commissioners of the amounts received for road tax in each of several years, and for the payment over of any sums which may be found due to the city under Acts 1890, c. 508, requiring the county commissioners to pay to the city a half of the amount of taxes collected for road purposes on assessable property within the city, for use by it for its streets, is properly brought in equity, for there is no means available to the city to know with precision the amounts actually collected for such taxes, except the accounts and returns in the possession of the county commissioners, and the suit is in effect one for discovery.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 387; Dec. Dig. § 130.\*]

**2. HIGHWAYS (§ 130\*)—TAXATION—SUIT FOR ACCOUNTING—OBLIGATION OF COMPLAINANT.**

A city suing the county commissioners for an accounting of the amounts received by them for road taxes in certain years, and for the payment over to the city of any sum found due under Acts 1890, c. 508, requiring the county commissioners to pay annually to the city half of the taxes collected for road purposes on assessable property liable to taxation within its limits, must furnish a list of the taxable property within its limits as a condition of relief, where the city has express authority to assess property within its limits, and where the county commissioners make their assessment by districts one of which includes the city.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 387; Dec. Dig. § 130.\*]

**3. TAXATION (§ 44\*)—STATUTES—VALIDITY.**

Acts 1890, c. 508, requiring county commissioners to pay annually to a city in the county half the taxes collected for road purposes on assessable city property for use by it for the city streets, does not violate Bill of Rights, art. 15, requiring every person in the state or holding property therein to contribute his proportion of public taxes for the support of the government according to his actual worth in real and personal property; no inequality of taxation resulting from the operation of the act.

[Ed. Note.—For other cases, see Taxation, Dec. Dig. § 44.\*]

**4. HIGHWAYS (§ 99½, New, vol. 14 Key-No. Series)—TAXATION—STATUTORY PROVISIONS—CONSTRUCTION.**

Under Acts 1906, c. 365, providing for a general road system for Carroll county, and providing for a special road fund for use in the repair of roads and bridges in the county, and for a general fund for use in the construction of all bridges costing over \$100, and special permanent improvements or temporary repairs to main roads, the general fund is applicable for large bridges and the permanent improvement of roads built under Acts 1904, c. 225.

**5. HIGHWAYS (§ 122\*)—TAXATION—STATUTES—REPEAL.**

Acts 1890, c. 508, requiring the county commissioners of Carroll county to pay to a city therein half of the taxes collected for road purposes from assessable city property for use for its streets, was not repealed by Acts 1892, c. 164, giving to road commissioners the power

to fix the rate of taxes for road purposes, but leaving with the county commissioners the levy of the taxes and declaring that inconsistent Acts, except Laws 1890, c. 508, shall be repealed.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.\*]

**6. HIGHWAYS (§ 122\*)—TAXATION—STATUTES—REPEAL.**

Acts 1890, c. 508, was not repealed by Acts 1904, c. 225, dealing in a comprehensive manner with county roads in the state, and declaring that nothing therein shall affect the present method of road construction or repair by counties at their own expense or otherwise, as authorized by law.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.\*]

**7. HIGHWAYS (§ 122\*)—TAXATION—STATUTES—REPEAL.**

Acts 1890, c. 508, was not repealed by Acts 1906, c. 365, providing a general road system for Carroll county, and for special and general road funds, and expressly excepting from the repeal provision acts relating to the payment of a portion of a special road tax to incorporated towns, especially in view of the repeal and re-enactment by Acts 1910, c. 341, of the charter of the city of Westminster, which declares that local laws affecting it shall not be repealed, but shall remain in force, and specifically mentioning the act of 1890 as not repealed.

[Ed. Note.—For other cases, see Highways, Cent. Dig. §§ 380, 393; Dec. Dig. § 122.\*]

**8. HIGHWAYS (§ 130\*)—TAXATION—STATUTES—CONSTRUCTION.**

Under Acts 1890, c. 508, requiring the county commissioners to pay annually to a city in the county half of the road taxes collected from taxable city property for use by it for its streets and roads, the city is entitled to its part of sums collected for the construction and repair of bridges costing less than \$100, for such structures are mere incidents to road maintenance, and may be included as a part of the road expenditures and a separate and distinct account for such bridges need not be kept.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 387; Dec. Dig. § 130.\*]

**9. HIGHWAYS (§ 130\*)—TAXATION—STATUTES—CONSTRUCTION.**

A levy by county commissioners of taxes for large bridges and main roads as authorized by Acts 1906, c. 365, is not within Acts 1890, c. 508, requiring the commissioners to pay annually to a city half the road taxes collected from taxable city property, for the city is not entitled to a half of the taxes levied and collected for large bridges and main roads.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 387; Dec. Dig. § 130.\*]

**10. APPEAL AND ERROR (§ 878\*)—QUESTIONS REVIEWABLE—PARTY FAILING TO APPEAL.**

A party taking no appeal is not entitled to a review of alleged adverse rulings on an appeal taken by the adverse party.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3573-3580; Dec. Dig. § 878.\*]

Appeal from Circuit Court, Carroll County, in Equity; William H. Thomas and Wm. Henry Forsythe, Jr., Judges.

"To be officially reported."

Suit by the Mayor and Common Council of Westminster against the County Commissioners of Carroll County. From a decree for complainant, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Charles E. Fink, of Westminster, for appellant. Guy W. Steele, of Westminster, for appellee.

PER CURIAM. The decree in this case will be affirmed for reasons to be given in an opinion to be hereafter filed.

Decree affirmed, the appellant to pay the costs.

STOCKBRIDGE, J. The city of Westminster was created a municipal corporation prior to the year 1860. It was the county seat of Carroll county and remained a part of that county, but the municipal corporation was given certain special, separate, and distinct powers which, with the several amendments to them, were included as a portion of the local laws of Carroll county when those laws were codified in 1888, and they appear in the Code of that year in sections 214 to 254 of article 7 of the Public Local Laws. Among the powers given to the municipal corporation was the control over the streets, roads, and alleys within the corporate limits, whether for the purpose of condemning and opening new highways, or of repairing and maintaining the existing ones. Sections 227 and 228. By sections 229 and 231 there was also vested in the municipal body the power to assess property located within or belonging to residents living within the corporate limits, as established by the Legislature. At the same time, there existed in the county commissioners of Carroll county the general powers vested in the county commissioners by the Code of Public General Laws, and now appearing in the Code (1912), art. 25, § 2.

In the year 1890 the General Assembly passed an act designated as chapter 508 of the acts of that year. By this it was provided:

"That it shall be the duty of the county commissioners of Carroll county to pay annually to the mayor and common council of Westminster, one-half of the amount of taxes levied and collected annually by said county commissioners for road purposes, upon assessable property liable to taxation within the limits of the city of Westminster, to be appropriated and used by the said mayor and common council of Westminster, for the repair, maintenance and improvement of the streets and roads within the limits of said city."

In the year 1891 the county commissioners of Carroll county paid over to the mayor and common council of Westminster from the levy of 1890 the sum of \$800, as the proportion due the city from the tax collected by said county commissioners, and which sum of \$800 was assumed to represent the one-half of the road taxes levied upon and collected from assessable property within the limits of Westminster, in conformity with the provisions of the act of 1890 just quoted.

Since the year 1891 the city of Westminster has annually presented a bill to, and received from, the county commissioners the like sum of \$800 per annum, upon an assumption that this was the proper amount of the proportion of taxes collected, to which the city was entitled under the provisions of the act of 1890, and this payment has been made irrespective of whether there was an increase or decrease in the assessable basis, or moneys collected for the road tax of the county, and entirely irrespective of the rate per hundred dollars levied for road purposes in any of the intervening years.

The present bill is filed by the municipal corporation for an accounting upon the part of the county commissioners of the amounts received by them for such road tax in each of the years, and for the payment over of any sum or sums which may be found to be due to the municipal corporation as the result of such accounting, and that without being furnished a list of the assessable property liable to taxation within the limits of the city of Westminster by the municipal authorities. The bill further prays for the rescission of the agreement, if any, between the county commissioners of Carroll county and the mayor and city council of Westminster for the acceptance of \$800 as the full share accruing to the city from the annual road levy, and that the receipts which had been given may be deemed as part payment only on account of each annual levy.

[1] The bill was demurred to upon various grounds, which demurrer, after hearing, was overruled. Some of the questions raised under the demurrer may properly be disposed of in limine. Thus the demurrer raised the question of equitable jurisdiction in a case of this character, upon the ground that, if there was any remedy at all, there was a full, complete, and adequate remedy at law. It will be sufficient upon this point to say that the question of adequacy or inadequacy of the remedy at law must depend in each case largely upon the facts of the particular case. The general rules are well and correctly stated in Miller's Equity Procedure, § 721, and in a note to the case of Wiggins v. Bisso, 2 Am. & Eng. Dec. in Eq. (1st Series) 65. An examination of the record in this case satisfies this court that the character of the accounts involved is such as to present a case proper for an equitable accounting, rather than a suit at law. While not technically a bill for discovery, it is in effect such, for there is no means available to the city authorities by which to know with precision the amounts actually collected for such taxes, except the accounts and returns in the possession and control of the county commissioners.

[2] The bill asks that the accounting be furnished without the city giving a list of the assessable property liable to taxation within the limits of the municipal corpora-

tion. It is true that the act of 1890 nowhere requires the city to furnish any such list, and there are numerous cases to the effect that, where such an act as this does not contain a provision therefor, the city is not compellable to furnish such a list. On the other hand, it is the city which has invoked the jurisdiction of equity to do justice as between it and the county commissioners. As already noted, the city has the express legislative authority to assess property within its limits for the purposes of taxation, a power which it cannot exercise without making a list of such property. The county commissioners make their assessment by districts, and the seventh district of Carroll county, in which the city of Westminster is located, is, so far as legal requirements are concerned, the smallest division for which the county commissioners can be assumed to have the precise information. Later on it will appear that the demand of the city must be restricted to the year 1908 and subsequent years, and it is therefore placing no undue hardship or burden upon the municipal corporation to require of it, as a condition of demanding and receiving the proportion of the road tax allotted to it by the act of 1890, that it should be required to furnish to the county commissioners a list of the assessable property liable to taxation within the corporate limits.

[3] The county commissioners seek to avoid responsibility for any other or greater sum than the amount of \$800 per annum paid over to the city upon the ground of the unconstitutionality of the act. The ground of the supposed invalidity of the act is that it contravenes article 15 of the Bill of Rights, which provides that "every person in the state, or \* \* \* holding property therein ought to contribute his proportion of public taxes for the support of the government, according to his actual worth in real or personal property," and that the provision of the act of 1890 would result in unequal taxation. This precise question was directly passed upon in the case of County Commissioners of Prince George's County v. Laurel, 51 Md. 457, and the validity of a similar provision was there sustained; Judge Irving saying:

"It has never been decided by this court that article 15 of the Bill of Rights was applicable to any taxation except that for the support of the state government, but that if it was held as applicable to municipal governments, it is hard to see how inequality of taxation would result from the operation of section 19 of said Act of Incorporation. It only provides that such taxes as are levied on the inhabitants or property in the town of Laurel for road purposes shall be expended on particular roads. It by no means establishes unequal taxation, but bestows the taxes collected in a particular locality on the roads of that locality."

The conclusion in this case is claimed to have been modified or its value destroyed by the language used by the same Judge in a case between the same parties, though arising out of a different act, and reported in 70

Md. 443, 17 Atl. 388, 3 L. R. A. 528. An examination of the latter case, however, discloses a wide distinction between the two cases, and the immediate question of the correctness or incorrectness of the conclusion reached in 51 Md. 457 was in no wise essential to the determination of the subsequent case, nor was that conclusion in any way modified. Substantially the same question has arisen in other states, and the conclusion of Judge Irving in 51 Md. 457, has been adopted, though for different reasons than those assigned by him. In the case of Board of Supervisors of Sangamon County v. City of Springfield, 63 Ill. 66, it was held that the revenues of a county are not the property of the county in the sense in which the revenue of a private corporation is regarded, and that the power of the Legislature in regard to them is plenary, and that an act providing for an apportionment between a county and a city of the moneys raised by taxation does not contravene the constitutional provision with regard to equal and uniform taxation. In the case of Duval County Commissioners v. Jacksonville, 36 Fla. 196, 18 South. 339, 29 L. R. A. 416, there was presented almost an exact counterpart of the present case, and it is there said, quoting from State v. Putnam County Com'rs, 23 Fla. 632, 3 South. 164:

"Though all public roads and all streets are public highways, yet neither all public highways, nor all public roads, are streets, or city or town highways."

Or to express it a little differently, the streets and highways of a city are no less public highways of the county, because they happen to lie within the corporate limits of a municipality. And in Sangamon County v. Springfield, supra, it is said that the turning over of one-half of the money raised from the property in the towns and cities does not destroy the equality and uniformity of the tax itself. The levy is made upon all the taxable property of the county just as any other tax is assessed and levied, and all the property in the county bears an equal portion of the burden of such tax in proportion to its value. Three cases in Missouri were cited by the appellant in support of its contention on this ground, but they do not meet the question involved. In Wells v. Weston, 22 Mo. 384, 66 Am. Dec. 627, the question was whether the Legislature could authorize a municipal corporation to levy a tax for its own local purposes on land lying beyond the corporate limits; here the issue is whether the Legislature can direct the application of money raised by taxation upon property inside of corporate limits in some proportion to defray certain specified expenses within those same limits. In City of St. Charles v. Nolle, 51 Mo. 122, 11 Am. Rep. 440, the question was the validity of a city ordinance imposing a license tax on wagons used to haul into or out from the city, and it was held, and only held, that there was no corporate

power to pass such an ordinance, and that the Legislature could give the city council no authority to pass such an ordinance, since in that case also the attempt would be to tax those residing without the city, purely for the municipal benefit. In *Town of Cameron v. Stephenson*, 69 Mo. 372, the question presented was as to the power of an incorporated town to levy a tax upon the land outside of the corporate limits for town purposes. Cases of this character, therefore, are in no way pertinent to the question now presented, and the objections to the act of 1890, based on its supposed unconstitutionality, cannot prevail.

[4] The next point of objection urged against giving effect to the act is that, even if it shall be held to be constitutional, it has been repealed by subsequent legislative enactments. A number of different acts are relied upon as producing this result. Before considering these it is important to see just what has been done in each of the years to be affected. In making up the tax rate for the year 1908 for the Seventh election district, there were two items which enter into the present controversy, one of 9 cents upon each \$100 valuation for "large bridges and main roads," and 12 cents for roads; in 1909, the same two items appear and for the same amounts; in 1910, the same items and amounts; in 1911, the same two items appear, but the amounts are 6 cents for each \$100 valuation for "large bridges and main roads" and 10 cents for roads. The reason for the two separate items is to be found in the provisions of chapter 365 of the Acts of 1906, an act the purpose of which was to provide a general road system for Carroll county. By section 137 of the local laws as fixed by that act, two funds were provided for, one a special road fund to be used in the annual repair of the public roads and bridges in the county from the amount collected from the levy in each road district and to be expended by road commissioners under the direction of the county commissioners; the other, a levy for a general road fund to be used in the construction of all bridges costing over \$100 and the special permanent improvement or temporary repairs of such main roads in the county, as they may deem advisable. This latter fund it appears from the evidence has been construed to be applicable for "large" bridges and the permanent improvement or temporary repairs of what are commonly known as Shoemaker Roads, that is, roads built under the Acts of 1904, c. 225, and this construction of the law seems reasonable and proper.

[5] The earliest in point of time of the acts which are urged as operating to repeal the act of 1890, is the Act of 1892, c. 164. By this act radical changes were made in the previously existing law of the county in relation to roads, and altering in important particulars the powers of the county commissioners with relation thereto. Most im-

portant in this connection was the power given to the road commissioners to determine and fix the rate of the tax to be levied for road purposes, but the levying of the tax was still left with the county commissioners. Section 2 of the act was in these words:

"That all acts or parts of acts inconsistent with the provisions of this act except chapter 508 of the Laws of 1890, be, and the same are hereby repealed."

This act did not expressly repeal the act of 1890, but reaffirmed it in unmistakable terms. There can be no question as to the legislative intent in the adoption of the act of 1892, and, as repeals by implication are not favored, it would be doing unwarrantable violence to the act of 1892 to construe it as operating to repeal the act of 1890. Nor was any such effect ascribed to it either by the county commissioners of Carroll county or the officials of the city of Westminster, for in each year thereafter down to the institution of this suit the sum of \$800 was demanded and collected from the county commissioners under the understanding apparently arrived at in 1891.

[6] The roads of Carroll county then enjoyed a rest from legislation down until the enactment of the Shoemaker Law in 1904. In that act the attempt was to deal in a general comprehensive manner with county roads throughout the state. But it dealt only with general provisions, and section 15 of the act declared that:

"Nothing in this act shall be taken to alter, or abridge or in any way affect the present method of road construction or repair by the respective counties, at their own expense or otherwise, as now authorized by law."

Clearly there was no endeavor here to repeal local enactments providing for the apportionment of moneys raised by taxation for road construction or repair in the several counties, nor did that act attempt or pretend to interfere with legislation to regulate these matters within the territorial limits of incorporated cities or towns.

[7] Next in sequence was the act of 1906. By this the act of 1892 was repealed, together with some of the other provisions of the local laws of Carroll county relating to roads and a new and general road system adopted for the county. It is unnecessary to quote or even abstract the provisions of that act, for in the case of this law, as in the act of 1892, the repealing portion of the act expressly excepted all such acts "as relate to the payment of a portion of the special road tax to incorporated towns."

Before concluding this phase of the case, it is proper to mention that the charter of the city of Westminster was repealed and reenacted by chapter 341 of the Acts of 1910, and by the third section of that act it was specially enacted that certain local laws affecting the municipality "are hereby declared not to be repealed or affected by this act, and are to be and remain in force as fully as though herein at large set forth"; and the second act contained in this enumeration is



"chapter 508 of 1900 (1890) relating to the road tax." Attention is called to this for the purpose of showing that throughout the changing legislation of 20 years ran the consistent purpose and intent of leaving untouched and unaffected the provision made in 1890 for the apportionment of the road tax.

Defense to the bill was also taken by the county commissioners upon the subject of bridges, and, while not absolutely essential to the disposition of the case, a few observations upon this can hardly be out of place in view of the insistence placed on it by the counsel for the appellant.

[8] The question is one which necessarily divides itself into two parts, that relating to what are called "small" bridges, i. e., bridges costing less than \$100 for construction or repair, and "large" bridges, or bridges the cost of which exceeded that sum. Is the city of Westminster under the terms of the act of 1890 entitled to any portion of the sums collected under the levy for bridges of either class? The act of 1890 makes no mention whatever of any bridges of any sort, and ordinarily this would be taken as limiting the right of participation on the part of the city to the funds realized from the levies for road purposes only. From the testimony of Mr. Dodrer, the county treasurer and clerk of the county commissioners, it appears that in 1891 and 1892 there were separate sums levied for roads and for bridges; that in 1893, 1894, 1895, 1896, 1897, 1898, 1899, 1900, and 1901 there were levies made for roads, but none for bridges. In 1902, 1903, 1904, and 1905 there was one levy for roads and one for large bridges, and for the years 1906, 1907, 1908, 1909, 1910, and 1911, the levy was in the dual form, one for large bridges and main roads, and one for roads. It will be observed therefore that in no year since 1892 has there been any levy distinctively made for small bridges, and the contention of the county commissioners now is that no separate account has been kept of the cost of such small bridges, and, there being no separate and distinct levy therefor, it is impossible to segregate from the levy for roads the actual or proper proportion of the amount raised by taxation, and which has been expended upon the construction of such small bridges. The reason for this is perfectly evident, namely, that a so-called small bridge, the construction or repair of which involved the expenditure of a less amount than \$100, was not deemed or regarded as being in a true sense a bridge expenditure, but merely one of the expenses necessarily incident to the construction and repair of a road, and constituting in reality a portion of the road. Thus if for purposes of drainage it was or became necessary to construct a culvert which might consist of three planks, or 30 or 40 feet of terra cotta pipe, the expense of which would be but trifling, in one sense such construction might be classed as a small bridge, and yet it was sim-

ply a matter necessarily incident to road maintenance, and proper to be included as a portion of the road expenditure. While there is no direct testimony upon the point, it is a self-evident fact that a "bridge," the cost or repair of which was less than \$100, could not be any extensive structure; certainly not one involving ponderous arches of masonry or reinforced concrete or of steel construction. At most, a structure to come within the limits of such an expenditure could be but a span of a few feet or yards in width, crossing some country brook or creekbed, and in reality hardly worthy of being dignified by the name of a bridge, being placed there, it may well have been, more as a matter of grading than for any other purpose, and therefore to have been properly dealt with under the general language employed in the various successive levies which were made of roads. Viewed in this light, it was immaterial and unnecessary that there should have been kept any separate and distinct account in the nature of an account for small bridges, and since the levy was made in the years with which this case is immediately concerned, were levies for roads, the city of Westminster ought to be and was entitled to the proportion granted to it by the Legislature of the amount realized from the levy for roads.

[9] A somewhat different situation is presented with regard to the other item in the levy, that "for large bridges and main roads." This appears in the levies of the county commissioners, as has already been pointed out, as the direct result of the act of 1906, an act not passed until 16 years after the Legislature had provided for the apportionment between the county commissioners and the city of Westminster of the money received by taxation for road purposes in the Seventh district of Carroll county. It was not therefore an item within the contemplation of the Legislature at the time when the act of apportionment was passed, and there may be fairly presented for argument the question whether the city of Westminster is entitled to participate at all in this portion of the levy. The most satisfactory decisions bearing upon this question seem to be those which have come before the courts of Florida, and which are well collected in the case of Duval County Commissioners v. Jacksonville, supra, and as most pertinent to the present consideration is the case of Skinner v. Henderson, 26 Fla. 121, 7 South. 464, 8 L. R. A. 55. In that case the city of Tampa had entered into a contract for the construction of a bridge over a river within the corporate limits of the city, and the county commissioners, on petition for that purpose, ordered that a portion of the costs of the bridge be paid by the county. The payment of the money by the county was enjoined, and the bill filed for this purpose alleged, among other things, that the bridge was wholly within the corporate limits, entirely a municipal improve-



ment, and not for a county purpose. A demurrer was filed to the bill, the effect of which was of course to admit as true this allegation, and the court says that the statute authorizing the city to build bridges within its limits did not necessarily revoke the authority given to the county by general statute, without restriction as to locality, to build a bridge within the city limits. As there may be bridges serving only a city purpose, so there may be others demanded in the same territory for county purposes, and where the circumstances create this demand, and the bridge is for the use and benefit of the people of the county at large, or of some considerable portion of them, and intended and needed as well for those outside as for those inside the city, the authority of the county to build is not annulled by the local city statute. If now the reasoning of this case be applied to the one before us, it will follow that there may be a bridge constructed in the city of Westminster costing in excess of \$100, the use or advantage of which is practically for the use and benefit of the residents of the municipality only, and in such a case, in view of the history of the legislation, it is difficult to see how any charge therefor could or ought to be imposed upon the county, to be defrayed out of the proceeds of a levy for large bridges and main roads. On the other hand, a case may arise for the construction of a bridge costing in excess of \$100, the use and benefit of which is for the benefit not merely of the inhabitants of the city of Westminster, but for that of the people of the county at large, or of some considerable portion of them, and intended and needed as well for them as for residents or property holders within the corporate limits. This fact would not, however, justify a claim on the part of the city of Westminster for the one-half part of the proceeds of this particular portion of the levy, although it might afford a good ground for some fair and equitable sharing of the costs of construction or maintenance. That, however, would be a matter of contract and agreement between the municipal authorities of Westminster and the county commissioners of Carroll county, and it is not necessary to be considered in disposing of the present case.

This view is further supported by the provisions of the Road Law of Carroll County, § 137, as enacted by chapter 365 of the Acts of 1906, and by section 2 of the same act. Section 137 of the Road Law is the provision under which the county commissioners derive their authority to make a levy for the two separate road funds, the first of which is designated as a "special road fund," and the other as "a general road fund"; the first to be applied generally to roads and small bridges, and the latter to bridges costing over \$100 and special improvements of

main roads. By section 2 of the act, which preserves the provisions with regard to incorporated towns, the right of such towns is expressly limited to "a portion of the special, road tax"; that is, to the fund first provided for in section 137, and which by the terms of the act is to be applied to roads and small bridges costing less than \$100.

[10] Apparently much of the contention in the circuit court for Carroll county rested upon the question of limitations or laches, the effect of which was to exclude entirely from consideration any question of accounting or liability upon the part of the county commissioners for unpaid portions of the taxes collected from the time of the passage of the act in 1890 down to 1908. These questions were elaborately considered in the opinion of the circuit court and fully passed upon, and from the rulings made thereon no appeal was taken upon the part of the city, and consequently cannot properly be considered as open to review by this court. Such questions are not open as to the period between 1908 and the institution of this suit, except in so far as an estoppel by acts in pais may be regarded as entering into the question of laches; but upon this we concur entirely with the views expressed by Judges Thomas and Forsythe, and therefore no reversal can be had upon this ground.

From what we have said it follows that the decree of the circuit court for Carroll county will be affirmed.

Affirmed, with costs to the appellee.

(123 Md. 373)

DUTTON v. STATE. (No. 2.)

(Court of Appeals of Maryland. May 1, 1914.  
June 24, 1914.)

1. CRIMINAL LAW (§ 1110\*)—JUDGMENT—CORRECTION OF RECORD.

On application to the lower court to have the record in that court corrected so as to properly state what occurred, the court below if satisfied from its own knowledge, or from the evidence adduced, that the clerk's docket entries were erroneous or incomplete, had the power and duty to have them corrected.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2903-2917, 2919; Dec. Dig. § 1110.\*]

2. CRIMINAL LAW (§ 1110\*)—APPEAL—MATTERS REVIEWABLE—DIMINUTION OF RECORD.

The action of the lower court, on an application for correction of the record and in reference to the changes requested, is final and not reviewable on appeal.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2903-2917, 2919; Dec. Dig. § 1110.\*]

3. CRIMINAL LAW (§ 1134\*)—APPEAL—MATTERS REVIEWABLE—MOTION FOR NEW TRIAL.

The action of the lower court in overruling a motion for a new trial is not reviewable by the Court of Appeals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. § 1134.\*]

**4. CRIMINAL LAW (§ 1134\*)—MATTERS REVIEWABLE—MOTION TO STRIKE OUT JUDGMENT AND SENTENCE.**

The action of the lower court on a motion to strike out the judgment and sentence is reviewable by the Court of Appeals.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2587, 2653, 2986-2998, 3056, 3067-3071; Dec. Dig. § 1134.\*]

**5. CRIMINAL LAW (§ 261\*)—NECESSITY OF ARRIGNMENT — MISDEMEANOR — "FELONY" — "INFAMOUS CRIME."**

Under Code Pub. Gen. Laws 1904, art. 27, § 17, providing the punishment for an assault with intent to rape, such offense is a misdemeanor, though punishable, in the discretion of the court, with death or imprisonment in the penitentiary for 20 years, and not a "felony," since the fact that a crime is punishable in the penitentiary or is infamous does not make it a felony, and is not even an "infamous crime," which depends on the character of the crime, and not upon the nature of the punishment; and hence it was not necessary that accused be arraigned.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 612, 613; Dec. Dig. § 261.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2736-2744; vol. 8, p. 7662; vol. 4, pp. 3573-3577.]

**6. CRIMINAL LAW (§ 1177\*)—SENTENCE—FORMALITIES IN PRONOUNCING SENTENCE.**

It is not reversible error, even in a capital case, not to ask the prisoner if he has any reason why sentence should not be passed, unless it appears that he was or may have been injured by the omission, but the practice of inquiring any reason why sentence should not be passed is recommended in all cases in which either the death penalty or confinement in the penitentiary can be imposed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3183-3189; Dec. Dig. § 1177.\*]

**7. CRIMINAL LAW (§ 1186\*)—FORMALITIES IN PRONOUNCING SENTENCE—OMISSIONS.**

Even if it be indispensable in capital cases to ask the prisoner if he has anything to say before sentence, error in omitting the inquiry affects only the sentence and not the verdict; and in view of Code Pub. Gen. Laws 1904, art. 5, § 81, providing that if the Court of Appeals reverses for error in the judgment or sentence itself, it shall remit the record to the court below that it may pronounce the proper judgment, and especially where a motion for new trial and to strike out a judgment and sentence have been overruled, the Court of Appeals is not required to reverse the judgment and remit that the court below may first ask the prisoner if he has anything to say and then to re-sentence him.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3215-3219, 3221, 3230; Dec. Dig. § 1186.\*]

**8. CRIMINAL LAW (§ 995\*)—RECORD—FORMALITIES AS TO SENTENCE.**

When the prisoner is asked if he has anything to say before sentence is passed the proper practice is to note such inquiry in the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2518, 2521, 2523-2526, 2528½, 2530, 2536-2543; Dec. Dig. § 995.\*]

**9. CRIMINAL LAW (§ 1213\*)—PUNISHMENT—CRUEL AND UNUSUAL PUNISHMENT.**

Under Declaration of Rights, art. 16, declaring that no law to inflict cruel and unusual penalties shall be made, and article 25, declaring that cruel or unusual punishments shall not be inflicted by the courts of law, a judgment and sentence of capital punishment for the

crime of assault with intent to rape, imposed under the discretion given the court in respect to such crime by Code Pub. Gen. Laws 1904, art. 27, § 17, was not unconstitutional.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3304-3309; Dec. Dig. § 1213.\*]

**10. CRIMINAL LAW (§ 1218\*)—CRUEL AND UNUSUAL PUNISHMENT—FEDERAL CONSTITUTION.**

Const. U. S. amend. 8, declaring that cruel and unusual punishments shall not be inflicted, is not a restraint upon and does not apply to the Legislature of a state, but only to the national Legislature.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3304-3309; Dec. Dig. § 1213.\*]

**11. CRIMINAL LAW (§ 635\*)—CONDUCT OF TRIAL—ADMISSION OF PUBLIC.**

In determining whether any part of the public shall be excluded from the trial of a criminal case the trial court is allowed some discretion, and no exclusion should be permitted which might injuriously and improperly affect the prisoner, and under no circumstances should a trial be so conducted as to have the appearance of a star chamber proceeding; and hence the trial of a charge of assault with intent to rape, held by the court in the petit jury room instead of the courtroom, and with the consent of defendant's attorney, where it did not appear that any one whom defendant or his attorney desired to be present was excluded, was not a deprivation of defendant's rights.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1452; Dec. Dig. § 635.\*]

**12. CRIMINAL LAW (§ 662\*)—RIGHTS OF ACCUSED—CONFRONTATION OF WITNESSES.**

Under Declaration of Rights, art. 21, providing that in all criminal prosecutions every one has the right to be confronted with the witnesses against him, the examination of the prosecutrix in a trial for assault with intent to rape by the court out of the presence of the defendant, except as he was called to the door for identification, was a deprivation of right and reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3, 1538-1548; Dec. Dig. § 662.\*]

Appeal from Circuit Court, Dorchester County; Henry L. D. Stanford and Robley D. Jones, Judges.

James Dutton was convicted of assault with intent to rape, and he appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

Thomas W. Simmons, of Cambridge, for appellant. V. Calvin Trice, of Cambridge, and Edgar Allan Poe, Atty. Gen., for the State.

PER CURIAM. The court being of the opinion that there was error in taking the testimony of the prosecuting witness, Margaret Gillis, out of the presence of the prisoner, under the circumstances set out in the record, the judgment will be reversed. An opinion will hereafter be filed giving the reasons for the conclusions reached by the court.

Judgment reversed, and new trial awarded.

BOYD, C. J. [1, 2] The appellant was convicted of an assault with intent to rape, and

was, by virtue of section 17 of article 27, Code of Public General Laws, as amended by chapter 366 of Acts of 1908, sentenced to be hung. The record originally transmitted to this court was defective, but on application of the appellant a writ of diminution was ordered. The appellant then applied to the lower court to have the record in that court corrected, so as to have what occurred properly stated. In *Greff v. Fickey*, 30 Md. 75, after a writ of diminution was issued by this court, for the purpose of having some alleged errors in the record corrected, a motion was made to have the docket entries in the lower court amended and completed, but that court overruled the motion because it was of opinion that, the term having passed, and the Court of Appeals having ordered that the docket entries be returned as they actually stood upon the docket, it would be improper to grant the motion. This court, through Bartol, C. J., said:

"We think the learned judge was in error as to the purport and design of the writ, and his powers and duty in the premises. If satisfied either from his own knowledge of what had actually occurred in the progress of the cause—or from evidence adduced—that the docket entries as made by the clerk were erroneous or incomplete, it was within his power and his plain duty to have them corrected, so that a full, true, and perfect transcript of the whole proceedings as they actually occurred in the progress of the cause might be sent up, in obedience to the writ."

That course was also approved in *Hays v. P. W. & B. R. R. Co.*, 99 Md. 413, 58 Atl. 439, and *Koch v. Wimbrow*, 111 Md. 21, 73 Atl. 896.

The lower court accordingly very promptly and properly granted the motion of the appellant in this case, and has made certain corrections which we will insert in this opinion, so that it may be seen how the record now stands; the action of that court in reference to the changes requested being final and not subject to review on appeal. *Greff v. Fickey*, supra. By an order in writing signed by the two judges who sat below, the clerk was directed to and did make the changes, additions, and corrections in the docket entries and record, so as to now read as follows:

"Plea and Traverse. Whereupon the said James Dutton, traverser, cometh to the bar of the court here in his proper person, and, forthwith being demanded concerning the premises in said indictment above specified and charged upon him, how he will acquit himself thereof, he waived arraignment, and he said, 'Not guilty,' and 'Traverse before the court,' and the said V. Calvin Trice, Esq., state's attorney of Dorchester, aforesaid, who for the said state of Maryland in his behalf prosecuteth, doth the like. That the consent of the attorneys for the state and for the traverser having been first given, thereupon the trial in this case was adjourned to and held in the petit jury room, immediately adjoining the courtroom proper, including the taking of all testimony, and the same being taken in the presence of the court, the clerk with his docket and other court officers, the said attorneys for the state and traverser, and all witnesses, but without the presence of said traverser during any part of the testimony of the chief prosecuting

witness, Margaret Gillis, who testified while said traverser was in said adjoining courtroom, with the door of communication closed, and in custody of the sheriff, except for the interval when said traverser was brought to said communicating door then opened, and identified by said witness, the said door being immediately thereafter closed until said witness left the stand and the traverser brought into said petit jury room to testify in his own behalf, where he then remained until the conclusion of said trial. The court, having heard evidence, thereupon directed the clerk of the court to enter in the proceedings in said case. 'The court finds the party guilty.'

"Sentence. Whereupon all and singular the premises being seen, and by the court here fully understood, it is thereupon considered by the court here that James Dutton, prisoner at the bar, be taken to the jail of Dorchester county from whence he came, and from thence to the place of execution," etc.

[3, 4] A motion for a new trial was made "short" the day the appellant was sentenced (November 14, 1913), and on November 18th a formal motion in writing was filed. On December 23d that motion was overruled, and on January 24, 1914, which was during the same term of court, a motion to strike out the judgment and sentence was made, which was overruled, and this appeal was taken to this court. That the action of the court in overruling the motion for a new trial is not subject to review by us is too well settled to require or justify the citation of authorities, but its action on the motion to strike out the judgment and sentence is reviewable by us. The ruling on such a motion was reviewed by us in *Hommer v. State*, 85 Md. 562, 37 Atl. 26, and other cases which might be cited, but we are confined to what appears on the face of the record itself, and there is no bill of exceptions, agreed statement of facts, or substitute for either of them. We will consider the questions referred to in the motion, but in somewhat different order from that in which they are therein stated.

[5] 1. Objection is made that the appellant was not arraigned. An assault with intent to rob, murder, or commit a rape is not a felony in this state. The punishment for those crimes is provided for in one section of the Code, and has been for many years, being now section 17 of article 27. In *Holohan v. State*, 32 Md. 390, it was said:

"Robbery, murder and rape are felonies. To constitute either of these crimes, the felonious act and felonious intent must concur. An assault with intent to commit either of these crimes is not a felony, but to bring an assault within this article and section, and subject the party charged to the punishment provided, it must be charged and proved to have been committed with an intent to commit a crime, which is a felony. If the intent had been effectuated by the act, a felony would have been committed. Only because it was not effectuated, the crime sinks from the grade of a felony to that of misdemeanor."

See, also, *State v. Dent*, 8 Gill & J. 12.

The distinction made in some jurisdictions that crimes punishable by death or confinement in the penitentiary are felonies and others misdemeanors has never existed in this state, but here only those are felonies

which were such at common law, or have been so declared by statute. The fact that a crime is punishable in the penitentiary or is "infamous" does not make it a felony in this state. It was said in *State v. Bixler*, 62 Md. 360:

"The general court of this state in [*Clarke's Lessee v. Hall*] 2 Har. & McH. 378, defined 'infamous crime' to be one which rises at least to 'the grade of felony.' This is however too narrow, for perjury is a misdemeanor, but by all authority is 'infamous.'"

On the same page it is also said:

"There are many misdemeanors punishable by confinement in the penitentiary, which clearly are not 'infamous crimes' within the meaning of the common law or of the Constitution. If, for example, the prisoner has been convicted of any of the assaults with intent, mentioned and punished by the Code, and had been sentenced to the penitentiary and served his time out there, without being pardoned by the Governor, he would not be chargeable with having committed an 'infamous crime.'"

In *Garitee v. Bond*, 102 Md. 379, 62 Atl. 631, 111 Am. St. Rep. 385, 5 Ann. Cas. 915, Judge Schmucker, in delivering the opinion of the court, referred to the case of *Ex parte Wilson*, 114 U. S. 422, 5 Sup. Ct. 938, 29 L. Ed. 89, where the Supreme Court held that the provision in the United States Constitution which prohibits prosecution for "a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury" must be considered not merely from the standpoint of the character of the crime, but also from the nature of the consequences to the accused, if he should be found guilty, and went on to say:

"But even in *Wilson's Case* it was held that at common law prior to the Declaration of Independence 'it was already established law that the infamy which disqualified a convict to be a witness depended upon the character of his crime and not upon the nature of his punishment.'"

Again it was there said, "The authorities generally, though not with entire uniformity, hold that the infamous nature of a crime was determined at common law by the character of the act itself, and not by the penalty inflicted for its commission," and after referring at length to *State v. Bixler*, supra, it was distinctly held that the crime considered in *Garitee v. Bond* could not be regarded as infamous merely because it was punishable at the discretion of the court in the penitentiary.

So whatever may be the law elsewhere, it is clear that an assault with an intent to commit a rape is not a felony, and is not even an "infamous crime" as that term is understood in this state. It is not now and never has been, so far as we are aware, customary or necessary to arraign one accused of a misdemeanor, even though if convicted he could or must be punished by confinement in the penitentiary. The Legislature in authorizing the court, in its discretion, to impose the death penalty or confinement in the penitentiary for not less than 2 nor more than 20 years on one convicted of the crime of

assault with intent to commit a rape did not declare it to be a felony, and in our judgment did not make it such by providing for the death penalty in the discretion of the court. In *Gibson v. State*, 54 Md. 447, the first count charged that the accused "*feloniously, willfully, and maliciously* did set fire to and burn a certain barn," etc. One ground for a motion in arrest of the judgment was, "because the jury have found him guilty of a felony, and the offense committed is only a misdemeanor by the laws of Maryland." In the course of the opinion it was said:

"The argument of the Attorney General that the offense charged in the first count is legally a felony, because the common law attached the character of felony to all offenses punishable by death, however well founded according to the English authorities, does not apply to offenses where the punishment of death is in the discretion of the court, and, this court having in *Black v. State*, 2 Md. 376, decided that such offenses are misdemeanors, we are not disposed to disturb that decision."

In *Salfner v. State*, 84 Md. 299, 35 Atl. 885, Chief Judge McSherry said:

"It is unnecessary that a party accused of a misdemeanor should be arraigned; but it is indispensable that a plea should be entered to the indictment, or that the record should show he waived a plea."

So without deeming it necessary to further discuss this branch of the case, or to refer to authorities out of the state as to when the accused must be arraigned, we hold that it was not necessary to arraign the appellant, and there was no error in not doing so, and hence the effect of a waiver of arraignment becomes immaterial.

2. The reason alleged that the defendant never, either in person or by his attorney, pleaded the plea of "Not guilty" which appears in the docket entries—it having been entered without the order or authority of the defendant or his attorney, and without his having been called upon to plead—is not sustained by the record. We have quoted above what the record states on that subject, and as it shows that he did plead "not guilty," and as there is nothing in conflict with that statement, it is unnecessary to further discuss the question.

[6-8] 3. Another reason assigned in support of the motion is that sentence of death was pronounced against the defendant without first asking him if he had anything to say. The authorities are not entirely uniform on the subject, although it may be admitted that the greater number of them hold that at least in capital cases the accused should be asked if he had anything to say why sentence should not be pronounced. The question has not heretofore been passed on by this court, and we have no statute on the subject, as many states have. There can be no doubt that most of the reasons originally given for the adoption of that practice are not applicable in this state. In the first place the prisoner is not only allowed counsel, but the courts always appoint counsel to defend those who are unable to employ them, in capital cases.

Again, the rules of courts generally fix the time within which a motion for a new trial or motion in arrest of judgment can be filed, and in the absence of such rules the time allowed at common law is applicable. Even if sentence should be passed before the expiration of such time, without having given the prisoner an opportunity to then speak, such a motion would be afterwards entertained if made within the time allowed. In *Heiskell v. Rollins*, 81 Md. 397, 32 Atl. 249, a judgment was entered by the clerk in a civil case the day the verdict was rendered, and on the same day a motion for a new trial was filed. We dismissed the appeal without prejudice, in order that the appellant could take steps to have the entry of judgment which was improperly entered stricken out and a final judgment then entered from which an appeal could be taken. The case was here on a second appeal, as reported in 82 Md. 14, 33 Atl. 263, 51 Am. St. Rep. 455. Such a practice being adopted in a civil case, the court would be all the more careful to see that a prisoner under the sentence of death did not suffer by reason of a premature judgment and sentence.

Then under our practice a motion can be made to strike out the judgment and sentence at any time during the term, as was done in this case. It would be practically impossible for the prisoner to suffer from this omission because he desired to present a pardon. If a pardon had been granted by the Governor before sentence, it is impossible to conceive of a case under our system and practice in which the court could fail to be informed of it, because of the omission to ask the prisoner whether he had anything to say. So we might look to the various reasons originally given for this practice, without finding a substantial one under existing conditions for setting aside a judgment and sentence in a criminal case because of the omission of this inquiry.

The decisions of the various courts which hold that omission to be reversible error differ as to the effect of such an error, but even if we were inclined to hold that it was indispensable in capital cases to ask the prisoner if he had anything to say, we would not hesitate to hold that the error would only affect the sentence and would not affect the verdict. In *State v. Hoyt*, 47 Conn. 518, 36 Am. Rep. 89, one of a number of reasons given by that court for declining to hold it to be necessary was that it would only affect the sentence and the weight of authority is to that effect. But in this state we have a statute (section 81, art. 5, Code) which provides that if this court shall reverse a judgment for error in the judgment or sentence itself, it shall be then the duty of this court to "remit" the record to the court below, in order that it may pronounce the proper judgment. In this case a motion for a new trial was made and overruled, as was the motion now under consideration, and it would seem

peculiar, to speak mildly, if the rules of practice required us to reverse the judgment and send it back to the same court which passed the sentence, in order that it might first ask the prisoner if he had anything to say and then re-sentence him.

Inasmuch as we will reverse the judgment for another reason, and order a new trial, it is perhaps unnecessary to discuss this point at such length, but as it was fully argued and thoroughly considered by us, we concluded to state our views on the subject. We are of the opinion that it is not reversible error, even in capital cases, not to ask the prisoner if he has any reason to give why sentence should not be passed, unless it is apparent that the prisoner was or may have been injured by the omission. But we do strongly recommend and advise that the practice be followed in all cases in which either the death penalty or confinement in penitentiary can be imposed. In capital cases the practice, so far as we are aware, has been followed throughout this state, and in most of the circuits in all penitentiary cases. In *Givens v. State*, 76 Md. 485, 25 Atl. 689, Judge Briscoe said:

"In *Commonwealth v. Roby*, 12 Pick. [Mass.] 514, the court say, that the constant practice of the commonwealth should be observed and followed, unless good reason can be assigned for the change. The forms adopted in a criminal trial are of importance, inasmuch as they have a strong tendency, by their solemnity, to impress upon all who are engaged in it the interesting and highly responsible nature and character of the duties which devolve on them respectively."

No more responsible duty can rest upon an officer of the law than the exercise of the discretion vested in the judges of this state in reference to this and some other crimes, by which they are called upon to determine whether a convict shall be sentenced to death or be imprisoned in the penitentiary. It is an exceedingly unpleasant duty in any case to impose the death penalty, and before exercising the discretion every judge should be glad to have all the information he can properly consider. It may be possible that something can be said before sentence which might influence the court in the exercise of its discretion; and, as we have already indicated, if it be apparent that such was or might have been the case, and the prisoner had not had an opportunity to be heard, we would feel called upon to remand the case in order that he might be re-sentenced, after the inquiry was made of him. Moreover, if the proceedings are conducted with the solemnity with which they should be when a sentence of death is about to be imposed, the prisoner may say something which will make his case a warning to others, even if his remarks are not of service to himself. So although we would not reverse a judgment unless we could see that the prisoner was or may have been injured by the omission, we repeat that in our judgment the practice, which we supposed was always followed in capital cases in

this state, of making the inquiry should be adopted in all cases in which the death penalty may be imposed, and ordinarily in all other cases in which the defendants may be confined in the penitentiary.

It may be well to add that when it is done the proper practice is to have the fact so noted in the record. In this case, we are not satisfied that any injury was done the appellant by the omission to make the inquiry, and, at any rate, as the judgment itself will be reversed, there is no occasion to remand the case for a new sentence. It will not be out of place to conclude the discussion of this branch of the case by referring to 19 Enc. Pl. & Pr. 456, where it is said:

"There seems to be a growing tendency, even where capital punishment is inflicted, to dispense with this ceremony, or at least to consider it not essential, on the ground that the reasons for its existence are not applicable at the present day."

[9, 10] 4. It is also alleged that the judgment and sentence in this case impose a cruel and unusual punishment, and also that the sentence imposed is out of proportion to the crime charged in the indictment, and too severe a penalty for said crime. The facts proven in the case are not presented by the record, but we cannot hold that the penalty authorized by the statute to be imposed for such a crime is in violation of the constitutional provisions. Article 16 of the Declaration of Rights of our present Constitution declares that:

"No law to inflict cruel and unusual pains and penalties ought to be made in any case—or at any time hereafter."

And article 25 is:

"That excessive bail ought not to be required, nor excessive fines imposed, nor cruel or unusual punishment inflicted by the courts of law."

It would hardly be contended that the punishment provided by our statute for the crime of rape—death or confinement in the penitentiary for not less than eighteen months, or more than 21 years—is in conflict with those provisions, and when the Legislature changed the penalty for an attempt to commit the crime to death or confinement in the penitentiary, in the discretion of the court, it is probable that it took into consideration the fact that it is often difficult to prove whether the crime of rape was actually consummated. Under some circumstances the outrage upon the particular woman and upon society can scarcely be said to be less because the prisoner did not succeed in accomplishing his purpose than if he had. If a revolting crime of this nature is so frequently repeated as in the judgment of the Legislature to call for such punishment, we cannot declare it to be contrary to such provisions of the Constitution. It is said in *Foot v. State*, 59 Md. 269:

"For the prevention of crime, which is the true end of all punishment the lawgiver may properly consider the frequent and easy opportunities of committing the crime and the difficulty of guarding against it, and may grade his punishment accordingly."

In passing it may be said that in that case the court referred to the fact that:

"The eighth amendment to the Constitution of the United States is not a restraint upon, and does not apply to, the Legislature of a state, but only to the national Legislature, and therefore has no application to this case. *Pervear v. Commonwealth*, 5 Wall. 479 [18 L. Ed. 608]."

In *Mitchell v. State*, 82 Md. 527, 34 Atl. 247, the traverser was convicted of an attempt to carnally know and abuse a woman child under the age of 14 years; that being a common-law offense and not covered by our statute. He was sentenced to imprisonment in the city jail for 15 years, and it was contended that it was contrary to the Declaration of Rights, but this court in considering the case said:

"Our law inflicts pain, not in a spirit of vengeance, but to promote the essential purposes of public justice. Severity is not cruelty. The punishment ought to bear a due proportion to the offense. Crimes of great atrocity ought to be visited with such penalties as would check, if not prevent, their commission."

Again on page 534 of 82 Md., on page 247 of 34 Atl., the court said:

"If the punishment is grossly and inordinately disproportionate to the offense so that the sentence is evidently dictated, not by a sense of public duty, but by passion, prejudice, ill will, or any other unworthy motive, the judgment ought to be reversed, and the cause remanded for a more just sentence. But no such instance of judicial misconduct has ever occurred in our good old state, and we trust that the day may never come when it will be witnessed. When the discretion which the law confers is exercised with a sedate and conscientious judgment under the influence of a love of public justice, and a desire to promote it, the judge is acting in the legitimate discharge of his duty, and his sentence is not subject to reversal."

So without further discussing this subject, no ground for reversal for the reason now being considered is shown by the record.

[11, 12] 5. This brings us to the action of the lower court for which we reversed the judgment by a per curiam order heretofore filed. The quotation above shows how the case was conducted, and that the witnesses for the prosecution were examined out of the presence of the prisoner. Article 21 of the Declaration of Rights provides:

"That in all criminal prosecutions, every man hath a right to be informed of the accusation against him; to have a copy of the indictment, or charge in due time (if required) to prepare for his defense; to be allowed counsel; to be confronted with the witnesses against him; to have process for his witnesses; to examine the witnesses for and against him on oath; and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty."

In determining whether any part of the public should be excluded from the trial of a criminal case, some discretion must be allowed the trial court. Under no circumstances should a trial be so conducted as to have the appearance of a star chamber proceeding, but cases sometimes occur which have a demoralizing influence on the spectators and to some extent on the community.

It has always, so far as we are aware, been the practice in this state to exclude minors in such cases, and, if women are not excluded, they are often at least warned that the character of testimony will be such as to make it undesirable for them to be present. Of course no exclusion should be permitted which might injuriously and improperly affect the prisoner, but there may be cases where the prosecuting witness can be protected without doing the prisoner any harm. To require a refined, virtuous woman to relate the facts of a felonious assault upon her in the presence of a large audience inflicts a great punishment on her, and often times does the accused more injury than if she were examined under other circumstances, for she may get in such a distressing condition as to improperly arouse the sympathies of the jury, and possibly to cause counsel for the prisoner to refrain from a cross-examination which might have helped his client. The testimony of an outraged woman is calculated to create a bitterness against the accused amongst the audience, the effect of which is sometimes difficult to keep from the jury, as spectators may by their looks or manner even unconsciously betray their bitterness of feeling. The danger is that the horror of the crime may cause the hearers to too readily connect the accused with the commission of it. It is undoubtedly oftentimes better for the accused to have the trial conducted with less publicity than cases ordinarily are, and in a case such as this we are not prepared to say that the rights of the appellant were violated by having the trial in the petit jury room, instead of the courtroom. The case was tried before the court, which under our Constitution the accused has the right to elect instead of a jury, and while the record does not show how many persons were in the room, it is not suggested that any one whom the prisoner or his counsel desired to be present was excluded. It does show that the trial was held there with the consent of the attorney for the traverser, and no objection was made to it being held there instead of in the courtroom. We can see no reason why the prisoner or his attorney for him could not agree to have the case tried where it was. We are aware that under some decisions in other jurisdictions that might not be allowed, but there is nothing in our Constitution or statutes to prohibit it, and we are satisfied that it may be in the interest of justice and for the good of the community to permit the trial court to hear a case of this character outside of the hearing of the general public, provided there are enough persons present to secure protection to the accused against any possible advantage being taken of him or injury done to him, and that it is done with his consent or that of his attorney under such circumstances as show his consent. The general rule is thus stated in Cooley's *Constitutional Limitations*, side page 312:

"It is also requisite that the trial be public. By this is not meant that every person who sees fit shall in all cases be permitted to attend criminal trials, because there are many cases where, from the character of the charge, and the nature of the evidence by which it is to be supported, the motives to attend the trial on the part of portions of the community would be of the worst character, and where a regard to public morals and public decency would require that at least the young be excluded from hearing and witnessing the evidence of human depravity which the trial must necessarily bring to light. The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with, and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility, and to the importance of their functions; and the requirement is fairly met with, if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether."

But we are of the opinion that there was error in taking the testimony out of the presence of the appellant. Whether or not that could be expressly waived by the accused himself is unnecessary to determine, as the record does not show that it was. He had the constitutional right to be confronted by the witnesses, and although his attorney must have known that he was not present, and may, so far as he could, have consented to let the traverser remain in the courtroom while the witnesses were being examined, we are of opinion that that could not bind the appellant. It is quite possible that one on trial may be able to make valuable suggestions to his attorney during the examination of witnesses—particularly the prosecuting witness in a case of this kind—as it matters not how well an attorney may have prepared for the trial of a case, it is impossible for him to anticipate all that may be said, or to know all the details a witness on the opposite side will testify to. It might be that in the course of her examination in the presence of the accused the prosecuting witness would discover that she had made a mistake in the identity of the party committing the crime. Other reasons suggest themselves to show the importance of the accused being present, but it has, so far as we are aware, been the uniform practice throughout the state to require the presence of the accused in capital cases during the examination of witnesses, and this is the first instance which has been brought to the attention of any of us where that practice has been departed from. We have no doubt that the lower court was induced by the best of motives to adopt the course it did, but we cannot hesitate to hold that it committed a grave error in permitting the testimony to be taken—especially that of the chief prosecuting witness—out of the presence of the accused. In *Johns v. State*, 55 Md. 360, Judge Alvey, in considering an objection to the introduction of the controller's certificate, said:



"It is only where the prosecution is to be maintained by the testimony of living witnesses that they are required to be produced in court, confronted with the accused, and deliver their testimony under the sanction of an oath, and be subject to cross-examination. In other words, no witness shall give his testimony in secret or out of the presence of the accused, and no party shall be put upon his trial upon mere hearsay evidence; but the witness shall be produced, and be subject to all the tests that the law has devised for the full disclosure of the truth."

We do not overlook the fact that the crime of which the appellant is accused is a misdemeanor, but, while that is true, he was liable to be sentenced to death, if convicted, as he in fact was, and he was entitled to the full protection of this constitutional provision. That he had the right to be confronted with the witnesses cannot be denied, and, if it be conceded that he could waive that right, the record does not show that he did, and in our judgment his counsel could not waive it so as to bind him. It is too important a right for this court to permit it to be waived by implication, by counsel, or by anything short of an express waiver by the prisoner, even if that is to be permitted, which need not be determined in this case.

For the error referred to, the judgment was reversed by the per curiam order heretofore filed.

(244 Pa. 496)

**MILL CREEK COAL CO. et al. v. CURRAN et al.**

(Supreme Court of Pennsylvania. March 23, 1914.)

**1. MINES AND MINERALS (§ 92\*)—WIDTH OF PILLARS—LEGISLATIVE POWER.**

The Legislature may provide for determining the width of the barrier pillar between two adjacent mines.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 218-220; Dec. Dig. § 92.\*]

**2. MINES AND MINERALS (§ 92\*)—WIDTH OF PILLARS—AUTHORITY TO FIX.**

The authority conferred on the tribunal created by Act June 2, 1891 (P. L. 183, art. 3) § 10, to fix the width of the barrier pillar between two adjacent mines includes the authority to determine whether the safety of mine employes requires a pillar of any width.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 218-220; Dec. Dig. § 92.\*]

**3. MINES AND MINERALS (§ 92\*)—WIDTH OF PILLARS—DETERMINATION—PRESUMPTION.**

Where the tribunal created by Act June 2, 1891 (P. L. 183, art. 3) § 10, has fixed the width of the barrier pillar between two adjacent mines, it will be presumed that it has considered the necessity for such pillar to protect mine employes.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 218-220; Dec. Dig. § 92.\*]

**4. MINES AND MINERALS (§ 92\*)—WIDTH OF PILLARS—DECISION OF TRIBUNAL—VALIDITY.**

A majority of the members of the tribunal created by Act June 2, 1891 (P. L. 183, art. 3) § 10, may render a valid decision fixing the width of the barrier pillar between two adja-

cent mines, providing all the members have an opportunity to participate in the deliberations.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 218-220; Dec. Dig. § 92.\*]

**5. MINES AND MINERALS (§ 92\*)—WIDTH OF PILLARS—PROCEEDINGS TO FIX—REPORT—VALIDITY.**

Act June 2, 1891 (P. L. 183, art. 3) § 10, creating a tribunal to fix the width of the barrier pillar between two adjacent mines, does not require that such tribunal shall report its findings to the department of mines, or that all the members of the board shall sign the report; and hence refusal of one member to sign a report did not invalidate it.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 218-220; Dec. Dig. § 92.\*]

**Appeal from Court of Common Pleas, Schuylkill County.**

Bill in equity by the Mill Creek Coal Company and others against John Curran, Mine Inspector, and others, to declare illegal an award fixing the width of a barrier pillar of coal between the mines of two operating companies. From a decree sustaining a demurrer to the bill, plaintiffs appeal. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

C. E. Berger and Otto E. Farquhar, both of Pottsville, for appellants. W. K. Woodbury and John F. Whalen, both of Pottsville, for appellees.

MESTREZAT, J. The parties to this litigation were before this court in Curran v. Delano, 235 Pa. 478, 84 Atl. 452, and the facts out of which the present suit arose will be found in the report of that case. That was a bill filed by Curran, as mine inspector, to enjoin the owners of the coal from reducing the width of a barrier pillar between the adjacent mines operated by the Mill Creek Coal Company and the Dodson Coal Company. We held that the proceeding was in effect a bill to determine the width of the barrier pillar between the adjacent coal owners, and that it would not lie, as the Legislature had conferred jurisdiction in such cases on a special tribunal by section 10, art. 3, of the act of June 2, 1891 (P. L. 176). We did not dismiss the bill, but directed it to be retained until the width of the boundary pillar was determined as required by the act of 1891.

The present bill was filed subsequently by the owners of the coal and the Mill Creek Coal Company, their lessee, against the mine inspector, the engineer of the Dodson Coal Company, a lessee of the same owners, the engineer of the Mill Creek Coal Company, and the Dodson Coal Company to have declared illegal and void an award made in pursuance of the act of 1891, and signed by the inspector and the engineer of the Dodson Coal Company, fixing the width of the barrier pillar between the coal of the two operating companies. The bill, after reciting the let-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



ting of the coal to the two coal companies, the mining of the coal by those companies, and the proceedings in the court below and in this court on the former bill, averred that proceedings to determine the width of the barrier pillar between the adjacent mines had been taken before the mine inspector and the engineers of the two operating companies, and that an award had been filed in the department of mines at Harrisburg by the mine inspector and the engineer of the Dodson Coal Company fixing the width of the pillar at 300 feet between the two collieries. The bill then alleged that the award was illegal, because there was no necessity for a barrier pillar; that the board convened by the mine inspector refused to consider the question of the necessity for a pillar; and that the engineer of the Mill Creek Coal Company was not a party to the award, did not take part in making it, that he did not sign it, and that he had no knowledge of it until it was presented to him for his signature. The Dodson Coal Company and its engineer, two of the defendants, demurred, and the demurrer was sustained by the court below, on the ground that it had no jurisdiction of the subject-matter of the bill. The plaintiffs have taken this appeal.

We do not deem it necessary to pass upon the question of the jurisdiction of a court of equity to determine the issues raised by the bill, as we are of opinion that, if the court had jurisdiction, it was fully warranted under the facts in dismissing the bill. Section 10 of article 3 of the act of June 2, 1891, creates a tribunal for determining the width of a barrier pillar between two adjacent coal properties. After providing that the owners of the coal shall leave a pillar between their properties of such width as will be a sufficient barrier for the safety of the employes of either mine, in case the other should be abandoned and allowed to fill with water, requires—"such width of pillar to be determined by the engineers of the adjoining property owners, together with the inspector of the district in which the mine is situated, and the surveys of the face of the workings along such pillar shall be made in duplicate and must practically agree. A copy of such duplicate surveys, certified to, must be filed with the owners of the adjoining properties and with the inspector of the district in which the mine or property is situated."

The averments of the bill show that the proceedings taken by the mine inspector and the two engineers were in strict accordance with the act of 1891. The inspector gave written notice to the owners of the coal and the two operating companies that there would be a meeting at his office on July 10, 1912, for the purpose of determining what width of pillar should be allowed to remain between the two mines. On the day named the inspector and the engineers of the two companies, together with representatives of the companies and the owners of the coal, met at the office of the inspector. The engineers presented maps showing the face of the work-

ings of their respective mines along the line of the barrier pillar. The Mill Creek map showed that the coal on that side of the line had been mined up to the land line; while the Dodson map showed that the coal on the other side had been mined up to within 300 feet of the land line. The tribunal agreed that whatever pillar was to be left must be composed entirely of the coal on the Dodson side of the line. After considerable discussion by the parties present, "McGinley (the engineer of the Dodson Coal Company) moved that the pillar remain intact as shown on the maps to-day. Motion seconded and carried, Curran and McGinley voting in the affirmative, and Kelshaw (the engineer of the Mill Creek Coal Company) voting in the negative." Certified copies of the maps showing the face of the workings on the barrier pillar, as required by the act of 1891, were filed with the owners of the property, and with the mine inspector.

[1-3] The proceedings before the mine inspector and engineers appear by the report made by the inspector and the engineer of the Dodson Coal Company to the department of mines at Harrisburg. A copy of this report is attached to and made part of the bill filed by the plaintiffs. The bill does not deny the facts set out in the report of the inspector and engineer. The grounds for attacking the proceeding, averred in the bill, are without merit. It is alleged that there was no necessity for a pillar, that the engineer of the Mill Creek Coal Company did not sign the award, and did not consult or deliberate with the others in making the award. It will be observed that the act of 1891 requires the owners of the adjacent coal properties to leave a boundary pillar which will be "a sufficient barrier for the safety of the employes of either mine in case the other should be abandoned and allowed to fill with water." The necessity for a barrier pillar was manifestly considered and determined. The width of the pillar was fixed at 300 feet, and it follows that the necessity for any pillar must have been considered by the inspector and engineers. The act does not provide that the tribunal created for the purpose of fixing the width of the pillar shall hear evidence and from that determine the question submitted for their adjudication. Nor does it deny the inspector and engineers the right to hear any testimony which they may think necessary to assist them in the performance of their duties, and it doubtless would not avoid their decision if they did call before them witnesses and hear their testimony. The legislative view, however, apparently was that, as the two engineers, experts in their line, were familiar with the underground workings of their respective mines, and as the mine inspector was also fully informed as to the condition of both mines, they should determine the width of the pillar from their own knowledge of the facts and experience in min-

ing operations. It is not clear how a more competent tribunal to determine the question could have been created. At all events, the Legislature had the power and authority to provide for determining the width of the pillar, and, having done so, the courts must recognize the tribunal and enforce its findings. The authority to fix the width of the pillar necessarily includes the authority to determine whether the safety of the employes in the mines required a pillar of any width. If in the judgment of the inspector and engineers no pillar was needed, it would be idle, as suggested in *Commonwealth v. Plymouth Coal Co.*, 232 Pa. 141, 81 Atl. 148, for them to fix the width of the pillar at, say, one foot, for the sake, merely, of literal compliance with the statutory obligation of leaving a pillar of some width. When, however, the tribunal fixes the width of the pillar, it will be presumed, what necessarily must be so, that they considered the necessity for any pillar to protect the employes engaged in the mines. In the present case, if the inspector and engineers declined to hear evidence on the question of the necessity of a barrier, it will be presumed that their own knowledge of the situation enabled them to determine the question, without the assistance of testimony.

[4] The allegation in the bill that Kelshaw, the engineer of the Mill Creek Coal Company, was not a party to the award, and was not consulted and did not deliberate with the others in making it, is a conclusion of the pleader, and not warranted by the facts as they appear in the bill. The bill avers that the meeting at the time fixed in the notices was called to order by the inspector, who acted as chairman; that Kelshaw was elected secretary; that he participated in the discussions at the meeting; and that, by the award attached to and made part of the bill, he voted on the motion to fix the width of the pillar. It is true that his vote was in the negative; but it shows that he participated in the deliberations of the tribunal when its members were properly convened for the purpose of determining the question. The bill does not aver, and it is not alleged, that there was more than one meeting by the inspector and engineers for fixing the width of the pillar; on the contrary, as appears above, the meeting was held on the day fixed, the inspector and the two engineers were present and, after discussion, fixed the width of the pillar. Kelshaw was therefore not only consulted in making the award, but took an active part in the proceedings, and voted upon the question of fixing the award. An averment in the bill that Kelshaw had no notice of a meeting for the purpose of making a decision or award is likewise without merit. The width of the boundary line was fixed at the meeting called for the purpose at which Kelshaw was present. The statute required no further action on the part of the inspector and engineers, except the filing with the owners of the proper-

ties, and with the mine inspector, certified copies of the maps showing the face of the workings of the barrier pillar which was done. The statute does not in terms require a formal report of the action taken by the inspector and the engineers other than the filing of the maps. In the present case the inspector and the other engineer made out a formal report of the proceedings which took place at the meeting at which the width of the boundary line was fixed and filed it with the department of mines at Harrisburg. While this may have been a very proper thing to do, and doubtless the inspector and engineer thought so, there is no provision in the statute requiring it. The filing of the maps with the owners and the inspector, disclosing the width of the pillar fixed by the inspector and engineers, is required by the statute, and no other report of the proceedings before the tribunal seems to be contemplated. The statute may be defective in not requiring a full report of the proceedings to the proper mine authorities of the district or the state; but that is a legislative, and not a judicial, question, and the failure to make such a report will not warrant the court in setting aside or annulling the proceedings.

[5] The contention of the appellant that the proceedings are invalidated because Kelshaw, the engineer of the Mill Creek Coal Company, did not sign the report made to the state department of mines cannot be sustained. As already pointed out, no such report is required to be made. The fact that Kelshaw voted in the negative in fixing the width of the barrier pillar does not invalidate the decision of the tribunal created by the act. There is nothing in the statute authorizing the three parties designated by it to fix the width of the pillar which requires a concurrence of all the members in the decision. The members of the tribunal designated by the act were each familiar with the conditions as well as the necessity of a boundary pillar, and were therefore entirely competent to determine the necessity for and the width of the pillar. If, however, all three of the members of the tribunal were required to join in the decision, the proceedings might frequently be rendered abortive, and the legislative intention defeated. The engineers of the property owners are presumed to exercise their own judgment, uncontrolled by their employers; but, if one of the owners should control the action of his engineer, there could be no decision, and the statute would be annulled. While we do not by any means concede that the tribunal created by the act of 1891 is a board of arbitration or its findings an award, yet it has been distinctly ruled by this court that if, by clear implication, the submission allows a majority of the arbitrators to make an award, they may do so, and it will be valid. Here, it is manifest, we think, considering the legislative intent, the personnel of the tribunal, and the purpose for which it was created, that it may be fairly

implied that, while the three members must have an opportunity to participate in determining the question, a majority may make a valid decision.

As suggested above, we do not think it necessary to consider whether a court of equity has jurisdiction in the present case. It may be that, where a bill discloses the misconduct of either or all the members of the tribunal in the performance of their duties, a chancellor would interfere and protect the injured parties. The question, however, is not before us now, and we need not determine it.

The judgment is affirmed.

(245 Pa. 264)

ORGAN et al. v. McCLEMAN et al.

(Supreme Court of Pennsylvania. May 4, 1914.)

MUNICIPAL CORPORATIONS (§ 705\*)—STREETS—COLLISION WITH VEHICLE—NEGLIGENCE—RIGHT TO RECOVER.

Where a 12 year old boy, while playing handball on a city sidewalk, ran backwards toward the curb, and while leaning over with upraised hands to catch the ball fell between the wheels of defendant's wagon, which was being driven slowly along the street without negligence on the part of defendant's driver, there could be no recovery for the resulting injuries.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass for personal injuries, by Frederick Organ, by his father and next friend, Daniel E. Organ, and Daniel E. Organ in his own right, against Henry A. McCleman and another trading as H. A. McCleman & Bro. From a judgment entering compulsory nonsuit, plaintiffs appeal. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Thomas A. Fahy and Walter T. Fahy, both of Philadelphia, for appellants. Frank P. Prichard and James Wilson Bayard, both of Philadelphia, for appellees.

PER CURIAM. Frederick Organ, 12 years of age, was playing handball with two companions on a sidewalk in the city of Philadelphia. In trying to catch a ball that had rebounded from the wall of a house, he ran backward towards the curb. When he reached the curb and was evidently leaning over it with upraised hands to catch the ball, he came in contact with a wagon of the appellees between the front and rear wheels. The rear wheel passed over one of his arms, and for the injuries sustained this action was brought. There was not the slightest evidence of any negligence on the part of the appellees' driver. He was driving his wagon slowly along the street, and there was nothing negligent in his being close to the sidewalk. What happened could not reasonably have been

foreseen by him, and he was not therefore required to guard against it. The case is one of an unfortunate accident, resulting from boyish play, and no responsibility for it attached to the appellees.

Judgment affirmed.

(245 Pa. 402)

LEHIGH VALLEY COAL CO. v. MIDVALLEY COAL CO.

(Supreme Court of Pennsylvania. May 18, 1914.)

1. EJECTMENT (§ 7\*)—RIGHT OF ACTION—BOUNDARY DISPUTE.

Ejectment is the proper remedy to determine a disputed title depending on the true boundary line between adjacent properties.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 12-15; Dec. Dig. § 7.\*]

2. TRIAL (§ 11\*)—TRANSFER FROM EQUITY TO LAW SIDE—BOUNDARY DISPUTE.

Where the bill in a suit to enjoin defendant from mining coal under plaintiff's land stated that plaintiff leased to defendant certain coal lands, and that, in settlement of a dispute as to the proper boundary line, a line was agreed on and recognized for many years by defendant, but that he recently threatened to disregard same, and where the answer denied the court's jurisdiction, averred possession by defendant, and set up matters of defense which raised questions of fact for a jury, the case was properly certified to the law side.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 28-30; Dec. Dig. § 11.\*]

Appeal from Court of Common Pleas, Columbia County.

Bill by the Lehigh Valley Coal Company to enjoin the Midvalley Coal Company from mining coal under plaintiff's land. From a decree dissolving a preliminary injunction and certifying the cause to the law side, plaintiff appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, STEWART, and MOSCHZISKER, JJ.

Fred Ikeler, of Bloomsburg, and F. W. Wheaton and P. F. O'Neill, both of Wilkes-barre, for appellant. A. W. Duy, of Bloomsburg, and George M. Roads, of Pottsville, for appellee.

MESTREZAT, J. [1, 2] This is an appeal from the order of the court below, sitting in equity, certifying the case to the law side of the court under the act of June 7, 1907 (P. L. 440). The bill avers, inter alia, the plaintiff's ownership in fee of certain lands in Columbia county, containing valuable deposits of coal; that the defendant, an adjoining owner of coal land, has, in disregard of the plaintiff's right, threatened to enter upon plaintiff's land to mine and remove the coal; that the defendant is engaged in driving an underground passageway that is directed towards and is intended to penetrate the deposit of coal; and that the plaintiff will suffer irreparable injury if the defendant is not restrained from committing

the threatened trespass. The bill prays that the defendant be restrained from entering or trespassing upon the plaintiff's land. The defendant filed an answer denying the material allegations of the bill, and averring that the court is without jurisdiction to entertain the bill, because it is an ejectment bill; that the defendant owns in fee the coal which the plaintiff seeks to restrain the defendant from mining and removing, and is in possession of the same and has been continuously since 1890. A preliminary injunction was granted which was subsequently dissolved by the court, and on motion of defendant's counsel the case was certified to the law side of the court. This is the error complained of on this appeal.

The learned court was clearly right in certifying the case to the common pleas. It appears from the bill that the plaintiff company leased to the defendant company certain coal lands in Columbia county, that there was a dispute as to the proper line between the leased lands and other lands of the plaintiff, and that there was an attempt by the parties to agree upon a consentable line. The bill avers that the line was agreed upon, was for many years recognized by the defendant company, but that recently the defendant threatened to disregard the line and enter upon and mine coal beyond the line and on the plaintiff's premises. Conceding its averments to be true, the bill discloses a disagreement as to the line between the properties of the two parties and the intention of the defendant to trespass upon the plaintiff's premises. If the defendant does enter upon the disputed premises and begins to mine the coal, the remedy for the infringement of the plaintiff's rights is an action of trespass, or, if the defendant is in possession, an action of ejectment. Either remedy will give the plaintiff adequate relief. If the plaintiff company desire to secure itself against loss by reason of the defendant's mining operations, an estoppelment will lie whether the action be trespass or ejectment. That writ will protect the plaintiff until the action to determine its rights is finally adjudicated. There are no averments in the bill which would justify a court of equity assuming jurisdiction in the case.

If, however, we turn to the answer we see far less reason for a court of equity adjudicating the question at issue and depriving the defendant of a trial by jury. It denies the jurisdiction of the court, avers possession of the premises in the defendant, and sets up other matters of defense which raise questions of fact for a jury. The controlling question here, as appears by the bill, is one of title to the disputed premises, which, of course, should be settled on the law side of the court. It is claimed and strenuously urged by the plaintiff that the question of title must be determined by the interpretation of the agreement between the parties

fixing the consentable line, and that therefore a judge sitting in a court of equity can determine it as well as if he were sitting in a court of law. This overlooks the vital proposition that the jurisdiction of the court does not depend upon the duties of the judge presiding at the trial. Ejectment is the established action for the trial of disputed titles in this state, and, with very few exceptions, a plaintiff is compelled to assert his title to real estate in that form of action. The judge presiding at the trial may, as the facts require, nonsuit the plaintiff, direct a verdict for either party, or submit the case to the jury. The ruling of the judge may depend solely upon his interpretation of a written instrument, but whether it does or not will depend upon other matters which cannot be anticipated, and which are not sufficient to deprive the law side of the court of jurisdiction to determine the rights of the parties to the land in dispute. Here, however, the parties not only disagree as to the construction of the contract establishing the consentable line, but the defendant company alleges that the contract to the extent that it purports to have altered the company's mining rights, under its lease of July 1, 1889, is either put to a fraudulent use, or the words it contains limiting the company's mining rights were introduced in the contract at the time of its execution by fraud, accident, or mistake. The answer also avers that the defendant is, and has continuously been since 1890, in possession of the premises. The question, therefore, at issue between the parties is one of disputed title, and depends upon the true boundary line between the adjacent properties of the two parties. The defendant not only challenges the plaintiff's interpretation of the agreement establishing the consentable line, but also attacks the validity of the agreement itself, which necessarily depends upon facts dehors the instrument. The rights of the parties, therefore, require that they be determined in an action of ejectment on the law side of the court.

The order certifying the case is affirmed.

(244 Pa. 427)

PORTER et al. v. HEALY et al.  
(Supreme Court of Pennsylvania. March 16, 1914.)

1. CORPORATIONS (§ 314\*) — STOCKHOLDERS — SECRET AGREEMENT OF DIRECTORS — MONEY RECEIVED FOR BENEFIT OF STOCKHOLDERS.

A corporation's directors, owning more than one-half its stock, accepted an offer to buy all the corporate stock at \$165 per share, a deposit, to be applied on the purchase price, was made with a surety company, and a letter was sent by the purchaser, with consent of the directors, to all stockholders, advising them that a sufficient deposit had been made to purchase all the outstanding stock at such price. When the deposit was made, the purchaser agreed to pay a further sum directly to the directors, under a secret agreement, which was not known to outside stockholders until they had parted

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Kay-No. Series & Rep'r Indexes

with their stock. Such further sum, pursuant to agreement, was not paid over until new directors were elected, giving the purchaser control of the corporation. *Held*, that such further sum was held by the directors in trust for all the stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1393-1398, 1400; Dec. Dig. § 314.\*]

**2. CORPORATIONS (§ 314\*)—DUTY OF DIRECTORS—ADVANCEMENT OF INDIVIDUAL INTERESTS.**

The directors of a corporation should not use their position to advance their individual interests, as distinguished from the interests which they represent.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1393-1398, 1400; Dec. Dig. § 314.\*]

**3. CORPORATIONS (§ 314\*)—DUTY OF DIRECTORS—ADVANCEMENT OF INDIVIDUAL INTERESTS.**

While a director of a corporation may sell his stock and keep any profits so acquired, he cannot, in combination with others, even by means which if standing alone would be lawful, take advantage of his official position for his individual profit, to the detriment of other stockholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1393-1398, 1400; Dec. Dig. § 314.\*]

**4. CORPORATIONS (§ 314\*)—DUTY OF DIRECTORS—ADVANCEMENT OF INDIVIDUAL INTERESTS—SALE OF STOCK.**

While majority stockholders, who are also directors, may, in selling their stock, obtain a higher price than do the minority stockholders, because they hold a controlling interest and may incidentally resign their positions as directors, they cannot include the sale of their position, with the influence flowing therefrom, as part of the consideration for the transfer of their stock at such higher price.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1393-1398, 1400; Dec. Dig. § 314.\*]

**5. CORPORATIONS (§ 314\*)—DUTY OF DIRECTORS—ADVANCEMENT OF INDIVIDUAL INTEREST—SALE OF STOCK—ACCOUNTING.**

Where directors of a corporation improperly use their position to secure higher prices for their stock than other stockholders can obtain, they will be required in equity to account to such stockholders for the sums thus unlawfully acquired.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1393-1398, 1400; Dec. Dig. § 314.\*]

**6. CORPORATIONS (§ 319\*)—SUIT BY STOCKHOLDERS AGAINST DIRECTORS—RIGHT TO MAINTAIN.**

That a stockholder has parted with his stock does not deprive him of his right to sue, in equity for an accounting, directors who have unlawfully taken advantage of their position to his detriment.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1415, 1416-1425; Dec. Dig. § 319.\*]

Appeal from Court of Common Pleas, Montgomery County.

Bill by J. Elmer Porter and others against J. Allen Healy and others, for discovery and accounting. From decree for plaintiffs, defendants appeal. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Frank P. Prichard and John G. Johnson, both of Philadelphia, and Montgomery Evans, of Norristown, for appellants. William W. Porter, of Philadelphia, and Henry Freedley and Henry M. Brownback, both of Norristown, for appellees.

MOSCHZISKER, J. This was a bill for discovery and to compel the defendants to account for and pay over to the plaintiffs their respective proportions of a sum of money alleged to be an illicit gain acquired by them "in the course of the transfer of the stock of the Pottstown Light, Heat & Power Co." The concern in question was a Pennsylvania corporation, and its capital stock consisted of 700 shares; the plaintiffs were minority stockholders, while the defendants owned in their own names 183 shares, and directly influenced about 200 more belonging to their relations—they were officers and directors of the company and had managed its affairs for many years—one of them being president and all of them together constituting a majority of the board. A purchaser appeared who desired the entire stock of the company, so as to own and possess its property and franchises; he was willing to expend \$202,330 for that purpose. While negotiations were pending, the defendants secured such control of about 100 additional shares that they could safely contract for their transfer, together with the other stock at their command, at \$165 per share. With matters in this condition, a bargain was struck, evidenced by a letter from the purchaser to the Security Company of Pottstown, of which one of the defendants was president, wherein it is stated that \$115,500 deposited with that company was "to be applied to the purchase of 700 shares of the capital stock of the Pottstown Light, Heat & Power Co., at the rate of \$165 per share," that at least 484 shares were to be delivered forthwith at that price, and "as many additional shares from day to day" as might be deposited by shareholders up to the 18th day of March, 1910, at which time the recipient was to return any unused balance of the fund, and, further, that the four defendants named in this suit were to sign and forward to all shareholders whose stock had not been delivered, "a letter," advising them that there was deposited with the security company a "sum sufficient to purchase all the said outstanding stock at \$165 per share." The defendants did not send out this letter; but the purchaser had one prepared and mailed to the stockholders, over the names of the defendants and others, including the security company, in which it was stated that the individual signers, constituting a "majority of the capital stock," had sold their holdings "at \$165" per share, "upon the understanding that all stockholders should have the same privilege," and that \$115,500

was on deposit with the security company to take up the stock at that price. The exact contents of this communication were not made known to the defendants at the time, and there was no proof that more than one of them had knowledge that it had been issued, until long subsequent. The letter had the desired effect, and almost every one accepted the \$165 per share, although 48 shares, owned by two of the plaintiffs, were not turned in until the merger of the company with another corporation, under the act of May 29, 1901 (P. L. 349), which occurred shortly afterwards, when they accepted the same price for their stock. At the time of the deposit of \$115,500, a further sum of \$86,830 was paid directly to the defendants, under a secret arrangement, not known to the plaintiffs until they and all other outside shareholders had parted with their stock; in fact, the amount of this fund with the details concerning its payment were not fully disclosed until the hearing on the bill. It appears that this money was not divided by the defendants in accordance with the shares of stock owned by them, but that one took \$40,740 for himself, without making any division with those whose stock he controlled, two took \$41,090, which they divided with the stockholder members of their family, and the remaining defendant received \$5,000. It further appears that the purchaser would not pay the \$86,830 until actual control of the organization of the corporation was duly passed to him, and that, to secure this, he had the transfer of stock put in escrow until a meeting of the directors was convened. At this meeting the defendants tendered their resignations, and had them duly acted upon in turn, as each retired, a successor designated by the purchaser being elected in his place, after which, and not before, the "control fund" was turned over.

Equity jurisdiction has not been questioned, and the defendants did not attempt to avail themselves of the act of June 7, 1907 (P. L. 440). The chancellor, who heard the testimony, made many findings of fact which, according to the view we take of the case, are of no particular importance to this opinion.

[1] In the first place, we do not give controlling weight to the written communication sent out by the purchaser; while upon this subject, however, we stop to observe that, although in some particulars this circular may have gone beyond the letter which the defendants agreed to sign, yet the names it contained were given to the purchaser by them for use in a communication to be sent to the shareholders, and the letter in question was in practical accord with the impression meant to be created by the defendants, i. e., that the deposit of \$115,500 represented the entire price to be paid for all the stock of the Light, Heat & Power Com-

pany, and that each and every stockholder was to receive but \$165 per share; moreover, in this transaction the defendants and the purchaser—

"were associates in common in the enterprise, each bound by the knowledge and actions of the other." *Commonwealth Title Ins. & Trust Co. v. Seltzer*, 227 Pa. 410, 414, 76 Atl. 77, 78 (136 Am. St. Rep. 896).

But the chancellor did find the important fact, that the \$86,830 fund was not so much a part of the price paid for the stock owned or controlled by the defendants as a secret consideration paid to them for the purpose of gaining immediate control of the organization of their corporation. Upon this subject, the court below states:

"While the control held by the defendants in their official capacity \* \* \* was not the sole consideration, \* \* \* it did constitute a strong inducement to bring about the sale and pay the large price agreed upon: it is also true that, so far as the purchasers were concerned, \* \* \* they put up the sum of \$202,230 to acquire all that the company had; \* \* \* the division of the money into parts, \$115,500 and \$86,830, was the act of the defendants, and immaterial to the purchaser. \* \* \* The defendants did use their official positions to obtain the actual possession of this sum of \$86,830. \* \* \* Upon the day of the settlement the defendants resigned their positions as directors and aided the purchasers to substitute their nominees to fill these vacancies; the money going to the defendants under the contract (the \$86,830) was held up until these acts were consummated, and there was no demurrer on the part of the defendants—they treated the acts as part of the contract. \* \* \* The defendants, a majority of the directors, did not act with the utmost good faith toward the shareholders of the company—they used their positions and influence to advance their individual interests \* \* \* to the disadvantage of the plaintiffs and other shareholders. \* \* \* If the defendants had sold their shares at \$290 (the approximate proportion which each share bore to the entire sum paid by the purchasers), the vendees would then hold a majority of the stock, and the control at any stockholders' meeting would vest in them as an incident to their purchase. But the defendants sold this control as their individual estate and received a special compensation for it. \* \* \* The 'bonus' was paid to them in part for this control of the board, and the defendants delivered the consideration forthwith. \* \* \* The resignations did not follow as a consequence of the sale of their stocks, but as a means and requirement to secure the 'control fund.' \* \* \* The resignations antedated the parting with their stocks; \* \* \* this may not have been a condition demanded by the contract of sale as originally framed, but the purchaser saw fit to impose it with the approval of the defendants. The 'control fund' was in sight, and the additional requirement from the defendant was accepted."

After a careful review of all the evidence, we cannot say that the learned chancellor had no proofs sufficient to sustain these findings.

The court below found in effect that the defendants had capitalized and made an illicit sale of their influence and positions as directors of the Light, Heat & Power Company, and that the \$86,830 was paid and accepted by them, at least in part, as a consideration for so doing; but the appellants

contend that the plaintiffs did not draw their bill on that theory, and that the pleadings presented no such issue. In considering this contention it is to be noted that the defendants not only admitted in their testimony that the "control fund" was separate and apart from the price received for their stock, but the answer filed by them, in speaking of the sale of their holdings, expressly avers:

"The price fixed for the stock itself was \$185 per share, \* \* \* and the additional compensation that we were to receive for parting with our control was an entirely private business matter. \* \* \* In the sale of our stock, and in all that we did in connection therewith, we acted solely as individual owners, \* \* \* and never did any act in connection therewith as directors."

The defendants thus treated the bill as raising an issue concerning their conduct as directors and the effect thereof; moreover, when the court found against them on that issue, they applied for a further hearing so that they might introduce other evidence relative thereto, and neither at the time of this application, at any of the hearings, nor in their exceptions filed below, did they expressly make the objection that the averments of the bill failed to raise the issue in question; finally, none of the present assignments of error expressly makes that point. But, nevertheless, the appellants now argue that no such issue was before the court, and hence that the decree cannot properly be supported upon that ground. As to this, it is sufficient to say that, under the circumstances, even though the bill may not in express words aver that the acts of the defendants constituted official misconduct, yet, in our opinion, its averments of fact are sufficient to sustain a decree upon that ground.

In determining that the defendants would have to pay to each of the plaintiffs a share of the \$86,830 proportionate to their respective holdings of stock, the chancellor proceeded on the theory that a majority of the directors of the corporation cannot "barter their offices for individual gain," particularly when they act in a manner calculated to mislead and deceive others into parting with their stock at a price fixed upon by the purchaser and such directors, and when if it had not been for their illegal conduct each of the shareholders would, in all probability, have received out of the money so illicitly gained, an increased price for his stock equal to the amount awarded to him. After referring to the authorities, the court below states:

"Our attention had not been called to any case where \* \* \* the majority directors, who were majority stockholders, sold the control of the company and the resignation of their offices, for a specific sum independent of the money received for their shares of stock. \* \* \* The authorities that seemingly countenance a resignation by majority directors as part consideration for their sale of stock are careful to say that such contracts are carefully scrutinized by the courts. They must be entirely free of

any bad faith to the shareholders; and, as already shown, the defendants cannot meet this test."

We likewise have examined all the authorities cited, and find none that rules this case; but we feel that the court below applied correct and appropriate legal principles in reaching its final conclusion that the defendants were liable to the plaintiffs in accordance with the decree entered.

[2, 3] The principle is well established that those in control of the management of a corporation are under an inherent obligation not in any manner to use their positions to advance their individual interests as distinguished from the interests they represent, and in Pennsylvania we have ruled that "a director of a corporation is a trustee for the entire body of stockholders"; it is likewise settled in this state that, though one who is a director may sell his stock and keep any profits so acquired, yet, under the guise of this rule, he cannot, in combination with others, even by means which if standing alone would be lawful in themselves, take advantage of his official position for his individual profit to the detriment of his corporation or its other stockholders. *Bird Coal & Iron Co. v. Humes*, 157 Pa. 278, 287, 27 Atl. 750, 37 Am. St. Rep. 727; *Com. Title Ins. & Trust Co. v. Seltzer*, 227 Pa. 410, 76 Atl. 77, 136 Am. St. Rep. 896.

[4] If the present case were merely an instance where majority stockholders disposed of their stock and honestly took advantage of the fact that they held a controlling interest in order to gain a higher price than the minority holders were subsequently able to secure, and who at the same time incidentally resigned their places as directors, then of course the complainants would not have a good cause of action. But, as already stated, the court below found that such was not the case; hence most of the appellants' argument has no application.

[5] In the last analysis, there is really only one substantial question for our consideration, and that is, Was the chancellor justified in concluding that the defendants intended to, and in fact did, include the sale of their positions, with the influence flowing therefrom, as part of the consideration delivered by them in return for "the control fund" of \$86,830? On this important point, after a review of all the proofs, we do not feel that the inferences drawn by the chancellor who heard the testimony are unreasonable or his conclusion unwarranted; therefore we accept the facts embraced in that conclusion as properly established, and, with these found against the defendant, the law of the case is clear and requires no long citation of authorities. By force of existing conditions, the corporate form is rapidly becoming the accepted method of conducting business, and much of the wealth and savings of the people is invested in such enterprises. When the individual investor places his contribution of

capital in a concern of this character, of necessity he must trust to the integrity of its directors, and he may do so with the knowledge that the law requires a high degree of honesty on their part, not only toward the corporation itself, as a separate entity, but toward its shareholders, and that, in so far as those in control owe a duty to the latter, they must observe good faith to the whole body of stockholders, and may not act with any separate group or clique in order to serve their own personal interests. Although the stock of one who is a director of a corporation is his individual property, to be dealt with as he pleases, and to be sold for such a price as he may be able to get for it, either in association with others or alone, yet, his official position is not his individual property in any sense, and he has no right, either directly or indirectly, to use it for his own selfish ends; when he does so, and thereby derives a gain that can be reasonably traced to such an abuse, all money thus made belongs either to the corporation, or, in a case like the present, in common to its shareholders; furthermore, when alleged misconduct of the managers of a corporation is under investigation, as recently said by this court in the Tenth National Bank v. Smith Construction Co., 242 Pa. 269, page 287, 89 Atl. 76, page 82:

"The law has ceased to look at the mere form of the device employed; it now pierces through the surface and seizes upon the evils which lie within."

These general rules work no hardship to any one; they simply mean that those intrusted with the management of a corporation must be above board, fair and honest with its stockholders in all matters concerning the common enterprise or its control, and that one so situated will not be permitted "to derive any personal profit or advantage by reason of his position, distinct from his coshareholders." All of which is in accord with the law as we defined it in *Bird Coal & Iron Co. v. Humes*, 157 Pa. 278, 287, 27 Atl. 750, 37 Am. St. Rep. 727, and the general principles stated in the text-books there cited. See 1 *Potter on Corporations*, §§ 324, 328, 330; 1 *Morawetz on Corporations*, §§ 515, 516, 518, 519. Further, see 10 Cyc. 787, 788, 791, 801, 825. We are not inclined to pare down or limit the application of these wholesome principles, nor are we convinced that they do not fit the present case.

[8] Aside from the matters which we have already discussed, it is contended by the ap-

pellants that there can be no legal recovery by the present plaintiffs in their individual right, and that, even if under some circumstances such a recovery would be allowed, yet all of the claimants in this particular case are barred because they parted with their stock before instituting suit. In discussing the first branch of this contention, the chancellor states:

"If directors are guilty of a breach of trust, injuries \* \* \* to the rights of the shareholders, or a portion of them, may be redressed at the suit of the injured stockholders; the rule is founded in part upon the consideration that directors are trustees for the stockholders, and that in any action to redress breaches of trust on the part of directors toward stockholders, the shareholders are the real parties in interest"—citing 10 Cyc. 965, and *Com. Title Ins. & Trust Co. v. Seltzer*, 227 Pa. 410, 76 Atl. 77, 136 Am. St. Rep. 896.

These views are substantially correct and applicable to this case; here the injury averred was not to the company but to the individual plaintiffs, and the corporation by merger and cancellation of its stock had, in practical effect, ceased to exist before the bill was filed. In view of these facts, we feel that the court below did not err in holding that the plaintiffs had a right to institute and maintain their action. On the next phase of the contention now before us, it appears that the bill was originally brought by two stockholders who had accepted the price offered by those in charge of the merger (\$165 per share), and by two others who had sold their stock at the same price to the original purchaser, and that additional stockholders who in like manner had parted with their shares subsequently intervened. But the fact that none of the plaintiffs was an actual shareholder at the time the bill was filed would not bar the action; for the chancellor found that the plaintiffs all parted with their shares in one general transaction, in which they were kept in ignorance of the true state of facts and induced to sever their association with the corporation by the sale of their stock at a price fixed upon by the defendants in working out the latter's secret scheme to get possession of the so-called "control fund." This being so, a result of the illegal acts complained of, i. e., the fact that the plaintiffs do not now hold their stock, cannot be pleaded as a bar to their recovery in equity.

The assignments of error are overruled, and the judgment is affirmed, at the cost of the appellants.



(112 Me. 557)

**KALIAMOTES v. WARDWELL.**

(Supreme Judicial Court of Maine. July 24, 1914.)

**NEW TRIAL (§ 70\*)—SUFFICIENCY OF EVIDENCE.**

A verdict sustained by evidence will not be disturbed by the Supreme Court on motion for a new trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 142, 143; Dec. Dig. § 70.\*]

On Motion from Supreme Judicial Court, Androscoggin County, at Law.

Action by George Kalliamotes against S. P. Wardwell. There was a verdict for plaintiff, and defendant moves for a new trial. Overruled.

See, also, 111 Me. 401, 89 Atl. 313.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

McGillcuddy & Morey, of Lewiston, for plaintiff. Tileston E. Woodside, of Lewiston, for defendant.

**PER CURIAM.** This case has been twice tried. The verdict rendered in the earlier trial was set aside upon defendant's exceptions. Both verdicts for the plaintiff are substantially the same. A careful reading of the testimony presented in the record of the second trial shows, we think, sufficient evidence to sustain the verdict and to negative the presence of bias, prejudice, or improper motive upon the part of the jury. This court is compelled to overrule the motion for a new trial.

Motion overruled.

(112 Me. 558)

**COOLIDGE v. SMITH.**

(Supreme Judicial Court of Maine. June 24, 1914.)

**NEW TRIAL (§ 102\*)—GROUNDS—NEWLY DISCOVERED EVIDENCE.**

A new trial on the ground of newly discovered evidence will be denied, where the evidence was known to the party, or, by the use of due diligence, might have become known at the trial.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. §§ 207, 210-214; Dec. Dig. § 102.\*]

Action by Henry E. Coolidge, administrator of William C. Coombs, deceased, against Reuel Smith, administrator of Marcia G. Coombs. There was a verdict for defendant, and plaintiff moves for a new trial for insufficiency of the evidence, and for newly discovered evidence. Overruled.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Oakes, Pulsifer & Ludden, of Auburn, for plaintiff. Ralph W. Crockett, of Lewiston, for defendant.

**PER CURIAM.** This is an action of trover to recover the value of certain personal prop-

erty which plaintiff claims belonged to the estate of William C. Coombs and which defendant claims belongs to the estate of Marcia G. Coombs. The jury, upon all the evidence, found in favor of the defendant, and we cannot say that the verdict was so manifestly wrong as to warrant us in setting it aside and ordering a new trial. But the plaintiff urges that, by reason of evidence not in his possession at the time of the trial, and which could not have been obtained by reasonable diligence, and discovered since the trial, he is entitled to again submit this cause to the jury.

It is well-settled law in this state that a party will not be granted a new trial on account of newly discovered testimony when such testimony was known to him, or, by the use of due diligence, might have become known to him. At the trial a witness for the defense was being cross-examined by plaintiff's attorney, and was asked if the horse in question was not purchased of a man by the name of Small, one of the witnesses who is now called to give newly discovered evidence, and was told that such was the fact. Clearly the plaintiff knew of the existence of this witness, and before the trial could have discovered what he would have testified to. As to the other testimony claimed to be newly discovered, we are of opinion that by due diligence the plaintiff might have discovered it.

Both motions overruled.

(83 N. J. Eq. 589)

**BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY v. DELAWARE, L. & W. R. CO. et al.**

(Court of Chancery of New Jersey. June 29, 1914.)

**1. RAILROADS (§ 98\*)—HIGHWAY CROSSINGS—ACTIONS—JUDGMENT—CONFORMITY TO PLEADINGS.**

In a suit to restrain a railroad company from laying a track across a much-traveled highway in addition to two tracks already laid and in operation, where no relief was asked against the existing tracks, an injunction would be denied, though travel on the highway was impeded by the existing tracks contrary to the charter of the railroad company's lessor (Act Jan. 29, 1835 [P. L. p. 25]) and General Railroad Act (3 Comp. St. 1910, p. 4231) § 26, unless the additional track would further impede such travel.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 291, 292, 296; Dec. Dig. § 98.\*]

**2. RAILROADS (§ 98\*)—HIGHWAY CROSSINGS—ACTIONS—WEIGHT AND SUFFICIENCY OF EVIDENCE.**

In a suit to enjoin the laying of an additional railroad track across a much-traveled highway across which defendant was operating two tracks upon which about 250 trains passed every 24 hours, evidence held to show that the additional track would not increase the dangers of the crossing or add to the congestion of traffic thereat, but that, on the contrary, it would relieve such congestion.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 291, 292, 296; Dec. Dig. § 98.\*]

### 3. RAILROADS (§ 98\*)—HIGHWAY CROSSINGS —ACTIONS—JUDGMENT.

In a suit to enjoin a railroad company from laying an additional track across a much-traveled highway, or, in the alternative, for a decree fixing the mode and manner of the construction and laying of such track for the proper protection and safety of travelers, where there was no prayer for relief with respect to the existing tracks, and it appeared that it was not feasible to elevate or depress the additional track or carry the highway across it alone, and it appeared that the company was employing safeguards at the crossing conforming to the best modern requirements which were not criticized in any manner, and that it proposed to install the same safeguards with respect to the additional track, no relief could be granted under the alternative prayer.

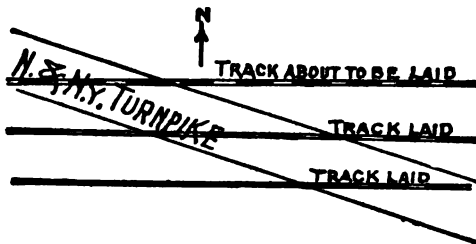
[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 291, 292, 296; Dec. Dig. § 98.\*]

Suit by the Board of Chosen Freeholders of the County of Hudson against the Delaware, Lackawanna & Western Railroad Company and others. Decree for defendants.

James J. Murphy, of Jersey City, for complainant. W. R. Crosson, of Newark, for defendants.

GRIFFIN, V. C. The defendant Delaware, Lackawanna & Western Railroad Company (hereinafter called the Lackawanna) is the lessee of the defendant Morris & Essex Railroad Company (hereinafter referred to as Morris & Essex) and in possession of a steam railroad operated from the city of Hoboken, Hudson county, in a general westerly and northerly direction across the counties of Hudson, Essex, and other counties of this state, and heretofore laid at grade two tracks across a road owned and maintained by the complainant known as Newark and New York turnpike, which point of crossing is called "Sanford's Crossing," and at the time of filing the bill herein said Lackawanna was engaged in laying a third track at grade, parallel with those theretofore laid and to the north thereof, and had said track laid up to said Sanford's Crossing, and intended to lay the same across said turnpike at said crossing, when restrained by the decree of this court.

The right of way of the Lackawanna crosses the highway at quite an acute angle as appears by the following diagram:



It is agreed that the additional track will occupy 25 feet of the highway, measured along the center line thereof. A dispute, however, has arisen as to the space occupied

by the two existing tracks along said center line; the complainants say 76 feet; the Lackawanna says 66. I am inclined to the view that the Lackawanna is correct, measuring along the center line, but, as vehicles have width, the complainant seems to be correct, not as to the center line measurement, but the distance that the vehicle must travel before it is completely off the tracks.

On the foregoing facts the complainant, by leave of the court, filed its amended bill, praying that the defendants be restrained from laying the additional track.

[1] It will be perceived that this bill is not filed for relief against the existing tracks (as in the case of Mayor, etc., of Newark v. Central R. R. Co., 73 N. J. Eq. [3 Bush] 469, 67 Atl. 1009), but only against the laying of the additional track; therefore the court may not decree with respect to those tracks, but may examine into the amount of traffic thereon and over the highway, and if on such inquiry it ascertains that the conditions are such that the use now made of said crossing by the Lackawanna is such that the passage of carriages, horses, and cattle on said road are impeded thereby, contrary to the terms of section 9 of the charter of the Morris & Essex (P. L. 1835, p. 29) and General Railroad Act (3 Comp. Stat. p. 4231) § 26, and finds the further fact that the additional track when in use will further impede the passage aforesaid, it will then become the duty of the court to enjoin its laying, but, if it finds that the using of the additional track will not constitute an additional impediment or will decrease the same, the injunction should be denied.

[2] An examination of the facts shows that about 250 trains pass over this crossing every 24 hours on week days, about 220 of which are passenger trains running at a speed as high as 60 miles an hour, the remaining trains being freight, running at a very low speed, and during the same period about 1,300 vehicles of all kinds and a few foot passengers pass along this highway over the tracks; but the rights of the respective parties should not be determined by spreading the traffic equally over the 24 hours, as during some periods of the day the traffic is much greater than at others. Thus take three periods of one hour each, viz.: Between 8 and 9 a. m. 18 east-bound 7 west-bound passenger trains and 86 vehicles of all kinds pass over this crossing, or one train every 2 minutes and 24 seconds, and one vehicle about every 45 seconds; between 5 and 6 p. m. 4 east and 15 west bound passenger trains, about one every 3 minutes, and 103 vehicles, about one every 35 seconds; between 6 and 7 p. m. 7 east and 11 west bound and 4 freight trains, or one every 2 minutes and 45 seconds, and 99 vehicles, one every 37 seconds.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In addition to the periods between the passage of these trains, the traffic is further delayed by reason of the gates being necessarily lowered while approaching trains are a long distance from the crossing.

From the foregoing exposition of the traffic on the railroad and turnpike, considering that the railroad of necessity has the right of way, it would seem that the traffic over the turnpike is now impeded in the language of the charter and statute aforesaid, but, as above stated, the frame of the bill does not give the court power to deal with existing conditions, but only to inquire into them for the purpose of passing on the propriety of permitting the additional track to be laid. This leads to the question: Will the use of the additional track further impede traffic on the turnpike?

The complainant says that it has proved that the laying of the additional track will increase the hazard. The testimony upon which this claim is made is that of Mr. Wasser, the county engineer, whose testimony on the subject is, in effect, that the danger is increased by the traveling public being compelled to cross over 100 feet of railroad instead of 75, with the possibility of three trains being operated on the three tracks at or about the same time. If there was a long freight train on the track sought to be laid, and a vehicle was crossing the turnpike towards the east, this train would interfere with the vision of the traveler, particularly by reason of the acute angle at which the turnpike crosses the railroad. But this might also be said of a train on the west-bound track.

The testimony of the defendants' engineers is to the effect that the running of the freight trains on the third track would neither increase nor diminish the hazard, but would result in raising the gates oftener, and free the turnpike of protracted obstruction, because, by removing the freight traffic from the main line, it would leave the passenger trains free to travel on schedule. The situation from the railroad's view is about as follows: The Harrison freightyard lies to the north of the tracks, and is about  $2\frac{1}{2}$  miles west of the tunnel. The freight trains run from this Harrison freightyard across the west-bound track over on the east-bound track, and, when near the tunnel, curve in and upon the west-bound track, travel a short distance, and then lead off to Boonton. These freight trains travel at a very low rate of speed, and while they are on either track, or crossing the same, necessarily they block the traffic east and west, with the result that passenger trains both ways are held up until the way is clear, then passing over this turnpike crossing in such rapid succession that the gates are kept down during the passage of several trains, thus resulting in a congestion of traffic on the turnpike; whereas, the engineers of the defendant say that with the additional track laid

this freight traffic would be eliminated from the two present tracks, and, by reason of the fact that the passenger trains then could run at regular intervals without these obstructions, the gates would be up a greater number of minutes in the day than at the present time; and in this view I concur. Therefore, in so far as traffic is concerned, it would relieve the congestion both on the railroad and on the highway.

This, therefore, leaves open the question: Will the laying of this additional track increase the danger of crossing? In the case of Mayor, etc., of Newark v. Central Railroad Co. of N. J., *supra*, Vice Chancellor Stevens, in his opinion, said:

"The bill is filed, primarily, to enjoin the defendant company from laying down at grade over Plum Point lane crossing three tracks in addition to the three already there, and, secondarily, by mandatory injunction, to compel the railroad to cross Plum Point lane in some other manner than at grade."

Then, after stating that since the decision of the Chancellor in the case of Newark v. Erie Railroad Co., 72 N. J. Eq. 447, 68 Atl. 413, there can be no doubt that the Court of Chancery may compel railroad companies whose roads cross streets at grade, and whose charters contain provisions like those of the defendants', to elevate or depress their tracks, or the highways crossing them, he proceeds to deal with the situation presented at that crossing. From the statement of facts in the opinion it appeared that Plum Point lane crossed the existing tracks diagonally; that Brill's yard lay to the south of the track, and, under the conditions existing, trains from the Manufacturers' branch, which lay to the north of the tracks, entered on the main track and traveled along the same, over the lane, crossing the other tracks in the Brill's yard. By the plan proposed the trains, instead of entering into the existing tracks, would cross the same, cross Plum Point lane, and connect with the Manufacturers' branch. This made an additional crossing of the highway. It appeared that there passed over the existing tracks daily 100 passenger trains and 20 freight; the speed of the passenger trains being from 40 to 60 miles an hour. The company desired the northerly track for the purpose of switching freight intended for the Manufacturers' branch, instead of using one of the main tracks on which the swiftly running passenger trains were constantly passing.

The Vice Chancellor said:

"It seems to me that it would conduce to the safety of the traveling public if the tracks so used were laid. Its presence would not tend to increase or impede travel over the crossing. It would rather facilitate it."

The situation there presented is precisely the same as in the present case; and it is my view that if the company be permitted to lay this additional track it will reduce the duration of interruptions to travel over the highway, without in any manner increasing the danger to those using the highway.

The Vice Chancellor in the above-mentioned case then considered the laying of the two additional tracks south of the existing tracks, and, finding that they were to be used for freight purposes, and that the use for that purpose would not only, at times, tend to block Plum Point lane, but obscure the vision of the traveling public while these freight cars either were at rest or being drilled, he continued the injunction.

[3] In addition to the prayer for injunction, the bill contains a prayer in the alternative, as follows:

"Or, in case such tracks shall be laid across said turnpike, this court may by its decree fix the mode and manner of the construction and laying of such tracks, for the proper protection and safety of persons traveling over and along said turnpike."

It is conceded that this single track cannot be elevated nor depressed. It also appears that the highway cannot be carried across this single track; that the only feasible method is to carry it across all tracks. This relief cannot be afforded within the scope of the bill. Under the last-mentioned prayer the only relief the complainant may have is a definition of the safeguards to be used at the crossing. The defendant's witnesses describe the present methods of safeguarding this crossing, which seem to conform to the best modern requirements. The complainant does not in any manner criticize them, nor has it suggested other additional safeguards. The defendants say that they propose to install the same safeguards with respect to the additional track that now exists in connection with the other two.

In this view of the case there is no evidence upon which the complainant is entitled to relief on this latter prayer.

Having reached the conclusion that the laying of this additional track only is brought in question by this bill, and that its laying will not further impede traffic on the road, the conclusion naturally follows that the order to show cause, with the restraint therein, should be vacated, and a decree will be advised accordingly.

(88 Conn. 322)

# GEORGE S. CHATFIELD CO. v. CITY OF WATERBURY.

(Supreme Court of Errors of Connecticut. July 13, 1914.)

## 1. SCHOOLS AND SCHOOL DISTRICTS (§ 65\*)—BOARD OF EDUCATION — PURCHASE OF SCHOOL SITES—AUTHORITY.

Under Act June 21, 1895 (12 Sp. Laws, pp. 412, 413), empowering the district committee of the Center school district of Waterbury to select and purchase school sites when directed by the legal voters of the district, and Act June 20, 1899 (13 Sp. Laws, p. 498), making the territorial limits of the city of Waterbury to include those of the Center school district, and creating a board of education to have the care and management of the public schools of the district and all other powers of boards of

education, and providing that the board shall make an estimate of expenses to the board of aldermen, who may accept the estimates or change items therein, the board of education has alone power to select and purchase school sites, provided the board of aldermen has provided funds therefor.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. §§ 162-167; Dec. Dig. § 65.\*]

## 2. MUNICIPAL CORPORATIONS (§ 892\*) — APPROPRIATIONS—OBJECTS.

Appropriations of municipal funds, whether general or special, for a definite purpose cannot be diverted to any other purpose.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1874, 1875; Dec. Dig. § 892.\*]

## 3. SCHOOLS AND SCHOOL DISTRICTS (§ 93\*) — PURCHASE OF SCHOOL SITES — POWER OF BOARD OF EDUCATION—STATUTORY PROVISIONS.

Under Act June 21, 1895 (12 Sp. Laws, pp. 412, 413), empowering the district committee of the Center school district of Waterbury to select and purchase school sites when directed by the legal voters, and Act June 20, 1899 (13 Sp. Laws, p. 498), creating a board of education for the city of Waterbury, with control over the public schools, the board of education, having asked and obtained from the board of aldermen an appropriation for a school site and the erection of a school building thereon, may not, after the purchase and the erection of the building, use any part of the unexpended appropriation for the purchase of land, but the unexpended appropriation must, as required by the charter, be covered back into the treasury.

[Ed. Note.—For other cases, see Schools and School Districts, Cent. Dig. § 216; Dec. Dig. § 93.\*]

Appeal from Superior Court, New Haven County; Milton A. Shumway, Judge.

Action by the George S. Chatfield Company against the City of Waterbury to recover the price of real estate alleged to have been sold by plaintiff to defendant. There was a judgment for plaintiff, and defendant appeals. Reversed and remanded, with direction to enter judgment for defendant.

Francis P. Gullfole, of Waterbury, for appellant. Nathaniel R. Bronson, of Waterbury, for appellee.

WHEELER, J. The board of education of the city of Waterbury duly submitted to the board of finance its estimate for general and special expenses for the year 1912, and requested a special appropriation of \$60,000 for "new Locust street school, twelve rooms." This location is in that section of the city known as the "North End." The board of finance included in its estimate of expenses submitted to the board of aldermen an item for "New School and Land, North End, \$50,000." The board of aldermen made the following appropriation: "No. 56, New School and Land, North End, \$40,000." No other appropriation was made by the board of aldermen for the year 1912 for the special expense for new school and land in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"North End." Thereafter, in July, 1912, the board of education purchased a school site on Hill street, located in the "North End," and later caused plans for a four-room school to be prepared and the same built upon this site at a total cost of \$22,000, including additional land purchased October 14, 1912, and added to this site, and paid for the site and school building from the special appropriation of \$40,000, leaving an unexpended balance of \$18,000. The board, in August, voted to purchase the Griggs lot on Division street for a school, but later rescinded its vote. In the next year the board purchased this site, and it was paid for out of a special appropriation for that purpose made in 1913. It was located in the North End section. In September, 1912, the plaintiff offered its option on the Chatfield site, so called, located on Division street opposite the Griggs site, and in the "North End" section. In the same month the board voted to accept the option and purchased this site for a school site. The board thereupon procured a search of title of the premises, and the plaintiff executed a deed, the form of which was approved by the city attorney. The plaintiff then handed the deed to the clerk of the board of education, who received it and placed it in the board's safe, where it remains. Thereafter the board approved the deed and search and the plaintiff's bill for the purchase price. This bill was subsequently approved by the board of finance, and the city clerk drew his order, countersigned by the comptroller, on the treasurer of the city for the purchase price, \$9,000. It was then presented to the mayor for his countersignature; but he refused so to sign. The deed as delivered to the city required it to assume a mortgage of \$3,500 and a lien of \$35.02. The board of finance later rescinded its action approving this bill. The board of education has never taken possession of said site or assumed control over it. Except as recited, the board of aldermen did not make any special appropriation for the purchase of the Chatfield site, nor direct nor authorize its purchase, and the board of education never requested an appropriation for that purpose.

[1] One of the main grounds upon which the city resists payment of the plaintiff's bill is that the board of education is without power to select or purchase school sites, but that this power is vested in the city and its board of aldermen.

Under the special act of 1895 (12 Special Laws, pp. 412, 413) the district committee of the Center school district of Waterbury was given power to select and purchase school sites "whenever so directed by the legal voters of said Center school district," provided the cost thereof be within the amount appropriated therefor by the legal voters of the district.

The power of the committee to act was thus made dependent upon a previous direc-

tion of the legal voters of the district, and upon the existence of an appropriation made therefor.

Under a special act passed in 1899 (13 Special Laws, p. 498) the territorial limits of the city of Waterbury were made to include those of the Center school district.

A department of education was created under the control of a board of education to have the care and management of all the property and affairs of the Center school district. And the board of education was given "entire charge and direction of all the public schools of said district" and all other powers of "boards of education, school committees, and school visitors in this state." These broad powers were subject to the limitations of the act. It must submit to the board of finance a detailed estimate of its expenses for the next year. That board makes its own estimate of expenses of the several departments and submits these, together with a recommendation of such tax rate as it may deem necessary, to the board of aldermen. This board may accept these estimates or deduct or change any item and add new items by pursuing a defined course, and must make its appropriations upon the basis of its own estimates and lay a tax to meet such estimated expenses.

The act provides:

"After this act shall take effect no meeting of said Center school district shall be held for any purpose whatever."

By the legislative authority of this act the powers over, and the duties toward, the schools and school affairs of the district ceased and passed to the department of education of the city of Waterbury, subject to the limitations of the act itself. The powers and duties theretofore vested in the district, and its committee devolved upon the department of education under the control of the board of education. The power to select and purchase school sites is not in exact terms given the department of education or its board. It is significant of the legislative intent that it is not in terms given another municipal body. Such duties are peculiarly within the province of a board of education. It and it alone of all municipal bodies possesses a knowledge of present and future educational needs, and has the practical experience in the use of such knowledge.

The functions of a board of aldermen are primarily legislative. It cannot act in such matters with intelligence save through its committee or delegated agents, and its committee or agents are of temporary appointment, without the ripened judgment of years of specialized study and service in a single field, such as a permanent educational body may and should possess. Considerations of this character unquestionably moved the General Assembly to commit to the department of education so broad a sweep of powers.

The abolishment of the district and the

1,000 feet distant and the Turner buildings less than 200 feet distant. The committee's report showed that in reaching the amount of damages assessed in each case it deducted from the value of the entire farm as one entire parcel of land appropriated to a single use at the time of the taking the value of what remained after the portions had been appropriated by the applicant and in view of the new conditions created by the taking.

"In determining this figure the committee took into consideration the loss of the land taken, not only as land but as an integral part of the farm, and the consequent injury to the owner in the efficient working of his farm; and it also took into consideration the natural slope of the land toward the proposed reservoir and the loss in value due to the belief prevailing in the minds of the public, and therefore in the mind of an intending purchaser, that the presence of a large public reservoir for the storage of drinking water situated adjacent to and within the drainage of the remaining portion of the farm would lead to annoying restrictions in and supervision of the use of the farm by the water and health officials of the city of Meriden; and further the belief that the presence of the reservoir and the work done in its construction would create an unhealthful condition in the region for several years to come. The committee makes no attempt to decide whether such beliefs are well founded. It is sufficient to know that they exist and must therefore affect the salability of the property. The committee declined to accede to the request of counsel for the applicant that they ignore all such evidence."

The remonstrance to this report was upon the ground that there was no evidence before the committee upon which it could find that a belief prevailed in the minds of the public that the presence of the reservoir would lead to the annoying restrictions and supervision mentioned or that it would lead to unhealthful conditions. These allegations of the remonstrance were denied and decided against the applicant by the judge who heard the remonstrance. The remonstrance also alleged error on the part of the committee in refusing to accede to the applicant's request to ignore this evidence and in considering the beliefs of the public and intending purchasers that the presence of the reservoir would lead to the annoying restrictions and supervision mentioned and to an unhealthful condition for several years to come. The court overruled these claims. From these rulings and one allowing interest on the amount of the assessment in favor of Terrill from the date of the judgment this appeal is taken.

George D. Watrous, of New Haven, and Alfred B. Aubrey, of Meriden, for appellant. Henry Stoddard and Howard C. Webb, both of New Haven, for appellee Terrill. Frank D. Haines, of Middletown, and Edwin S. Pickett, of New Haven, for appellee Turner.

THAYER, J. (after stating the facts as above). [1] That the committee adopted the correct rule for assessing the damages to the respondents is not questioned on this appeal. The amounts which the respondents were entitled to recover was to be ascertain-

ed by comparing the values of the farms before the taking with the values of what was left after the taking in view of the new conditions created by the taking. *N. Y., N. H. & H. R. R. Co. v. New Haven*, 81 Conn. 581, 583, 71 Atl. 780; 2 *Lewis, Eminent Domain* (3d Ed.) § 686; *Johnson v. Boston*, 130 Mass. 452, 454; *Lincoln v. Commonwealth*, 164 Mass. 368, 376, 41 N. E. 489; *Penney v. Commonwealth*, 173 Mass. 507, 53 N. E. 865, 73 Am. St. Rep. 312.

[2, 3] The remonstrance raised both questions of law and questions of fact as grounds for asking the court to refuse to accept the report of the committee. Both related to the committee's action in considering the belief, which it found to exist in the public mind, that the presence of the reservoir would lead to annoying restrictions and supervision and to unhealthful conditions which affected the market value of the portion of the farms remaining to the respondents after a part had been taken by the appellant. The claim that there was no evidence that such a belief existed was removed from the case as a question of fact by the court's finding that there was such evidence. And the same is true as to the claim stated in the remonstrance that there was no evidence that unhealthful conditions were in fact likely to result. But this finding is important only as removing from the reach of this appeal any question upon that ground of remonstrance. It lays no foundation for the claim that the belief in reference to the unhealthful condition to result from the construction of the reservoir and its presence was well founded. The committee reported in clear terms that it made no attempt to decide whether these beliefs were well founded. It therefore did not consider the testimony which the court finds was before it tending to show that the presence of the reservoir and its construction would create unhealthy conditions in the locality. The committee says in the report that it is enough to know that the beliefs exist and must therefore affect the salability of the property. This report as to its ruling was made, undoubtedly, because the claim had been made before the committee that the beliefs, whether well founded or not, were enough to affect the salability of the respondent's remaining property, and, having adopted this view against the request of the applicant's counsel, it very properly (*Fox v. South Norwalk*, 85 Conn. 237, 239, 82 Atl. 642) stated the facts in its report so as to present the correctness of the ruling as a question of law to be decided by the superior court. That court having sustained the committee's ruling, this appeal brings the same question before us for decision.

The report does not show what the annoying restrictions were which the public believed would follow from the creation of a reservoir below the respondent's lands, and, as we have already observed, it shows that the

committee did not find that any unhealthy condition would be created by the construction and existence of the reservoir. There is nothing in the report to show that the public beliefs referred to were well founded and reasonable or that they were not entirely unfounded and unreasonable, children of the imagination bred of ignorance or prejudice. It is said in behalf of the respondents that the topographical situation of their lands is such that the entire drainage must be into the reservoir and that the logical sequence is that this will lead to annoying restrictions, limitations, and supervision of the properties by the officials of the appellant city, and that the statutes of the state place restrictions upon the respondent's free use of their lands after the reservoir shall be in use, and that from the situation disclosed it thus appears that the beliefs referred to were not speculative or fanciful, but were well founded.

It is also urged that the appellant made no attempt in the superior court to show that any substantial amount of damages was awarded for depreciation in the respondent's lands by reason of the existence of these beliefs or to have the report recommitted with directions to the committee to state therein the amount which was allowed for depreciation by reason thereof. Either party could have asked for a recommitment of the report for this purpose. As neither party did so, we must take the record as we find it. We cannot assume that the committee made the finding which it did for the purpose of raising a merely academical question for the superior court to decide. Unless it allowed substantial damages on this account, there was no occasion for this finding, and if it considered that the beliefs were well founded there was certainly no occasion for saying that no attempt was made to decide whether they were so and that it was enough to know that the beliefs existed.

It is apparent from the report that the committee held that the taking and use of a portion of the respondent's lands as a reservoir caused a damage to their remaining lands because their salability was injuriously affected by the belief in the minds of the public that this taking and use will impose annoying restrictions and unhealthful conditions upon the other lands, although such beliefs are false and unfounded. The only question before us is whether the superior court's action in overruling the remonstrance and sustaining this ruling of the committee was correct.

In *Cowper Essex v. Local Board for Acton*, 14 Appeal Cases, 153, 177, Lord MacNaghten uses this language:

"It is said that objection to a sewer farm comes from an unfounded apprehension of possible mischief. Does that matter? Call it what you will, ignorance, or prejudice, or fancy, the loss to the owner who may want to sell is not the less real. In such a case apprehension of mischief is damage itself. And the deprecia-

tion in value must be the measure of compensation if the owner is to be compensated fairly."

In the same case Lord Chancellor Halsbury in his opinion (page 159) says:

"I should hesitate very much to affirm the proposition that a belief in imaginary injury, though in fact an existing belief, and in fact affecting the marketable value of property, furnished any ground either for damages in an action or for compensation under the Lands Clauses Act."

The question, although discussed by counsel and referred to in the opinions in that case, does not seem to have been decided; it appearing that the jury had found that the land taken for a sewage farm did in fact injuriously affect and thus depreciate the value of the claimant's remaining land. The case, which is cited by both appellant and appellees, is interesting as indicating the views of distinguished members of the judiciary, but it is not decisive of the question before us.

We think that a depreciation in value of the respondent's remaining lands caused by an unfounded public belief is not a damage caused by the applicant's taking of the other lands under its charter. If the belief was not well founded, then the taking and use for reservoir purposes of the other lands will not in fact injure that which remains. What causes the damage to the latter is not the taking and use of the other lands, but the ignorance, prejudice, or folly of those who wrongly conceive and believe that it will cause them damage. Suppose the belief to be that, under section 2599 of the General Statutes (which is one of the statutes referred to by the respondent's counsel), the appellant's officers and agents have the power to restrict the use of the respondent's lands to forestry purposes and to prohibit their use for agricultural purposes and to prohibit the use of their dwellings for residential purposes. Such a belief would be wholly unfounded and easily proved to be so. A reference to the statute would show it to be false. If the rulings complained of are correct, the appellant may be compelled to pay for a depreciation in value caused by such belief and is remediless. It is not permitted to prove that the belief is unfounded. Or if proof is made that it is unfounded, that proof is not considered. That is immaterial. The fact of the belief exists, as the committee say, and that is enough. If witnesses upon the stand testified to their individual beliefs or opinions that these officers and agents had such powers under the statute, the appellant would be allowed to show that the belief was not well founded, but was ill-founded, and this would destroy the effect of their testimony. It cannot be permitted that, from such discredited witnesses, triers may find that such belief prevails in the mind of the public and make the appellant responsible for the results of such belief. Such damage is not a necessary, natural, or proximate result of the taking. Something like this appears to

have been done in the present case, for the court has found that there was evidence tending to show that unhealthy conditions would result from the presence of the reservoir in proximity to the respondent's land. Had this evidence satisfied the committee that such conditions would in fact result from that cause, it would presumably have found the fact and the resulting depreciation in the value of the respondent's lands from that cause. That would show a well-founded belief on the part of the witnesses and, if the belief was general in the public mind, a well-founded public belief. But it would be the fact that the reservoir really created the condition and not the private or public belief that it did which would entitle the respondents to damages.

[4] The charter of the city of Meriden under which these proceedings are had provides that the court may direct when and in what manner the damages shall be paid and that when they are paid the lands sought to be appropriated are and remain taken, etc. This gives no authority for a judgment for the amount of the award and for interest and the issuance of an execution for the enforcement of the judgment. The court therefore went beyond its powers in rendering judgment for the amount of the award and for interest and that an execution issue therefor. *New Milford Water Power Co. v. Watson*, 75 Conn. 237, 251, 52 Atl. 947, 53 Atl. 57; *Fox v. South Norwalk*, 85 Conn. 237, 82 Atl. 842.

There was error, and the judgment is reversed, and the case remanded for further proceedings according to law. The other Judges concurred.

(88 Conn. 471)

#### Appeal of CITY OF NORWALK.

(Supreme Court of Errors of Connecticut. July 17, 1914.)

#### 1. STREET RAILROADS (§ 31\*)—BRIDGES—APPORTIONMENT OF COST—PUBLIC UTILITIES COMMISSION—DECISION—REVIEW.

A city which was a party to a proceeding before the Public Utilities Commission for the apportionment between itself and a street railway company of the cost of constructing a bridge, for which it had let a contract, is entitled to appeal under Public Utilities Act (Acts 1911, c. 128, § 29), authorizing any city aggrieved by an order of the commission in any matter to which it was or ought to have been made a party to appeal to the superior court, as against the objection that it is not alleged that the city has or ever had any power to build the bridge.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 67, 68; Dec. Dig. § 31.\*]

#### 2. STREET RAILROADS (§ 31\*)—CONSTRUCTION OF BRIDGES—STATUTORY PROVISIONS—"RECONSTRUCTION."

Acts 1911, c. 207, providing that, when any highway bridge over which a street railway is operated shall become unsafe, the company shall pay the expense of reconstructing the bridge, but, if reconstruction or the construction of a new bridge is required for any other cause, the Public Utilities Commission may apportion the cost thereof between the municipality and the

railway company, provides for the reconstruction of a bridge adapted to changed conditions, though the reconstructed bridge is in one sense a new one, but in fact a substitute in point of highway traffic for the old one; the word "reconstruction," as distinguished from mere repair and strengthening, meaning rebuilding.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 67, 68; Dec. Dig. § 31.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6007, 6008.]

#### 3. STREET RAILROADS (§ 31\*)—CONSTRUCTION OF BRIDGES—APPORTIONMENT OF COST—PUBLIC UTILITIES COMMISSION—JURISDICTION.

Where a city and street railway company, which maintained a track over a bridge, disagreed as to the apportionment of the cost of erecting a new bridge, and as to the number of tracks and type of rail to be laid across the bridge, the Public Utilities Commission has authority, under Acts 1911, c. 207, to apportion the cost of the work on the theory of a disagreement between the company and the municipality as to the necessity of any repair or reconstruction, or as to the character of the repair or reconstruction, or as to the apportionment of the cost of repair or reconstruction.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 67, 68; Dec. Dig. § 31.\*]

#### 4. STREET RAILROADS (§ 31\*)—CONSTRUCTION OF BRIDGES—DECISION OF PUBLIC UTILITIES COMMISSION—REVIEW.

The superior court has jurisdiction to review the determination of the Public Service Commission made pursuant to Acts 1911, c. 207, as to what is an equitable portion of the expense of repairing, strengthening, or reconstructing a bridge to be borne by a street railway operating tracks over it.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 67, 68; Dec. Dig. § 31.\*]

#### 5. STREET RAILROADS (§ 31\*)—CONSTRUCTION OF BRIDGES—DECISION OF PUBLIC UTILITIES COMMISSION—REVIEW.

Under Public Utilities Act (Acts 1911, c. 128) § 31, providing that appeals shall be brought by complaint stating the reasons therefor, and the court shall hear the appeal, re-examine the question of the legality of the order appealed from, and the propriety and expediency thereof in so far as the court may have cognizance of the subject, and shall proceed in the same manner as on complaints for equitable relief, where an appeal is taken from an order of the Public Utilities Commission in the exercise of a purely executive function, the court can only inquire whether the commission has acted illegally or has exceeded or abused its power, but apportioning the expense of a bridge, under Acts 1911, c. 207, between a city and a street railway company, is the exercise of a quasi judicial function, and the superior court on appeal must re-examine not only the legality of the order but also its expediency and propriety.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 67, 68; Dec. Dig. § 31.\*]

#### 6. STREET RAILROADS (§ 31\*)—CONSTRUCTION OF BRIDGES—DECISION OF PUBLIC UTILITIES COMMISSION—REVIEW.

Neither the Public Utilities Commission nor the superior court, on appeal from its order, is bound by technical rules respecting the admissibility or relevancy of evidence, and, in proceedings for the apportionment of the cost of a bridge on which a street railway company maintains tracks, the commission and the court sit to receive aid in the formation of a personal judgment as to what is an equitable apportionment under the circumstances.

[Ed. Note.—For other cases, see *Street Railroads*, Cent. Dig. §§ 67, 68; Dec. Dig. § 31.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**7. STREET RAILROADS (§ 81\*)—CONSTRUCTION OF BRIDGES—APPORTIONMENT OF COST—PUBLIC UTILITIES COMMISSION—APPEAL—REASONS OF APPEAL.**

The reasons of appeal from an order of the Public Utilities Commission under Acts 1911, c. 207, apportioning the cost of a bridge, which question the equity of the apportionment, are sufficient to require the superior court to re-examine the propriety of the order of the commission.

[Ed. Nota.—For other cases, see Street Railroads, Cent. Dig. §§ 67, 68; Dec. Dig. § 81.\*]

Appeal from Superior Court, Fairfield County; Howard J. Curtis, Judge.

Petition by the City of Norwalk to the Public Utilities Commission for the apportionment of the cost between it and the Connecticut Company, a street railway company, of a bridge over the Norwalk river. From an order of the superior court sustaining a demurrer to the appeal and reasons of appeal by the City from an order of the Commission, the City appeals. Reversed and remanded, with directions to overrule the demurrers to the reasons of appeal.

The Legislature, by special act of 1911 (16 Sp. Laws, pt. 1, p. 490), authorized the town of Norwalk, through its bridge committee, to construct a bridge across the Norwalk river to replace an existing bridge on which was laid a single track of the Connecticut Company. Subsequently the city of Norwalk was incorporated as the successor of the town. The particular type, style, and dimensions of the new bridge were determined by the bridge committee under the authority of the special act, and a contract for the construction of the bridge was awarded. The city of Norwalk, through its bridge committee, then presented a petition to the Public Utilities Commission pursuant to chapter 207 of the Public Acts of 1911, representing that the old bridge was unsafe for public travel, and that it was unable to agree with the respondent, the Connecticut Company, as to the type of rail and number of tracks to be laid upon the new bridge, and also as to the proportion of the expense of the new construction that should be borne by the respondent, and asking the commission to determine these matters.

The petition was duly heard, and the commission filed a report showing that the parties had appeared with their witnesses and were fully heard, and ordering that the Connecticut Company should lay two tracks across the new bridge with an approved type of grooved rail, and should pay \$16,614 as its equitable portion of the expense of the construction of the bridge.

The city of Norwalk appealed to the superior court, under the authority of sections 29-31 of the Public Utilities Act (chapter 128 of the Public Acts of 1911), from so much of the order of the commission as determined the amount to be paid toward the construction of the bridge by the Connecticut Com-

pany. The appeal sets forth the petition, the action of the commission, consisting of a statement of facts, the claims of the parties, the reasons given by the majority of the commission for their conclusions, and the order of which the substance has been above stated, together with a memorandum of dissent by one of the commission as to the rule adopted by the majority in determining the amount of the apportionment, and as to the amount so determined. To this appeal, and to the reasons of appeal included therein, the appellee demurred, and from the judgment of the superior court sustaining the demurrer, and dismissing the appeal, this appeal is taken.

John J. Walsh, of Norwalk, Edward J. Quinlan, of Greenwich, and Edwin L. Scofield, of Stamford, for appellant. Harry G. Day, Benjamin I. Spock, and Norman S. Buckingham, all of New Haven, for appellee.

BEACH, J. (after stating the facts as above). [1] The first ground of the demurrer to the appeal is that it does not appear, nor is it alleged, that the city of Norwalk has, or ever had, any power to build the new bridge. While it is true that the petition is defective in not specifically alleging that the act of consolidation and incorporation of the city of Norwalk was approved by the electors of the town, it does appear from the appeal that the city of Norwalk was a party to the proceedings before the commission, and that it is bound by law to construct and maintain the new bridge. The language of section 29 of the Public Utilities Act is that any city aggrieved by an order of the commission, in any matter to which "it was or ought to have been made a party, may appeal therefrom to the superior court," etc. This ground of demurrer to the appeal is not well taken.

[2] The second ground of demurrer is that the provisions of chapter 207 of the Public Acts of 1911 have no application to the bridge in question. The argument is that the bridge is a new bridge, and that, although the act requires a street railway, under the conditions stated, to pay an equitable part of the expense of constructing a new bridge, it nevertheless omits to give the commission authority to apportion the cost of a new bridge, but only gives authority to apportion the cost of repairing, strengthening, or reconstructing an old bridge. This point is too fine for practical use in the construction of the statute. The word "reconstruction," as distinguished from repair and strengthening, means rebuilding. It cannot be limited to an exact reproduction of the original bridge. Some latitude must be allowed for present and prospective changes in highway and waterway traffic, and for the expression of architectural design. Similar objections were made when the former board of railroad commissioners exercised their authority to alter the location of existing

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

highways in eliminating grade crossings. The claim was then made that they had exceeded their powers by laying out new highways, as distinguished from relocating highways. It was held, in answer to this claim, that while the commissioners had no power to lay out a new highway as an independent matter, they did have power to lay out what was in one sense a new highway, but was in fact a substitute for the old, discontinued highway. *State's Attorney v. Branford*, 59 Conn. 402, 407, 22 Atl. 336; *Fairfield's Appeal*, 57 Conn. 167, 171; 17 Atl. 764; *Meriden v. Bennett*, 76 Conn. 53, 66, 55 Atl. 564. So in this statute the word "reconstruction," as used in the latter part of the act, is evidently large enough to include a reconstruction adapted to changed conditions, though the result is in one sense a new bridge, provided it is in fact a substitute, in point of highway traffic, for the old.

[3] It is also claimed that the jurisdiction of the commission is confined by the statute to cases where the parties have disagreed, or at least have had an opportunity to disagree, as to the necessity and character of the proposed reconstruction. But the letter of the statute is satisfied if the parties disagree either as to the necessity or character of the reconstruction, or as to the apportionment of the expense. In this case the parties disagreed, not only as to the apportionment of the expense, but also as to the number of tracks and type of rail to be laid across the bridge, and the double track ordered by the commission involves a substantial change in the strength and expense of the reconstruction as compared with what would have been sufficient if a single track had been ordered. For these reasons, we think that the objections to the jurisdiction of the Public Service Commission are not well founded.

[4] The remaining paragraphs of the demurrer question the jurisdiction of the superior court, first, on the ground that the whole subject-matter is beyond the constitutional jurisdiction of the court, because its determination calls for the exercise of executive as distinguished from judicial functions, and, second, on the narrower ground that the reasons of appeal do not present any issue properly cognizable in the superior court under the provisions of the Public Utilities Act respecting appeals to that court.

As to the constitutional question, we said, in *Spencer's Appeal*, 78 Conn. 301, 305, 61 Atl. 1010, 1011:

"The question is not one new to our deliberations. None other, perhaps, has been more frequently before us in recent years, or had a more deliberate consideration and exhaustive discussion."

It is unnecessary to reopen that discussion. The precise issue before us is a comparatively narrow one, namely: Whether the superior court has jurisdictional power to revise the determination of the Public Service Commission, made pursuant to chapter 207 of

the Public Acts of 1911, as to what is an equitable portion of the expense of repairing, strengthening, or reconstructing a bridge to be borne by a street railway operating its tracks over it. It is apparent that the apportionment of the expense of such a bridge between the municipality and the street railway company is not a purely administrative matter in the same sense as the question what type of rail or how many tracks should be laid over it when reconstructed. We think such an apportionment of expense is one of those matters which lies "so near the border line of judicial power that its definition calls for subtle distinctions, and its nature depends to an extent on the purpose and manner of its use." *Malmö's Appeal*, 72 Conn. 1, 5, 43 Atl. 485, 486. On the one hand, it is in practical effect a money judgment, though not enforceable by execution without the aid of the superior court. Public Utilities Act, § 11. On the other hand, it is so intimately connected with the purely administrative question of the character of the particular repair, strengthening, or reconstruction that its determination has been properly left to the discretion of the Public Service Commission. Like the selection, under statutory limitations, of persons suitable to be licensed to sell intoxicating liquors, it is competent for the Legislature to commit such apportionment either to judicial or executive officers as may be found necessary. *Hopson's Appeal*, 65 Conn. 140, 146, 31 Atl. 531. There is therefore no valid constitutional objection to the appellate jurisdiction of the superior court in the premises.

[5] The next question is as to the extent of such appellate jurisdiction, and that depends on the statute. The Public Utilities Act provides as follows:

"Sec. 31. Procedure. Questions Reviewed. Each appeal shall be brought by a complaint in writing, stating fully the reasons therefor. \* \* \* Said court shall hear such appeal and re-examine the question of the legality of the order, authorization, or decision appealed from, and the propriety and expediency of such order, authorization, or decision, in so far as said court may properly have cognizance of such subject, either by itself or a committee, and shall proceed thereon in the same manner as upon complaints for equitable relief; and the decision of such court, subject, however, to review on appeal to the Supreme Court of Errors on questions of law, shall be final and conclusive upon the parties."

This section appears to have been drawn with careful regard to the decisions of this court as to the nature of so-called appeals from administrative tribunals, and as to the limitations on the jurisdiction of our courts in passing on such appeals.

It recognizes the fact that such appeals are in the nature of original applications to the superior court by directing them to be proceeded with in the same manner as complaints for equitable relief. *Malmö's Appeal*, 72 Conn. 1, 6, 43 Atl. 485; *Moynihan's Appeal*, 75 Conn. 358, 360, 53 Atl. 903; *Cole's Appeal*, 79 Conn. 679, 680, 66 Atl. 508. It

also recognizes the fact that, when such appeals are taken from orders passed in the exercise of a purely executive function, the only question which the court can inquire into is whether the tribunal in question has acted illegally or has exceeded or abused its powers. On the other hand, the Legislature has carefully attempted to confer on the superior court, "in so far as said court may properly have cognizance of such subject," the right and duty of re-examining the expediency and propriety of orders appealed from. We think there is a limited class of orders to which this language of the statute may properly apply. There seems to be no reason why a quasi judicial function—that is, one which may constitutionally be exercised either by the courts or by an administrative tribunal—may not, by a plain expression of legislature intent, be committed to an administrative tribunal in the first instance, and then, at a second stage of the proceedings, to the courts for the purpose of review.

The order apportioning the expense of this bridge was passed in the exercise of such a quasi judicial function, and we think that section 31 of the Public Utilities Act properly requires the superior court, on an appeal therefrom, to re-examine not only the legality of the order but also its expediency and propriety. The reasons of appeal required by the statute must, of course, fairly present the questions desired to be reviewed; and the remaining question is whether any of the reasons of appeal are sufficient to properly invoke the appellate or correctional jurisdiction of the superior court.

[§, 7] Some of the reasons of appeal are open to the objection of treating the Public Utilities Commission as if it was a court engaged in the trial of a civil action. That is not so. Neither the commission nor the superior court, on appeals from its orders, is bound by the technical rules respecting the admissibility or relevancy of evidence. So far as this case is concerned, they sit to receive aid in the formation of a personal judgment as to what is an equitable apportionment of the expense, under all the circumstances. *Hopson's Appeal*, 65 Conn. 140, 147, 148, 31 Atl. 531. There are, however, reasons of appeal, such as the seventh, eighth, and ninth, which directly question the equity of the apportionment made by the commission, and these are sufficient to require the superior court to re-examine the propriety of the order.

There is error, and the cause is remanded, with direction to overrule the demurrers to the reasons of appeal. The other judges concurred.

WHEELER, J. I concur in the opinion, except in its holding that the apportionment of the expense of the bridge is a matter on the border line between the judicial and administrative power. I am of the opinion

that the apportionment of the expense of the bridge in its subject-matter is judicial in its nature, and in no sense administrative, and therefore the appeal from the order making such apportionment brings up the matter for a hearing *de novo*.

(88 Conn. 461)

STATE *ex rel.* MALKIN v. McMAHON *et al.*  
(Supreme Court of Errors of Connecticut. July 13, 1914.)

1. MUNICIPAL CORPORATIONS (§ 58\*)—GRANT OF POWERS—EFFECT.

Where the charter grants a municipality power to exercise a necessary governmental duty accompanied by a grant of means fully adequate to carry it into effect, a municipality, upon acceptance of the charter, is bound to exercise the power.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 145-147; Dec. Dig. § 58.\*]

2. MUNICIPAL CORPORATIONS (§ 36\*)—TAXING DISTRICTS—CHARTERS—CONSTRUCTION.

By Act June 6, 1913 (16 Sp. Laws, pt. 2, p. 1038), the city of Norwalk, the town of Norwalk, South Norwalk and the East Norwalk fire district were consolidated, a new city of Norwalk being created, whose boundaries included the whole territory formerly occupied by the four municipalities. The new city was divided into taxing districts, the first including the territory formerly occupied by the city of Norwalk, the second by the territory occupied by South Norwalk, and the third that occupied by East Norwalk. Sections 11 to 21, relating to the first district, impose upon it the liability for any burdens, expenses, and liabilities for the former city and such other liabilities as the taxing district may incur. Other sections give to the second and third districts control of the waterworks and light plants formerly owned by the municipalities now embraced in those districts, and give them the usual power of municipalities over such agencies. *Held* that, as the purpose of the act was apparently to consolidate the four municipalities, leaving the incidents of local taxation as it was before its passage, the first district is liable for the expenses incurred in lighting its streets, though section 10 of the act provides that expenses of permanent pavements shall be borne by the fourth taxing district, which includes the first, second, and third, and that all other burdens shall be made by taxes levied upon the inhabitants and property within the limits of that district, there apparently being a distinction between the provision that the expenses for pavements shall be borne by the fourth taxing district and that other burdens shall be met by taxes levied upon the inhabitants thereof.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 105-111; Dec. Dig. § 36.\*]

Case Reserved from Superior Court, Fairfield County; Joseph P. Tuttle, Judge.

Mandamus by the State, on the relation of Albert R. Malkin, to compel William H. McMahon and others, as the Board of Estimate and Taxation of the City of Norwalk, to modify the separate assessment list of the first taxing district. Reserved on agreed facts. Alternative writ quashed, and complaint dismissed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Louis Goldschmidt, of Norwalk, for relator. John S. Pullman, of Bridgeport, for respondents Montgomery and others. William F. Tammany and John H. Light, both of South Norwalk, and John J. Walsh, of Norwalk, for respondent Board of Estimate & Taxation.

**BEACH, J.** The General Assembly of 1913 (16 Sp. Laws, pt. 2, p. 1038) passed an act consolidating the town of Norwalk with the cities of Norwalk and South Norwalk and the East Norwalk fire district, and incorporating the city of Norwalk, whose boundaries include the whole territory formerly occupied by the above-named municipalities. The act divides the new city into five districts for purposes of taxation: The first taxing district, which was the former city of Norwalk; the second taxing district, which was the former city of South Norwalk; the third taxing district, which was the former East Norwalk fire district; the fourth taxing district, which is the territory included in the first, second, and third taxing districts above described; and the fifth taxing district, which is the entire new city of Norwalk.

The general scheme of taxation provided for contemplates that the fifth district shall assume all the burdens formerly borne by the town of Norwalk; that the first, second, and third districts shall each assume, to some extent, the local burdens formerly carried by its municipal predecessor, and that certain other taxes for city, as distinguished from ordinary town, expenses shall be borne by the fourth district, which includes the entire urban district of the new city.

This controversy presents the question whether the expense of lighting the streets of the first district is to be borne by the first district separately, or by the fourth district.

The first district is a body politic and corporate, and has a separate board of commissioners and a treasurer, whose duties are prescribed by the act. The same is true of the second and third districts, respectively. The fourth district is not a body politic or corporate, being merely a geographical division of the city for certain specified purposes, including certain taxing purposes. The general supervision and control of the finances and taxation of the entire city is vested in a board of estimate and taxation appointed by the mayor.

The commissioners of the first district, as required by the act, presented to the city treasurer estimates and requests for appropriations covering the expenses to be separately borne by the first district for the fiscal year next ensuing, not including any estimated expense of lighting the streets of the first district. The board of apportionment and taxation added to these estimates an appropriation of \$10,300 for that purpose, and increased by that amount the taxes to be separately assessed upon the district. This amount of \$10,300 represents the agreed price for

lighting the streets of the first district for the fiscal year next ensuing, as provided in an existing contract between the former city of Norwalk and the local electric lighting company. The contract in question was in force at the passage of the act of consolidation, and runs for the period of three years from December 1, 1912.

The relator is a citizen and taxpayer of the first district, and brings this writ of mandamus to compel the board of apportionment and taxation to eliminate this item of \$10,300 from the separate assessment list of the first district, and to include it in the list of the fourth district.

[1, 2] The precise question is whether the expense of lighting the streets of the first district, which was formerly the city of Norwalk, is properly chargeable, under the act, to the first district separately, or to the fourth district, which includes also the former city of South Norwalk and the East Norwalk fire district. Its decision involves also the larger question whether the cost of street lighting is included among the "burdens, expenses, and liabilities" of the former municipalities which are expressly imposed upon the first, second, and third districts, as successors to the rights, property, and obligations of the city of Norwalk, the city of South Norwalk, and the East Norwalk fire district, respectively, or whether the total cost of lighting these three districts was intended to be distributed throughout the fourth district by a uniform rate of taxation.

The scheme of taxation outlined by the act is well defined in its general outlines, as will appear from the following references to the act: Section 10 provides that the fifth district shall assume the expenses formerly borne by the town of Norwalk, also the expenses of the board of health, and certain salaries and office expenses of elective city officials, and that all expenses of permanent pavements "shall be borne by said fourth taxing district." The distribution of all other taxes is generally provided for as follows:

"And all other burdens and expenses of the city shall be met by taxes levied upon the inhabitants and property within the limits of the fourth taxing district, and it shall be the duty of the assessors to indicate in the completed list of the city, and by separate lists, the property and amount thereof taxable in each of the several taxing districts herein created, and the money derived from the taxation of the inhabitants and property of each of the aforesaid taxing districts shall not be used for any other purpose than to defray the burdens and expenses of such taxing districts as herein imposed."

Evidently a distinction is made between the words "shall be borne by said fourth taxing district" and the words "shall be met by taxes levied upon the inhabitants and property within the limits of the fourth taxing district," the latter phrase meaning that the expense in question may be assessed either upon the fourth district, as such, or may be separately assessed upon any one of the

three taxing districts included in the fourth district.

The act next specifies in detail the powers and duties of the several taxing districts, except the fifth. Sections 11 to 21 relate to the first district, and, so far as material to this case, they provide that it shall succeed to all the property of the former city of Norwalk, and have the ownership, management, and control of the waterworks formerly owned by that city. It is also provided that:

"All the inhabitants and property within the limits of said first taxing district shall be liable to taxation to defray any burdens, expenses and liabilities of the former city of Norfolk at the passage of this act and such other liabilities as said taxing district may incur under the provisions of this act."

These enactments are certainly sufficient to specifically impose on the first district the existing obligations of the city of Norwalk under its street lighting contract, and to subject the inhabitants and property within the first district to taxation for any liability of the former city of Norwalk under such contract existing at the passage of the act.

Sections 22 to 33 relate to the second district, and contain similar provisions in respect of the assumption by the second district of the rights, property, and obligations of the former city of South Norwalk, and making the inhabitants and property within the second district liable to taxation to defray its "burdens, expenses and liabilities."

The former city of South Norwalk owned its electric lighting and power plant, as well as its waterworks, and the act gives to the second district the ownership, management, and control of both of these public utilities.

Section 25 provides that the second district shall elect a board of electric commissioners, who shall have all the powers and discharge all the duties of the former board of electrical commissioners of the former city of South Norwalk, and provided by chapter 122 of the General Statutes relating to municipal gas and electric plants. Section 28 provides that any net profits of the electric plant, after all indebtedness of the plant has been paid, shall be applied in reduction of the debt of the second district, and section 29 provides that any deficiency of income to meet current expenses and interest on indebtedness shall be made up by taxing "all persons and property liable to taxation in said district."

The East Norwalk fire district also owned its electric plant, and sections 34, 39, and 40 of the act give to the third district similar rights of ownership, management, and control of the plant, and similar rights and obligation in respect of the separate use of any profits and separate liability to taxation to make good any deficit.

Sections 44 and 45 provide that the city, at the expense of the fourth taxing district, shall maintain the sewer systems of the first, second, and third districts, and shall maintain the police and fire departments, of

the cities of Norwalk and South Norwalk and of the East Norwalk fire district, until the city shall establish a police and a fire department, for the entire fourth district; also that the city shall maintain the garbage disposal plant of the second district at the expense of said district until it shall establish a like plant for the fourth district.

Section 80 enumerates the powers of the city council, who are chosen at the general city election, and included among such powers are the following:

"To regulate the erection and maintenance of lampposts, telegraph, telephone, and electric light poles and conduits, wires and fixtures; to provide for public lighting of streets and to protect the same from injury; \* \* \* to make, repair, clean, light, and keep open and safe for public use and travel, and free from encroachment and obstruction, the streets, highways, sidewalks, gutters and public grounds."

These are the provisions of the act which bear most directly on the question at issue, and they make it clear that street lighting is one of the "burdens, expenses, and liabilities," existing at the passage of the act, which were intended by the act to be imposed upon the first, second, and third districts, separately, as the successors in right and obligation to their respective municipal predecessors. The act constitutes the first, second, and third districts separate municipal corporations for certain limited purposes, subject, in these respects, to the general supervisory control of the consolidated city. It specifically confers on the second and third districts, respectively, the ownership, management, and control of the municipal electric lighting plants in each district; conferring on these districts in the act itself, and by reference to the General Statutes, the powers usually possessed by municipalities operating such plants. To this extent the act is substantially a charter creating these municipalities and defining their powers. And it is well settled that in such charters the grant of a power to exercise a necessary governmental duty, accompanied by the grant of means fully adequate to carry it into effect, when followed by the acceptance of the franchise, is equivalent to an express imposition of an obligation to exercise the power. *Gates v. Boston & N. Y. Air Line*, 53 Conn. 338, 342, 5 Atl. 695; *N. Y., N. H. & H. R. R. Co. v. Bridgeport Traction Co.*, 65 Conn. 410, 423, 32 Atl. 953, 29 L. R. A. 367; *Water Commissioners v. Manchester*, 87 Conn. 193, 201, 87 Atl. 870; 1 *Dillon Municipal Corporations* [5th Ed.] § 246, and note.

The second and third districts are therefore obligated to light their own streets, and by the express language of the act to light them at their own expense. For like reasons the first and second districts are obligated by the grant of municipal water, waterworks, and the express language of the act to sprinkle their own streets at their own expense.

So also the former city of Norwalk was at the passage of this act obligated to light its

own streets, and we think that obligation among others, was intended to be imposed upon its successor, the first district of the consolidated city, by the words already quoted:

"All the inhabitants and property within the limits of said first taxing district shall be liable to taxation to defray any burdens, expenses, and liabilities of the former city of Norwalk at the passage of this act," etc.

The relator reads these words as referring only to unsatisfied obligations due or performable at the passage of the act, and not as relating to any continuing municipal burdens and expenses, except such as are elsewhere specially mentioned, to wit, in the case of the first district, the care and maintenance of the real estate, public library, and waterworks formerly belonging to the city of Norwalk.

We think, however, that the language above quoted expresses a part of the general scheme for the distribution of taxation for municipal expense among the several taxing districts of the new city.

The relator's theory of the distribution of taxation would make the fourth district, as such, liable to be taxed for all nonenumerated burdens and expenses of carrying on the municipal government, except those burdens and expenses formerly imposed by law upon the town of Norwalk. If that theory were correct, we should expect to find in the act some comprehensive language expressly imposing such burdens and expenses on the fourth district. But there is no such language, and we find, instead, that sewers, fire and police departments, and garbage disposal plant are specifically mentioned as the only municipal agencies expressly required to be maintained by the city "at the expense of the fourth taxing district."

The only general language expressly imposing liability for taxation for burdens and expenses not enumerated is in connection with the city at large, which is made to assume the "burdens and expenses" of the former town, and in connection with the first, second, and third taxing districts, each of which is expressly made liable to taxation to defray the "burdens and expenses" of its own municipal predecessor. It is quite consistent with this general scheme for the distribution of taxation that each of these districts should be expressly vested with the ownership and the exclusive management, control, and financial responsibility for the real estate and public utilities formerly owned by their respective predecessors. The main purpose of the scheme of taxation is to leave the incidence of local taxation just where it was before the act of consolidation, so far as is reasonably consistent with the new form of municipal government; so that none of the four districts representing separate municipalities should be subjected to additional taxation for the then existing local burdens

and expenses of another district, except to the extent expressly provided for in the act. Neither is it inconsistent therewith that the general administrative control over all the affairs and activities of the new city should be vested in a central council.

The relator's theory as to the incidence of taxation would put upon the second and third districts the burden of lighting their own streets, and also of paying more than half the expense of lighting the streets of the first district. It would also require the first and second districts to bear separately the entire expense of sprinkling their own streets and, in addition, to pay nearly seven-eighths of the cost of sprinkling the streets of the third district. And it would compel the second district, which owns both waterworks and electric plant, to sprinkle and light its own streets and to pay, in proportion to their respective grand lists, toward the cost of lighting the streets of the first district, and of sprinkling the streets of the third district. It is inherently improbable that the Legislature intended to state so unequal a rule of local taxation, and still more improbable that these municipalities would have accepted this charter, knowing that it stated such a rule.

For the reasons above stated, the superior court is advised to grant the respondent's motion to quash the alternative writ, and to dismiss the complaint.

Costs in this court will be taxed in favor of the respondents.

(5 Boyce, 179)

# ENGLAND-KELCH CO. v. EVENING JOURNAL CO.

(Superior Court of Delaware. Sussex.  
March 23, 1914.)

CONTRACTS (§ 247\*)—ACTIONS—SUFFICIENCY OF EVIDENCE—ABANDONMENT.

In an action to recover money paid out and services performed under a written contract, evidence held sufficient to warrant the court in deciding as a matter of law that the contract sued on was abandoned and a new contract substituted therefor.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1139, 1787; Dec. Dig. § 247.\*]

Action by the England-Kelch Company, a corporation, against the Evening Journal Company, a corporation. Verdict directed for defendant. Motion for new trial overruled.

Argued before BOYCE and CONRAD, JJ.

Aaron Finger, of Wilmington, for plaintiff.

Daniel O. Hastings, of Wilmington, for defendant.

Summons case (No. 80, January term, 1913), brought by the England-Kelch Company against the Evening Journal Company to recover the amount of money paid out and for the reasonable value of the services, alleged to have been paid and performed, under a written contract entered into between

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the parties, on the 28th day of June, A. D. 1911, as follows:

"\* \* \* It is proposed to issue on definite dates to be fixed hereafter in the Evening Journal what shall be known as the 'industrial edition' for the state of Delaware to consist of one or more pages to be published once a week for three consecutive weeks.

"It is understood that the party of the second part shall give the necessary time and attention and assume all expenses incident to the securing of contracts for advertisements to be published in said industrial editions, including cost of all advertising cuts; each contract to cover a minimum space of two inches single column, to each advertiser, with a maximum space of two pages, the rates to be as follows: Two dollars per inch each insertion; one hundred dollars per page each insertion.

"List of persons or firms to be solicited for such advertisements shall first be submitted to and accepted by the party of the first part, and the party of the first part cannot be bound by any contracts until they are duly accepted by an authorized agent of the party of the first part.

"It is further agreed by the party of the first part that of the total gross collections of money received for such advertising that said party of the second part shall be entitled to fifty per cent. (50%) of same; it is further agreed that all checks received in payment of such advertising shall be made payable to the party of the first part.

"It is further agreed that when said second party signs up two thousand dollars (\$2,000) worth of contracts and same have been accepted by said first party, then said second party shall be paid by said first party twenty-five per cent. (25%) of the amount of contracts so accepted and subsequently accepted by said first party, such amounts so paid to be deducted from the gross amount to be received and paid to said second party under the terms hereof. Such payments, however, not to be made oftener than every two weeks.

"It is agreed that for every three columns of advertising matter procured by the party of the second part, for insertion in said editions, the party of the second part will provide one column of reading matter which shall refer to some one or more of the businesses or industries so advertised, but said reading matter shall not contain the name of any person, firm or corporation engaged in any such businesses or industries.

"It is further agreed that all contracts, orders, and bills shall be made in the name of the party of the first part, and all collections shall be made by the representatives of the party of the first part, excepting in the case of prepaid contracts, said party of the second part receiving in final payment for his services and expenses incurred by him and his agents in securing such advertising, fifty per cent. (50%) of the gross receipts, less any amount which shall have been paid to the party of the second part on account of this agreement. \* \* \*"

The uncontradicted testimony disclosed that an unsuccessful canvass was thereafter made prior to sending the telegram, set forth in the opinion of the court, and that at a conference between the parties in response thereto a substituted oral agreement was entered into by which at least \$10,000 worth of advertisements was to be secured for an edition of the Evening Journal, to be known by the name of "Little Delaware's Bigness." The terms of the original contract as to compensation and furnishing reading matter were to remain in force. The business was never secured. A list of advertisements

amounting to \$2,934, was turned in and accepted by the defendant company, December 2, 1911, about the time the plaintiff company abandoned all effort to secure further business. It was not shown by the plaintiff that this list was of the slightest pecuniary advantage to the defendant company, but on the other hand it was positively asserted that it was not. The plaintiff claimed \$1,544.31.

BOYCE, J. (delivering the opinion of the court). The contract sued upon in this action is dated the 28th day of June, 1911. The question is whether this contract was not subsequently abandoned. It was competent for the parties thereto to novate, alter or waive said contract.

On August 1, 1911, the defendant company sent the following telegram to the plaintiff company:

"Wilmington, Del., etc.

"Fred England, 208 Broadway, New York.

"Financial, mercantile and manufacturing conditions are bad. Results to date are very discouraging. We advise abandoning the proposition at once. Either phone or see us without delay to decide matters.

"The Evening Journal Co."

A few days thereafter the said Fred England, representing the plaintiff company, came to Wilmington and conferred with representatives of the defendant company. The uncontradicted evidence is that the parties, finding it impractical to continue the original contract, entered into a new or modified agreement; and we find as a matter of law that a new or substituted oral agreement was entered into. The plaintiff company, therefore, cannot recover under the special counts on the contract sued upon; neither can it recover under the common counts, unless the work done—that is, the subscriptions obtained—were beneficial to the defendant company.

There is no evidence that the advertisements turned in by the plaintiff company, which were not paid for, were of the slightest beneficial interest or value to the defendant company. While we are always reluctant to withdraw a case from the jury, yet, under the uncontradicted testimony in this case, we are constrained to give the jury binding instructions to return a verdict for the defendant.

Gentlemen of the jury: The court direct you to return a verdict for the defendant.

Verdict for defendant.

Motion for a new trial was made, and by consent of parties was argued before PENNEWILL, C. J., and BOYCE, J.

The grounds relied upon were:

That the evidence of the defendant tending to establish a new contract was conflicting, and the case therefore should have been submitted to the jury, under proper instructions from the court as to what their verdict

should be if they should find that a valid new contract had been made.

That the evidence of the defendant fails to disclose that there was any consideration for the alleged guarantee; but that, on the contrary, the evidence clearly discloses that there was no consideration for the same, and consequently it was void.

In the argument, it was conceded that no testimony was offered by the plaintiff to deny or to controvert the testimony on the part of the defendant relative to the alleged new contract, but it was contended that the testimony of the defendant itself was not sufficiently clear and certain to warrant the court in deciding, as a matter of law, that a new contract had been made which prevented the plaintiff from recovering.

PENNEWILL, C. J. The court feel constrained to refuse the motion for a new trial.

(10 Del. Ch. 257)

### DILL et al. v. DILL et al.

(Court of Chancery of Delaware. March 16, 1914.)

#### 1. LANDLORD AND TENANT (§ 55\*)—INJURIES TO REVERSION—CUTTING TIMBER—INJUNCTION.

The cutting of timber by a tenant will be prevented by an injunction, because of the inadequacy of legal remedies.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 136-150; Dec. Dig. § 55.\*]

#### 2. INJUNCTION (§ 52\*)—TRESPASS TO LAND—CUTTING OF TIMBER.

The cutting of timber by a trespasser will be prevented by injunction, because of the inadequacy of legal remedies.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 105; Dec. Dig. § 52.\*]

#### 3. INJUNCTION (§ 46\*)—TRESPASS TO LAND—CUTTING OF TIMBER.

A court of equity will enjoin destructive trespass to land and timber growing thereon, without regard to the question whether in the particular case they have any peculiar value or not.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 98, 99, 107; Dec. Dig. § 46.\*]

#### 4. INJUNCTION (§§ 37, 38\*)—TITLE TO LAND—ISSUE FOR COURT AT LAW.

Where title to land involved in a suit to restrain the cutting of timber thereon is in dispute, a court of equity will, under Rev. Code 1852, amended to 1893, p. 704, c. 95, § 1, and independent thereof, direct a trial of the issue of title by jury in the Superior Court and pending the trial will by preliminary injunction preserve the estate in statu quo.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 85-90; Dec. Dig. §§ 37, 38.\*]

Suit by Mary Ann Dill and others against Mary Ellen Dill and others to restrain the cutting of timber. Issue framed for trial by jury at the Superior Court, and preliminary injunction ordered to preserve the estate in statu quo.

The bill alleged that on or about March 1, 1890, Andrew Dill died seised of a certain

tract of land situate in South Murderkill hundred, Kent county, a portion of which lies north of a stream known as White Marsh branch, adjoining lands of Mary Ellen Dill, Annie E. Dill and John Wesley Dill. The greater part of the land north of White Marsh branch is woodland and branchland, and the balance of it was at one time cultivated. By his will, Andrew Dill left all of the real estate owned by him at the time of his death to his wife, Mary Ann Dill, one of the complainants, for life, and at her death to her children, the other complainants and Emeline Dill, who refused to become a party complainant, and, therefore, was made a party defendant, but no relief was asked in the bill against her. The bill also alleged that on February 4, 1913, and at divers other times prior thereto, the defendants other than Emeline Dill, their agents, workmen, servants and employes did enter upon and cut, fell and carry away timber trees growing on said land, thereby materially damaging said land and reducing the value thereof. It is further alleged that these defendants threaten to continue to trespass upon said land and cut, fell and carry away timber, which would further damage the land and reduce the value thereof. Besides the usual prayers for answer, subpoena and other relief, there are prayers for discovery by the defendants to the complainants of the number of trees cut and for an injunction to restrain further cutting, felling and carrying away of timber growing on said land, but the principal relief sought is an injunction.

The answer denied the cutting, felling and carrying away of timber on February 4, 1913, but admitted that at times prior thereto they, their father and grandmother had cut, felled and carried away timber and wood from said land. Two defenses were set up by the answer: (1) That the legal title to said land is in the defendants, other than Emeline Dill; and (2) that if the legal title to said land is not in said defendants, then by the exercise by them, their father and grandmother of ownership and right to said land, which was held, possessed and controlled by them, adversely to every one else, for over twenty years, they have acquired title thereto.

By agreement of the solicitors for the complainants and defendants, the cause was heard on bill, answer, testimony of witnesses examined orally before the Chancellor and exhibits.

William Watson Harrington and James M. Satterfield, both of Dover, for complainants. James H. Hughes, of Dover, for defendants.

THE CHANCELLOR. The only relief sought by the complainants is a permanent injunction perpetually enjoining the defendants from cutting timber. (This, of course,



is not literally true, because one of the defendants is a cotenant of the same title with the complainants, and any decree for an injunction, temporary or permanent, should not be made applicable to that particular defendant.) The title of the complainants is disputed by the defendants. Unless the complainants have a good title they are not entitled to have the defendants perpetually enjoined from cutting the timber.

[1-4] There is no doubt that in this state the cutting of timber, whether by a tenant (and so constituting technical waste), or by a trespasser, is such an injury as will be prevented by an injunction by decree of the Court of Chancery. *Waples v. Waples*, 2 Har. 281, and *Fleming v. Collins*, 2 Del. Ch. 230, wherein there was a trespass under a claim of title adverse to the complainant. There is corroborative authority in the decisions of other courts. 5 Pomeroy's Equity Jurisprudence, § 496. The fundamental source of this jurisdiction is the inadequacy of legal remedies to save a threatened injury and the character of the property affected. Land and timber growing on it are made subject to protection, because they are regarded as per se property of peculiar value, and a court of equity will enjoin destructive trespass to them without regard to the question whether in the particular cases they have any peculiar value, or not. When, however, the title to the land in question is in dispute, injunctive relief is withheld pending a decision as to the title, for courts of equity will not in general try disputed legal titles to land. 1 Pomeroy's Equity Jurisprudence, § 252.

Pomeroy, it is true, says the above rule is one of expediency and policy rather than essential condition and basis of the equitable jurisdiction. This means that the court may retain jurisdiction to try a disputed title. The matter is thus stated in 5 Pomeroy's Equity Jurisprudence, § 506:

"The general principle of equity, that having taken jurisdiction of a cause for one purpose it will retain it and give complete relief, makes it a proper proceeding for courts of equity, if they see fit, to investigate the title themselves at the hearing of the same suit in which the temporary injunction is granted, and then make permanent or dissolve the temporary injunction according to the result of the inquiry."

It will be seen, however, that the policy of this state is very clear on the subject.

It is said that the need for injunctive relief to prevent threatened acts of trespass and threatened depredations which if continued would deplete the land of trees and thereby injure the freehold of the complainant, gives this court of equity jurisdiction to decide the dispute as to title, on the theory that thereby multiplicity of suits is prevented.

In the case of *Hughlett v. Harris*, 1 Del. Ch. 349, 12 Am. Dec. 104, Chancellor Kensey Johns, Sr., restricted the rule above mentioned to cases where the party has not only

a right to the injunction to prevent future wrong, but also to have relief in a court of equity for the wrong previously done. In this case, however, there is no question of multiplicity of suits. Here it is further urged that because this court has jurisdiction to grant an injunction to stop the cutting of timber, it should proceed to full relief by deciding the dispute as to the title of the complainants to the land on which the timber grows. Whatever may be the rule elsewhere, the precedents and policy of the courts and of legislation here is to the contrary of the above proposition.

The case of *Fleming, Trustee, v. Collins*, 2 Del. Ch. 230, furnishes a complete guide and precedent in this case, which is entirely like the reported case, so far as appears in the report and in the record. The bill was to prevent the cutting of timber and an account. By the answer the defendant claimed to be in possession and to be entitled to the land and cut the timber because he had a right to do so as owner. The title of the complainant was also attacked. Before the final hearing of the case an issue was directed to try the title to the land in controversy by a jury at bar of the Superior Court, and the jury found the title to be in the complainant. The cause was then heard on bill, answer, exhibits, depositions and the verdict found on the issue, the question being as to the account for timber cut and satisfaction for the value thereof. The subject-matter being the cutting of timber, Chancellor Harrington held it was an injury irreparable in its nature and remediable in equity by whomsoever committed, and not confined to technical waste. Having taken jurisdiction to prevent an injury of this kind, though it be in the nature of a trespass, the Court of Chancery will do complete justice by decreeing an account of and enforce satisfaction for the timber cut.

The course pursued by Chancellor Harrington should be followed. The equity of the bill in this case is to prevent the further threatened cutting of timber, which in this state at least is considered an injury to the real estate of such a character as is irreparable, and for this there is ample authority in the decisions of courts elsewhere. *Hughlett v. Harris*, 1 Del. Ch. 349, 12 Am. Dec. 104; *Wilds v. Layton*, 1 Del. Ch. 226, 12 Am. Dec. 91. As in the case of *Fleming v. Collins*, supra, there is here a serious dispute as to the title to the premises. The complainants claim the paper title and in support of their contention show a plot in the Orphans' Court in proceedings for partition, whereby the title to the premises in question was acquired by one under whom the complainants are clearly entitled, if the ancestor took title by the proceeding in the Orphans' Court. On the other hand, the defendants by a deed claim paper title, though there is as to that deed a difficulty in identifying the premises mentioned therein as the premises in ques-

tion. Both sides claim possession under color of title as above stated. The defendant further claims that if they have no color of title, still by adverse possession they have acquired title. It is impossible to reconcile the testimony. If the issues of fact related to the woodland alone, treated as a separate tract, the difficulty would not be so great. But without expressing an opinion on the question of title, it is very clear that this court should not try the title to the land, but should send an issue to a jury for the purpose. This issue is one of fact, as well as of law, and so is proper for a jury of the Superior Court to try under the instructions of the court as to the law. If it had been a question of law only, the issue should be refused, as was done by the Chancellor in *Sparks v. Farmers' Bank*, 3 Del. Ch. 225, 230.

Even as a question of policy or expediency, the Court of Chancery should not undertake to grant a perpetual injunction based on a decision of the dispute as to title to land. It is not clear that this remedy would be full and adequate. True it is all the complainants ask for. But does it really settle the question of title, or prevent the parties from bringing a suit or suits at law to try their title? It seems not. But if this court should in this case decide an issue to be tried by a jury, whether the complainants or defendants held the legal title to the land then there would be an adjudication between them in a court of law that would settle the title. Again, even if the complainants be found in this cause to be entitled to the property in question, possession could not in this cause be awarded them and they must still bring ejectment at law. 5 Pomeroy's Equity Jurisprudence, § 507.

Not only is it the established doctrine in Delaware that the Court of Chancery will not try disputes of title to land, even in cases where it has a clear right to protect the land pending a decision of the dispute as to title; but there is in general in Delaware no need for an appeal to a court of equity for such relief. By an ancient statute a writ of ejectment may be issued by the Superior Court to prevent waste during the pendency of an action of ejectment. See Revised Code of 1893, c. 88, § 10. A court of equity, then, should be very chary of taking jurisdiction to try disputes of title when there is such an ample remedy at law. There is, moreover, the statutory requirement that:

"When matters of fact, proper to be tried by a jury, shall arise in any cause depending in chancery, the Chancellor shall order such facts to trial issues at the bar of the Superior Court." Revised Code of 1893, c. 95, § 1.

Beyond all this is the time-honored duty of the Court of Chancery not to step outside the well-defined limits of its jurisdiction, but, as predecessor said, "to keep within the ant merestones." Equitable Guarantee &

Trust Co. v. Donahoe, 8 Del. Ch. 422, 45 Atl. 383.

It has been evident in this case that there was a dispute as to title, and no further proceeding in this court would have been taken pending the decision of an issue to try the question of title, but for the attitude of counsel for both sides of the cause. But in the absence of a stipulation in the cause, the objection made in the brief of counsel for the defendant to the right of the court to try the title leaves but one course to be pursued, though it is regrettable because much testimony has already been taken in the cause.

An issue will be framed to be tried by a jury at the bar of the Superior Court, whether the complainants, Mary Ann Dill, Samuel Herman Dill, Alvertie Wroten, Homer C. Dill, Susan Ella Little and Leonard C. Dill and Estaline Dill, one of the defendants, are entitled to the land, and in the meantime a preliminary injunction will be ordered to preserve the estate in statu quo; and as no injury will be done to either party by a suspension of the rights of all parties to the land, the amount of the bond will not be large.

(10 Del. Ch. 314)

#### PHILLIPS et al. v. PHILLIPS et al.

(Court of Chancery of Delaware. June 29, 1914.)

#### 1. RELIGIOUS SOCIETIES (§ 3\*)—STATUTES—CONSTRUCTION—REPEAL.

26 Del. Laws, c. 83, regulating religious corporations, repeals prior statutes inconsistent with it.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 2, 4; Dec. Dig. § 3.\*]

#### 2. WILLS (§ 71\*)—CONSTRUCTION—STATUTES APPLICABLE.

The validity of a will must be determined by the law in force at the time of the death of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 187, 188; Dec. Dig. § 71.\*]

#### 3. RELIGIOUS SOCIETIES (§ 16\*)—RIGHT OF RELIGIOUS CORPORATIONS TO HOLD LAND.

26 Del. Laws, c. 89, § 4, provides that the trustees of religious corporations shall have power to purchase, receive, hold, and enjoy real property for the use of the congregation, their ministers or members, or for schools, almshouses, or burying grounds. Section 11, which immediately follows a section applicable wholly to the Episcopal Church, provides that all gifts or grants to any "such" corporation of any real estate or money, or security to be laid out in real estate, shall be by deed, duly delivered and recorded, at least one year before the death of the grantor. Held, that in view of preceding statutes, which for over 100 years had prohibited religious corporations from taking real property by devise, section 11 must be held to apply to all religious corporations, and not only to those referred to in the preceding section, and hence a religious corporation cannot accept a devise of land, or a bequest of money to be laid out in land.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 103-108; Dec. Dig. § 16.\*]

#### 4. RELIGIOUS SOCIETIES (§ 16\*)—BEQUESTS—STATUTES APPLICABLE.

Act March 1, 1855, § 2 (Rev. Code 1852, amended to 1893, p. 313 [11 Del. Laws, c. 275]),

declaring that no grant, conveyance, devise, or lease of any real estate dedicated or appropriated to purposes of religious worship shall vest any right in the grantee, unless such grant shall be to a corporation organized under Rev. Code 1852, amended to 1893, p. 310, c. 39, § 10, has no application to a bequest of money to be laid out in land, the interest of which is to be applied to the maintenance of a religious corporation.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 103–108; Dec. Dig. § 16.\*]

**5. WILLS (§ 439\*)—CONSTRUCTION.**

The primary consideration in construing a will is to ascertain the testator's intent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.\*]

**6. WILLS (§ 447\*)—CONSTRUCTION—PRESUMPTIONS.**

In construing a will, an intention to do what is illegal is not presumed; and if two constructions are possible, that will be adopted which is consistent with the law.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 963; Dec. Dig. § 447.\*]

**7. WILLS (§ 450\*)—CONSTRUCTION.**

That interpretation of a will which will give effect to all terms, provided it is consistent with the general intent, will be adopted.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 966; Dec. Dig. § 450.\*]

**8. WILLS (§ 448\*)—CONSTRUCTION.**

A construction of a will which will avoid intestacy should be favored.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 964; Dec. Dig. § 443.\*]

**9. WILLS (§ 447\*)—CONSTRUCTION.**

If the meaning of a testator's language is clear, and the general purpose of a gift is unmistakable, the courts cannot change the gift by construction, so as to avoid its illegality.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 963; Dec. Dig. § 447.\*]

**10. RELIGIOUS SOCIETIES (§ 16\*) — BEQUESTS—CONSTRUCTION—"INTEREST."**

Where a testator bequeathed a sum of money to a church to be invested in real estate and the interest to be applied on the salary of the minister, the bequest is one to be laid out in land, and hence is void; for, while the term "interest" usually means compensation paid for the use of money, there is no technical meaning which will prevent it being considered synonymous with the income from real estate or rent, that being the obvious meaning given it by the testator, and consequently the bequest cannot be held one authorizing the beneficiary to lend the money upon land as security.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 103–108; Dec. Dig. § 16.\*]

For other definitions, see Words and Phrases, vol. 4, p. 3692–3709; vol. 8, p. 7691.]

**11. WILLS (§ 865\*)—BEQUESTS—INVALID BEQUEST.**

A testator is considered to have died intestate as to an invalid bequest.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2183–2199; Dec. Dig. § 865.\*]

**12. WILLS (§ 866\*)—INVALID BEQUESTS—EFFECT.**

Where the residuary clause was invalid, both the bequests made by that clause and other invalid bequests pass to the next of kin of the testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 2200–2203; Dec. Dig. § 866.\*]

Bill of interpleader and for instructions by Anna M. Phillips and another, as executors, against Sarah Louisa Phillips and others,

and the trustees of Mt. Pleasant Methodist Episcopal Church, a religious corporation. Decree for the first-named defendants.

Bill of interpleader and for instructions to executors. Hannah R. Weldin by will dated April 7, 1906, and a codicil dated February, 1911, both probated shortly after her death, which occurred August 28, 1911, made the following gifts:

"Twenty-third. I hereby give and bequeath for the benefit of Mt. Pleasant Methodist E. Church, near Bellevue, Del., the sum of one thousand dollars, the money to be paid to the trustees of said church, to be invested in real estate, and the interest to be applied yearly toward the salary of the minister in charge, except five dollars of the interest, which I wish to go toward helping keep, yearly, the cemetery mowed, and the wall in repair.

"In said will I have given the reversions (if any) of my money to 'the Women's Home Missionary Society.' I hereby revoke that gift to said society, and give the reversions to the Trustees of Mt. Pleasant Church, near Bellevue, Del., to be invested in real estate, and the interest to be applied to help keep said church and parsonage in repair."

The testatrix owned no real estate at the time of her death, and her estate consisted entirely of personal property. On December 11, 1852, the congregation of Mt. Pleasant Methodist Episcopal Church was duly incorporated under chapter 89 of the Revised Code by the election of trustees and the certification by them of a corporate name, "The Trustees of Mount Pleasant Methodist Episcopal Church," which certificate was duly recorded.

Having administered the estate and paid all the legacies except those above mentioned, and being uncertain as to the proper interpretation of the will, the executors, in view thereof and of the conflicting claims as to the validity of the gifts, filed a bill for instructions, making defendants the legatees and those who would be distributees of the personal estate of the testatrix in case she had died intestate.

The sections of the statute which affect the validity of the gift are sections 4 and 11 of chapter 89, volume 26, Laws of Delaware, approved March 14, 1911, viz.:

"Sec. 4. The trustees so elected and their successors shall be a corporation, by the name so adopted and certified; shall have perpetual succession with all the incidents and franchises of a corporation aggregate, and with power to purchase, receive, hold, mortgage and enjoy property, real and personal, for the use of the said society or congregation, their ministers or members, or for schools, almshouses or burying grounds. The act of a majority of the trustees shall be valid."

"Sec. 11. But all gifts, or grants, to any such corporation, of any real estate, or of money, securities or other thing of value, to be laid out in real estate, shall be by deed duly executed, delivered, acknowledged and recorded at least one year before the death of the donor or grantor, to take effect presently for the use of the corporation, and without any power of revocation, trust, condition, or limitation whatever, or the same shall be void, unless such grant

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

shall be really and bona fide for a full and valuable consideration actually paid, without fraud, or collusion, before executing such deed."

The case was heard on bill and answers.

George Lodge, of Wilmington, for the church. Frank L. Speakman, of Wilmington, for next of kin of testatrix.

**THE CHANCELLOR.** The question raised by the bill is whether the gifts to the church were prohibited by the statute of Delaware and so void. Here the legatee is a religious corporation, incorporated under a statute applicable specially and solely to societies and congregations of Christians. The present statute controlling this case was passed in 1911, but the portion of it specially applicable here is part of the ancient statute enacted in 1787. It was part of the statute which regulated and controlled both the character and amount of property which churches could acquire and the purposes for which the property could be acquired and used. A brief mention of the earlier statutes is desirable.

[1-3] Among the statutes published in the earliest compilation of the laws of and relating to the state of Delaware was Act 17 George II, c. 8. See Hall's Digest, Revised Code of 1829, pp. 457, 458. This act authorized religious societies of protestants to purchase or take by gift land for burying grounds and erecting churches, houses of religious worship, schools and almshouses, but prohibited them from purchasing, or taking by gift, land for the maintenance or support of the churches, houses of worship, schools or almshouses, or any other purpose. In short, such a corporation could either buy, or receive by gift, land for burial grounds, or for erecting churches, schools and almshouses, but for no other purpose. In 1787 an act was passed by the General Assembly of Delaware to provide a method for the incorporation of religious societies. See Hall's Digest, Revised Code of 1829, p. 459. It provided for the election of trustees by the congregation and the certification of a name, and the corporation was thereby created. The corporation was authorized to purchase and take land for the use of the congregation. But all gifts and grants of land, or moneys "to be laid out and disposed of" in the purchase of land were rendered void, unless made by deed at least 12 months before the death of the grantor, or unless for full consideration paid without collusion. The act of 1787 was construed in 1835 in the case of *Ferguson v. Hedges*, 1 Har. 524, where the court held invalid a direct devise of land to St. Andrew's Church generally, and in the case of *State v. Wiltbank*, 2 Har. 18, where there was a gift to a religious society by will of the proceeds of the sale of land to be applied towards educating poor children of members of the church, and the gift was considered as though it were a devise of land and held to be invalid under the act of 1787.

Neither of the above acts seem to have

been directly and expressly repealed. But section 14 of the act of 1787 declared that the prior Act 17 George II, c. 8, was repealed so far as it was altered or amended by the later act of 1787. It would seem clear that after 1787 the enabling provisions of the earlier statute were repealed. A statute which invalidated a general devise of land to a religious corporation certainly altered and amended a prior statute which allowed such a society to take land by devise for certain designated purposes. In discussing these early statutes the court in *State v. Wiltbank*, supra, does not seem to have expressed themselves on this point, and it was not necessary in that case to do so, for they held that the gift there considered was invalid even under the words used in the statute of George. It is certainly true, however, that as a result of the later statute the power to take by gift land, or money to be laid out in land, was entirely taken away from such corporations. Even a gift for the erection of a church was made invalid thereby. The purpose of the gift, or the use to be made of the thing given, did not affect the question as to its validity.

But in the Revised Code of 1852 there was substituted for them a new act combining some of the features of each. See Revised Code, c. 39, p. 105. This chapter was continued in the later publications and was variously amended from time to time, but has as yet received no judicial construction on the point here involved. By an act approved March 14, 1911, the chapter concerning religious societies was affected by striking out of it all the sections thereof then in force and inserting in lieu thereof a new statute. See Delaware Laws, vol. 26, c. 89, p. 189. Some of the sections are re-enactments of the existing law, some sections are changed, and some sections are new ones not in prior statutes. It is safe to say, then, that all prior statutes inconsistent with it are repealed by this act of 1911. It follows, then, that as the testatrix whose will is under consideration died after the passage of the act of 1911, the validity of the provisions of her will are governed by that act.

After providing the old method of incorporating congregations of Christians, the act of 1911 empowered the corporation to purchase and hold property, real and personal, for the use of the congregation, their ministers or members, or for schools, almshouses or burying grounds. See section 4. Then follow several sections as to the election of trustees, duties of officers and the like. By section 10, the rector, wardens and vestrymen of any Protestant Episcopal Church on certifying their name or style could be constituted a corporation, with the franchises, rights and powers vested by the act in trustees of other religious societies. Then follows section 11, which is quoted above.

Judging from the context immediately preceding section 11, it is possible to hold that it

refers to corporations described in section 10, for the words "such corporation" might be given this very narrow construction. If so, then it does not apply to the gift under consideration, which was not to an incorporation of a congregation of the Protestant Episcopal Church. This question did not arise, and could not have arisen, in the earlier cases in Delaware above referred to, for the act of 1787 was differently arranged as to its subject matter. Section 11 of the act of 1911, above quoted, is in substance like section 3 of the act of 1787. By section 2 of the act of 1787 a religious corporation so created was given power to take and hold property, real and personal, for the use of its congregation. Then follows section 3: "Provided always, nevertheless," with the prohibition of a gift of land, or money to be laid out in land, except by deed. This prohibition applied to all religious corporations created under the act. No separate provision was made in that earlier act for incorporating congregations of the Protestant Episcopal Church. This was added later and appears in the revision of 1852 and in subsequent revisions of the statutes. It is clearly a construction too narrow to hold that section 11 of the act of 1911 applies only to the corporations of the particular religious body referred to in the immediately preceding section. Both from the history and spirit of the legislation it superseded, and the evident purpose of the act, section 11 applies to all corporations incorporated under it, including the one named in the will under consideration in this case. In legal effect it is as though section 11 of the act of 1911 followed section 4 of that act.

[4] It is clear that section 2 of the act of March 1, 1855 (see Revised Code, p. 313), does not apply to the will of Hannah R. Weldin. It was not a gift of real estate to be dedicated, or appropriated, to purposes of religious worship, but was a gift of money for the purchase of land to be held as an income-producing investment, the income to be used to pay the salary of the minister and in keeping in order and repair a cemetery, church and parsonage. Under other circumstances it might be a pertinent question to be determined whether section 2 of the act of 1855 repealed section 10 of chapter 39 of the Revised Code of 1839, page 310. The word "unless" in the act of 1855 may mean that a gift by devise, or otherwise, to a religious corporation, created under chapter 39 of the Revised Code, of land dedicated or appropriated, or to be dedicated or appropriated, for purposes of public worship was made valid, though theretofore invalid. In this connection it may be held that even if this be true, the re-enactment in the act of 1911 of section 10 of chapter 39 of the Revised Code of 1839 reinstated the prohibition, and to that extent repealed section 2 of the act of 1855. On these subjects no opinion is expressed.

[8-10] In comparing the earlier with the present statute, this difference is noted. The

former invalidates gifts "of and for any sum or sums or money, goods, chattels, stocks in any public funds, securities for money, or any other personal estate to be laid out or disposed of in the purchase of any lands, tenements, rents or other hereditaments," while the latter affected gifts "of money, securities, or other thing of value to be laid out in real estate." This, however, is not important. The former has not been construed, and there is little or no real difference between the two. A gift of money to be laid out in real estate means the same thing as a gift of money to be laid out or disposed of in the purchase of real estate.

The question to be decided here is really a narrow one. There are two gifts of money to a corporation created and existing under a law, which in respect to the crucial language was the same when the corporation was created as when the will was made and the testator died. Both gifts are of money "to be invested in real estate," and the "interest" applied for certain designated purposes. Is a devise of money to a religious corporation to be invested in real estate, and the interest applied to certain designated uses of the corporation, invalid under section 11 of the above quoted act?

On one side it is asserted that it is clearly within the prohibition of the act. On the side of the church it is urged that the language of the will is at least consistent with meaning an investment not by the acquisition of real estate, but by taking it as security for a loan to be made on it, and that the use of the word "interest," which is applicable not to income from land but from the use of money, shows that ownership of land was not contemplated by the testatrix. It was also urged that the language should be construed to mean "to be invested *on* real estate."

The primary consideration in construing a will is to ascertain the intention of the testator, and if the law invalidates a gift made in words with that meaning a court must declare in accordance with the law. There can be no fair doubt that the testatrix intended that land should be bought with the money she gave to the church. When one buys productive land, an investment is made in real estate. The testatrix intended that the purchase should be of real estate likely to yield an income by its being rented, or otherwise used to produce revenue. The absence of a forfeiture of the gift, or a gift of it otherwise on failure to invest in real estate, is quite important in ascertaining the purpose of the testatrix in using the language in the will. The obligation to purchase land with the money is imperative. So the use of the word "interest" is not controlling. Primarily "interest" means the compensation paid for the use of the money, or the penalty for delays in the payment of a debt, and is not aptly used in describing the income from real estate. There is, however, no such technical meaning to be given to the word "interest"

as shall peremptorily prevent its being considered synonymous with income from real estate, or even rent. Both interest and rent are incidents resulting from the use of property. A variation of meaning in describing the incident should not operate to control the principal thing to which the incident relates.

In construing a will, an intention to do what is illegal is not presumed, and if there be two constructions, the one consistent with, and the other repugnant to, the law the former will be adopted. So also an interpretation will be adopted as will give effect to every word of the will, provided the effect be consistent with the general intent of the whole will. So also intestacy is to be avoided as to the whole will and every gift in it. But it is also true that if the meaning of the language used is clear, and the general purpose of the gift is unmistakable, that construction must be adopted even if the law renders the gift so construed illegal, and even if some particular words relating to incidents of the gift are not given their primary meaning and even if intestacy in whole or part results.

Having found a natural and reasonable meaning for the words actually used by the testatrix, it is easy to resist the importunity of counsel to substitute other words for those used in the will, and the words "to be invested in real estate" will not be changed to read "to be invested on real estate." It being clear, then, that the testatrix intended the money given to the church to be laid out in real estate, the whole gift is invalid by force of the statute which declares void a legacy of money to be laid out in real estate, even though in adopting this conclusion the word "interest" is not thereby given its primary meaning, but another one which is quite reasonable, and even though a partial intestacy will arise from the adoption of such interpretation. The court is not at liberty to modify the strictness of the statute, or thwart its evident purpose and application by adopting a construction different from that clearly shown by the language used.

[11, 12] Both gifts, viz., the gift of a sum of money contained in the twenty-third paragraph of the will and of the residue in the codicil, are within the prohibition of the statute and invalid. Being void gifts the subject matter is to be disposed of as though the testatrix died intestate as to it.

In *Ferguson v. Hedges*, 1 Har. 524, a void devise was held to go to the residuary devisee because the subject of it was not validly disposed of by the testator. While in the case of *State, Use of Derrickson, v. Walter*, 2 Har. 151, a void bequest of the proceeds of sale of lands was held to go to the heirs at law of the testator. In *Hearn v. Cannon*, 4 Houst. 20, 15 Am. Rep. 701 (Court of Errors and Appeals, 1869), there was a devise of all the testator's real estate to three persons, one of whom was dead at the date of the will, and

there was no other or residuary devise of his real estate. The court considered the devise to be void as to an undivided third of the real estate, and that this share did not pass to the other two devisees, but descended to the heirs at law of the testator as land of which he died intestate. Under these decisions the legacy of one thousand dollars being void would have passed under the residuary clause; but as the residuary bequest is also void, both gifts go to the next of kin of the testatrix as distributees of the balance of her personal estate as though she had died intestate.

Let a decree be entered accordingly.

(123 Md. 546)

SULLIVAN v. SMITH. (No. 23.)

(Court of Appeals of Maryland. June 25, 1914.)

1. MUNICIPAL CORPORATIONS (§ 706\*)—USE OF STREETS — COLLISIONS — ACTIONS—INSTRUCTIONS.

Where, in an action for injuries to a child struck by an automobile, there was no evidence that the machine was moving faster than a moderate speed, and the theory of the defense was that the child ran in front of the car so unexpectedly that it was impossible to avoid her, and the court charged that, if the chauffeur might have avoided the accident by ordinary care, defendant was liable, unless the child was guilty of contributory negligence, and that, even if the child was negligent, she could recover, if the chauffeur could have avoided the accident by ordinary care after he saw, or, by ordinary care, might have seen, that she was in danger, an instruction that if the child stepped or ran in the way of the automobile when it could not be stopped, and under circumstances where with ordinary care it could not be stopped to prevent the injury, defendant was not liable was not objectionable as misleading, for failing to submit the question of the speed of the automobile.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

2. MUNICIPAL CORPORATIONS (§ 705\*)—USE OF STREETS — OPERATION OF AUTOMOBILES — REGULATIONS.

Where the chauffeur who ran over a child did not see the child until within a few feet of the machine, and he had no reason to suppose that any person would run out into the street, his failure to sound the horn was not negligence, for the case was not within Code Pub. Civ. Laws art. 53, § 150, requiring the sounding of the horn as a signal of approach when necessary to prevent injury to other persons using the highways.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

3. MUNICIPAL CORPORATIONS (§ 705\*)—USE OF STREETS—COLLISIONS—LIABILITY.

Where a child struck by an automobile testified that she looked and saw no automobile, the failure of the chauffeur to blow his horn was not the cause of the accident, for it did not mislead the child.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1515-1517; Dec. Dig. § 705.\*]

4. EVIDENCE (§ 586\*)—WEIGHT.

The testimony of a witness that he looked and did not see an object which he must have

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

seen if he had looked is unworthy of consideration.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2432-2435; Dec. Dig. § 586.\*]

**5. MUNICIPAL CORPORATIONS (§ 706\*)—COLLISIONS—CONTRIBUTORY NEGLIGENCE.**

In an action for injuries to a child struck by an automobile, evidence held to justify a finding that she could have seen the car had she looked in time to have avoided the accident.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

**6. MUNICIPAL CORPORATIONS (§ 706\*)—USE OF STREETS—COLLISION—NEGLIGENCE.**

In an action for injuries to a child struck by an automobile, evidence held not to justify a finding that the chauffeur was negligent in turning his car toward the curb at the time of the accident.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

**7. TRIAL (§ 228\*)—INSTRUCTIONS—BURDEN OF PROOF.**

An instruction that the mere happening of the accident complained of raises no presumption of negligence, but the burden is on plaintiff to "establish" negligence, is not objectionable for using the word "establish" instead of "prove."

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 509-512, 526; Dec. Dig. § 228.\*]

**8. TRIAL (§ 253\*)—INSTRUCTIONS—MISLEADING INSTRUCTIONS.**

An instruction that the burden is on plaintiff to establish by a fair preponderance of affirmative evidence that the negligence complained of caused the accident is not objectionable as leading the jury to ignore the evidence of defendant on the question of negligence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

**9. MUNICIPAL CORPORATIONS (§ 706\*)—USE OF STREETS—COLLISIONS—NEGLIGENCE—BURDEN OF PROOF.**

In an action for injuries to a child struck by an automobile, plaintiff has the burden of establishing by a preponderance of the evidence that the negligence of the driver of the automobile caused the accident, but that fact may be established by the testimony of defendant.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1518; Dec. Dig. § 706.\*]

**10. MUNICIPAL CORPORATIONS (§ 703\*)—USE OF STREETS—COLLISIONS—REGULATIONS OF AUTOMOBILES.**

A city ordinance requiring the driver of any vehicle before turning the corner of any street or turning out or stopping at the curb line to first see that there is sufficient space free from other vehicles so that the turn, stop, or start may be safely made, and to give a signal, does not require the driver of an automobile to blow the horn whenever he passes another driver, and does not apply to a driver not turning the corner of a street, or turning or starting from the curb line, or stopping at that line, but driving in the street.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1509-1513; Dec. Dig. § 703.\*]

Appeal from Superior Court of Baltimore City; Chas. W. Heusler, Judge.

"To be officially reported."

Action by Florence C. Sullivan by Fleury F. Sullivan, her next friend, against Wilbur

E. Smith. From a judgment for defendant, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, STOCKBRIDGE, and CONSTABLE, JJ.

William Pepper Constable and George Weems Williams, both of Baltimore (Michael H. Fahey, of Havre de Grace, on the brief), for appellant. C. John Beeuwkes and German H. H. Emory, both of Baltimore, for appellee.

BOYD, C. J. The appellant sued the appellee for injuries sustained by her as the result of the alleged negligence of the agent of the latter in running his automobile. There are four bills of exception in the record; the first three presenting rulings on the admissibility of evidence; and the fourth those on the prayers. The plaintiff offered three prayers, all of which were granted, and the defendant offered six, the first, second, third, and fourth of which were granted, and the fifth and sixth were rejected. The fifth sought to take the case from the jury on the ground that there was no evidence legally sufficient under the pleadings to entitle the plaintiff to recover, and the sixth relied on the alleged contributory negligence of the plaintiff as a bar to recovery. As the last two were not granted, there is no exception to the rulings on them, but the appellee contends that they ought to have been granted, and hence the judgment should not be reversed, even if the court be of the opinion that there was error in other rulings of the lower court, relying on State, Use of Bacon, v. B. & P. R. R. Co., 58 Md. 482, Bowman v. Little, 101 Md. 273, 61 Atl. 223, 657, 1084, and other authorities cited; but, while the questions involved in them will be referred to, it will not be necessary to pass on those prayers.

The defendant's car was a Packard with a limousine body, weighing about 4,500 pounds. The accident happened on Cedar avenue in the city of Baltimore. There is some confusion about the number of the house where the plaintiff was living with her grandmother, and where she came from at the time of the accident, but we understand it to be No. 3008. Cedar avenue on that block is described as having a brick sidewalk 6 feet wide from the steps of the houses, and then there is a space between that and the curb of a little over 6 feet. The street from curb to curb is about 40 feet wide, and just outside of the curb on the west side is a gutter about 3 feet wide. The street runs north and south, and No. 3008 is on the west side. There is a peculiar conflict of testimony as to whether there was a wagon standing near 3008, but, according to the plaintiff's witnesses, there was a delivery wagon standing somewhere between 3010 and 3006. The most accurate description of it seems to show that the back

of the wagon was about opposite the step of No. 3010, with the horse facing south.

The chauffeur of the defendant and the occupants of Dr. Likes' car, which was going the same direction as the defendant's and about 30 or 40 feet behind it, said they saw no wagon standing there. Mrs. Lewis, a witness for defendant, said she was living at No. 3020, and was going to 3010; that Mr. Carroll's wagon came down the street and stopped at 3018 and delivered an order there; that she passed the wagon when it was between 3016 and 3014; that the wagon was not at 3010 until after the accident. It is impossible to reconcile the statements of the witnesses about the wagon although there is no reason to suppose that any of them were intentionally testifying to an untruth. In some respects the defendant's case is stronger on the theory that the wagon was at the place where most of the plaintiff's witnesses place it—a foot or two beyond the gutter and somewhere between 3010 and 3008. For the purposes of this opinion we will assume that it was there as the weight of the testimony so shows. It is described as being about 5 feet 9 inches wide. The plaintiff had been talking with Mr. Meyers on the steps of her grandmother's house, and started across the street to tell her that he was there. Her grandmother was at Mr. Landes' store, which was No. 3001 Cedar avenue and on the corner of that avenue and a small street known as Bay street.

The testimony of the plaintiff was that she walked down to the gutter, stopped and looked up and down the street to see if anything was coming, and, as she did not see anything, she started across the street about 2 or 3 feet in front of the horse hitched to the wagon. Her testimony is somewhat confused as to how far she then went before stopping again, but we understand her to mean that when she passed in front of the horse to a point about even with the left wheels of the wagon she stopped again and looked up and down the street, and, seeing nothing, started diagonally towards Mr. Landes' store, but was struck by the automobile soon afterwards.

The theory of the defendant is that she ran from the house into the street and was struck by the right front wheel of the automobile. The chauffeur testified:

"The little girl I did not see until she ran into the side of the front wheel of the car. As soon as I saw her, I veered the car a little to keep from running over her, but the momentum of the child carried her on, and the car struck her and she rolled over, and the rear wheel went over her."

Mrs. Lewis, who was on the pavement of No. 3010, said:

"She run out off the steps, after talking to the man, right out in front of the automobile and never stopped; I seen it, standing there; I seen it all; she run out and the front wheel struck her in the side of the head and the hind wheel run over her, and I just stood there and I couldn't move."

She was asked where the child was picked up, and replied:

"Out in the street between her house and the next house; she run cater-cornered between the two trees."

There was a line of trees on the west side of Cedar avenue, but, as the accident was on November 15th, and as no mention is made of them obstructing the view, the leaves were probably off.

In their brief the attorneys for the plaintiff says the controverted facts are, broadly speaking:

"(1) Whether Carroll's grocery wagon was standing on the west side of Cedar avenue near 3008 at the time of the accident, and thereby screened from the view of the plaintiff the approaching automobile; (2) whether the plaintiff in crossing the street used due care in looking and listening, or ran heedlessly, and without looking, into the defendant's (appellee's) machine; (3) whether Maynard, the chauffeur, by the exercise of proper care, could have avoided the accident, the decision of which depends upon (a) whether he should have sounded his horn, (b) whether he should have seen, or did see, the plaintiff in time to either stop his car or divert its course, and thus have avoided the accident, (c) whether he caused the accident by changing the course of the automobile to the westward after he cleared the wagon."

As already stated, we will assume that a wagon was standing with the rear in front of the steps of 3010, but the evidence is strong, if not conclusive, that the plaintiff could have seen the car approaching if she looked before leaving the curb. There is certainly evidence strongly tending to show that she ran heedlessly, and without looking, into the defendant's machine and, if it be conceded that that was a question for the jury, the defendant had the right to have the jury instructed as to his theory of the case. We will consider the questions (a), (b), and (c), stated above, in discussing the prayers.

[1] The defendant's first prayer does not seem to be objected to. It instructed the jury that if they found "that the injuries complained of resulted from an unavoidable accident unmixed with negligence on the part of the servant of the defendant in charge of the automobile referred to in the evidence, then the verdict of the jury must be for the defendant," and then went on to define negligence. The defendant's second prayer, the granting of which the appellant contends was specially injurious error, was as follows:

"The court instructs the jury that if they find from the evidence in the case that the infant plaintiff stepped or ran in the way of the automobile of the defendant when it could not be arrested in its course, and under circumstances where with ordinary care on the part of the chauffeur the car could not be brought to a pause early enough to save the infant plaintiff from injury, the defendant is not liable, and the verdict of the jury must be for the defendant."

That prayer is the same as the defendant's eighth granted in McDonnell's Case, 43 Md. 534, and the defendant's third granted in Carneal's Case, 110 Md. 211, 72 Atl. 771, but in neither case did this court pass on them, as



the appeals were by the respective defendants.

While such a prayer might be misleading in some cases, we do not see how it could have been in this. From what we have said it will be seen that the defendant's theory was that the plaintiff ran from the sidewalk into the front of the car so suddenly and unexpectedly that it was impossible for the chauffeur to avoid striking her. The court in granting the plaintiff's first prayer had told the jury, in very broad terms, that, if they found the "injury might have been avoided by the exercise of ordinary care and prudence on the part of the defendant's servant or agent in the management and operation of said automobile," the defendant was liable, unless they also found that the plaintiff was guilty of contributory negligence, and by the second prayer that, even if the plaintiff was negligent, she was entitled to recover if the jury found that the chauffeur "could have avoided the accident by the exercise of ordinary care, after he saw, or, by the use of ordinary care, might have seen, that the plaintiff was in the roadway of Cedar avenue, and in danger of being struck by the said automobile." Of course, if the defendant's agent had been running the car in a negligent manner—for example was running at excessive speed—the prayer as it is framed would be objectionable. A chauffeur might not be able to stop or check his machine in time to avoid an accident, because he was running at such an excessive speed that he could not stop or check it, and, under such circumstances, he would not be excused. But there is not a particle of evidence that the chauffeur of the defendant was running at such a speed; on the contrary, witnesses for the plaintiff, as well as those for the defendant, testified that he was running at a moderate, or at least at a lawful, speed. There could therefore be no objection to this prayer for not submitting the question of speed to the jury.

[2] Whether or not the chauffeur was guilty of negligence in not sounding his horn must depend upon whether he was required to do so by statute or ordinance, or whether the circumstances were such as to require him to give some such signal. As will be seen in our consideration of the defendant's fourth prayer, we are of the opinion that article 1 of section 4 of the ordinance of 1908 was not applicable, and we also think that no negligence can be imputed to him by reason of section 150 of article 56 of the Code of 1912. The chauffeur testified that he did not see the plaintiff until she was within a few inches of his machine. There is nothing to contradict that statement, and if the wagon was there, as the plaintiff contends and we assume to be true, he could not have seen her as he went around the wagon. He had no reason to suppose that either a child or an adult would run out from the sidewalk at that point from behind the wagon. There

is no statute and no ordinance in evidence which requires drivers of automobiles to sound their horns every time they pass around other vehicles standing in the street, as this wagon was. Such signals would be useless in many localities if they were so required, as they would be so frequent as to be of little or no warning. There was nothing in this instance to suggest to the chauffeur that it was necessary to blow his horn to prevent injury to other persons using the highway.

[3] But, beyond all that, it is not contended that the plaintiff was relying on such a signal, and was misled by it not being given, and it cannot be said that the omission to sound the horn was in any way the cause of the accident. The plaintiff testified that she looked and there was nothing coming. Just why the chauffeur ought to have seen this little girl, when she swore she looked and did not see such a large object as this automobile, is not explained. It was argued for the appellant that, if the occupants of Dr. Likes' car could see her, the chauffeur ought to have seen her, but that does not follow, as a driver of an automobile necessarily has to give attention to a number of things, and it might well be that when the occupants of Dr. Likes' car saw her at the gutter the chauffeur was at that time engaged with his machine or attracted by something else which his duty required him to observe. On the east side of the street Mr. Landes was then holding his team waiting until this automobile passed so he could back his team into the alley, and it may be that the chauffeur was looking at that team just as the little girl came out to the street.

[4] It is impossible to know in many cases precisely what did happen, when there is contradictory evidence, but there are some well-established rules by which we must be governed. One is that when a witness says he looked and did not see an object, which he must have seen, if he did look, "such testimony is unworthy of consideration," to use the language of the opinion in Helm's Case, 84 Md. 515, 36 Atl. 119, 36 L. R. A. 215, which has been followed and applied a number of times.

[5] While we do not want to be understood as accusing this little girl, who was only seven years of age, of deliberately testifying falsely, it is shown beyond all question that she could have seen the approach of the car if she had carefully looked up the street before she attempted to cross in front of the horse. There was nothing to prevent her seeing it when she stopped at the gutter, as she said she did, and when she stopped the second time, which was after she had passed in front of the horse and was about in line with the wheels of the wagon, one of her witnesses, in answer to the question why she did not call to the child, said:

"Because I thought the child saw the automobile. I didn't see any use calling to her;

she stopped, and I supposed that's what she stopped for. Q. You supposed when she stopped she saw it? A. I thought she would see it; I didn't see why not."

The occupants of Dr. Likes' car saw the little girl before she started into the street. There was therefore no reason why the plaintiff could not have seen the car coming, if she carefully looked. But she says that after she went beyond the horse she stopped again and looked up the street and did not see anything coming and then started across the street. As the length of the horse and wagon was about 18 or 20 feet, it is difficult to understand why she did not see the car if she looked from the place and at the time she said she looked. The testimony shows that she was struck by the right front wheel of the car, and if she was about even with the left wheels of the wagon when she looked she only had a few feet to go before she would have been beyond where she was struck. There is therefore much to be said in favor of the appellee that she ran or, as some of the witnesses say, "darted out" from the pavement just as the automobile came by, and that it was in that way she was injured.

[6] There is nothing to show negligence in the chauffeur turning his car towards the west curb, which would be to his right, as stated by Mr. Meyers. His statement that "if he had gone straight ahead instead of making the turn, he would not have hit the child at all" is simply his opinion, and we must say such an opinion is not based on the facts, if other parts of his testimony are to be accepted as true. He was asked how close the automobile was when it passed the wagon, and replied: "Six to twelve inches." And again: "Q. You mean to say the automobile grazed that wagon within 6 to 12 inches? A. Something like that; yes. Q. Are you confident of that? A. Yes, sir." If that be true, it was physically impossible for the automobile to have turned to the right and have struck the plaintiff with the right wheel where this accident occurred. The chauffeur said that as soon as he saw the child he veered to the left, trying to avoid striking her, which would, of course, be the natural thing for him to do after he saw her. Mr. Landes, one of the plaintiff's witnesses, who was on the opposite side of the street, testified that: "After the automobile cleared the wagon it bore to the right and it came within five or six feet of the gutter. I guess the little girl after she was struck was lying four or five feet back of the automobile. I did not see the child start to come across the street. I did not see her until after she was run over." He also said "it cleared the wagon not very far, about several feet."

But if he was correct, surely it could not be said that the chauffeur was negligent because after he cleared the wagon he turned to the right. The chauffeur had no reason to suppose that this little child or any one else would be in the way. Even if Mr.

Meyers could be said to be correct in his version, what we have just said would be applicable. If it be admitted that, if when the chauffeur saw the child he had gone ahead instead of veering to the side, he might have avoided the accident, how can that be said to be evidence of negligence? If he thought that by turning his car from the course he was running he might avoid striking the child, he could not have been censured for doing so, and if the child then changed her course, and got in the way of the machine, it would not have been negligence on his part simply because he had changed the course he was originally running.

We are then of the opinion that there was no occasion for qualifying this prayer by submitting in it any of the reasons suggested by the appellant to show that the chauffeur could have avoided the accident, further than it was qualified by the plaintiff's prayers which were granted. It tersely, but fairly, presented the defendant's theory of how the accident happened, and we do not think that, under the circumstances, it was calculated to mislead the jury.

[7, 8] The criticism of the defendant's third prayer is very technical. That prayer is as follows:

"The court instructs the jury that the mere happening of the accident complained of raises no presumption of negligence on the part of the servant of the defendant operating the automobile referred to in the evidence, but the burden is upon the plaintiff to establish by a fair preponderance of affirmative evidence that negligence on the part of said servant caused said accident, and if the minds of the jury are left by the evidence in a state of even balance as to the existence of such negligence, then the verdict of the jury must be for the defendant."

Objection is made to the use of the word "establish" instead of "prove." The cases of *Ohlendorf v. Kanne*, 66 Md. 495, 500, 8 Atl. 351, *Barabasz v. Kabat*, 86 Md. 23, 37 Atl. 720, and *Laubheimer v. Naill*, 88 Md. 174, 40 Atl. 888, sufficiently answer that. Then the statement that "the burden is on the plaintiff to establish by affirmative evidence" is objected to. That is met by the case of *B. & O. R. R. Co. v. State, Use of Savington*, 71 Md. 500, where on page 599, 18 Atl. 969 on page 971, Chief Judge Alvey said, "It is incumbent upon the plaintiff to give some affirmative evidence of the existence of such negligence." That has been approved in *Riley v. N. Y., P. & N. R. R. Co.*, 90 Md. 53, 44 Atl. 994, and *B. & O. R. R. Co. v. Black*, 107 Md. 642, 69 Atl. 439, 72 Atl. 340. Nor can we agree with the appellant that this prayer prevented the jury from considering any evidence reflecting upon the negligence of the defendant, except that offered by the plaintiff.

[9] The burden was undoubtedly on the plaintiff to establish by a preponderance of evidence that the negligence on the part of the chauffeur caused the accident. That might be established by witnesses offered by the defendant, but the burden was neverthe-

less on the plaintiff to establish it. In *P., B. & W. R. R. Co. v. Hand*, 101 Md. 233, 61 Atl. 285, the objectionable prayer said that the fact of contributory negligence "must be proved by the defendant," although the law is that, if the plaintiff's evidence discloses contributory negligence, he is not entitled to recover. So, also, in *United Railways v. Riley*, 109 Md. 327, 71 Atl. 970, the prayer was "unless the defendant show," etc. If such an expression as that used in this prayer now under consideration could not be used, it would be difficult to submit a proper prayer on the burden of proof. What we have said above ought to be sufficient to show that the use of the expression "affirmative evidence" does not make the prayer objectionable. The opinion of the court in *Cooper v. Holmes*, 71 Md. 20, 17 Atl. 711, sufficiently points out why it was thought that the expression "positive testimony" was improper to relieve us of any further discussion of that. We see no reversible error in granting the third prayer.

[10] The fourth instructed the jury:

"That under all the evidence in this case there is nothing in article 1, § 4, of the Ordinance of 1908, referred to in the evidence, in relation to the rules of the road which required the driver of the defendant's automobile to give plainly visible or audible signal when approaching the place where the accident occurred."

That section is as follows:

"Section 4. Turning and Starting.—The driver or person having charge of any vehicle before turning the corner of any street or turning out or starting from or stopping at the curb line of any street, shall first see that there is sufficient space free from other vehicles so that such turn, stop or start may be safely made, and shall then give a plainly visible or audible signal."

As the driver was not turning the corner of a street or turning out or starting from the curb line or stopping at that line, it is difficult to understand what that section has to do with the facts of this case. If it meant that whenever one automobile passes another the driver must blow the horn, it would doubtless have said so, but there is nothing in this section to require that. It does not require the driver to give an *audible* signal, but he may give a "*plainly visible*" one or an *audible* one.

There was no reversible error in granting either of the prayers of the defendant which were granted, and hence it is unnecessary to consider the fifth and sixth, as suggested by the appellee. Nor do we find any error in the rulings on the admissibility of evidence. The question in the first bill of exceptions was properly held to be inadmissible. It was not necessary to look through the Smith car or through the grocery wagon to see the little girl, and the witness did not pretend that he had looked through either. The rulings in the second and third bills of exception were also right, but we will not further prolong this opinion by discussing them.

The injuries sustained by this little girl were such as to arouse the sympathies of every one knowing of them, as she was undoubtedly seriously and painfully injured. But her case was submitted to the jury as favorably for her as under the law she could ask, and, while we do not review their action, we can at least say that there was abundant testimony in the record to justify the verdict of the jury.

The judgment must be affirmed.

Judgment affirmed, with costs to the appellee.

(123 Md. 511)

FRIEDENWALD et al. v. BURKE. (No. 18.)

(Court of Appeals of Maryland. June 25, 1914.)

1. ATTORNEY AND CLIENT (§ 140\*)—COMPENSATION—REASONABLE COMPENSATION.

The court, in determining what is a fair and reasonable compensation to an attorney for services in any particular case, must consider the character and extent of the services, the importance of the case, and the amount involved, and the question cannot be decided simply according to the arbitrary individual opinions of the judges.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 336-349; Dec. Dig. § 140.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 501\*)—SPECIAL ADMINISTRATOR—REASONABLE COMPENSATION—OPINION EVIDENCE.

The court, in determining the compensation of a special administrator appointed by the orphans' court to defend a will and protect contingent interests thereunder, for the services rendered, must accord great weight to the opinions of eminent members of the bar.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2072, 2140, 2142-2148; Dec. Dig. § 501.\*]

3. EVIDENCE (§ 571\*)—OPINION EVIDENCE—WEIGHT—REASONABLE COMPENSATION.

The estimate of an attorney, called on to express an opinion as to the amount of reasonable compensation for services rendered by another attorney, depends largely on the analysis of the services and the particular point of view from which it is made.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2395-2398; Dec. Dig. § 571.\*]

4. EXECUTORS AND ADMINISTRATORS (§ 501\*)—SPECIAL ADMINISTRATOR—COMPENSATION.

A special administrator, appointed by the orphans' court to defend a will and protect contingent interests thereunder, *held* entitled, in view of the importance of the case and the amount involved, to a compensation of \$8,000.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2072, 2140, 2142-2148; Dec. Dig. § 501.\*]

5. ATTORNEY AND CLIENT (§ 140\*)—COMPENSATION—REASONABLE COMPENSATION.

While the fact that a client is rich cannot afford a justification for a charge by his counsel of more than a reasonable compensation, the amount involved in a controversy constitutes in many instances in a large degree the measure of the importance of the case, and the responsibility of counsel, and must be considered in determining the amount of reasonable compensation.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 336-349; Dec. Dig. § 140.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 6. Costs (§ 61\*)—AWARD OF COSTS.

Where, on petition by a special administrator, appointed by the orphans' court to defend a will and protect contingent interests, for compensation for services rendered, the amount allowed by the Court of Appeals on appeal from an allowance of the orphans' court is considerably more than the amount contended for by appellants and less than the amount allowed by the orphans' court, the Court of Appeals will direct that each party pay a half of the costs.

[Ed. Note.—For other cases, see Costs, Cent. Dig. § 27; Dec. Dig. § 61.\*]

**Appeal from Orphans' Court, Baltimore County.**

"To be officially reported."

Petition by Edward H. Burke, special administrator of Joseph Friedenwald, deceased, for allowance for compensation. From an order allowing compensation, Hiram W. Friedenwald and others, administrators with will annexed of the deceased, appeal. Reversed and remanded.

See, also, 122 Md. 156, 89 Atl. 424.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Vernon Cook and Edgar H. Gans, both of Baltimore (Louis N. Frank, of Baltimore, on the brief, for appellants. T. Scott Offutt, of Towson, for appellee.

THOMAS, J. This is the second appeal in this case, and it is only necessary to state briefly the circumstances under which the controversy arises. Joseph Friedenwald died in December, 1910, leaving an estate of about \$4,000,000. After his death three wills were found, one dated December, 1910, one April, 1903, and the other August, 1875. A caveat was filed by some of his children to the will of 1910, and a long and vigorously contested trial of the issues resulted in a verdict in favor of the caveators. The will of 1903 was then offered for probate in the orphans' court of Baltimore county, and a caveat thereto was filed by some of the children of the deceased against his other children and his grandchildren. In answer to the petition of the caveators the caveatees stated:

"These respondents further say that the said Joseph Friedenwald left what purported to be a last will and testament, dated the 12th day of December, 1910, which was probated in common form in this court, but, upon caveat being filed and issues being framed, it was determined by a jury sitting in the circuit court for Baltimore county that the said will was invalid because the said Joseph Friedenwald was, at the time of its execution, not of sound and disposing mind, and did not understand the contents thereof. Although these respondents are legally bound by the verdict of the jury and the judgment of this court thereupon, still they believed then, and believe now, notwithstanding said verdict, that the said Joseph Friedenwald was of sound and disposing mind at the time he executed the will of December 12, 1910, and understood the contents thereof; that he was just as competent to make a will on December 12, 1910, as he was on April 24, 1903, and

that therefore these respondents do not believe that the will of 1903 expresses the real and final intentions of their father and grandfather with respect to his property, and they are not interested in defending it; but, inasmuch as all the charitable and small pecuniary legacies will be paid by the family of the said Joseph Friedenwald, even though the will of 1903 is set aside, the only persons who might be interested in sustaining the will of 1903 are the grandchildren of the late Joseph Friedenwald, and their descendants, born and unborn, who have contingent interests under said will, and those interests should be represented by some person appointed by the court to defend the will, at the cost of the estate, to the extent that such person, in the exercise of his independent judgment, in view of all the circumstances of the case, shall deem proper."

On the 9th of January, 1913, the orphans' court passed the following order:

"Maryland, sc.—The State of Maryland—To All Persons to Whom These Presents shall Come: Greeting: Know ye that Joseph Friedenwald died leaving an alleged will dated April 24, 1903, which has been offered for probate in this court and a caveat has been filed thereto, and that some one should be appointed by this court to defend the said alleged will, at the cost of the estate, in the interest of the grandchildren of the said Joseph Friedenwald and their descendants, born and unborn, who may have contingent interests under said will, to the extent that such person in the exercise of his independent judgment, in view of all the circumstances of the case, shall deem proper. Therefore Edward H. Burke is hereby appointed a special administrator pendente lite, charged, however, with the sole duty of defending the said alleged will, to the extent that he in his independent judgment shall deem proper and to secure for it admission to probate, if that is attainable on full and fair investigation, and these shall be his letters therefore which are hereby granted to him."

Issues were sent to the circuit court for Baltimore county for trial, and, the verdict of the jury being in favor of the caveators on the issue of undue influence, the will of 1903 was set aside. Thereafter Edward H. Burke, Esq., special administrator, filed a petition in the orphans' court setting out the services he had rendered as special administrator and as attorney in defending the will, and praying that the administrators c. t. a. be required to pay him such sum as the court determined was a reasonable compensation for such services. There was filed with the petition the certificate of a number of prominent members of the bar, to the effect that they were familiar with the services rendered by the petitioner, and that \$15,000 was a reasonable and proper compensation for same, and on the same day, July 10, 1913, the court passed an order directing the administrators c. t. a. to pay the petitioner that sum "for the services rendered by him to said estate as special administrator pendente lite." The administrators c. t. a. filed a petition, excepting to the allowance on the ground that it was excessive and unreasonable, and praying the court to rescind said order. At the same time they presented to the court the form of an order suspending the payment of the amount, which the court

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

refused to sign, and they then appealed from said action of the court and from the order of July 10th. On appeal we remanded the case, without affirming or reversing the order of the 10th of July, in order that the exceptions to said allowance might be set down for a hearing and disposed of by the orphans' court after the parties had an opportunity to offer evidence in support of their respective contentions. In disposing of the case as then presented, Chief Judge Boyd, speaking for the court, said:

"We are of the opinion, then, that the orphans' court had the power to appoint the appellee, and we can have no doubt that they have the power to grant him such reasonable compensation as the services rendered by him justify. The answer of the appellee to the caveat of the will of 1903 suggested the appointment of some one, and the language of that answer was practically adopted in the letters—amongst other things, that some one be appointed 'at the cost of the estate.' As Mr. Burke was an attorney, it was undoubtedly intended that he should act as an attorney in defending the will, as otherwise the court would have provided for his employing some other attorney. The record is not very clear as to that; but we take it for granted that the answer filed by the appellee to the petition of the caveators and the other proceedings taken by him were all done in his name as special administrator, and hence he must have acted in both capacities. But, as he did not have charge of the assets of the estate, and could not have been made responsible for them, or any of them, his great responsibility and his real services were those of an attorney, and, in allowing him compensation for his services, those facts cannot be ignored. \* \* \* The appellee should be allowed a proper and reasonable compensation for such services as he rendered as special administrator, keeping in mind the facts we have already alluded to, and for such as he rendered as attorney. One of the most delicate duties courts are called upon to perform is that of fixing the amount of compensation of attorneys in cases in which they are entitled to be paid out of an estate or fund before the court. It would be difficult to lay down a general rule, to be allowed in all cases where such compensation is to be allowed, beyond saying that it must be reasonable and fair. In this case there is a certificate of nine attorneys referred to above, and the court fixed the amount recommended by them. While a certificate signed by responsible and leading members of the bar is entitled to great weight, it is, of course, not conclusive, and when an ex parte order has been passed fixing the compensation of an attorney, and those interested in the estate promptly object to the allowance, on the ground that it is excessive and unreasonable, and ask that the order allowing it be rescinded, they are entitled to be heard." 122 Md. 156, 89 Atl. 424.

When the case went back to the orphans' court evidence was produced by the appellee tending to show that the allowance was a proper and reasonable one, while the appellants offered evidence to show that it was excessive and unreasonable. After considering the evidence the court below passed an order confirming its previous order, allowing \$15,000 as a reasonable compensation for all the services rendered by the appellee, as special administrator and as attorney, from which order the administrators c. t. a. have again appealed, and we are now called upon

to discharge that delicate duty to which allusion was made on the former appeal.

[1] In determining the question of what is a fair and reasonable compensation to an attorney for his services in any particular case, a consideration of the character and extent of those services, the importance of the case, and the amount involved is essential to a proper conclusion (*Miller v. Gehr*, 91 Md. 709, 47 Atl. 1032; *De Bearn v. Winans*, 115 Md. 139, 80 Atl. 730; *Heating Co. v. Whitelock*, 120 Md. 408, 87 Atl. 820; 4 Cyc. 1001, 1004), and, as said by the court in *National Bank v. Dulaney*, 96 Md. 159, 53 Atl. 944:

"Such a question is not to be decided simply according to the arbitrary individual opinions of those constituting the trying tribunal. The judicial mind must have respect to the evidence offered for its instruction and guidance."

[2-4] Mr. Burke states that, according to his understanding of his letters, it was for him to determine, after an investigation of the facts and an examination of the law, whether the caveat should be resisted or he should allow the will to be set aside in the orphans' court; that he accordingly secured from counsel for the caveatees a copy of the evidence produced at the trial of the caveat to the will of 1910, consisting of 2,000 typewritten pages; that after a careful reading and study of this evidence and an examination of the authorities, he decided that Mr. Friedenwald was capable of making a will in 1903; and, as he had been informed by counsel for the caveators that the ground upon which the will was to be attacked was "testamentary incapacity," he notified counsel for the caveators of the conclusion he had reached, and advised them that there would have to be a trial of the case, and that he filed an answer to the caveat as special administrator; that in March counsel for the caveators advised him that they wanted to try the case the following Tuesday in the orphans' court, and that he told them that he did not think he could agree to try it in the orphans' court, that it would look like collusion to do so, but that he would think it over; that he then consulted Mr. Peach, one of the officials of the orphans' court, and he advised him to try the case in the circuit court before a jury, and that he then wrote counsel for the caveators that he would "insist on a trial before a jury," and would prepare issues, and that if he wanted to try the case promptly and would come out to Towson as soon as court met, he would be glad to arrange it; that a few days later counsel for the caveators came to see him, and told him that, inasmuch as he insisted upon a trial before a jury, they would abandon the caveat and would dismiss it as soon as they could see one or two of their clients; that some time later counsel for the caveators came out to Towson and said they were going to try it; that he prepared and filed the petition for issues, and at the same time "submitted a form of issues"; that he, Mr. Gans and Mr.

Harley, finally agreed upon the issues that were to be sent to the circuit court, and arranged with Judge Duncan to have the case tried on the 30th of June; that he then, in preparing for the trial, made a very careful examination and study of all the Maryland cases, went to see and talked with a number of witnesses, and was fully prepared to defend the will from an attack on the ground of testamentary incapacity, which was the ground that he understood was the one on which the contest was to be made.

At the trial of the case in the circuit court, which occupied about two days, the court granted the prayers offered by Mr. Burke, directing a verdict for the caveatees upon all the issues except the issue of undue influence. The appellee states that there was nothing in the evidence produced at the trial of the caveat to the will of 1910 to suggest that undue influence had been exerted on the deceased, and that at the trial of the issues relating to the will of 1903 he was not prepared to offer any evidence in rebuttal of the evidence offered by the caveators showing that the will had been procured by undue influence; that the parties who were charged with having exerted such influence were three of the caveatees, one of whom was, at the time of the trial, in Europe, and all of whom were in favor of setting aside the will; that they were the only persons by whom such evidence could have been contradicted; and that after giving the matter careful consideration, he concluded that it would be useless to call them, because he did not believe that they would contradict the evidence adduced by the caveators, and that therefore the only thing he could do, so far as that issue was concerned, was to cross-examine the witnesses and submit the case on the evidence produced by the caveators.

Under the will of 1903 the estate was to be held in trust by the executor during the life of the testator's wife, who was to receive \$8,000 annually. The trustees were directed, after her death, to pay to each of nine of the testator's children, not including Mrs. Selz and Mrs. Brager, \$30,000, \$10,000 to each of three grandchildren, children of a deceased child; the income from \$20,000 to his daughter, Mrs. Selz, and \$1,000 to each of the children of his daughter, Mrs. Brager, living at the time of the death of his wife. The seventh clause directed that after the expiration of 5 years from the death of his wife, and until 21 years after her death, the trustees should pay one-half of the income from the residue of the estate to such of his children and their descendants as were living at the time of the accrual of said income, and upon the expiration of said period of 21 years distribute the corpus of the estate to such of his children and their descendants as were then living, and provided that his daughters, Mrs. Selz and Mrs. Brager, and their descendants should be excluded from the provisions of said clause. Mr. Burke says in his petition

that as the result of setting aside the will of 1903 the will of 1875 was admitted to probate, and the children, and the descendants of the deceased child or children of the testator thereby secured an immediate distribution of his entire estate, and he says, further, in his testimony that as both the caveators and the other children of Mr. Friedenwald, caveatees, desired the will to be broken, the whole responsibility was on him to decide, in the first instance, to what extent the caveat should be resisted, and, after the introduction of the evidence of undue influence, to determine whether the three caveatees who were charged with having exerted such influence should be called to rebut that evidence, and that the fact that he had to bear that responsibility should be taken into consideration in deciding what is a fair compensation for services rendered by him as special administrator and attorney.

Mr. Charles F. Harley, who represented the caveators in the trial of the caveat to the will of 1910, and also in the contest over the will of 1903, after testifying that he thought the fee fixed by the orphans' court was "a very reasonable one," gave his reasons for so stating as follows:

"Under the law the elements to be considered are the time and the labor involved and the amount involved, and the responsibility and diligence, and a number of other elements, and, looking at those elements, it seems to me that the amount of \$15,000 is very moderate. He had about six months' labor in this matter, the estate was exceedingly large, unusually large, and the responsibility was exceedingly great, in my judgment, greater than my own responsibility, and greater than the responsibility, in my judgment, of the distinguished gentlemen on the other side in the first case; it was an unusual responsibility; it was the first time anything of the kind had occurred; it was rather establishing a new practice, as suggested by the Court of Appeals in 64 Maryland. The whole situation was an immense question, it involved immense responsibilities upon the shoulders of this member of the bar; and, while I was on the other side of the case, my judgment was that he discharged those obligations with integrity and diligence."

Mr. Osborne I. Yellott, who examined the testimony of Mr. Burke, the evidence produced at the trial of the issues concerning the will of 1910, the wills of 1910 and 1903, and the petition of the appellee says that the responsibility that Mr. Burke had was a peculiar and delicate responsibility, in that he represented people, many of whom were not in being, and that "it required a very high order of professional service, and a very high conception of professional duty and obligation in order to carry out the work as well as he did;" that from his knowledge of the mortality table, the contingent interests represented by Mr. Burke represented an "absolute interest" of \$300,000, and that, "considering the responsibility and the amount involved and the work he did and the way in which he did it," he thinks \$15,000 is a reasonable compensation for the services rendered by the appellee.

Mr. Frank Gosnell, who stated that he was

familiar with the character and extent of the services rendered, said that, without considering the value of the interest of the contingent remainderman, the fact "that he was employed to defend the will, and to carry out the intention of the testator," imposed a very great responsibility upon the appellee.

"He had opposed to him Mr. Harley, who represented some of the children, and, as I understand Mr. Gans represented others, and he did not expect to get any assistance from these gentlemen, so that everything devolved upon him. I think, the responsibility and the labor and the amount of the estate involved entitles him to a fee of \$15,000.

Mr. William Sheppard Bryan, Ex Attorney General of this state, who had read the petition of the appellee containing a statement of the services rendered, testified that \$15,000 was "a reasonable and fair fee for the services rendered, considering that he was the sole representative of those interests."

Mr. Edgar Allan Poe, present Attorney General of the state, testified that, in view of the responsibility imposed upon the appellee, the size of the estate and the extent of the services rendered, a fee of \$15,000 was reasonable.

The testimony of Mr. William Grayson and Mr. Robert Bussey is to the same effect, and it was admitted that Mr. Shirley Carter and Mr. S. S. Field, if present, would have testified that the amount allowed by the orphans' court was a reasonable compensation for the appellee's services.

Such testimony by members of the bar of the standing, prominence, ability, and experience of these gentlemen is justly entitled to and must be accorded great weight in the determination of the question involved. On the other hand, other gentlemen of the bar, of high standing and unquestioned ability and character, whose opinions are worthy of the most careful consideration by this court, after hearing the testimony of Mr. Burke, have placed a very much lower estimate upon the services rendered by him.

Mr. Joseph Packard testified:

"I would leave out of view entirely the question of commission, because an administrator, a special administrator, handles no funds, and the question of commission does not enter into it as it does in the case of one who recovers or conserves an estate, but simply represents a contingent interest of the grandchildren or the great-grandchildren, and that contingent interest would simply be to protect whatever they might have against the loss of the estate by their parents, or against the parents willing it away from them. That would be the only two contingencies, as I heard the testimony the other day, in which the question of the amount of the estate could arise. I consider that the amount of the estate, therefore, cuts very little figure in this case. It is simply a question between whether the minimum fee should be charged or a full fee, and I would say that the full fee should be charged in a case like this; whether the estate was \$500,000 or \$5,000,000, it would not make any practical difference. It would not be proper to charge in an estate worth \$10,000 or \$25,000 as much as that, as all professional men recognize the difference between a minimum fee and a full fee. I would consider the services in this case very much

analogous to the services to be performed by any arbitrator or by a special master. The arbitrator has the responsibility of deciding the whole case, and so does a special master, and having all those things in view, and having regard to all the circumstances testified to by Mr. Burke, of course I assume the entire truth of his testimony, and his absolute honesty in claiming the fee that he does, but I am called upon to express my opinion as a professional man on that subject, and my opinion is that \$2,500 would have been the full fee for the services that have been described."

Mr. Charles W. Field stated that, in view of the fact that the appellee did not succeed in sustaining the will, he thinks that \$3,500 would be a proper fee for his services. In the opinion of Mr. Eugene O'Dunne the work the appellee had to do was very much simplified by the fact that the caveat to the will of 1910 had been "fully and ably tried by able and learned counsel on both sides"; he had the benefit of the rulings of the court on the evidence and the prayers; his work was like the preparation for a retrial of a case that "had been thoroughly threshed out, assuming that it was to be tried on the same grounds." According to his view, if the appellee had assumed the responsibility of disposing of the matter without a trial, he would have been entitled to extra compensation, but as he very properly avoided that responsibility by a trial of the case, a fee of \$3,000 would be a liberal compensation for his services, and he says that he does not look upon the value of the estate "as an at all controlling factor."

Mr. J. Walter Lord states that, taking into consideration the time and labor involved, the difficulties of the case, the experience of counsel, the certainty of compensation and the character and extent of responsibility \$3,500 would be a fair and reasonable fee for the services rendered by the appellee. He says further that the appellee's employment was that of a special officer of the court, like that of a master or referee, and that his responsibility "in that regard" should not be measured by the amount of the estate; that his responsibility as representing the contingent interest of the grandchildren depended upon the value of that interest; that the substantial interests in the case were not interested in defending the will, and that the appellee "was only to decide whether the will ought to be defended in the interest of these grandchildren."

Mr. Charles Morris Howard expressed the opinion that \$2,500 was a liberal fee for the services rendered, and said that, while an attorney is authorized, where a larger amount is involved, to charge a larger fee than he would be justified in charging where the amount involved is small, he did not think that, because the case is a large one, you should lose sight of the fact that the measure of compensation "is the work, responsibility, time, and diligence that goes into the matter. In other words, if the services he has performed is worth \$2,500, it becomes imma-



terial, in a sense, whether the estate consists of one, three, or four millions of dollars, because it is a question of how much should be fairly charged, how much he has a right to charge, for the services performed." As reflecting only upon the *amount* of labor performed, he says that the appellee was not prepared to defend the will from attack on the ground of undue influence; that when the evidence of undue influence was offered, he only cross-examined the witnesses, and did not make a "strenuous fight along those lines," and that, in considering what the appellee should receive for his services, what he did should be taken into consideration; that if the appellee had been engaged two or three weeks in defending the will, or had made the fight and the will had been sustained, his opinion as to the amount of the fee "would have been different." Mr. Edward N. Rich testified that in his opinion \$3,000 would be full compensation for the services rendered by the appellee, and stated that Mr. Burke had the advantage of the testimony that had been produced in the contest over the will of 1910; that the responsibility imposed upon him was avoided by the trial of the case before a jury; that he was not charged with the care and custody of the estate; and that the duty imposed upon him was only "a little more than would be imposed by a retainer," which required him to go over the record "in the previous case" and to decide whether he would be justified in incurring the expense of another trial. The record also contains an agreement that Mr. George R. Willis and Mr. R. E. Lee Marshall were familiar with the character of the services rendered, and, if present, would have testified that a fee of from \$2,500 to \$3,000 would be a fair and reasonable compensation for the same.

[5] The evidence in this case illustrates the great diversity of opinion among members of the profession as to the value of professional services in a particular case, and it is perhaps not unnatural, for there can be no fixed and certain standard by which to measure it, and while, as we have said, there are certain well-recognized elements that are essential to a proper and fair conclusion, each case has its distinguishing features, and the estimate of one called on to express an opinion depends largely upon the analysis of the services and the particular point of view from which it is made.

Apart from establishing the principles upon which such questions are to be decided, reference to adjudicated cases afford but little assistance in reaching a proper conclusion, as each case must be determined according to its special facts and circumstances.

When this case was before us at the October term we held that the appellee was entitled to a fair and reasonable compensation for the services rendered by him as special

administrator, as well as those rendered by him as attorney. While these services were mainly those of an attorney, we think his letters imposed an added responsibility. He was in the attitude of counsel compelled to decide and act without his client, and the evidence shows that he fully and conscientiously discharged the duties required of him. He had opposed to him counsel of recognized ability and experience, who might be expected to press their claims with zeal and vigor, and whose judgment and skill would be quick to detect any weakness in his defense. He was no doubt greatly aided by the record of the trial of the previous case, but in the careful preparation he made for the trial he was required to look up and consult other witnesses, and to examine the authorities upon the various questions that he might reasonably expect to arise. The amount involved was large, and the case was an important one. While the fact that a client is rich can, as suggested by some of the witnesses, and as must be conceded, afford no justification for a charge by counsel in excess of what is a reasonable compensation for his services, the *amount involved* in a controversy bears a very different relation to the question, and constitutes in many instances, in a large degree, the measure of the importance of the case and the responsibility of counsel. In view of the character and the amount of work he was required to perform, and in consideration of the importance of the case and the amount involved, we have, after most careful deliberation, reached the conclusion that \$8,000 is a fair and reasonable compensation for the services the appellee rendered as special administrator and as attorney, and that the sum allowed by the orphans' court should be reduced accordingly.

[6] Inasmuch as the amount allowed by this court is considerably more than the amount contended for by the appellants, and less than the amount allowed by the orphans' court, we will direct that each party pay one-half of the costs.

Order reversed, and case remanded in order that an order may be passed by the court below in conformity with this opinion, each party to pay one-half of the costs.

(123 Md. 405)

VON BUCHWALDT v. SCHLENS et al.

(No. 8.)

(Court of Appeals of Maryland. June 24, 1914.)

1. TRUSTS (§ 56\*)—DEED OF TRUST—SUIT TO SET ASIDE—SUFFICIENCY OF EVIDENCE.

Evidence, in a suit to set aside a deed of trust executed by complainant in anticipation of marriage, to protect her property from the rumored improvidence of her intended husband, held insufficient to show that its execution, though at the suggestion of her relatives, was not her free, voluntary, and unbiased act.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 76; Dec. Dig. § 56.\*]



## 2. TRUSTS (§ 59\*)—DEED OF TRUST—RIGHT TO SET ASIDE.

Where plaintiff, as her voluntary and unbiased act, executed a deed of trust in anticipation of marriage, to protect her property from the rumored improvidence of her future husband, the income to be paid to her annually for life, the fact that the contingency for which she provided did not arise, and that she desired to avoid the inconvenience of an unnecessary precaution, was not ground for annulling the deed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 78–81; Dec. Dig. § 59.\*]

## 3. TRUSTS (§ 56\*)—DEED OF TRUST—SUIT TO SET ASIDE—BURDEN OF PROOF.

Where the evidence in a suit to set aside a deed of trust does not bring the case within the rule applicable to a gift to one standing in a confidential relation to the donor, the burden of proof is on plaintiff to establish her right to the relief sought by showing that the execution of the deed was procured by fraud or undue influence.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 76; Dec. Dig. § 56.\*]

Appeal from Circuit Court No. 2 of Baltimore City; James P. Gorter, Judge.

"To be officially reported."

Bill by Alice Wilkens Von Buchwaldt against Gustav A. Schlens, trustee, and others, to set aside a deed of trust. From decree for defendants, complainant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Jacob S. New and E. L. Stinchcomb, both of Baltimore (Johannessen & Powell, of Baltimore, on the brief), for appellant. T. Rowland Slingluff and Stuart S. Janney, both of Baltimore (Slingluff & Slingluff, Bartlett, Poe, Claggett & Bland, and Ritchie, Janney & Griswold, all of Baltimore, on the brief), for appellees.

THOMAS, J. The original bill in this case was filed in October, 1911, by the appellant, Mrs. Alice Wilkens Von Buchwaldt, to set aside a deed of trust executed by her on the 8th of October, 1900. After the testimony had been taken the bill was amended, and now avers as the grounds upon which she seeks to have the deed annulled, that she was born in Baltimore, Md., in 1877, and has resided since 1879 in Germany; that by reason of her "continuous residence abroad" she "has at no time been able to read, write, speak, or understand" the English language, and that in October, 1900, "while temporarily in the city of Baltimore, under the influence hereinafter more particularly mentioned, she was constrained to execute, against her will, to her brother-in-law, Gustav A. Schlens, the defendant, and husband of her sister, Henrietta Wilkens Schlens, now deceased," the deed of trust in question. The influence referred to above is stated in the next (sixth) section of the bill as follows:

"That shortly before the execution and delivery of said deed of trust she became engaged to

be married to the defendant, said Christian Von Buchwaldt, whom she afterwards married; that said engagement was strongly objected to by the mother of your oratrix, who endeavored to prevent your oratrix from becoming the wife of said Christian Von Buchwaldt, and that under the constraint and most urgent importunities of her mother she was finally induced to execute said deed of trust upon the belief hereinafter mentioned, and said deed, with that understanding, was prepared for the purpose of restoring amicable relations between your oratrix and her mother."

In the next paragraph she states "that she was finally induced to sign the deed upon the belief that she could, at any time thereafter, should she so desire, revoke the same, and that but for said belief she never would have executed" said deed; that after executing the deed she returned to her home in Germany, and about four months later she decided "to put her property in trust," and notified "Gustav A. Schlens, trustee," to have the deed recorded, believing that she could, at any time thereafter, "revoke the same." The bill then avers:

"Recently, however, upon notifying said Gustav A. Schlens, trustee, of her desire to revoke said deed, she, greatly to her surprise, was informed that the deed as executed by her was irrevocable, and that it could not be revoked except under and by virtue of a decree passed in a cause to which all the parties, who by the terms of said deed had an actual or contingent interest in said property, were made parties, so as to be heard by the court."

It is to be observed that the bill does not allege that the deed was procured by *fraud*, but the claim to the relief sought is based upon the averments that she was constrained to execute it "against her will," by the constant and most urgent importunities of her mother for the purpose of restoring amicable relations between them, and that she acted "upon the belief that she could, at any time thereafter, should she so desire, revoke the same."

[1, 2] The rules applicable to cases of this kind have been so often and clearly stated by this court that it is only necessary to repeat what had already been said, and to give a reference to some of the cases illustrating the application of these principles. In the early case of *Todd v. Grove*, 33 Md. 188, where the relation of the parties was that of principal and agent, the court, speaking of gifts between parties standing in a confidential relation, and after a review of many of the English and American cases, said:

"From the doctrines announced by these authorities, it is plainly deducible, as well as positively decided, that a gift obtained where such relation exists, as we have shown did exist between the parties in this case, is *prima facie* void, and the burden is on the donee to establish, to the full satisfaction of the court, that it was the free, voluntary, unbiased act of the donor; that a court of equity, on grounds of public policy, watches such transactions with a jealous scrutiny, and to set them aside it is not necessary to aver or prove actual fraud, or that there was such a degree of infirmity or imbecility of mind in the donor as amounts to legal

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

incapacity to execute a will or a valid deed or contract."

The doctrine there announced was applied in the case of *Williams v. Williams*, 63 Md. 371, and in the case of *Whitridge v. Whitridge*, 78 Md. 54, 24 Atl. 645, Judge McSherry quotes the following statement of Lord Romilly in *Cook v. Lamotte*, 15 Beav. 239, as follows:

"The rule in cases of this description is this: Where those relations exist by means of which a person is able to exercise a dominion over another, the court will annul a transaction under which a person possessing that power takes a benefit, unless he can show that the transaction was a righteous one. It is very difficult to lay down with precision what is meant by the expression 'relation in which dominion may be exercised by one person over another.' That relation exists in the cases of parent, of guardian, of solicitor, of spiritual adviser, and of medical attendant, and may be said to apply to every case in which two persons are so situated that one may obtain considerable influence over the other. The rule of the court, however, is not confined to such cases. Lord Cottenham considered that it extended to every case in which a person obtains by donation a benefit from another to the prejudice of that other person and to his own advantage, and that it is essential in every such case, if the transaction should be afterwards questioned, that he should prove that the donor voluntarily and deliberately performed the act, knowing its nature and effect. It is not possible to draw the rule tighter, or to make it more stringent, and I believe it extends to every such case."

After referring to other English cases and to *Todd's Case* and *Williams' Case*, Judge McSherry said:

"But it is needless to multiply references to adjudged cases on this subject, \* \* \* because it is the firmly settled law of Maryland that a gift or voluntary conveyance between living parties standing in the confidential relation of parent and child is *prima facie* void, and when assailed by the donor or grantor, can only be upheld if satisfactorily proved to have been the free, voluntary, and unbiased act of the person who made it."

The statement of the above rule obviously limits its application to cases in which the person holding the position of influence obtains some benefit from the person subject to the influence, and where no such benefit is procured there is no reason why a court of equity should regard the transaction with such jealous scrutiny, or impose upon the grantee in a deed of trust the burden of showing that it was the free, voluntary, and unbiased act of the grantor. In the case of *Williams v. Williams*, *supra*, Judge Miller said:

"But it would seem to be clear that there must be some gift, or conveyance, or some bargain, purchase, or other business transaction, by means of which the party holding the position of influence acquires property or obtains some pecuniary advantage or benefit, in order to bring this equitable rule into operation. It cannot in reason be applicable where the deed simply settles the estate and property of the grantor upon himself for life, and after his death transmits it to his own heirs at law. If a party capable of disposing of his property chooses, for the purpose of protecting it from his own improvidence, or for any other reason, thus to settle it, why should a court of equity look with suspicion upon the transaction simply because

he has made his father or his solicitor the trustee in the deed of settlement?"

This view was concurred in by Judge Robinson, and is not in conflict with the rule applied by the majority of the court in that case, for the court held that the deed of trust there in question did confer benefits on the trustee. The language of Judge Miller is quoted with approval in the later case of *Rogers v. Rogers*, 97 Md. 573, 55 Atl. 450, where the declaration of trust did not secure any advantage to the trustee or provide for commissions, and where Judge Pearce said:

"But if it had conferred a right to a fixed commission, this would not have altered the case, since, it was held in *Brown v. Mercantile Trust Co.*, 87 Md. 392 [40 Atl. 256], that the law regards reasonable commissions as compensation for services rendered, and not as a benefit granted by the deed. \* \* \* Under these circumstances, then, can it be said that this declaration of trust is *prima facie* void, and that the burden is on the trustee to establish to the full satisfaction of the court that it was the free, voluntary, unbiased act of the grantor? We think not."

[3] Where the facts do not bring a case within the rule applicable to a case in which a gift or conveyance is made to one standing in a confidential relation to the donor or grantor, the burden of proof, as in all other cases, is upon the person assailing the validity of the deed, and the principles by which it is to be determined are also well settled in this state. In *Goodwin v. White*, 59 Md. 503, Judge Alvey said that:

"Every person, whether man or woman, of sound and disposing mind, if under no legal disability, has the absolute right of making any disposition of his or her property that he or she may think proper, provided it does not interfere with the existing rights of third persons. If the disposition of property be fairly made by a competent person, though entirely voluntary and without consideration, it is perfectly valid, and cannot be rescinded simply because the court may think it absurd or improvident that such a disposition should have been made."

In *Brown v. Mercantile Trust Co.*, 87 Md. 377, 40 Atl. 256, the court, after referring to a number of decisions, said in reference to the contention that the declaration of trust was invalid because it did not contain a power of revocation:

"The rule now seems to be the one stated by Lord Justice Turner, in *Toker v. Toker*, 3 De G., J. & S. 491: 'That the absence of a power of revocation may be evidence that the party did not understand the transaction and so of undue influence.' But whether it would be so or not would depend upon all the circumstances of the case. \* \* \* Again I think it is going too far to say that no voluntary settlement can be valid unless the settlor is advised there should be a power of revocation inserted in it. What the court has to be satisfied of in these cases, I apprehend, is that the settlement, whether containing or not containing a power of revocation, is the free determined act of the party making it; and the absence of advice as to the insertion of a power of revocation is a circumstance, and a circumstance merely, to be weighed in connection with the other circumstances of the case."

In *Rogers v. Rogers*, *supra*, it is said:

"There is a class of voluntary settlements to which powers of revocation are appropriate, and

another class to which they are not, and it is fairly well settled that each case depends, in this regard, upon its own facts."

And in *Dayton v. Stewart*, 99 Md. 643, 59 Atl. 281, Judge Jones, in affirming the rule stated in *Goodwin's Case* and *Roger's Case* as to the effect to be given to the absence of a power of revocation in a declaration of trust, quotes the statement in 1 *Perry on Trusts*, § 104, that:

"A trust once created and accepted without reservation or power can only be revoked by the full consent of all parties in interest; if any of the parties are not in being or are not sui juris, it cannot be revoked at all. It is perfectly clear that where the settlor did not misapprehend the contents of the deed, and there was no fraud or undue influence and no power of revocation was reserved, the settlor is bound, though some contingency was forgotten and unprovided for."

In the light of these firmly settled principles, let us examine the facts in this case.

The record is a voluminous one, containing nearly 600 pages, and we shall not attempt to review it in detail, but will confine ourselves to a reference to those features of the evidence that, in our view, are controlling in the decision of the issues involved.

William Wilkens, Sr., the father of the appellant, died in Baltimore city in 1879, where he had lived for a number of years and acquired a large estate. He was married three times. By his first wife he had three children, viz., Henrietta, who married the appellee, Gustav A. Schlens, and who is now deceased, Charles Wilkens, and William Wilkens, and by his third wife he had three children, viz., Anna Maria, now Mrs. Von Bose, Alice, the appellant, who was born October 6, 1877, and Christian, who was born in April, 1879. By his will, which was executed in 1876, before the birth of the appellant and her brother Christian, after confirming the marriage settlement made with his wife and giving her his household furniture and \$20,000, in case she survived him, and after providing for a number of special legacies, he directed that all the rest and residue of his estate, including his interest in the property mentioned in the marriage settlement, be divided into as many parts as he had children, the child or children of a deceased child to represent the share of such deceased child. To his daughter Henrietta, wife of the appellee Gustav A. Schlens, he gave one share absolutely. He gave one share to his son William for life, with remainder to his children. One share was given to his brother, Louis Wilkens, and his two friends, Herman H. Graue and Charles Morton Stewart, in trust for his son Charles for life, with remainder to his children, etc. The share of his daughter Anna Maria, now Mrs. Von Bose, he devised and bequeathed to Herman H. Graue, Louis Wilkens, and Gustav A. Schlens, in trust to apply the income, or so much thereof as they deemed necessary, to her support and education during her minor-

ity, the amounts so applied by them to be paid to her mother, and after she arrived at the age of 21 years to pay the income to her during her natural life, for her sole and separate use, without power to her to alien or anticipate said income. The will directs that after her death her share shall be paid to her children, and in the event that she dies "leaving no issue," one half of her share is given to her mother, if living, and the other half to the other children of the testator. In case his wife is not living at the death of his said daughter, the whole of her said share is to go to his other children, and the trustees of the will were given the power to appoint their successors. The next clause of the will is as follows:

"And if it shall happen that any other children shall be born to me hereafter who or their issue shall be living at the time of my death, then I give and devise each such child, or his or their representative issue, one of the said equal parts or shares into which my residuary estate shall be divided as aforesaid, provided such child or the issue living at the time of my death of any such hereafter to be born child then deceased, shall live to attain the age of twenty-one years. And I empower my executors to expend so much as they shall deem requisite of the income of the contingent share or shares of such hereafter born child or children, or issue aforesaid, during their respective minorities, in or towards their maintenance and support respectively; and in case of the death of any such hereafter to be born child of mine, or of all the issue of any such deceased child, as aforesaid, under the age of twenty-one years and without issue, then I limit and give the part or share of my estate which such child would have taken if living to the age of twenty-one years in the same manner as hereinbefore provided in respect to the part or share of the said Anna Maria in case of her dying without issue, as aforesaid."

Herman H. Graue, Louis Wilkens, and Gustav A. Schlens were appointed executors. After the death of her husband Mrs. Catherine Wilkins, in 1880, returned to Germany to live, and she and her said children have lived there ever since. The share of her children in their father's estate remained in the hands of Gustav A. Schlens and Louis Wilkens, trustees, during their minority, and so much of the income therefrom as was required for their support and education was regularly sent by Mr. Schlens to their mother, who in 1885 married Gen. Schubert, of the German Army. The record shows that in the distribution of the personal estate of William Wilkens \$26,599.31 was distributed to Gustav A. Schlens and Louis Wilkens, trustees of Alice Wilkens, that in the partition of his real estate a number of lots, appraised at \$109,123.41 were allotted to said trustees, "and that during the years from 1883 to October 6, 1898 (the date of her majority), the sum of \$50,000 was added to her estate, as the result of income, unused in her maintenance and support, being taken into the corpus of her estate." Entertaining some doubt about the proper construction of that clause of Mr. Wilken's will in which the appellant was given her share of the testator's estate, in

July, 1898, Mr. Schlens wrote her mother, Mrs. Schubert, as follows:

"July 14, 1898. Dear Catherine: In October Alice will be twenty-one years old and of age, and now the question comes up how her estate shall be handled, as it does not say positively in the testament. The legal way is that lawyers be engaged to represent both sides, one for Alice and one for the trustees. The lawyers take the testament into the court. Each of them represent their side, and then it will be left to the judges to say what was the intention of the testator. Such proceedings, of course, cost a great deal of money and Alice's estate will have to pay all. I have now had a conversation with Mr. Slingluff, the attorney of the estates, and it is his view that the judges would decide that it was the intention of the testator to treat Alice's estate in the same way as her sister Mamie's, that is that the estate should remain in the hands of the trustees for their management, but Alice would be entitled from her twenty-first birthday to receive the net income of her estate. In order to evade the considerable, and, no doubt, useless expense of such a lawsuit, there is another way, namely, that Alice, by her own free will, declares she would be satisfied that her estate be treated in the same way as the estate of Mamie, namely to remain in the hands of the trustees for management, and that Alice received the entire net income. Please talk this matter over with Alice and let me know the result. If Alice is satisfied, I will have the legal document made up and sent over for her signature. With heartfelt greetings, A. Schlens."

That the suggestion that the appellant's share of her father's estate was, under the terms of the will, to remain in trust like the share of her sister, Mrs. Von Bose, did not meet with the approval of Mrs. Schubert and the appellant, and that they finally determined to have the matter submitted to the court, is shown by the following letters from Mr. Schlens:

"August 17, 1898. Dear Catherine: Your letter of August 2 from Norderney has been received. I have expected that my letter about this matter would cause you restlessness, but the matter had to be brought up for discussion. I am sorry to hear that you are under the impression that the trustees about his matter would cause trouble. Please understand me once and for all forever, that the trustees don't want anything and have nothing to say. They are named by the testament as managers, and they are compelled to follow the provisions and conditions under the supervision of the court to invest income funds also according to the instructions of the court, and for the conscientious carrying out of these provisions they have been obliged to give a bond of \$100,000 for each child. I inclose a short extract from the testament leaving out formalities. Mamie's share remains in trust. She received from her twenty-first year on the entire income, and upon her death her entire estate goes to her children. In the event that she dies leaving no children, one half of her property goes to you, if you are alive at that time; the other half goes back to the estate of William Wilkens. Should you, at Mamie's death, not be living, Mamie's entire estate goes back to the estate of William Wilkens. No provision has been made for the after-born children, except that the trustees are authorized, up to the time that they arrive at the age of twenty-one years, to remit sufficient funds for their education and support. Then comes an additional proviso that in case of the death of the children without leaving any children, the same conditions shall become effective as with Mamie, namely, that one half of the estate goes

to you if you are alive at such time, and the other half goes back to the estate of William Wilkens; and if you are not alive, the entire estate reverts back to the estate of William Wilkens. This condition has reference to all the afterborn children, both Alice and Christian. For instance, Alice marries, and the trustees, after having converted her entire estate into cash, send same to Alice upon her arriving at the age of twenty-one years. Her husband would get hold of this money, gamble or spend it recklessly; all such things have happened before; and Alice should die without leaving any children, the money is gone. In that event, you as well as the other heirs of the estate of William Wilkens would come to the trustees and demand their respective shares of Alice's estate according to the provisions of the testament and you will all be perfectly justified to make such a demand. Now, if the trustees have paid Alice's share over to her, then in that event the trustees and their bondsmen may be legally compelled to supply this share of Alice's estate out of their own pocket, and neither the trustees nor their bondsmen can afford to run such a risk. After this explanation you will no doubt perfectly understand that Alice's as well as Christian's estate must remain in trust. It was the desire of the deceased to provide for all his children and to safeguard them from poverty. Charles Wilkens thanks God that his estate was placed in trust; he would have formerly, in his youthful extravagance perhaps squandered his estate, and would have undermined his health, whereas he is now comfortably fixed with his wife and six fine children. He can enjoy the entire income and can afford to live well on it, and he thanks his father that he has in such a manner provided for himself and family. I have seen no lawyers, only I have read the testament through again and thought it over, and the above is the result. If you think over this matter, no doubt you will agree with me. With heartfelt greetings, Ad. Schlens."

"September 26, 1898. Dear Catherine: Upon receipt of your letter of the 20th inst. I went to the office of Mr. Slingluff and talked the said matter over with him. He is also of the opinion that it would be best for all parties concerned, and more satisfactory, if we would let this matter be decided by the court. Inasmuch as Mr. Slingluff represents the estate, it will be necessary to select another attorney to represent Alice's interest. If you recall the name of some attorney, let me hear of your selection (Mr. Frick does not practice any more he is over eighty years of age). If you cannot think of any one authorize me to select a competent and honest lawyer. I ask for an immediate reply. With heartfelt greetings, Your Ad. Schlens."

Accordingly Alice Wilkens filed a petition in the circuit court for Baltimore county, "alleging, among other things, that she had attained the age of 21 years on the 6th of October, 1898, and that she was entitled to hold her property free and discharged from any trust whatever." The suit was pending in the lower court and in the Court of Appeals until June 21, 1899, and in the meantime the appellant and her mother were kept advised of the progress of the case by Mr. Schlens. After the decision of the Court of Appeals, which is reported in 89 Md. 529, that "the share held in trust and set apart for Alice Wilkens became vested in her absolutely upon her attaining the age of 21 years," Mr. Schlens wrote Mrs. Schubert and the appellant, fully explaining the result of the case, and that it terminated the trusteeship.

The conclusion of the suit was followed by a controversy about counsel fees, which Mr. Schlens finally succeeded in adjusting in April, 1900. The court having determined that the appellant was entitled to the possession of her estate, she then executed a power of attorney to Mr. Schlens, under which he continued to exercise practically the same powers exercised by him as trustee, and to remit to her regularly the income.

On the 6th day of October, 1898, the day the appellant became 21 years of age, she celebrated at her mother's home her engagement to Capt. Von Buchwaldt of the German Army. Shortly thereafter Mrs. Schubert began to hear rumors reflecting unfavorably upon the character and habits of her prospective son-in-law, and in consequence thereof she became very much opposed to the proposed marriage of the appellant. She told the appellant of the rumors she had heard, and insisted upon her breaking the engagement, but the appellant refused to accede to her wishes, and firmly resisted the opposition of her mother and all the other members of her family to her marriage. Mrs. Schubert stated that the matter was a subject of daily discussion and of frequent quarrels between her and the appellant, and that she told her that if she insisted upon marrying Capt. Von Buchwaldt she should at least do something to protect her property, and that the appellant agreed with her "that some steps ought to be taken." She says further that in her correspondence with Mr. Schlens she told him how unfortunate they were, and tried to arouse his sympathy for the appellant as her guardian and relation; that she told him what she had heard about Capt. Von Buchwaldt, that he was not trustworthy, and that something should be done to prevent his getting possession of the appellant's property. In the summer of 1900 the appellant's sister, Mrs. Von Bose, and her husband decided to visit America, and invited the appellant to accompany them. Shortly before their departure the appellant decided to do so. Her mother was much pleased with the idea, and hoped that the change would do her good, and that she would find some one else "that she would like better" than Capt. Von Buchwaldt. She advised her to consult her uncle, Mr. Schlens, about the propriety of taking some step to protect her property in the event of her proposed marriage. On their way to America the matter was discussed by her and her brother-in-law, Capt. Von Bose. They arrived in New York in August, and, after remaining there a few days, went to visit Mr. Schlens in Baltimore. Shortly after reaching Baltimore, Capt. Von Bose spoke to Mr. Schlens about the opposition of the family to the proposed marriage of the appellant, and of her and their desire that something should be done to protect her property. They remained in Baltimore about a week, and then started on a trip to the West. On the

24th of August, 1900, Mr. Schlens wrote Mrs. Schubert as follows:

"Dear Catherine: Our travelers left us on Tuesday, the 21st, I suppose they are now at Niagara Falls. From there they will go to Chicago, where Charles Wilkens will look after them. They arrived here one month too soon, and therefore suffered considerable from the heat. Their appetites, however, was good. Mamie stated that she had gained three pounds here in Baltimore. We have, as yet, not talked about estate, etc. This had been put off until their return. Relative to Chrissie's estate the legal routine has to be followed. This cannot be avoided."

After further reference to his nephew's estate, the letter concluded, "With heartfelt greetings, Your, Ad. Schlens." After their return to Mr. Schlens', September 28th, Captain Von Bose, Mrs. Von Bose and the appellant talked with Mr. Schlens about the engagement of the appellant to Capt. Von Buchwaldt and their desire to protect her estate from the possible consequences of an unfortunate alliance. As the result of these conversations they all went to the office of Mr. Fielder C. Slingluff, who had always acted as counsel for the several estates created by the will of the appellant's father, and there the matter was carefully and fully discussed with Mr. Fielder C. and Mr. Lee Slingluff. About a week later the appellant executed the deed of trust to Mr. Schlens which is the subject of this controversy, and which was, in accordance with the advice of the counsel and understanding then had with her, withheld from record until after she returned home and had an opportunity to consider it further, consult her mother and relatives, and cabled Mr. Schlens to have it recorded. Mr. Schlens, on the 15th of October, 1900, wrote Mrs. Schubert about the execution of the deed as follows:

"Dear Catherine: Our visitors have now left us, and they will return to you to-morrow, per Steamer Deutschland. Nellie and Ernst are also in New York, as well as Willie, they will see them off. I hope that all three have had a good time, and that they will have lots to tell you, as to what they have seen. With Alice I had a long and earnest conversation. Have explained to her that she could not respect and trust that man and mutual respect and confidence were the foundation, and the first conditions of a happy marriage. If her father would still be living, he would positively refuse his consent. Alice realized the truth of all this, but she seems to be so taken up with that man, that I fear that nothing can save her, and that she, with her eyes open, is running into her misfortune. I deem it my duty to protect her interests, with all my might, and with all my might to protect her estate. After a mutual talk with Alice, Dolly, Mamie, Captain and Mrs. Von Bose and Willie, we proceeded to Mr. Slingluff's office, and Alice made a deed of trust, wherein she transfers her entire estate to me as trustee, so that she, like Mamie, only received her entire income, but she can exercise testamentary disposition over same, which is not the case with Mamie. This deed of trust has been left in my keeping. The same shall not go into court on record, that is, shall not become operative until Alice has talked with you about the matter. She will then telegraph to me. So consider this seriously. Personally I have less work if Alice's estate remains in her

control, as it is now, but as the matter stands now, I would cheerfully undertake the extra work, in order to safeguard Alice. It would be too abominable if this nice estate, for which her father worked so hard, should be squandered, so that the blinded Alice would suffer poverty. Dolly told me he would attend to it that Alice would make a contract before her marriage, so that her income would not be liable for his debts, and could only be used for her support. If all this is carried out, of which Alice of course will tell Buchwaldt, then perhaps he will step back when he as a money hunter realized that he cannot get his hands on the estate. This deed of trust cannot be revoked. Alice said she understood everything and will explain things further to you, bond, furnishings she can receive with consent of the court. Consider everything fully. These are serious matters, which will have to be looked at from every view point. With heartfelt greetings, Your, Ad. Schlens."

The deed, which was executed on the 8th of October, 1900, and conveyed all her property and estate, estimated to be worth about \$250,000, including her interest in the property mentioned in the marriage settlement with her mother, Gustav A. Schlens, of Baltimore city, in trust, recites:

"Whereas the said Alice Wilkens has attained the age of twenty-one years, and has received her share of her father, William Wilkens' estate, and is desirous of settling her property in trust, as hereinafter particularly set forth, and by so doing carry out the true intention of her father in securing for herself during her lifetime, the sole and separate use of the income of the property so inherited, notwithstanding the fact that the Court of Appeals has decided that said provision of her father's will did not apply to her share of his estate, and that she was entitled to the same absolutely."

It requires the trustee to collect the income, rents, etc., and after the payment of all expenses, taxes, etc., and the "usual commissions to the trustee for his services," "to pay over out of the net income thereof, to said Alice Wilkens for her maintenance and support, for and during her natural life, so much thereof as she may demand and ask for," and to invest the balance of said income. It further provides that:

"In the event of said Alice Wilkens marrying and leaving issue or descendants of issue living at the time of her death, the property hereby conveyed, shall, upon the death of the said Alice Wilkens, be divided among said issue or descendants of issue per stirpes and not per capita; but in the event of the said Alice Wilkens not marrying, or marrying and leaving no issue or descendants of issue living at the time of her death, the power to dispose of the whole or any part of the estate hereby conveyed by will, is reversed to the said Alice Wilkens, and in that event, the same may be disposed of by will as if this deed had never been executed; but in case said Alice Wilkens does not marry, or marries and leaves no issue or descendants of issue surviving her at the time of her death, and dies without having disposed of the whole or any portion of said estate by will, then and in that event, all of said property hereby conveyed, or the remaining portion not disposed of as above, shall pass to her heirs at law and distributees according to the Maryland law of intestacy."

The trustee is authorized, in case the appellant desires to invest a portion of the principal of the trust estate in a "homestead," to convert a part of the property into cash

and to advance so much of the principal as he may deem proper for that purpose. He is also given ample power to invest and to change the investments of the estate, and is required to report his proceedings in the execution of the trust annually to the circuit court of Baltimore city or some other court of equity of competent jurisdiction. In case of the resignation, removal, or death of said trustee the court which assumes jurisdiction of the trust is expressly authorized to appoint as his successor such person as the appellant shall recommend.

Mrs. Schubert, who two years before, resisted the suggestion that the appellant's estate was under the will of her father to be held in trust, was consistently averse to the deed of trust becoming operative, and it was only after the appellant persisted in her determination to marry Capt. Von Buchwaldt that she was willing to give her consent to the deed being recorded. After the appellant returned to her home from her trip to America Mrs. Schubert continued her bitter opposition to the marriage, and the appellant finally, in December, 1900, determined to abandon her home and go to the parents of her prospective husband. On the 28th day of December, 1900, Mrs. Schubert wrote Mr. Schlens:

"Dear Adolf: As I promised you I write to day to tell you the final decision of Alice's fate. Perhaps she had written you already, that she has taken her fate in her own hands and by choosing between this stranger and her own mother, has deserted me. She defiantly forced my consent to her marriage, was tired of the long struggle. Now she is visiting her parents-in-law and will probably be married there, for my husband had forbidden the house, to this man, who deceived us so, this is the thanks I get, for loving my child over twenty years and being a true mother, a few sweet words and promises from a giddy fellow and all is forgotten. Mamie and Chrissie, I am thankful to say, sympathize with me in the wrong Alice has done. I cannot protect my poor child now, will you please do what you can for her? I have withheld my consent to the tying up of her money on the hope she would change her mind and would marry a respectable man, who would later manage her estate. But that will not be, and before leaving I gave her the advice to write you, that you have it legally settled in court. What sad holidays we passed under these circumstances you may well imagine. Mother and I have fallen out about this affair, as she at all times in the most unaccountable manner took the part of this man, and is greatly responsible for the trouble. She may call me a disobedient daughter, but she urged my daughter to disobey me and for this I cannot forgive her. Chrissie probably answered your letter. He was much pleased with the large draft. I have his bank book and give him what he needs. With kindest regards, your Catherine Schubert."

The appellant must also have written Mr. Schlens of the step she had taken, for in his letter to her of January 8, 1901, he says:

"Dear Alice: Your letter of December 24th from Glucksburg duly received, as well as your postcard of the 27th. So the dice are cast. You have left your parental home to belong to the man of your choice. I shall refrain from any further comments, but I hope and wish that this most important step will turn out to your welfare and lead to your happiness."

He asked her to send him a copy of the marriage contract, in order that he might have a clear understanding of it, and the rest of his letter refers to certain sums of money which she requested and which she was required to deposit as, according to his letter, "a bond for Capt. Buchwaldt," and to certificate of her birth, which she was expected to furnish. The two following letters from Mrs. Schubert to Mr. Schlens are the best evidence of the relations then existing between her and the appellant:

"Dresden, Jan. 21, 1901. Dear Adolf: Your letter containing draft was promptly received, and I return you the receipt for the same with many thanks that much to my sorrow, this affair of Alice's has been settled, you know from my letter. Unfortunately I knew that if I forced a decision it would be to this end as Alice was blindly infatuated with this person. She has now taken her fate in her own hands and must see how she gets along. As I hear she has at least had enough sense to tie up her estate over there. Here in Germany it is necessary to make a marriage contract, Alice has made one, but has not shown it to me—the foolish girl has lost all confidence in me. I had told her she must choose between Buchwaldt and me, and she did so, as two days before Christmas she left for Glucksburg, to visit her parents-in-law, from where she will probably marry, when, not even her own mother has an idea. May she find the happiness for which she is making such sacrifices. With kindest regards, Your Catherine Schubert."

"February 8, 1901. Dear Adolf: Your letter surprised me greatly, Alice has so completely estranged herself from me, that I know nothing and must hear through strangers, that at this or that time is to be the marriage of my daughter. They say it is to be within the next few days but I hardly think so as she hasn't the caution yet. As Buchwaldt is now captain he needs only a marriage which will yield 1500 M. interest, namely the amount of 37,500 M. at 4%. Alice does not even need the ready money, consequently you need only have the German consul in Baltimore to certify that this money is hers and these authentic papers you may send over as to her request for you to send her \$50,000 I am as much surprised as you. It seems to me as the B. wanted to secure himself against any risk he is taking in marrying Alice. In your place I would make all possible objections before sending her the money. Everybody here advises me to make a very binding marriage contract, but I am helpless, as I have no power whatever over Alice. After begging her urgently, she sent a marriage contract or rather a copy of it to Dollie, but it was unsigned. Whether the original is signed or where it is she does not mention. She will probably send you a copy, cannot you as her old guardian demand a copy that has been duly authenticated and keep it for her? She acts in this matter as though we were her enemies, though it is all for her good. You will see by the contract that only in case of her death is it necessary to invest the sum of \$50,000 here consequently there is no need for you to send it now. I cannot explain it any other way but that B. cannot get the money into his hands quickly enough. Does he want to pay debts with it? I cannot find out and Alice would probably be only too glad to pay them. The marriage contract is crude, no provision is made in case she dies and leaves children. I thought she needed my written consent to her marriage, but that is not necessary in Prussia, so unknowingly I gave Mr. Von Buchwaldt advantages. He is rid of the troublesome parents-in-law and gets the wealthy girl. I have reproached myself often that I hindered the tying up of Alice's money, but I

did not think my gentle Alice could be so stubborn. I could cry when I think that the money for which my deceased husband worked so hard, will be in the possession of a dissolute Prussian lieutenant. I send you a copy of the contract, will close this with kindest regards. Your Catherine Schubert."

Mr. Schlens received from the appellant a cablegram requesting him to send her a certain check and directing him to file the deed of trust, and on the same day he wrote her in reply as follows:

"Jan. 28th, 1901. Dear Alice: To-day I received your dispatch, 'Send Check, Reichsbank, Aupstelle, Stettin, file deed,' and I presume that the demanded check is intended for the bond M. 65,000. I will have to sell bonds for that purpose, and will send you the money by next mail. The deed of trust I will not place in court until I hear from you further, and until I have received a copy of the marriage contract. After the trust deed is once on file then I cannot send you the said \$50,000 except with the consent of the court. I deem it my duty to stand by you, according to my best knowledge, just you depend on me. Your true Uncle, Adolph."

Having received Mrs. Schubert's letter of January 21st, Mr. Schlens again wrote the appellant on February 1, 1911:

"Dear Alice: I wrote to you on the 28th of January and received a letter from your mamma to-day, dated the 21st day of January, wherein she confirms that your estate here should again be placed in trust, which agrees with your dispatch of January 27th. Inasmuch as matters were not quite clear to me I went with your dispatch and mamma's letter to Mr. Slingluff, in order to obtain his opinion, as a lawyer. After careful consideration, he told me it was my duty to take the trust deed without delay into court to go on record, which I did at once, and now I cannot do anything without the sanction of the court. The matter concerning the bond I had attended to before, and so the court had nothing to do with that at that time. I could, however, obtain no check in Baltimore on the Reichsbank, but I inclose one on the Dresden Bank, Berlin, for M. 65,000. This check is issued by Alexander Brown & Sons, the largest Banking House. They are multi-millionaires, and you will have no trouble with same. I would advise you to have this bond taken out in your name in the new 4% government loan and Prussian state loan. Please acknowledge receipt of above. With heartfelt greetings, Your true Uncle, Adolph Schlens."

On the 5th of February Mr. Schlens, in order to guard against the possibility of his letter of the first and the inclosed check being lost, sent the appellant a copy of said letter and a duplicate check for the amount therein mentioned, and on the 7th of February the appellant wrote Mr. Schlens, acknowledging receipt of the check and confirming her cablegram, as follows:

"Glucksburg, 7 February, 1901. Dear Uncle Adolf: I received the check and sent you to-day receipt for the same. As you know from my telegram I desired the check for the guarantee fund to be made payable to the Reichsbank in Stettin, it will simplify matters when my future husband buys the necessary bonds there. I do not know positively whether 31/2% Prussian Consols are required, if not, I will of course take 4% Reichsanleihe, as you wrote me. Many thanks, dear uncle Adolf, for the trouble you had getting the certificate of birth for me. Father, when he gave me my certificate of bap-



tism and confirmation in Dresden said: That was all he had, possibly the certificate of baptism is sufficient. Inclosed you will find the marriage contract. As you will notice therein I will have the sole management of my estate, if this is not expressly mentioned the husband has the management. In the contract of the separation of estates the clause was inserted that I shall never be held liable for debts. To place my estate absolutely safe I telegraphed to you 'file deed.' We had already agreed on everything and I would have had it then invested if Mama had not at first been so opposed to it. The Consens must be handed in by February 15th, therefore I telegraphed and hope soon to hear from you. My wedding will take place about the middle of March. Thanking you for all your trouble and with best love. Your Alice."

"I hope you are just as well and healthy as when we saw you last fall."

On the 16th of February the appellant again wrote Mr. Schlens:

"Glucksburg, February 16, 1901. Dear Uncle Adolph: Many thanks for the check which I received the 13th inst. and I herewith send you a receipt. To-day I received the duplicate check and the copy of your letter. I have already cashed the original check as it was urgent, and I expect to hear from my intended in reference to buying the papers. I was very glad you sent the check so promptly, the copy of my marriage contract you have probably received, the attorney drew it up so that the 200,000 M. shall not be invested until immediately after my death and my husband then to receive the interest. The deed of trust has been executed, and we can all feel assured that the money of my dear father cannot be squandered. It is now perfectly safe and the best I could do has been done. Of papers for my marriage I still need a certificate from the proper authority in Baltimore, that according to the laws of the state of Maryland there is no obstacle to my entering the state of matrimony. This certificate must be authenticated by the German Consul in Baltimore, that the authority in Baltimore giving the certificate has the power to do so. Further I need papers or certificate stating that my father was an American citizen. This will answer instead of American citizenship papers for me, as I have no certificate to show I am American, this need not be authenticated by the consul. I beg you to try immediately to get these papers for me. If the certificate of the authorities cannot be gotten and you cannot get the papers, please let me know by telegram. If this certificate cannot possibly be obtained, it may be dispensed with. Aren't these troublesome formalities which are necessary here? The papers are necessary for the civil marriage. Please procure them as soon as possible or telegraph me if you cannot get them. With kindest regards and much love for you, Your Alice."

The appellant and Capt. Von Buchwaldt were married in April, 1901. Mrs. Schubert did not attend the wedding, and she states that the appellant visited her in the following December, but that "the final reconciliation" did not take place until the "birth of her grandson in Stockholm." The deed of trust was recorded as stated in Mr. Schlens' letter, a copy of it was sent to the appellant, and Mr. Schlens has continued ever since to administer the trust under the jurisdiction of the circuit court No. 2 of Baltimore city. In April, 1907, the appellant wrote Mr. Schlens to know if the deed of trust could not be revoked, and she says that she did so,

not with the view of taking "the management of" her property from her uncle, who had always managed it "as well as possible," but with the idea of having her "cash property" sent her in order to avoid double taxation. Mr. Schlens wrote her in reply:

"If the cause has been removed, on account of which you at that time placed your estate in trust, or if the conditions have changed to such an extent that a revocation of the trusteeship is desirable, then I cannot blame you if you desire again to take the management of your estate in your own hands."

He told her that he had seen an attorney about it, and that he shook his head, but said that he would consider the matter carefully and give him an opinion. He then added:

"I personally would be agreeable if the trust could be revoked. I am getting older and have enough business."

About two weeks later he wrote her inclosing the written opinion of Messrs. Slingluff & Slingluff, attorneys, in which, after stating that the only reasons assigned by the appellant for revoking the deed of trust was the heavy expense of the administration of the trust and her desire to avoid "the payment of taxes upon her property in this country, as well as upon her income therefrom in Germany," and after a review of all the circumstances attending the execution of the deed and some of the Maryland cases bearing upon the question, they advised him that, as it would be impossible for the appellant "to contest the deed on the ground that it was not her free and voluntary act, there is no way to revoke it or have it set aside." Some time after receiving that opinion the appellant, without the knowledge of Mr. Schlens, employed other counsel, and the original bill, which is not in the record, was, as we have said, filed in 1911 against Mr. Schlens, trustee, her mother, sister, and brother, and all other persons having any possible interest in the property conveyed by deed.

The evidence shows that the rumors that excited so much opposition on the part of the appellant's family to her marriage were not well founded, and that Capt. Von Buchwaldt has won and deserves their confidence and respect. Mrs. Schubert, her son, Mrs. Von Bose and her husband, who in 1899 and 1900 advised the appellant to take some step to protect her property from the consequences of what they then thought would be a most unfortunate marriage, were, in 1912, 12 years later, called to testify in her behalf for the purpose of showing that the paper she then signed to accomplish that end was executed against her will and under a mistaken belief as to its terms.

In reviewing the evidence in the case we have, at the risk of greatly extending this opinion, referred to the correspondence between the appellant, her mother, and Mr. Schlens, all of which was in German at some length, because it furnishes a contemporane-



ous history of the events leading up to and following, and the conditions attending, the execution of the deed in question, shows with unerring accuracy the intention of the parties and the motives that actuated them, and sheds a light upon the transaction that cannot be gathered from the testimony of witnesses whose recollections are necessarily affected by the lapse of time, and unconsciously colored by the suggestions of changed conditions. Without meaning to intimate that any of the witnesses who testified on behalf of the appellant intentionally misrepresented the facts to which their testimony relates, we think the letters and other evidence to which we have referred furnish a complete answer to the averments of the bill. Mrs. Schubert and the appellant knew that Mrs. Von Bose's estate was held in trust, and when, in 1898, it was suggested that the appellant's estate was subject to like restrictions, they resisted it to the point of having her absolute right to her property determined by the Court of Appeals of this state. She then executed a power of attorney to Mr. Schlens giving him the management of her estate, and after hearing the unfavorable reports about her prospective husband, she agreed with her mother and the other members of her family that, in view of her determination to marry him, she should take proper steps to protect her property. The deed was executed while she was on a visit to America, but, under the advice of counsel, it was withheld from record in order that she might have further time to consider it and to consult her family and friends. Mr. Schlens immediately wrote Mrs. Schubert, explaining the provisions of the deed, and telling her that, while the appellant said she understood everything, it should not become operative until she and the appellant had given it further and careful consideration. He told her that it *could not be revoked*, and said that it was a serious matter which should "be looked at from every viewpoint." The appellant lived with her mother until a few days before Christmas in 1900, when she left home because of the continued opposition to her marriage. Mrs. Schubert then wrote Mr. Schlens that she no longer had any influence over the appellant, and regretted that she had opposed the recording of the deed of trust. It was not until a month later that the appellant cabled Mr. Schlens to file the deed, and about a week later wrote him that they "had already agreed to everything," and that she would have had the deed recorded sooner if her mother had not been opposed to it. This evidence alone leaves no escape from the conclusion that the appellant not only fully understood that the deed could not be revoked, but that in directing Mr. Schlens to have the deed recorded she acted independently of any influence of her mother.

But this is not all. Mr. Schlens, Mr. Fielder C. Slingluff, and Mr. Lee Slingluff testify

that the terms of the deed were fully discussed and carefully explained to the appellant in Mr. Slingluff's office; that the appellant apparently understood English very well; that Mr. Slingluff referred to and discussed the case of *Whitridge v. Whitridge*, supra, and suggested to the appellant that she, like the plaintiff in that case, might after executing the deed attempt to have it set aside, and that she resented the idea; that he also suggested to her the propriety of making some one else the trustee, and advised her to consult other counsel, and that she declined to do so; that in discussing the terms and effect of the deed Mr. Schlens frequently explained to her in German what was said by counsel; that after the deed had been prepared the appellant went to the office of Mr. Slingluff to execute it; that it was then read and explained to her in English and German; that she desired the deed as first written to be changed in two particulars; that the changes were accordingly made; and that the deed was then executed by her with the understanding that it would not be recorded until after she returned home, and had a chance to consider it further and to consult her family and cable Mr. Schlens to have it recorded. Mr. Schlens says that when the appellant first spoke to him about protecting her property from the risks of an unfortunate marriage, she told him that she wanted it placed in trust like her sister's, Mrs. Von Bose's, estate. It is true, the recollection of the appellant and of Mrs. and Captain Von Bose as to what was said in Mr. Slingluff's office is not in entire accord with the testimony of the others present, but the appellant says that her uncle, Mr. Schlens, in whom she had complete confidence, did not influence her to execute the deed, and his version and that of the two counsel is corroborated by the other and unquestioned evidence in the case, and shows that they did everything that prudence could suggest in order to make her fully understand and appreciate the effect of the step she was about to take, and to caution and guard her against the possibility of too hasty action. At the time she executed the deed the appellant was 23 years of age, well educated and intelligent, and of resolute and positive character, with a judgment ripened by experience and opposition; and, to strike down a deed executed under the circumstances disclosed in this record would in effect deprive every man and woman of the power to protect his or her property from the danger of loss to which it is likely to be exposed. Fortunately for the appellant the contingency for which she provided has not arisen, and it is perhaps but natural that she should now desire to avoid the inconvenience of an unnecessary precaution. But if her fears and apprehensions had been realized the deed would have afforded her much needed protection.

Counsel for the appellant urge that the fact that the deed does not contain a power

of revocation "casts a suspicion" upon it, but while that fact is to be considered with all other circumstances surrounding the execution of the deed, it does not warrant the conclusion that the appellant did not understand it. Such a provision would have defeated the very purposes for which the deed was executed by exposing the appellant's estate to the danger against which she sought to guard it. In the case of *Dayton v. Stewart*, supra, Judge Jones said:

"The object of the deed as expressed on the face of it, and as it appears in evidence, was to secure the property thereby conveyed to the grantor and to her children named in the deed; and its execution was suggested by the fact that she was, at the time, contemplating a second marriage. It being intended to protect the property conveyed from the contingencies that might attend upon this second marriage and free it from the marital rights of her future husband, that her children might enjoy it in the event of her death, and that she might be more secure in its enjoyment while she lived, was inconsistent with a power of revocation in the deed. Its execution would have afforded but small protection to its beneficiaries with the means embodied in it to, at any time, recall and annul it and expose the property to the very contingencies against which it was designed to secure it."

The deed did not confer any benefit upon the trustee, but even if it did, we think the evidence shows that it was the free, voluntary, and unbiased act of the appellant, and must, therefore, affirm the decree of the court below.

Decree affirmed, with costs to the appellee.

(123 Md. 269)

**MAYOR AND CITY COUNCIL OF BALTIMORE v. STALFORD.** (No. 22.)

(Court of Appeals of Maryland. April 9, 1914.)

**1. MUNICIPAL CORPORATIONS (§ 845\*)—PUBLIC IMPROVEMENTS—INJURIES TO ABUTTING PROPERTY—DECLARATION.**

A declaration, in an action against a city for injuries by water, which alleges that the city tore up an open gutter in front of plaintiff's premises for the construction of a sanitary sewer, and negligently reconstructed the gutter and relaid and repaved the same for the purpose of carrying off the surface water, and left and allowed to remain cracks between the rock used in paving the gutter, so that surface water percolated into plaintiff's house, demands a recovery for the negligent repaving of the gutter, and not for injuries from the negligent construction of the sanitary sewer or for injuries from the negligence in maintaining the open gutter in an unsafe condition.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1796-1802; Dec. Dig. § 845.\*]

**2. MUNICIPAL CORPORATIONS (§ 845\*)—PUBLIC IMPROVEMENTS—NEGLIGENCE—ACTIONS—ISSUES, PROOF, AND VARIANCE.**

Where the declaration, in an action against a city for injury by surface water percolating into the cellar of plaintiff's building, was based on the negligence of the city in reconstructing an open gutter, torn up by the city in constructing a sewer, and the proof was that the gutter was repaved at the completion of the construction of the sewer 16 months before the

injury complained of, and that there were, at the time of the injury, cracks in the pavement at places not definitely located, but no evidence that such cracks existed at the time of the repaving or prior to the time of the injury, or that they were caused by any defect in the repaving, the variance was material.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1796-1802; Dec. Dig. § 845.\*]

**3. MUNICIPAL CORPORATIONS (§ 845\*)—PUBLIC IMPROVEMENTS—INJURIES TO ABUTTING PROPERTY—BURDEN OF PROOF.**

A plaintiff suing a city for injuries due to the negligence of the city in repaving an open gutter removed by it in constructing a sewer, has the burden of showing that the injury was caused by the negligence of the city in repaving the gutter.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1796-1802; Dec. Dig. § 845.\*]

Appeal from Superior Court of Baltimore City; Walter I. Dawkins, Judge.

"To be officially reported."

Action by John C. Stalford against the Mayor and City Council of Baltimore. From a judgment for plaintiff, defendant appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE, BURKE, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Edw. J. Colgan, Jr., and S. S. Field, City Sol., both of Baltimore, for appellant. James A. Latane and Albert S. J. Owens, both of Baltimore, for appellee.

**PATTISON, J.** This is an appeal from a judgment recovered in the superior court of Baltimore City by appellee, John C. Stalford, against the appellant, the mayor and city council of Baltimore.

The declaration, consisting of one count, alleges that the plaintiff is the owner of a leasehold interest in the premises known as 814 East Lombard street, in the city of Baltimore, which are used and occupied by him as his place of business, and, after alleging the power and duty of the defendant to open, construct, pave, maintain, and keep in repair sewers and drains in and through the public streets and alleys in said city, it alleges:

That "along and through" Lombard street "there was, and still is, a sewer, drain and gutter for the purpose of carrying off the surface water therefrom," and "that the defendant, in the performance of its duties and obligations aforesaid, undertook to tear up and remove said sewer, drain, and gutter in front of and in the immediate vicinity of the plaintiff's premises on said Lombard street, and subsequently to reconstruct said sewer, drain, and gutter, and to relay and repave the same for the purpose of carrying off the surface water aforesaid, and it thereupon became and was the duty of the defendant to reconstruct said sewer, drain, and gutter, and to relay and repave the same in a careful, proper, and workmanlike manner; yet the defendant reconstructed said sewer drain, and gutter and relaid and repaved the same in a careless, unskillful and negligent manner, and left and allowed to remain in said paving large cracks and crevices in the spaces between the rocks

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and stones used in paving said sewer, drain, and gutter in such way that, instead of carrying off the surface water from said street, the said water settled in said cracks and crevices and penetrated into the earth below said sewer, drain, and gutter and saturated the said earth for a great distance around, so that the same became soft and springy, and the said water percolated through the same to, through, and under the foundation of the plaintiff's house and flooded the cellar of said house with large quantities of water \* \* \* continuously from on or about the 5th day of January, 1912, down to the time of the bringing of this suit, \* \* \* by reason of which, and on account of the careless, unskillful, and negligent manner in which the defendant reconstructed said sewer, drain, and gutter and relaid and repaved the same, the said house and structure of the plaintiff's were greatly damaged and injured and the foundation walls thereof rendered unsafe, and the said cellar of said house was rendered unfit for use by the plaintiff, and that a large quantity of stock, consisting of leather goods and hides, being stored in said cellar for use by the plaintiff in his business, was greatly injured and damaged and rendered valueless to the plaintiff."

To this declaration the defendant pleaded the general issue plea.

At the conclusion of the testimony taken by the plaintiff and defendant, two prayers offered by the plaintiff were granted, and of the prayers offered by the defendant two were granted, one granted as modified, and the others were rejected. The defendant excepted to the action of the court in granting the plaintiff's prayers and in refusing to grant its rejected prayers and in overruling its special exception to the plaintiff's first prayer.

[1] By the first prayer of the plaintiff the court was asked to instruct the jury that:

Should they find that the defendant or its agents built the sanitary sewer "along Lombard street in front of the plaintiff's property, and if the jury further find in so doing the defendant or its agents tore up and removed portions of the street bed and gutter on Lombard street in the immediate vicinity of the plaintiff's property, and subsequently, after the construction of said sewer (if the jury so find), reconstructed, repaved, and relaid the said torn up and removed portions of the street bed and gutter of said street in a careless, unskillful, and negligent manner, and negligently left and allowed to remain in certain portions of the said street bed and gutter at or near the northwest corner of Lombard and High streets certain ends of sheathing or lagging standing and protruding above the surface of the street, in such a way that instead of carrying off the surface water from said streets, the water settled and penetrated into the nearby ground and eventually percolated and ran through the same into the cellar of the plaintiff's house, flooding the same and damaging and injuring his premises and property, then the plaintiff is entitled to recover in this action."

The defendant specially excepted to the plaintiff's first prayer for the reason that there was no legally sufficient evidence: (1) That the defendant tore up and removed portions of the street bed and gutter on Lombard street in the immediate vicinity of the plaintiff's property and thereafter reconstructed, relaid, and repaved such torn-up and removed portions of said street bed and gutter; (2) or that the defendant was guilty

of any negligence in the prosecution of any work which it engaged in in the bed of Lombard street in the laying of a sanitary sewer therein and in repaving over the trench in which said sewer was laid; (3) or that the defendant left certain ends of sheathing or lagging standing and protruding above the surface of the street, either in a negligent or any other manner; (4) or that said ends of lagging caused any damage to the plaintiff. And the defendant's first prayer asked the court to take the case from the jury for a want of evidence, under the pleadings, entitling the plaintiff to recover.

We will consider together the rulings of the court in granting the plaintiff's first prayer, and in overruling defendant's special exception thereto, and in refusing the defendant's first prayer. In passing upon these rulings it will be necessary for us to state at length the facts of this case.

The plaintiff, John C. Stalfort, a leather manufacturer, was at the time of the alleged injury to his property complained of in the declaration, January, 1912, the owner of the building situated on the northeast corner of Lombard and Albemarle streets, in the city of Baltimore, which at such time was used by him in his business, and in the cellar of which were stored the leather and hides which are said to have been injured by water entering the cellar at the time mentioned in the declaration. The surface water upon Lombard street, at least east of Albemarle street, was then carried off by means of the open gutters upon the street. In the fall of 1910 the city constructed a sanitary sewer under the bed of Lombard street, starting at a point east of High street, the next street east of Albemarle street, and extending by and in front of the plaintiff's premises to and beyond Albemarle street on the west. This sewer was laid on the north side of the street, and in constructing the sewer the city dug a trench about 83 inches wide and 10 or 12 feet deep in which they laid a terra cotta pipe 12 inches in diameter and refilled the trench and repaved the street where the trench had been dug. It is alleged in the declaration that:

The defendant tore up and removed "the sewer, drain, and gutter in front of and in the immediate vicinity of the plaintiff's premises on Lombard street and reconstructed said sewer, drain, and gutter and relaid and repaved the same for the purpose of carrying off the surface water, in a careless, unskillful, and negligent manner, and left and allowed to remain in said paving large cracks and crevices in the spaces between the rocks and stones used in paving said sewer, drain and gutter," etc.

The sewer, drain, and gutter there mentioned is not the sanitary sewer that we have spoken of, but the open gutter on the north side of Lombard street in front of the premises of the plaintiff. It was in the construction of the sanitary sewer that the gutter is alleged to have been torn up, and it was in the repaving of the street or gutter, as al-

leged by the plaintiff, where the trench was dug, that the charge is made that the gutter was not carefully and skillfully relaid and repaved. It is true the plaintiff uses the words "sewer, drain, and gutter"; but the reference there made was to the open gutter, and it was so conceded in the argument.

This suit therefore is not brought to recover for injuries resulting from the negligent and unskillful manner of constructing the sanitary sewer, but for the reconstruction or repaving of the open gutter which had been removed and torn up, as alleged by the plaintiff, in the construction of such sanitary sewer. Nor is it brought to recover for injuries resulting from the negligence of the defendant in properly maintaining and keeping in a safe condition the open gutter referred to.

[2] As to the exact location of the sanitary sewer, the plaintiff testified that it was constructed "in the street, close to the gutter," and Covington K. Allen, assistant engineer to the sewerage commission, who was in charge of the sanitary sewer, testified that the northernmost line of the sewer trench was about 18 inches from the curb of Lombard street. In opening the trench and refilling it, the gutter or curb along Lombard street was not removed," but that in digging the trench he encountered at the corner of High and Lombard streets the iron gutter plates which were directly in the line of the trench, and these had to be removed so that the trench could be dug under them. Upon the sides of the trench was driven lagging two inches thick, and driven, we may assume, to or about the depth of the trench. To what extent the pavement between such lagging and the curb, a distance of 18 inches or less, was disturbed in the removal of the pavement at the place where the trench was thereafter dug, and in digging this trench and in laying the pipe therein, is not specifically stated; but we do not think it a violent presumption that upon the completion of the work upon the sewer that at least a portion of this paving in the gutter was in such a condition as to require repaving and relaying. It was put in evidence, however, by the city that upon the completion of the sanitary sewer the pavement that had been removed, torn up, or disturbed in digging the trench and laying the sewer was thereafter properly relaid and repaved.

The evidence of the plaintiff as to the condition of the repaving does not relate to its condition at the time that it was done, but at the time of the injury, 16 months after its completion. It is true the witness Dehne, produced on the part of the plaintiff, stated that he saw this work being done and that it was not properly done; but the only reason he could find for stating that it was not properly done was because it was done by Italians.

The evidence of the plaintiff as to the defects—the cracks and crevices—in the

pavement, at the time of the injury, is indefinite, especially so as to the exact location of such defects. In fact, these defects seem to have been largely disregarded by the plaintiff in the prosecution of his suit. He relied, as it would seem, mainly, if not altogether, and based his right to recovery, upon the condition that was found in the gutter at the corner of High and Lombard streets under the iron gutter plate mentioned above. This is shown by his prayer, which makes no mention whatever of the defects mentioned and described in his declaration. As to such defects he is silent in asking instructions of the court.

The evidence of the plaintiff as to the condition of the gutter under the gutter plate that we have referred to was confined altogether to the time of the injury, except the testimony of Dehne, to which reference will be hereafter made. The plaintiff testified:

"That a man from the water department located a very large hole at the corner of High and Lombard streets that was not paved at all. There was a kind of iron plate laid there, and it was not paved at all and the water just went in there. That he saw a hole under the plate where the water just ran right in underneath; even on the side of the gutter it was not paved right."

Edwin D. Stalfort, a son of the plaintiff, stated that the gutter underneath the gutter plates was left entirely unpaved.

"There were planks left there with no cobblestones whatever over them, or around them, at all, as is usually done in paving, and being left open like that the water had a free flow."

In his cross-examination he further referred to these planks, saying:

"That they were those that are used in forming trenches when work of that character is being done; that is, laying planks of any kind. These planks were extending above the ground in some places as much as six inches. There was no paving there whatsoever; there were no cobblestones; there was no regular paving. The ground was very soft and mushy, having this water over it all the time, and the water naturally flowing down in there caused the depth to be quite great; that is, one could take a crowbar or something even longer and bury it completely."

Another son, Arthur J. Stalfort, testified that he was present when the employes of the city water department came down and removed the gutter plate at the corner of High and Lombard streets. He saw under the gutter plate.

"There was no paving there. There could be no paving because these planks were left sticking up six or eight inches above the ground and there could not have been any paving done. One of the men took a crowbar and just stood it on the ground, and it sank in the ground, and he nearly lost the crowbar."

Otto Lang, a witness called by the plaintiff, testified that he saw under the gutter plate when it was removed by the city officials in January, 1912, and that:

At such time "there was no paving; there could not be any paving because those planks were left sticking up six or eight inches above the ground, and one of the men took a crowbar and just stood it on the ground and it sank in the ground and he nearly lost the crowbar."

The witness Dehne, who is employed by the United Railways Electric Company as foreman of its sewerage division, and whose duties are to look after its drains, including the drains under gutter plates, and see that they are kept open, testified that this was one of the gutter plates that he looked after; that in the winter of 1912 he went to this place to clean out the drain under the gutter plate; and that during the months of January, February, and March he visited that point on an average once or twice a week. As we have already stated, he testified that he saw the gutter when it was being repaved by the Italians. He also testified that he had been familiar with the streets and the pavement thereof at the corner of High and Lombard streets since the spring of 1908; that at that time the street was paved with cobblestones and it was in good condition; that when they repaved it it was again paved with cobblestones. He was asked:

"Well, what happened then? A. After they had finished it, on another occasion I went there to clean it out, and these cobblestones had gone down, the whole thing had settled, there was no bottom there for it. The water was running on the dirty soil, the refuse that went in underneath it."

He was then asked "Did you see any flagging sticking up around there or anything of the kind?" An objection being made to this question, it was sustained by the court. He was then asked:

"Well, did you see anything else there, Mr. Dehne? A. Well, I didn't take particular notice of anything there."

Upon cross-examination he was asked:

"You have also stated, I believe, that when the sewerage people, as you say, had finished this work, they did repave under the gutter plate? A. Repaved, yes, sir; I seen that myself. Q. Shortly after it was done or being done? A. While it was being done."

He then stated that his visit to this place at the time that he discovered the stones under the gutter plate had disappeared was in January, 1912; that he reported it to the office of his company, but to no one else.

Mathias, another witness produced on the part of the plaintiff, testified that he was with Dehne at the corner of High and Lombard streets; that on one occasion he took off the gutter plate and found "holes in there"; that he had his gum boots on and stepped into one of these holes "and went pretty near up to my knees." He never took much notice of the holes; went there to clean it out, and when he did so he left. He cleaned it out both before and after the sanitary sewer was put in. The holes were found there after the sewer was built, "although it got choked up before," and, although he was asked to tell more about the character of the pavement and the holes that he spoke of, nothing was said by him as to the lagging concerning which the two sons of the plaintiff and Lang had testified.

Benham, superintendent for William H.

McCarthy & Co., the contractors who laid the sanitary sewer and who repaved the surface where the trench had been dug, testified that they removed the gutter plate to dig the trench; that, after the trench was dug and the sewer laid, the surface of the trench underneath the gutter plate was repaved in the same manner as other parts of the surface of the trench was repaved; and that there was no lagging sticking up. In describing how the repaving was done, he said that, after the trench was "back-filled," it was flushed and rammed and the lagging cut off and the surface of the trench covered with sand and paved over.

The plaintiff, who saw the gutter plate removed, and both Dehne and Mathias, employes of the United Railways Company, who had frequently visited the gutter at the place covered by the gutter plate and had cleaned it out, one of them having stepped in it, do not recall the existence of any lagging. And Dehne saw them when they were laying the pavement at this point, and yet, when his attention was called to it and he was asked if he noticed anything else there other than what he described, he said he did not.

The declaration in stating the negligence charged against the defendant, upon which the plaintiff bases his right of recovery, alleges that the defendant, in repaving the gutter in front of and in the immediate vicinity of plaintiff's premises on Lombard street, "left and allowed to remain in said paving large cracks and crevices in the space between the rocks and stones used in paving said sewer, drain, and gutter in such way that instead of carrying off the surface water from the street the said water settled in said cracks and crevices and penetrated into the earth below said sewer," etc.

In his prayer no allusion is made to the defects in the repaving of the gutter mentioned and described in the declaration, but by it the court is asked to instruct the jury if it finds other conditions existing which are attributed to the negligence of the defendant, that is, if they find that the defendant left and allowed to remain in certain portions of said street and gutter at or near the northwest corner of Lombard and High streets certain ends of sheathing or lagging standing and protruding above the surface of the street, in such a way that, instead of carrying the surface water from said street, the water settled and penetrated into the ground near by, etc., that they must find for the plaintiff.

At the place where the lagging is said to have been seen, the witnesses for the plaintiff all testified that at the time of the injury complained of there was no paving there at all, but a hole in which water flowed and settled into the earth. Even though lagging may have been seen by the witnesses who have testified to that fact, at the place mentioned by them, it would not follow that it was cut off and the pavement placed above it. If, on

account of the great flow of water at the place mentioned, the stones had been removed or had sunk in the ground, and a hole, as testified to, was made there, it is more than probable that the ends of the lagging might have been seen in the hole, though below the surface of the pavement.

In the declaration in the case of *Smith Co. v. Smick*, 119 Md. 279, 86 Atl. 500, it was alleged that the defendant did not furnish the plaintiff with a reasonably safe and proper place and machine in which to do and perform the work required of him, in that the plaintiff was negligently transferred from a small job press machine that he had been accustomed to work on, and put to work on another machine of a much larger and different style; that this latter machine was not protected by any shield or warning; that the same was dangerous; that he was inexperienced in the use of the latter machine, and no instructions were given him as to its use; and that while operating the machine his hand was caught and injured.

The evidence disclosed that the machines were of the same style, and in construction differed only in some minor particular. That the large press ran regularly at the same speed and at the time of the accident it was running as slow as it could go. The presses were run in the same way, and the danger of operating the two was identical.

The evidence offered on the part of the plaintiff was to the effect that the injury was caused by the jumping or jerking of the machine while the plaintiff was feeding it. The plaintiff himself testified that, when he had been working on the press for about a half hour, "all of a sudden the press gave a jerk that quick (indicating) and took my hand right up; sort of pulled me up with my hand."

The cause of the jerking and jumping of the press was attempted to be explained upon several theories: First, because the set screw and lock nut were worn out; and, secondly, "that the dust, etc., in the building got on the belt, and made it hug the pulley and caused the jerk."

[3] We in that case said:

"It is clear there is a manifest variance between the allegations of the declaration and the facts proven at the trial and set out in the record to sustain the plaintiff's theory of the case as made by the pleadings. The burden of proof was upon the plaintiff to show that the injury was caused by the negligence of the defendant as alleged in the pleadings, and the defendant had the undoubted right to have the jury confined to the issue as made by the pleadings. *City Passenger Ry. Co. v. Nugent*, 86 Md. 360 [38 Atl. 779]; *Fletcher v. Dixon*, 107 Md. 420 [68 Atl. 875]; *Darby Co. v. Hoffberger*, 111 Md. 86 [73 Atl. 565]. \* \* \* It is clear we think that the case the plaintiff sought to prove at the trial was a different case from the one alleged by the pleadings."

In the case before us, like the case from which we have just quoted, the facts alleged in the declaration in respect to the cause of the alleged injury to plaintiff's property are altogether different from the facts stated in

the plaintiff's prayer upon which he asked to recover.

It will also be borne in mind that all the evidence in the case, both that of the plaintiff and defendant, upon the question of the repaving of the gutter, was to the effect that it was repaved at the completion of the construction of the sanitary sewer, and the uncontradicted evidence of the defendant is that it was properly repaved. The gutter had been repaved 16 months prior to the time of the alleged injury to the plaintiff's property, and it cannot be legally inferred, in the absence of evidence showing the defective repaving of the gutter, that it was defectively repaved because of the condition in which it was found 16 months thereafter. And the plaintiff cannot recover under the pleadings in this case unless it be shown that such repaving was defectively done, and the burden of showing this fact is upon him. There is some evidence of the existence, at the time of the injury, of cracks, crevices, or holes in the pavement at other places, though not very definitely located; but it is not shown that such cracks, crevices, or holes were there at the time of the repaving, or at a period earlier than the time of the injury complained of, or that they were caused from any defective repaving of the gutter.

The case of *Hanrahan v. Baltimore City*, 114 Md. 517, 80 Atl. 312, is specially cited by the plaintiff in support of his contention that the variance between the aforesaid facts alleged in the declaration and the facts stated in the plaintiff's first prayer is not sufficient to warrant the rejection of said prayer.

In the fourth count of the declaration in that case it is alleged that the trench therein mentioned, in which was used sheathing or lagging, was negligently, improperly, and unskillfully dug and built, so as not to protect the house and property of the plaintiff against injury by the digging and building of said trench, and in consequence thereof the plaintiff's property was injured and damaged as therein stated. In that case the use of "proper and sufficient shoring, sheathing," or lagging was specially mentioned and involved in the allegation charging the defendant with negligence in the construction of said trench; and as the sheathing or lagging was not cut off below, but left protruding, above the surface, producing the results there shown by the evidence, it was proper in that case to mention and include this fact with other negligent acts of the defendant, as disclosed by the testimony, in holding that the prayer of the defendant removing the case from the consideration of the jury should not have been granted.

For the reasons we have stated, we think the court was in error in granting the plaintiff's first prayer, and in not granting the defendant's first prayer, asking that the case be taken from the jury because of the want of legally sufficient evidence, under the pleadings, to entitle the plaintiff to recover.

The plaintiff's second prayer being dependent upon the correctness of his first prayer, it should also have been rejected.

The defendant's second and third prayers were properly rejected, under the pleadings in this case.

The defendant's fifth prayer should also have been rejected, as the question of notice to the defendant of the existence of the defects in the repaving of the gutter is not involved under the pleadings in this case.

Under the pleadings, we think the sixth prayer of the defendant should have been granted.

The defendant's seventh and ninth prayers we think were properly rejected.

The judgment of the court below will be reversed.

Judgment reversed, and a new trial awarded, with costs to the appellant.

(123 Md. 590)

**CAPLAN v. BUCKNER. (No. 31.)**

(Court of Appeals of Maryland. June 25, 1914.)

**1. SPECIFIC PERFORMANCE (§ 121\*) — PAROL CONTRACT OF SALE OF REAL ESTATE—EVIDENCE.**

In a suit for the specific performance of a parol contract to buy real estate, evidence held to sustain a finding that the conveyance was to be made subject to a ground rent.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 387-395; Dec. Dig. § 121.\*]

**2. SPECIFIC PERFORMANCE (§ 41\*)—CONTRACTS ENFORCEABLE.**

A parol contract of sale of described land clear of incumbrance, except a ground rent, for a price fixed, a specified part payable on the date of settlement and the balance secured by a mortgage on the property, will be specifically enforced at the suit of the vendor, where the contract is fair, reasonable, and mutual, and where the purchaser has entered into possession under the contract and has paid a part of the price.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 120-123; Dec. Dig. § 41.\*]

**3. SPECIFIC PERFORMANCE (§ 52\*)—ENFORCEMENT OF CONTRACTS—EQUITY.**

A court of equity will not enforce a contract which does not express the intentions of the parties, or is the result of a mistake of either or both.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 155-159; Dec. Dig. § 52.\*]

**4. SPECIFIC PERFORMANCE (§ 66\*)—ENFORCEMENT OF CONTRACTS—EQUITY.**

The court, in a suit for the specific performance of a parol contract to buy real estate free of incumbrance, except a ground rent, must find, before denying relief, that there was a mistake of the parties, and that the contract did not express the real agreement; and, where the contract expresses the intention of the parties, and is fair and just, equity may, in the exercise of a sound judicial discretion, controlled by established principles of equity, enforce it.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. § 197; Dec. Dig. § 66.\*]

**5. SPECIFIC PERFORMANCE (§ 82\*)—CONTRACTS FOR SALE OF REAL ESTATE—MUTUALITY.**

A parol contract for the sale of real estate for a price fixed required the vendor to convey a good title, free from incumbrance, except a ground rent. There was a mortgage on the property, and the parties agreed that the purchaser should have possession until the vendor secured a release of the mortgage, and in pursuance of the agreement the purchaser took and remained in possession, and paid a part of the price. Held, that the contract was enforceable at the suit of the vendor as against the objection of want of mutuality.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 89-99; Dec. Dig. § 32.\*]

**6. SPECIFIC PERFORMANCE (§ 99\*)—CONTRACTS ENFORCEABLE—DELAY IN PERFORMANCE.**

Where a vendor, contracting to convey real estate clear of incumbrance except a ground rent, was unable to convey because of a mortgage and the parties agreed that the purchaser should have possession until the mortgage was released, a delay on the part of the vendor in performing the contract did not prejudice the purchaser, and did not prevent the vendor from maintaining a suit for specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 289-304; Dec. Dig. § 99.\*]

**7. SPECIFIC PERFORMANCE (§ 30\*)—CONTRACTS ENFORCEABLE.**

A contract for the sale of real estate for a fixed price, a specified part payable on the date of the conveyance and the balance to be secured by a mortgage, is not so indefinite that the court will not decree specific performance at the suit of the vendor, merely because it does not specify the time in which the mortgage shall be made payable, for the mortgage must be paid in a reasonable time, especially where a mortgage prepared by the purchaser was made payable in one year and the vendor made no objection on account of the time of payment.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 83-85; Dec. Dig. § 30.\*]

**8. APPEAL AND ERROR (§ 837\*)—RECORD—INSTRUMENTS FILED AFTER APPEAL.**

An instrument filed after the decree appealed from cannot be considered by the court on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3262-3272, 3274-3277, 3289; Dec. Dig. § 837.\*]

Appeal from Circuit Court of Baltimore City; Henry Duffy, Judge.

"To be officially reported."

Suit by Louis Buckner against Harry L. Caplan. From a decree for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

M. Albert Levinson and Julius H. Wyman, both of Baltimore, for appellant. Louis Hollander and David Ash, both of Baltimore, for appellee.

THOMAS, J. This is an appeal from a decree of the circuit court of Baltimore city, requiring performance of a verbal contract of sale of a leasehold property in said city.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 91 A.—31



In 1912 the appellee, plaintiff below, owned the property known as number 914 Watson street, and the appellant owned and occupied as his place of business the adjoining property, number 915 Baltimore street. According to the plaintiff's testimony, in February, 1912, he received through his daughter a telephone message that the defendant wanted to see him about 914 Watson street. He went to see the defendant the next day, and the defendant wanted to know if he would sell him the property at a reasonable price, or rent it to him. He told the plaintiff that he did not have enough room in his property, and that he wanted the plaintiff's property as a place to store his goods. The plaintiff told him he would rather sell the property. The defendant asked him what he would take for it, and the plaintiff told him \$2,000. The defendant then asked him "if it was in fee or had a ground rent," and the plaintiff replied, "It is subject to a ground rent of \$40 a year, payable \$20 every six months." The defendant said he had purchased the property on Watson street adjoining the plaintiff's property and subject to the same ground rent, for \$1,500, and that he would pay the plaintiff the same price for his property, but would not pay \$2,000. The plaintiff told him that the property he purchased had a store front, while the plaintiff's property had marble trimmings, and would make a nice home, and that if the defendant converted his property into a dwelling it would cost him more than the plaintiff asked for his property. The defendant said that if he purchased the property he would rebuild, and if the front brick and marble trimmings were of any value to the plaintiff he would let him have them. The plaintiff finally told the defendant that he would take \$1,800 for the property, but he declined to purchase it at that price. As the property was then vacant, the defendant asked him if he would not rent it to him until after the "Hebrew Holidays," that is, "until the last part of April or May," and said that at that time he would be prepared to make him a better offer, and that it would be worth \$10 a month to him in the meantime for the purpose for which he wanted to use it. The plaintiff, in view of the fact that the defendant only wanted the property for a short time, and with the hope of getting a better offer for it from him, rented it to him for \$10 per month. In June the defendant notified the plaintiff that he was through with the property, and requested the plaintiff to come to see him. The plaintiff went to see the defendant, and they agreed upon the terms of sale, which were that the plaintiff would convey the property to the defendant subject to the ground rent of \$40, clear of all liens or incumbrances, for \$1,800, \$600 of which was to be paid cash on the day of settlement, and the remaining \$1,000 to be secured to the plaintiff by a mortgage of the property. At the time this agreement was made the plaintiff told the

defendant that there was a building association mortgage on the property which would have to be released. The defendant employed Mr. M. Albert Levinson to examine the title, and the plaintiff gave him a reference to his title. In making the examination Mr. Levinson discovered that there was another mortgage on that and a number of other properties, spoken of in the testimony as the Cronhardt mortgage, which the plaintiff did not know of. When Mr. Levinson informed the plaintiff of the existence of this mortgage, the plaintiff went to see the defendant and told him of it, and told him that he would see the mortgagee for the purpose of having the mortgage released as to his property. It was then arranged that the settlement for the property would be made a month later, about the 1st of August. The plaintiff went to see about the Cronhardt mortgage, and the mortgagee refused to release it unless the entire mortgage debt was paid. The plaintiff then saw the defendant and told him what the mortgagee had said, and that it would be some time before he could secure the release. The defendant then suggested that he would take possession of the property as the purchaser and owner, and continue in possession of it until the plaintiff could give him a good title, clear of all incumbrances, and would in the meantime pay the plaintiff interest on the purchase price of \$1,600 and all expenses on the property, including the ground rent, taxes, and water rent, and that as soon as the plaintiff could give him a clear title he would pay the \$1,600 in the way that they had previously stated, and the plaintiff agreed to that arrangement and to give him a good title to the property. Foreclosure proceedings were instituted on the Cronhardt mortgage, and the plaintiff was not able to secure a release of the mortgage as to his property until the following May. In the meantime several persons approached him with the view of buying or renting the property, and in February, 1913, he went to see the defendant and wanted him to pay him six months' interest on the purchase price and the expenses for six months, showing him at the time a memoranda of the six months' interest, ground rent, taxes, and water rent, amounting to \$82. At the same time he suggested to the defendant that they should have their agreement reduced to writing, and the defendant told him to have the agreement prepared. The plaintiff did so, and took the agreement, which was prepared in duplicate, to the defendant and proposed to him to execute them. The defendant told him that he did not have time that day, and asked him to come back "day after to-morrow." The plaintiff went to see the defendant again as he requested, and the defendant told him that he did not understand "much about agreements" that he preferred to show it to Mr. Levinson, and that he would not do anything until Mr. Levinson saw it. The plain-



tiff went to see the defendant again, and defendant told him that Mr. Levinson had promised him to come in, but had not been there yet. The plaintiff got tired of the matter being postponed, and went to see the defendant in March, and said to him, "This is not business," and the defendant replied, "Well, you can take my word of honor that I am so awful busy that I don't know what to do first; leave the thing go until after Easter, and you will have my assurance that you will not be bothered or have any trouble with me, everything will be all right and settled up and adjusted in regard to expenses." About the last of May the plaintiff succeeded in getting the Cronhardt mortgage released, and he then went to see defendant and told him that he was ready to give him a clear title to the property. The defendant told him that he would see Mr. Levinson, and offered the plaintiff some money on account of the expenses we have mentioned; but, as they had agreed on the last of June as the date for the transfer of the property and final settlement, the plaintiff told the defendant that he could wait that much longer for the amount due on account of the expenses. The plaintiff reminded the defendant that he would have to have the cash payment of \$600 on the day of settlement, as he had arranged to turn that over to the building association on account of its mortgage, which was to be released as to the property to be conveyed to the defendant, and the defendant said he would give him \$100 on account of the "purchase price then." He gave the plaintiff his check for \$100 and told his bookkeeper to write a receipt for \$100 "on account of purchase price for 914 Watson street," which the plaintiff signed. The defendant told the plaintiff to come in in about a week, and he would give him some more money, and when the plaintiff went to see him as suggested, he gave the plaintiff another check for \$100 and took from him a receipt like the one he signed before. The plaintiff further testified that when the defendant gave him the second check the defendant told him that but for his agreement to purchase the property he would not buy it; that the conditions had changed; that when he agreed to purchase it he had made arrangements to have it torn down and to rebuild it and his adjoining property, but that he had since concluded that he did not have to make any alterations in the building, and that the defendant further said to him that, as "there was nothing signed," he would be satisfied if the plaintiff would release him from the purchase, and that he would give him the \$100; that he told the defendant that he had purchased a property, and that he had arranged to use the mortgage that he was to get from the defendant in paying for it, and that he, plaintiff, could not very well get out of that agreement. The deed for the property in question was prepared by Mr. Levinson, the mortgage and mortgage

notes were prepared by the plaintiff's counsel, arrangement was made for the release of the building association mortgage, and, according to the agreement of the plaintiff and defendant, they and their counsel met at the office of Mr. Levinson on the 30th of June to close the matter. In going over the items of expense from the date of the agreement, in August, 1912, to the day of settlement, when they came to the item of ground rent, the defendant insisted that he did not buy the property subject to a ground rent, and that the agreement was that he was to have the property clear of incumbrances, and he declined to take the property.

According to the testimony of the defendant, he rented the property from the plaintiff in the spring of 1912, to be used as a place in which to store his goods during the Easter season, which was his busy season, and after that season was over he surrendered the property about the last of April. The plaintiff then came to see him and wanted him to buy the property for \$2,000. He refused to take the property at that price, and told the plaintiff that all he wanted was the lot. In June the plaintiff told him that he would take \$1,600 for the property provided he got the material, and he told the plaintiff that he did not think he would need the material, and that he, plaintiff, could have it. He agreed to purchase the property for \$1,600 and to pay \$600 cash and to give a mortgage for the balance. The plaintiff did not say anything to him about the property being subject to a ground rent. He employed Mr. Levinson to examine the title, and several weeks later Mr. Levinson notified him that foreclosure proceedings had been instituted on the Cronhardt mortgage. On the 4th or 5th of August the plaintiff came to see him and told him of the difficulty about the Cronhardt mortgage, and said he was going to try to get rid of the difficulty, and that if the defendant wanted to do so he could continue to occupy the property, and that if the plaintiff could arrange to give him a good title to the property, the defendant could pay, in addition to the purchase price, the interest thereon and the expenses on the property in the meantime, and that if he was not able to give the defendant a title clear of all incumbrances, he could pay rent as he had before. The defendant estimated that the interest, taxes, and water rent would amount to about the same as the rent he had previously paid, and he agreed to the arrangement suggested by the plaintiff, and accordingly took possession of the property on the 4th or 5th of August, 1912. About eight months later the plaintiff told him he would "soon be through with the difficulty with the Cronhardt mortgage," and be ready to settle, and about a month later the plaintiff told him that he was then ready to settle. Mr. Levinson called his attention to the other mortgage on the property, and the plaintiff

wanted the defendant to give him \$500 and let the mortgage remain on the property, which he refused to do. About the last of May the plaintiff went to see the defendant and told him he was ready to settle, and asked him to help him out and give him a little money. The defendant told him that he owed him some money anyhow, and had just as well give him \$100, and if the deal went through it could be deducted, and if the deal did not go through it could be credited on the rent. The defendant gave him his check for \$100. Three days later the plaintiff asked the defendant to give him \$200, and the defendant told him that that would be too much, as his rent would not amount to that if the deal did not go through. The plaintiff asked him if he was not good for that much, and the defendant replied that he "was good for some money," and then gave him another \$100, because, as he says, it was his busy season, and he "was too busy to look into it." Some time before he gave the plaintiff the money referred to, on one occasion he came home from a trip to Norfolk, and his bookkeeper told him that the plaintiff had left an agreement for him. He did not look at the agreement and did not want to see it, and when the plaintiff came in a few days later he told him he did not want to enter into any further agreement, and that all he wanted was the property according to their agreement, and that he would then pay for it, and the defendant says that if he had read the agreement, and had seen any mention of the ground rent, the trouble would have "started right there." In reply to the question, "Was at any time the word 'ground rent' mentioned?" He replied, "Never, to understand it; that it was ground rent."

The evidence further shows that the defendant had purchased and owned a number of properties subject to ground rents; that he was familiar with the ground-rent system in Baltimore, and that the deed for the property, which was prepared by defendant's counsel about the time he examined the title in 1912, described the property as subject to a ground rent of \$40. It is true, the defendant says that he never saw the deed, and his counsel states that he did not show it to him or tell him of the ground rent. But it seems that he had a number of interviews or communications with his counsel in regard to the title of the property between the time the deed was prepared in 1912 and the date fixed for the final settlement in June, 1913, and it would be rather remarkable if nothing was said from which he might have inferred that there was a ground rent on the property, even if it did not occur to him to inquire about it. The defendant does not say that the plaintiff told him that the property was not subject to a ground rent, and when the court stated to him that, as he was familiar with the ground-rent system in Baltimore and owned

the adjoining property on Watson street, which was subject to the same ground rent, the court would like to know why it was he did not ask the plaintiff if the property was in fee or subject to a ground rent, he replied that in all his dealings the "word 'ground rent' was always mentioned," and that there was no occasion in this case to ask about the ground rent because he was only buying the ground and the plaintiff was to get the material. In his answer to the bill, however, he admits that he agreed to purchase the property for \$1,600, but nowhere states, as a part of that agreement, that the plaintiff was to have the material in the building. He further states in his answer that he agreed to pay the expenses that would accrue pending the litigation in regard to the Cronhardt mortgage as rent, and that he paid the \$200 "on account of rent," yet according to his testimony the rent for the entire year would have been only \$120, and he does not deny that he required the plaintiff to sign a receipt for each payment stating that it was on account of the purchase price. The agreement was not produced at the trial, and when it was demanded by the plaintiff, counsel for the defendant stated that he had never seen it, and that the defendant had never seen it, and the defendant testified that he told his bookkeeper to destroy it.

[1] The only evidence in the case tending to show the terms of the verbal agreement is the testimony of the plaintiff and the defendant. The fact that the defendant had purchased a number of properties subject to ground rents, including the property on Watson street adjoining the property of the plaintiff; his explanation of why he supposed the property was in fee and did not make any inquiry about it; the fact that the attorney who was employed to examine the title knew in June, 1912, that it was leasehold property; and the further fact that the defendant had in his possession the unsigned agreement prepared by the plaintiff's counsel, which disclosed that the property was subject to a ground rent—would at least suggest some doubt as to accuracy of his statement that the agreement was that the property was to be conveyed to him in fee, and in our judgment his evidence is not sufficient to overcome the positive testimony of the plaintiff that he told him that the property was subject to a ground rent of \$40. In this view we are supported by the conclusion of the learned judge who heard the case in the court below, and who had the advantage of seeing the witnesses, and was aided in judging of the accuracy of their recollections and testimony by the manner in which they testified.

[2] We have carefully examined the authorities referred to by counsel for the appellant, and do not find any legal difficulty in granting specific performance of the agreement. It possesses all the elements necessary

to entitle the plaintiff to the aid of a court of equity. The contract was fair, reasonable just, bona fide, mutual, and definite and certain in its terms, the defendant admits that he entered into possession of the property under it, and the evidence shows that he paid a part of the purchase price. *Duvall v. Myers*, 2 Md. Ch. 401; *Geiger v. Green*, 4 Gill, 472; *Gelston v. Sigmund*, 27 Md. 334; *Hopkins v. Roberts*, 54 Md. 312; *Spear v. Orendorf*, 26 Md. 37; *Goldman v. Britton*, 90 Md. 259, 44 Atl. 1029; *Miller's Eq. Proc.* §§ 679-711; 36 Cyc. 654.

[3] It is undoubtedly the rule in this state that a court of equity will not enforce a contract which does not express the intentions of the parties, or is the result of the mistake of either or both of the parties. *Kraft v. Egan*, 78 Md. 36, 28 Atl. 1082; *Somerville v. Coppage*, 101 Md. page 524, 61 Atl. 319.

[4] But in this case the evidence does not show that the agreement was the result of a mistake on the part of the defendant. On the contrary, we think it shows that he knew that there was a ground rent on the property. The fact that he now says that he did not know it cannot determine the plaintiff's right to relief, for otherwise there could be no enforcement of a contract where there is a conflict of evidence as to its terms. The court must find from all the evidence that there was a mistake, and that the contract executed or entered into by the parties does not express the real agreement. The rule that the specific performance of a contract is not a matter of right but rests in the discretion of the court refers to a "sound judicial discretion, controlled by established principles of equity, and exercised upon a consideration of all the circumstances of each particular case." *Somerville v. Coppage*, supra.

[5] There is no force in the suggestion that the contract was lacking in the element of mutuality. The agreement was that the plaintiff would convey to the defendant a good title to the property, subject to the ground rent, but clear of all incumbrances, and at the time appointed for the settlement he was ready and able to comply with that agreement. The fact that there was a mortgage on the property, and they agreed that the defendant should have possession of the property and pay the expenses until the plaintiff secured a release of the mortgage, did not destroy the binding force of the contract. It is said in *Miller's Equity Proc.* § 686:

"When the agreement shows that the vendor has not, at the time, a clear and unincumbered title, but is to acquire it, and then convey, if he is able to give a clear title at the time when by the equities of the particular case he is required to execute the conveyance in order to entitle himself to the consideration, there will be no obstacle to a specific enforcement by the vendor." *Canton Co. v. B. & O. R. R. Co.*, 79 Md. 424, 29 Atl. 821.

And in the case of *Maryland Construction Co. v. Kuper*, 90 Md. 529, 45 Atl. 197, Judge

Boyd, after referring to a number of cases, says:

"The authorities are therefore ample to establish the doctrine that the mere fact that the vendor's property is incumbered, or his title is defective, at the time the contract of sale is made, will not prevent his enforcing the contract in equity, if he has removed the incumbrance and perfected the title by the time he is required by his contract to convey it, and, generally, when he has acted in good faith relief will be granted him, if he is ready to furnish a clear title at the time of the decree, provided the delay has not prejudiced the purchaser and time is not of the essence of the contract. If this were not so, an owner of land who has incumbrances upon it might pay them off for the purpose of giving the purchaser a clear title, and then not be able to enforce the contract of purchase, or he might be subjected to heavy costs in order to have his title cleared, and then not be able to require the purchaser to perform his part of the contract."

[6] In the case at bar the contract was that the plaintiff would give the defendant a title to the property, subject to the ground rent, but clear of all incumbrances, and agreed that the defendant should have the possession and use of the property, upon the terms stated, until he secured the release of the *Cronhardt* mortgage. The defendant was in no way prejudiced by the delay, and it would operate as a hardship upon the plaintiff to now hold that he cannot enforce the agreement.

[7] The agreement did not specify the time in which the mortgage for \$1,000 was to be made payable, but that does not render the terms of the contract too indefinite within the rule referred to. In *Tribert v. Burgess*, 11 Md. 452, the court said:

"Another objection to this contract is that it cannot be specifically enforced because it is too indefinite, inasmuch as no time is limited for payment of the mortgage; and, as the parties have agreed upon one, the court cannot undertake to fix it. Such an objection is not a valid one. Very recently, in *Farrell v. Bean*, 10 Md. 233, this court said: 'When no particular time of payment is limited in a mortgage, it is to be paid in a reasonable time. And if the payment is not so made, the mortgagee is entitled to a foreclosure.'"

That case is cited and approved in *Lawson v. Mullinix*, 104 Md. 156, 64 Atl. 938, where the court held that when no time is fixed for the consummation of a contract, a court of equity will require it to be consummated in a reasonable time. The mortgage which was prepared by the authority of the defendant to carry out the terms of the agreement in this case was made payable one year after date, and no objection was made to it on that account.

[8] The record shows that about two months after the decree of the court below was passed the defendant filed a petition in the case, and with it the agreement which the plaintiff stated he delivered to the defendant in February, 1913, and which the defendant failed to produce at the trial. The property in question is referred to therein as leasehold property; but as the paper was not filed

is unable to produce securities because of their loss, for which he is not answerable, should suffer only to an extent necessary to make up any deficiency occasioned by a failure of the securities to realize on the market the amount invested in them. He, however, in order to avoid delay and to afford a speedy determination of a question which could not be finally decided except on appeal to this court, affirmed the report of the auditor.

The accountants are not asking relief from liability for losses by depreciation in value of securities not authorized by law which were purchased with the funds of the trust estate. They voluntarily proved the present market value of the securities and admitted a surcharge of all losses by reason of depreciation. They did not ask credit for loss in value through depreciation, but for the loss of the securities themselves.

Under the finding of the auditor that the trustee was not in fault in trusting her attorney, we think the credit claimed should have been allowed.

[2] Where a trustee mingles the money of the trust estate with his own, or invests it in his own name, it may be well held that the use of the money was for himself, not for the estate, and, when he is called to account, the only answer he may be permitted to make is the production of the funds. This is because he has committed a breach of the trust. The law, however, does not forbid or make unlawful an investment in securities not of a class expressly authorized by the acts of assembly. Where such an investment is made for the trust estate there is not a breach of trust, although there may be liability for loss by reason of depreciation. The securities in question were purchased for, and held by and in the name of, the trust estate, and there was not a breach of trust in making the investments.

[3] Since they were accounted for at their depreciated market value, there was no ground for a surcharge because of the illegality of the investment. The only charge is that they were not safely kept by the trustees, and this charge was not sustained by the auditor. A trustee is not an insurer of trust funds against the possibility of loss, and all that is required of him is good faith and reasonable diligence. *Adams' Estate*, 221 Pa. 77, 70 Atl. 436, 128 Am. St. Rep. 727, 15 Ann. Cas. 518.

[4] The appeal of the Provident Life & Trust Company, succeeding trustee, is based on the refusal of the auditor to surcharge the accountants with the amount of a mortgage collected by her attorney and the loss of moneys of the trust estate given by the trustee to him for investment in mortgages on real estate. The appellant's contention is that the finding by the auditor that there was

no negligence upon the part of the trustee in trusting her attorney is erroneous, because some three years before her death she knew the bonds of a gas and electric company had been taken from the box in which the trust securities were kept. The evidence in relation to these bonds was that the trustee wrote her attorney that on a visit to the box for the purpose of cutting off coupons she did not find these bonds, and that she presumed that they were in his keeping. Interest was paid upon them until her death. That this circumstance did not, in fact, excite her suspicion or create distrust is conclusively shown by the fact that she continued to give him the means of access to the box in which her personal securities were kept in the bank. That it was not ground for suspicion appears from the nature of the services he performed as her attorney. The general management of the trust was not delegated by the trustee to her attorney, and he represented her in legal matters only. She kept her own accounts, collected the income, had full charge of the estate, and his services were as her attorney at law. The trust estate consisted of 79 original investments made by the decedent, and 46 reinvestments made by the trustee. The original securities were bonds, stocks, and Western farm mortgages, as to many of which there was default in payment of interest and principal. When the professional services of an attorney were required in collecting mortgages, or in attending to securities issued by companies that were in process of liquidation or reorganization, it was usual and proper that the securities should be taken to the attorney's office. The payment of moneys to the attorney for investment in specific loans on mortgage securities, as shown by her accounts, were made as such payments are usually made. The conclusion of the auditor that for these losses the trustee should not be held liable was confirmed by the orphans' court, and we find no reason for setting it aside. On the subject of the continuance of trust in her attorney, after she had observed that two bonds were not in her box, the auditor reported:

"But there is no evidence produced that would bring a suspicion home to her, and she evidently did not suspect him of doing anything wrong in this instance, since she trusted him fully afterwards, and for this act, which presumably was satisfactorily explained to her, it does not seem proper to hold that she had such knowledge of his misconduct as should have put her on her guard and caused her to withdraw from him the confidence and trust she had in him."

The appeal of Alfred D. Sharpless and William P. Sharpless is sustained, and the decree appealed from by them is reversed, and it is directed that their account be confirmed. The appeal of the Provident Life & Trust Company is dismissed. The costs on both appeals to be paid by the estate.

(245 Pa. 224)

DAVIS v. FLESHMAN et al.

(Supreme Court of Pennsylvania. May 4, 1914.)

**1. GAMING (§ 28\*) — RECOVERY FROM STAKEHOLDER—RIGHT.**

A recovery may be had from the stakeholder under a gambling contract, where the stake has not actually been paid over to the winner, though the contingency upon which the bet turns has happened.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 62-67; Dec. Dig. § 28.\*]

**2. GAMING (§ 25\*) — WAGERING CONTRACTS — REMEDIES.**

The law will not aid the winner in a wagering contract to recover from the loser the amount of the stake, or assist the loser to recover the amount of the bet after the transaction has been closed.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 51-56; Dec. Dig. § 25.\*]

**3. GAMING (§ 49\*) — WAGERING CONTRACT — ACTION TO RECOVER STAKE — BURDEN OF PROOF.**

In an action for the amount of a stake deposited by plaintiff with the other party to a wagering contract, the burden is on plaintiff to show that when he demanded the return of the stake the contingent event which was to determine the bet had not taken place.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 100-102; Dec. Dig. § 49.\*]

**4. GAMING (§ 50\*) — WAGERING CONTRACT — ACTION TO RECOVER STAKE—NONSUIT.**

Where, in an action to recover money deposited by plaintiff with defendant as security for the payment of wagers, it appeared that defendant operated a "bucket shop" and accepted bets from plaintiff on the fluctuations of the stock market, that plaintiff deposited such money as security for payments of losses, and that on the day before defendant failed plaintiff ordered his transactions closed and demanded his profits, but the evidence did not show with certainty that the transactions were open, undetermined, and unexecuted when plaintiff ordered them closed, or that any sum then remained in defendant's hands dependent on the fluctuations of the market, the court properly granted a nonsuit.

Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 103-107; Dec. Dig. § 50.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by Joseph A. Davis against James B. Fleshman and another, trading as J. B. Fleshman & Company, to recover a stake deposited with defendants in a gambling transaction. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

The facts appear in the opinion of the Supreme Court and in Davis v. Fleshman, 232 Pa. 409, 81 Atl. 412. The trial judge entered a nonsuit, which the court in banc subsequently refused to take off.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Trevor T. Matthews, of Philadelphia, for appellant. B. F. Pepper and G. W. Pepper, both of Philadelphia, for appellees.

MESTREZAT, J. In 1904 the defendants were engaged in the business of gambling

upon wagers or bets that the market value of certain stocks would rise or fall as evidenced by quotations from the New York Stock Exchange. The business did not contemplate the purchase or sale of shares of stock, but was only a dealing in differences or fluctuations in the prices of stocks. The firm would receive deposits of money as a stake or security for the payment of the difference between the selling price of the stock on one day and the selling price of the same stock on another day. The business was closed out on November 28, 1904. Since the 22d day of October, 1904, the plaintiff deposited with the defendants at various times certain sums of money as a stake or security upon the bet or wager of the fluctuations of certain specified stocks, aggregating \$1,860, which is now sought to be recovered in this action. An affidavit of defense was filed denying the liability of the defendants for the whole or any part of the sum claimed by the plaintiff. A rule for judgment was taken which was discharged by the court below. An appeal was taken to this court, and the judgment of the court below was affirmed. Davis v. Fleshman, 232 Pa. 409, 81 Atl. 412. In the opinion we said, *inter alia*:

"Whether this is a case where the evidence will show that the illegal gambling transactions were closed and the accounts stated between the parties, and where the original deposits still remain with the broker so identified that they can be recovered back; or, an instance where the plaintiff is endeavoring to reclaim losses paid on illegal gambling transactions, which the law will not aid him to recover; or, one where the plaintiff dealt with the defendants as principals, and where the conduct of the parties demonstrates that as between themselves they treated the matter as closed, settled, and ended, and where, all being *sui juris*, the law will look at the plaintiff as one who has paid his bet—the loss from which he will not be assisted to recover cannot be satisfactorily ascertained from the information contained in the statement of claim and the affidavits of defense."

On the subsequent trial of the cause, the learned court below granted a nonsuit which it subsequently refused to take off, and the plaintiff has taken this appeal.

[1] We have no quarrel with the doctrine of the cases cited by the appellant. Since the decision in *McAllister v. Hoffman*, 16 Serg. & R. 147, 16 Am. Dec. 556, decided more than three-quarters of a century ago, it has been the settled law of this state that a recovery may be had from a stakeholder even though the contingent event upon which the bet turns has happened, if the stake has not actually been paid over to the winner. Before actual payment the gambler may repent and demand of the stakeholder the repayment of his deposit. The law regards the transaction as illegal and void, and the deposit in the hands of the stakeholder is still the money of the gambler. Hence he may maintain an action to recover it before it passes into the hands of the other party to the gambling transaction. The authorities cited by the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

learned counsel for the appellant declare this to be the law of this state, and we know of no decision of this court in conflict with it.

[2] It is equally well settled in this jurisdiction that all mere wagering contracts are illegitimate transactions which the law declares void and which will not be enforced at the instance of either party to the contract. It will not aid the winner to recover from the loser the amount of the stake, and it will not give assistance to the loser to recover back the amount of the bet after the transaction has been closed. It will leave the parties as it finds them. The law will not attempt to settle disputes between gamblers by enforcing their alleged rights arising out of the illegal transaction.

[3, 4] This was not a case of marginal dealings in which a broker purchased and sold stocks for his customer. It is not pretended that such was the purpose of the contract entered into between the plaintiff and the defendants. The latter carried on what is known as a "bucket shop," in which the real transaction was a daily settlement of differences in the fluctuations of the prices of stocks on the New York Stock Exchange. No stocks were purchased or sold by the defendants for or on account of customers. This was well known by the plaintiff. The plaintiff deposited with the defendants a certain sum of money as a wager or bet that a certain number of shares of a particular stock would advance. If the stock did so advance, the plaintiff was the winner. If, however, the price of the stock declined, the defendants won and held the amount of the deposit. During the whole period of the transaction involved in this case the plaintiff made the deposits or series of bets upon the various stocks from time to time; the amount aggregating, as already observed, \$1,860. It appears that in six of the transactions, in which the aggregate payments were \$220, the movement of the market was in favor of the plaintiff. He ordered the transaction closed and made a demand for his profits on November 28, 1904; but the defendant firm failed the following day, and he was unable to collect the amount of his winnings. As to whether the other bets resulted favorably to the plaintiff the evidence does not with certainty disclose. Uncertainty as to this and other material matters exists throughout the case. The evidence on the trial of the cause did not clear up the uncertainty which we held to exist in the pleadings when the case was here before, and we declined to enter judgment for want of a sufficient affidavit of defense. The burden was upon the plaintiff to show, as alleged in his statement, that the several transactions were open, undetermined, and unexecuted on November 28, 1904, and that the contingent event which was to determine the bet had never taken place. This is denied

by the defendants, and the evidence does not support the plaintiff's contention. At all events, the evidence is so uncertain that a verdict finding such to be the fact could not be sustained. If the bets were against the plaintiff, the deposit, automatically, went into the hands of the defendants as winners. In the absence of evidence to the contrary, it must be assumed that the successive amounts were deposited with the defendants because each prior deposit went to the defendants as winners; each transaction being closed and followed by its successor. The evidence does not, therefore, clearly show any sum remaining in the hands of the defendants dependent upon the fluctuations of the market in favor of the plaintiff which was necessary to enable the plaintiff to recover in this action.

This is not an action brought by the loser in a gambling transaction against a stakeholder to recover the amount of the deposit before the transaction is closed and the amount paid to the winner. The defendants were not stakeholders of the funds deposited with them in the sense which would permit a recovery by the loser in an undetermined or unexecuted gambling transaction. The plaintiff and defendants were both parties to the illegal contract. The money deposited by the plaintiff with the defendants was a wager upon the fluctuations of the prices of certain specified stocks. This deposit was made with the defendants to secure them in their winnings. They could have trusted the plaintiff to pay his debt if he lost but they did not intend to take any such chance. They therefore made themselves secure by requiring the deposit. When the bet was won by the defendants, it automatically passed to and went into the possession of the defendants. The transaction was then closed, and the defendants no longer held the deposit awaiting the happening of the contingency which determined their right to the deposit. They were not stakeholders who were disinterested in the result of the bet and who held the fund for the successful party to the wagering contract. They were parties to the illegal transaction and held the deposit as winners of the bet. This action therefore was brought by one party against the other party to a gambling transaction which the law declares void and which it will not enforce in aid of either party.

The judgment is affirmed.

(345 Pa. 406)

THIEL v. CITY OF PHILADELPHIA et al.

(Supreme Court of Pennsylvania. May 23, 1914.)

1. MUNICIPAL CORPORATIONS (§ 995\*)—PAYMENT OF SALARIES—INJUNCTION—WANT OF APPROPRIATION.

City officials will be enjoined at the suit of a taxpayer from paying salaries for services rendered under act of July 22, 1913 (P. L. 879), creating a division of housing and sanitation in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the department of public health and charities in cities of the first class, where no appropriation has been made therefor by ordinance.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 2163-2165; Dec. Dig. § 995.\*]

**2. MUNICIPAL CORPORATIONS (§ 191\*)—ORDINANCE—CONSTRUCTION—APPROPRIATION FOR SALARIES.**

Prior to act of July 22, 1913 (P. L. 879), creating a division of housing and sanitation in the department of public health and charities in cities of the first class, such department was empowered to establish a system of inspection and supervision over drainage, and to appoint inspectors at salaries to be fixed by councils and to employ tenement house inspectors. A city ordinance, approved December 31, 1913, made an appropriation for sanitary inspection, and fixed the number and salaries of the employees of that department, but did not indicate an intention to fix salaries and make an appropriation under the act of 1913. *Held*, that such ordinance related to the organization of the department under legislation existing prior to the act of 1913, and did not carry into effect the provisions of such act.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 525-529; Dec. Dig. § 191.\*]

**3. MUNICIPAL CORPORATIONS (§ 176\*)—DEPARTMENT OF PUBLIC HEALTH AND CHARITIES—STATUTE CREATING DIVISION—TIME OF TAKING EFFECT.**

The Act of July 22, 1913 (P. L. 879), creating a Division of Housing and Sanitation in the Department of Public Health and Charities in cities of the first class, did not go into operation automatically, but required definite action on the part of the city councils to make it effective to render its repealing clause operative on prior legislation inconsistent therewith.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 427-440; Dec. Dig. § 176.\*]

**4. MUNICIPAL CORPORATIONS (§ 191\*)—DEPARTMENT OF PUBLIC HEALTH AND CHARITIES—ORGANIZATION OF DIVISION—"THERE SHALL BE."**

The words "there shall be," as used in the act of July 22, 1913 (P. L. 879), providing that there shall be a division of housing and sanitation attached to the department of public health and charities in cities of the first class, are equivalent to the words "there shall be established."

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 525-529; Dec. Dig. § 191.\*]

**5. STATUTES (§ 259\*)—REPEALING STATUTES—TIME OF TAKING EFFECT.**

Where a revising statute is to take effect at a future period or upon the happening of certain contingencies or performance of certain acts, a clause therein repealing former laws on the same subject does not take effect until the act goes into operation.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 333, 340; Dec. Dig. § 259.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by John Thiel against the City of Philadelphia and others to enjoin payment of salaries. From decree awarding injunction, the defendant City of Philadelphia appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

James Gay Gordon, Jr., James M. Dohan, Asst. City Sol., Michael J. Ryan, City Sol., and John H. Fow, all of Philadelphia, for appellant. Paxson Deeter, of Philadelphia, for appellee.

ELKIN, J. [1, 2] This bill was filed by a taxpayer to restrain the defendant city officials from making payment of salaries to the other defendants named in the bill for services rendered under the provisions of the act of July 22, 1913 (P. L. 879). The purpose of this act was to create a division of housing and sanitation in the department of public health and charities in cities of the first class. The learned court below very properly held that, no appropriation having been made for the payment of the salaries in question, there was no fund upon which warrants could be drawn to make such payments, and that, the city officials not having authority to divert public moneys from the purposes for which they were specifically appropriated, the injunction should be awarded. It is argued that the ordinance of December 31, 1913, making an appropriation to the department of public health and charities, in the item for sanitary inspection, is broad enough in its terms to include the salaries of those defendants who claimed to have rendered services under the act of 1913. A careful reading of the ordinance convinces us that this position is not tenable. The amount appropriated for sanitary inspection, the number of inspectors and other employees of that department, and the salaries fixed in the ordinance, all relate to the organization under the old law and nothing therein contained shows the slightest indication of an intention to fix salaries and make an appropriation under the act of 1913. Without an appropriation there can be no payment of salaries. This is too well settled to admit of argument. On this ground alone it would be necessary to affirm the decree entered by the court below.

[3, 4] Another question has been raised, and being important to the orderly administration of the work of the Health Department, it should be decided. When and how does the act of 1913 go into operation and become effective? How shall the division of housing and sanitation be organized and by whom? Who shall determine the number of inspectors to be appointed and the salaries to be paid? On these most important questions the act is silent. The first section simply provides that in cities of the first class there shall be attached to the Department of Public Health and Charities a Division of Housing and Sanitation, but nothing is said as to how or when this division shall be organized, or what department or branch of the Municipal Government shall determine the number of inspectors required to enforce the provisions of the law. The words "there shall be" as used in connection with the organiza-

tion of a division of housing and sanitation are equivalent to "there shall be established," and this necessarily implies that some authority must establish the division. It is not established automatically.

The second section provides for a chief of division, an assistant chief, and not less than 4 supervising inspectors, and not less than 100 other inspectors. The act does fix a minimum salary for the chief of division, but nothing is provided as to the salaries of other employes, the number of inspectors, and the power of appointment, except that the director, with the approval of city councils, shall have the power to add such additional clerks, stenographers, typewriters, and messengers as may be necessary to conduct the business of the division thus created. The only power conferred by the act upon the director in connection with fixing the number of employes in his department is that which relates to the statistician, clerks, stenographers, messengers, and even then he cannot act without the approval of city councils. The plain inference is that as to all other employes city councils must take the initiative by determining the number of inspectors to be employed and fixing the salaries to be paid. So far as this record discloses city councils have not acted, and we can see no escape from the conclusion that by reason of this failure to act there has been no organization of a division of housing and sanitation under the act of 1913. Under these circumstances, it is most pertinent to inquire, How and when does the act of 1913 supersede the old law? We have already indicated that the act of 1913 did not go into operation automatically, but that it required definite action upon the part of city councils to make it effective. It did contain a repealing clause, the effect of which must now be considered. If it repealed all former laws inconsistent with its provisions as of the date of its approval, and the new law for the reasons above stated is not in force, it would necessarily follow that the city is without any law regulating sanitary inspection at the present time. If such a result necessarily followed, it would be most unfortunate; but according to our view of the law it is not necessary to so hold.

[8] It is well settled that, where the provisions of a revising statute are to take effect at a future period, or upon the happening of a certain contingency, or the doing of certain acts, and the statute contains a clause repealing former laws on the same subject, the repealing clause does not take effect until the provisions of the repealing act go into operation. *Smith on Statutory Con.*, section 783; *McArthur v. Franklin*, 16 Ohio St. 193. Many other authorities might be cited to the same effect. This court recognized the principle in *Com. v. Heller*, 219 Pa. 65, 67 Atl. 925, wherein Chief Justice Mitchell said:

"The authority of the councils is ample at any time to establish a water department un-

der section 2, and when they do the water commissioners under the act of 1865 will be superseded and functus officio, but until that is done the act of 1865 is left in operation, and the commissioners under it retain their authority."

The same may be said of the case at bar. The old law remains in force until it is superseded by the organization of the division of housing and sanitation under the act of 1913, and the repealing clause of this act does not take effect until the new law goes into operation. This means that the old law is still in force, and that the ordinance of December 31, 1913, making an appropriation for sanitary inspection, may be utilized in paying the salaries of employes who performed such services as were required to be performed under the old law.

Nothing further need be said as to the legal questions in controversy between the parties here, but it is proper to suggest to all parties concerned that it is high time to get the matters adjusted without further delay so that worthy employes may receive their salaries promptly. Until an organization of the division under the new law has been effected and put in operation, the employes under the old law should continue to serve and receive their salaries under the appropriation made in the ordinance of December 31, 1913. The uncertainty as to the law under which their services are rendered should no longer exist.

In an additional brief filed with leave of court, several constitutional questions have been raised, but we have concluded that these questions cannot properly be disposed of in the present proceeding. The objections insisted upon are not sufficient to have the act as a whole declared invalid; and, if it be deemed expedient to have these questions raised at a subsequent time, it may be done in a proper proceeding in which the precise questions are involved.

Decree affirmed. Costs to be paid by the city.

(245 Pa. 334)

In re SPATZ'S ESTATE.

Appeal of FENSTERMACHER.

(Supreme Court of Pennsylvania. May 18, 1914.)

TRUSTS (§ 169\*)—TRUSTEES—NEGLECT AND MISMANAGEMENT—SURRENDER.

Where, on the audit of a deceased testamentary trustee's account, as stated by his administrator, to which account the substituted trustee excepted, it appeared that decedent held a trust fund of \$20,000 for a minor and others, that proceedings instituted by the minor's guardian for decedent's removal as trustee has been discontinued by agreement on his filing a bond, reciting that the full \$20,000 should be secured intact, and that the accountant charged himself with securities having a face value of \$20,174.18, and where the accountant converted a portion of the securities into cash, and paid a portion of the \$20,000 to the substituted trustee, who refused to accept the remaining securities in satisfaction of the balance, and where there was no evidence of the value of many of the se-

\*or other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



curities, and it was shown that decedent had mismanaged the estate and impaired its value, the court properly ordered the administrator to pay the balance in cash to the substituted trustee.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 222-224; Dec. Dig. § 169.\*]

Appeal from Orphans' Court, Berks County.

In the matter of the Estate of John H. Spatz, deceased. From a decree dismissing exceptions to the adjudication, Warren H. Fenstermacher, administrator of Isaac S. Spatz, deceased, who was a trustee of Emma S. Mohn under the will of John H. Spatz, deceased, appeals. Affirmed.

See, also, 240 Pa. 303, 87 Atl. 572.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Joseph R. Dickinson and W. Kerper Stevens, both of Reading, for appellant. Stephen M. Meredith, of Reading, for appellee.

POTTER, J. This is an appeal by the administrator of Isaac S. Spatz, deceased, who was trustee of Emma S. Mohn, under the will of John H. Spatz, deceased, from the decree of the orphans' court of Berks county. The appeal is from the dismissal of exceptions to the adjudication of the account.

By his will, John H. Spatz, who died in 1898, gave to his executor, Isaac S. Spatz, the sum of \$20,000 to be held in trust and invested for the benefit of testator's daughter, Emma S. Mohn, during her life, with remainder to her children. In 1906 the Reading Trust Company, guardian of Luella F. Mohn, a daughter of Emma S. Mohn, presented a petition to the orphans' court, alleging that the trustee was wasting and mismanaging the trust estate, and that he was insolvent, and praying for his removal. As the result of an arrangement between the parties, the trustee filed for the protection of the trust estate a bond in the penal sum of \$40,000 and the proceeding for his removal was discontinued. In the bond an agreement was recited upon the part of the trustee that the full amount of \$20,000 of trust funds should be secured intact.

In 1911 Isaac S. Spatz died, and letters of administration on his estate were granted to Warren H. Fenstermacher, who filed the account of the decedent, as trustee under the will of John H. Spatz, deceased. The accountant charged himself with certain securities having a face value of \$20,174.18. Exceptions were filed to the account by the Reading Trust Company, which had been appointed trustee to succeed Isaac S. Spatz, deceased, and while these exceptions were pending, the accountant converted a portion of the securities into cash, and paid over to the substituted trustee the sum of \$10,728.27, leaving a balance due on the principal of the trust fund of \$9,271.73. The substituted trustee refused to accept from the accountant the remaining securities in his hands, and

demanding that the balance should be paid in cash.

The auditing judge in his adjudication found that the deceased trustee had neglected and mismanaged the trust estate, and had impaired its value; that he kept no intelligent or accurate account; that there was no evidence of the value of a number of the securities set forth in the account; and that it was impossible to say what they were worth; in conclusion the auditing judge ordered the accountant to pay the balance as shown above, to the substituted trustee. When the substituted trustee refused to accept the securities, appellant might have disposed of them and paid over the proceeds. If as he claims, they were good, then no loss would have been incurred. If they were not, then the question whether the former trustee was chargeable for any loss resulting from the investment in the securities in question could have been raised and determined. As the accountant did not, however, see fit to pursue this obviously reasonable course, we do not see that he can fairly complain of being charged with them at their face value. As has already been stated, while Isaac S. Spatz was living, the guardian of the minor who was entitled to the remainder of the trust estate filed a petition, alleging mismanagement of the trust estate and insolvency of the trustee, and prayed for his dismissal. It was then that the trustee offered in court, to give a bond with security approved by the court "to secure to the cestui que trust, intact, the full amount of the trust fund of \$20,000," and the due execution of the trust in accordance with the will and with law. The offer was accepted, the bond was given, and was approved by the court, and the proceeding for the discharge of the trustee was discontinued. The bond was given as an inducement for the withdrawal of the proceeding for the removal of the trustee. Full effect must therefore be given to the intention of the parties in giving and accepting the bond. That intention was to secure the payment of the full amount of the trust fund of \$20,000. The sum of \$10,728.27 has been paid, leaving a balance of \$9,271.73, which as the auditing judge has found, is properly due. Under these circumstances it was not necessary for the court below to consider whether the securities were proper investments or not. That question might have arisen in the proceeding for the dismissal of the trustee, but he did not, at that time, see fit to justify the investments which he had made, and he settled the question of his liability in that respect by agreeing to give security for the payment of the full amount of the funds in his hands belonging to the trust estate. The court below, therefore, very properly dismissed the exception which was filed to the award of \$9,271.73, which is the balance due to the estate.

In this view of the case, many of the ques-

\*For other cases see same topic and section. NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tions raised by the assignments of error become unimportant, and it is not therefore necessary to consider them in detail. Counsel for appellant argue at considerable length that the securities in question are good. The testimony does not satisfy us that the margin of security as to a number of the properties is sufficient to justify a prudent trustee in accepting the securities as a desirable investment. At any rate, the quality of the securities can be readily tested. If the amount invested in them can be realized, either by collection, or sale of the securities, the result will be satisfactory to all concerned. If it cannot be realized, the responsibility is not properly to be placed upon the new trustee. It is a matter to be settled in connection with the accounts of the deceased trustee. The bond which he gave was not conditioned for the production of undesirable securities, but it was given to secure the payment of the trust fund intact. This, of course, means payment in cash.

Two of the assignments of error relate to the refusal of the court below to allow the accountant credit for the cost of filing the account, and for a reasonable counsel fee for services rendered in preparing the account, and at the audit. We do not see why such an allowance should not be made at the proper time and place. But this account, for some reason deals only with the principal sum of the trust estate. No accounting for the income is here shown. It may be that the court below intended that an allowance for expenses should be made when the accounting for the income is filed. That is a matter which will no doubt be properly adjusted by the court below.

The assignments of error are overruled. This appeal is dismissed at the cost of appellant, and the decree of the orphans' court is affirmed.

(245 Pa. 314)

#### In re GOTTESFELD.

(Supreme Court of Pennsylvania. May 11, 1914.)

#### 1. JUDGMENT (§ 470\*)—COLLATERAL ATTACK.

A judgment of a court having jurisdiction cannot be reviewed collaterally in another court in a proceeding of any nature.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 907; Dec. Dig. § 470.\*]

#### 2. JUDGMENT (§ 648\*)—COLLATERAL ATTACK—DISBARMENT PROCEEDINGS.

Where an attorney at law was convicted in a federal court of conspiring to conceal assets from a trustee in bankruptcy, and was sentenced, such judgment was conclusive, and the fact that he was guilty of the crime of which he was convicted could not be disputed by the attorney in subsequent disbarment proceedings.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1309, 1310; Dec. Dig. § 648.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Petition for disbarment of Samuel J. Gottesfeld. From a decree ordering that his

name be stricken from the roll of attorneys, he appeals. Appeal dismissed.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

Harry Shapiro, of Philadelphia, for appellant. John Hampton Barnes and William B. Linn, both of Philadelphia, for appellee.

STEWART, J. [1] The appellant was a regularly admitted practitioner of law in the several courts of Philadelphia county, when on the 29th of September, 1911, he was indicted, with another, in the Circuit Court of the United States, charged with conspiring to conceal assets from a trustee in bankruptcy. To this indictment he pleaded not guilty, and after trial was duly convicted and sentenced to a term in the penitentiary. While serving the term of his imprisonment the Law Association of Philadelphia presented its petition in court of common pleas No. 1, setting forth therein the above facts, accompanied with a copy of the indictment and record of the conviction, asking that a rule be granted requiring him, Samuel J. Gottesfeld, to show cause why he should not be disbarred and his name be stricken from the roll of attorneys of that court. The rule having issued the appellant filed an answer in which he admitted the fact of his conviction in the manner set forth in the petition, but denied his guilt, averring circumstances which led to his conviction which, in his view, imputed no actual guilt on his part. Later he filed a petition alleging that because of his confinement in the penitentiary he was prevented from properly defending himself, asking that a rule issue, directed to the Law Association, to show cause why a continuance of the proceeding should not be allowed and he afforded an opportunity to be heard. September 29, 1913, the court dismissed the rule for continuance and made absolute the rule to show cause why appellant should not be disbarred. The present appeal is from these several decrees.

[2] The burden of appellant's complaint is that he was denied an opportunity to impeach, not the record of his conviction, for that was admitted, but the verdict that condemned him. In other words, he asserts that he was not guilty of the offense for which he was tried and convicted, and insists that because the court gave him no opportunity to establish his freedom from guilt he was condemned unheard. The case calls for but little comment. It is fundamental that a particular sentence imposed, or judgment rendered, by a court having jurisdiction cannot be reviewed collaterally in any other court in any kind of a proceeding. The nature of the judgment has no effect on the operation of the rule. A decree with regard to the personal status of the individual is equally conclusive with a decision upon right of prop-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

erty. Such decree, or judgment, is in the nature of judgment in rem.

"Thus judgment of outlawry not merely declares the party an outlaw, but renders him so, and is therefore a judgment in rem, and resembles the act of the Ecclesiastical Court depriving a man of his preferment," etc. Note to *Duchess of Kingston Case*, 2 *Smith's Leading Cases*, 751.

The doctrine of *res judicata* applies whether the judgment be in civil or criminal proceeding, and, once rendered, the party convicted may not thereafter dispute the truth thereby established. The appellant had no right to a further hearing on the question of his guilt. His guilt was a fact established by an unchallenged record of a court of competent jurisdiction, and was no longer open to dispute. A decree of disbarment followed necessarily. It was of no consequence that in committing the offense of which he was convicted appellant was exercising no function of his professional office. The offense was in its nature *crimen falsi*, involving employment of falsehood to injuriously affect the administration of public justice, and was therefore an infamous offense. The disbarment that followed was not punitive, but protective simply. Courts can command public confidence only as those who serve therein are themselves observant of the law which it is the duty of the courts to enforce. In his high office the attorney at law is a minister of justice; he ceases so to be when, whether in the line of his professional work or outside of it, he prostitutes his knowledge of the law and the skill he has acquired therein to thwart the law by deceit and falsehood in its one and only purpose, viz., to accomplish distributive justice among men. Such was the offense of which the appellant was found guilty; the sentence and judgment established his disqualification for the high and responsible office he held, and the record of his conviction, once brought to the attention of the court, was ample warrant in itself for the decree of disbarment that followed.

The appeal is dismissed at costs of appellant.

(244 Pa. 582)

**SURAVITZ v. PRUDENTIAL INS. CO. OF AMERICA.**

(Supreme Court of Pennsylvania. March 30, 1914.)

**1. INSURANCE (§ 655\*)—APPLICATION—WARRANTIES.**

In an action on a life insurance policy issued on an application stipulating that the answers therein are to be deemed representations and not warranties, the inquiry may extend, not only to the materiality of the answers alleged by defendant to be false, but also to the accuracy and good faith of defendant's agent in writing down the answers, and to whether the application was signed in good faith without having been read, and without knowledge that the answers were incorrectly written down; the applicant in such case being relieved from

the harshness of the rule applicable to warranties.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1677-1685; Dec. Dig. § 655.\*]

**2. INSURANCE (§ 90\*)—POWER OF AGENT—PROVISION IN APPLICATION.**

A covenant, in an application for life insurance, that the agent cannot bind the company by "making or receiving any representations or information," will not protect the company from liability on the policy where the agent has negligently or fraudulently written untrue answers in the application different from the answers given by the applicant.

[Ed. Note.—For other cases, see *Insurance*, Dec. Dig. § 90.\*]

**3. INSURANCE (§ 291\*)—APPLICATION—VALIDITY OF POLICY.**

While an applicant for life insurance must exercise good faith in disclosing the condition of his health as known to him and believed to be true, his failure to disclose the existence of a latent disease, concerning which from the nature of things he could have no exact information, will not invalidate the policy.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 681-690, 694-696; Dec. Dig. § 291.\*]

**4. INSURANCE (§ 668\*)—APPLICATION—MISREPRESENTATIONS—QUESTION FOR JURY.**

Whether an applicant who states to the best of her knowledge and belief that she is in good health, when in fact she is suffering from a latent disease, acts in good faith in making such statement is for the jury in an action on the policy.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.\*]

**5. INSURANCE (§ 655\*)—ACTION ON POLICY—EVIDENCE.**

Where, in an action on an insurance policy, the defense was that false answers were made in the application, and it appeared that the husband and daughter of the insured were present when the answers were made, their testimony that the answers written down in the application were not the answers made by insured to the agent who wrote them down, and also the report of a medical examiner corroborating such testimony, which report was in the hands of the insurance company, were admissible in evidence.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1677-1685; Dec. Dig. § 655.\*]

Appeal from Court of Common Pleas, Lackawanna County.

Assumpsit on a life insurance policy by Jacob Suravitz against the Prudential Insurance Company of America. From judgment for defendant, plaintiff appeals. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

C. P. O'Malley and Peter L. Walsh, both of Scranton, for appellant. A. A. Vosburg, of Scranton, for appellee.

ELKIN, J. This is an action on an insurance policy which by its terms made all statements of the insured representations and not warranties. The defense is that the answers contained in the application as to the good health of the applicant for insurance, and whether she ever had any serious illness or disease, were untrue in fact when made, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the false answers, being material to the risk, avoid the policy. Appellant denies that any intentional misrepresentation was made by the applicant to the agent of the insurance company, who wrote down the answers in the presence of the husband and daughter of the insured; and at the trial it was urged that the answers were made in good faith, without any intention to evade, suppress, or conceal facts which should be disclosed, and that the alleged false answers relied on to avoid the policy were incorrectly written down by the agent who solicited the insurance. It is conceded on all sides that the case was for the jury, and our only concern is to see that it was submitted with instructions properly defining the legal rights of the parties.

[1] At the outset we are confronted with the question, Is an applicant for insurance so absolutely bound by the answers set forth in the copy of the application attached to the policy as to preclude an inquiry into their correctness, even on the grounds of fraud, accident or mistake? As to warranties, the decisions in our own state and elsewhere have gone very far towards closing the door to inquiries of this character upon the theory that when one desiring to take out insurance warrants his answers to be true, he is bound not only to make his answers good, but to see that they are properly written down, and to know what those answers are. This doctrine as applied to warranties has been so repeatedly asserted in our Pennsylvania cases that it is now too late to question the wisdom or soundness of the general rule, although exceptions have been made in some instances. In support of the general rule the following cases may be cited: *Cooper v. Fire Ins. Co.*, 50 Pa. 299, 88 Am. Dec. 544; *United Brethren Mutual Aid Society v. O'Hara*, 120 Pa. 256, 18 Atl. 932; *Mengel v. Insurance Co.*, 176 Pa. 280, 35 Atl. 197; *Wall v. Society of Good Fellows*, 179 Pa. 355, 36 Atl. 748; *Dinan v. Benefit Association*, 201 Pa. 363, 50 Atl. 999; *Murphy v. Insurance Co.*, 205 Pa. 444, 55 Atl. 19; *Rinker v. Life Ins. Co.*, 214 Pa. 608, 64 Atl. 82, 112 Am. St. Rep. 773.

As to representations, the rule is not so unbending, and according to our view the distinction should be broadened rather than narrowed. It is argued that the only difference between a warranty and a representation is that under the former the materiality of the answer is not a defense, while under the latter it may be. This general distinction is recognized in all jurisdictions, and learned writers on the subject frequently advert to it, but we are not prepared to say, even in the light of the authorities, that this is the only distinction which can be properly made. If under a representation the materiality or immateriality of the answer may be inquired into, in a suit upon the policy, it is difficult to see why other pertinent questions may not be raised, when it appears

that a mistake was made in recording the answer, or that fraud was practiced upon the applicant, or that the agent who solicited the insurance misinformed or misled the insured. Upon what line of correct reasoning, or by what fair rule of interpreting the covenants of contracting parties can it be said that the materiality of an answer may be the subject of inquiry in a suit upon an insurance policy, but that no such inquiry can be made as to whether the answer itself was properly written down by the agent, or that a mistake was made in the preparation of the application which formed the basis of the contract? The parties themselves did not limit the inquiry to the question of materiality, but simply provided that the statement made by the applicant shall be deemed representations and not warranties. What purpose had the contracting parties in mind when they wrote into their covenant that such statements would be deemed representations only? Was this a mere subterfuge, a change in terms without a change in meaning, or was the change intended to serve a more definite purpose by affording relief to those applicants who in good faith answered the interrogatories asked them by the agent of the insurance company who negligently, intentionally, or fraudulently wrote down the answers incorrectly? In our opinion the change in the covenant from a warranty to a representation was intended to broaden the scope of inquiry in such cases so as to give relief to parties who in good faith take out policies of insurance, from the harshness, and in many instances the injustice, of the old rule applicable to warranties. If this be the correct view, and it is certainly the just and equitable one, we can see no reason for limiting the inquiry to the single question of the materiality of the answer. Whether true answers were made, and whether the answers as made were correctly written down by the agent of the insurance company, and the good faith of the party making the answers to the best of his knowledge and belief are questions which go to the very essence of the insurance risk, and parties should not be denied the right to have such matters determined before a proper tribunal unless they have covenanted otherwise. As to warranties, the general rule is that the insured is concluded by his answer as it appears in the application attached to the policy, but as to representations no Pennsylvania case has gone so far as to hold that the same drastic rule should be applied, and no case has decided that the inquiry is limited to the single instance where the materiality of the answer is raised by the issue. Indeed the opposite view has been held in several cases. *Columbia Insurance Co. v. Cooper*, 50 Pa. 331; *Smith v. Fire Ins. Co.*, 89 Pa. 287; *Ellenberger v. Insurance Co.*, 89 Pa. 464; *Susquehanna Mut. Fire Insurance Co. v. Cusick*, 109 Pa. 157; *Kister v. Insurance Co.*, 128 Pa. 553, 18 Atl. 447, 5 L. R. A. 646, 15

Am. St. Rep. 696; *Meyers v. Mutual Ins. Co.*, 156 Pa. 420, 27 Atl. 39; *Dowling v. Insurance Co.*, 168 Pa. 234, 31 Atl. 1087; *Mullen v. Insurance Co.*, 182 Pa. 150, 37 Atl. 988. In some of the cases cited the covenant was that of warranty, but even in those cases this court held that where the agent of an insurance company omits a material portion of an answer of the applicant, or incorrectly writes down the answer as made, either intentionally or negligently, in a suit upon the policy the applicant may show by parol what the real answer was, if the application was signed in good faith without having been read, or if the applicant signed without knowledge of the fact that the answer had been incorrectly written down by the agent. These cases were put upon the ground that the fraud or mistake of an insurance agent, acting within the scope of his authority, will not enable his principal to avoid the policy to the injury of the insured who acted in good faith. It will thus be seen that this court in exceptional cases, even under the old rule, where the equities were strongly with the insured, refused to be bound by the doctrine generally applicable to warranties. If exceptions were made even under covenants of warranty, surely a more equitable rule should prevail when the parties write into their contract that all statements made by the insured shall be deemed representations. The cases are not in entire harmony, but a fair reading of them will show a tendency to broaden the scope of inquiry into questions relating to the materiality, correctness, and truthfulness of answers, and the good faith of the applicant in making them, when suit is brought upon a policy containing a covenant that the statements of the insured shall be deemed representations and not warranties.

[2] It is argued, and with much force, that this doctrine has no application to a case in which the policy of insurance limits the power of the agent, and *Rinker v. Insurance Co.*, 214 Pa. 608, 64 Atl. 82, 112 Am. St. Rep. 773, is relied on to sustain this position. We cannot agree that the case just cited is authority for the rule so broadly stated. In that case the policy contained a covenant of warranty, and therefore the question as to what rule should be applied to representations did not arise. This distinction is fundamental and should be kept in mind in this class of cases. Then, again, the limitation of the power of the agent in that case was very different from that appearing in the case at bar. In the present case the limitation of the power of the agent is in the following language:

"No agent has power in behalf of the company to make or modify this or any other contract of insurance, to extend the time for paying a premium, to waive any forfeiture, or to bind the company by making any promise, or making or receiving any representation or information."

There was nothing in this covenant to put the insured on notice that she would be absolutely bound by the answers incorrectly written down by the agent, or that she would be concluded by the answers thus incorrectly recorded, so that no inquiry could be subsequently made as to what the true answers were. The covenant that the agent could not bind the company by "making or receiving any representation or information," falls far short of protecting the principal from the negligence or fraud of the agent in preparing the application. The contention here is that the agent either negligently or intentionally wrote down the answers incorrectly, not that he had received any false representation or information to induce the insurance. In several of the cases hereinbefore cited it was expressly held that the negligence or fraud of the agent could be inquired into in a suit upon the policy, and we can see no reason why this rule should not apply to the present case.

[3, 4] There is another question which demands consideration. Is an applicant for life insurance bound to know at his peril that he is suffering from a latent organic disease, so that his policy will be avoided if a representation that he is in good health afterwards turns out to be untrue in fact, although made in good faith at the time of signing the application? In a general way it may be said that good health means apparent good health, without any ostensible, or known, or felt symptom or disorder, and does not necessarily exclude the existence of latent unknown diseases on the part of the applicant. May on Insurance, § 295. As to this question there is a distinction between covenants of warranty and of representation. This court held in *United Brethren Mutual Aid Society v. Kinter*, 12 Wkly. Notes Cas. 76, that where there was no warranty on the part of the insured as to his freedom from diseases except those mentioned in the application, and, there being no evidence that the insured had knowingly and willfully misrepresented the condition of his health, the plaintiff was entitled to recover. That case was put upon the ground that the applicant is bound to exercise good faith in disclosing such facts about the condition of his health as are known to him, and which he honestly believes to be true, and that he is not bound to know at his peril of the existence of a disease which experience teaches may exist in latent form, and concerning which one may not, in the very nature of things, have an exact knowledge. To the same general effect see *Moulou v. American Life Ins. Co.*, 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447; *Grattan v. Insurance Co.*, 92 N. Y. 274, 44 Am. Rep. 372; *Ferguson v. Insurance Co.*, 102 N. Y. 647. In *Washington Life Ins. Co. v. Schaible*, 1 Wkly. Notes Cas. 369, the court below held that the validity of the policy depended upon the good faith of the insured in making representations in regard to her health. The jury

were instructed that if the applicant answered the questions honestly, and did not willfully or fraudulently suppress facts known to her, the policy would not be avoided although at the time of making the representations she may have had an organic disease in latent form unknown to her. The judgment in favor of the plaintiff was affirmed by this court. The same view was expressed by Mr. Justice Green in *March v. Life Ins. Co.*, 186 Pa. 629, 645, 40 Atl. 1100, 1103 (85 Am. St. Rep. 887), in the following language:

"We are not prepared to sustain the twelfth assignment, as the deceased might have been afflicted with an entirely occult ailment altogether unknown to her, and in that event her failure to communicate it to the defendant would not be a fraud upon the company."

Under the authority of these cases it was for the jury to say whether the deceased acted in good faith, and honestly answered that she was in good health at the time of making the application for insurance. Did she know that she was afflicted with organic heart trouble, or had she been advised that she was suffering from such disease; if so, her answers as to the condition of her health were false, and the policy would be avoided if the jury so found. On the other hand, if she did not know of her own knowledge, or from the symptoms which manifest themselves in diseases of the heart, or from consulting a physician, that she was suffering from latent organic heart trouble, and honestly answered that she was in good health, it was for the jury to pass upon all the facts relating to this branch of the case, and to determine whether the applicant was in good health to the best of her knowledge and belief when she answered the question. In this connection it should be observed that the application signed by the insured contained the declaration:

"That all the statements and answers to the above questions are complete and true to the best of my knowledge and belief."

In other words, the covenant was that the statements made by the applicant shall be deemed representations, and the answers were to be tested by the knowledge and belief of the party making them. In such a case the question of good faith is necessarily involved in the inquiry, and, if there be a conflict in the testimony, it is for the jury to determine the fact.

[5] We need but advert to one more question in the general discussion. The deceased was a Hungarian, with a very imperfect knowledge of the English language. At the time of making her answers she spoke through an interpreter, and there is no evidence that she either did or could read the policy or the application. In such a case a greater burden rests upon the insurer to deal fairly with the insured. This is especially true as to the acts of the agent in soliciting the insurance and writing down the answers. *La Marche v. Life Ins. Co.*, 126 Cal. 498, 58

Pac. 1053; *Phenix Insurance Co. v. Golden*, 121 Ind. 524, 23 N. E. 503; *State Insurance Co. v. Jordan*, 29 Neb. 514, 45 N. W. 792; *Hayes v. Insurance Co.*, 81 App. Div. 287, 80 N. Y. Supp. 888. In the present case the husband and daughter were present when the answers were made and both testify that the answers written in the application were not the answers made to the agent who wrote them down. In addition there is the report of the medical examiner which corroborates the testimony of these witnesses, and this report was in the hands of the insurance company which was affected with notice of what it contained. Undoubtedly the plaintiff had the right to introduce this report in evidence for the purpose of showing what answers the insured made to the medical examiner and to corroborate the testimony of the witnesses who were present when the application was signed.

Under the facts of the present case we sustain the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, eleventh and twelfth assignments of error. The tenth assignment is not sustained, although when the case is again tried all points of this character should be so framed as to meet the views herein expressed. The same may be said of the thirteenth assignment, which in some of its parts may not be in entire harmony with the views set forth in this opinion.

This is clearly a case for the jury, and we have discussed the questions involved at some length in order to indicate our views of the law as a guide to all those interested when the case is again tried.

Judgment reversed and a venire facias de novo awarded.

(245 Pa. 30)

**WANNER v. MANUFACTURERS' & MERCHANTS' MUT. FIRE INS. CO. et al.**  
(Supreme Court of Pennsylvania. April 20, 1914.)

**1. APPEAL AND ERROR (§ 215\*)—PRESENTATION BELOW—INSTRUCTIONS.**

Where the trial judge's attention was not called, before the jury retired, to his mistake in his charge in attributing to plaintiff certain testimony given by plaintiff's agent, no advantage could be taken thereof on appeal.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1309-1314; Dec. Dig. § 215.\*]

**2. INSURANCE (§ 579\*)—AGREEMENT TO SETTLE—DEFAULT—EFFECT TO RELEASE OF INSURED.**

Where insurance companies neglected to promptly settle a loss in accordance with an agreement of the insurance adjuster representing them, the insured was released from the agreement and not precluded by it from claiming the full amount of her loss.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. §§ 1417, 1419; Dec. Dig. § 579.\*]

**3. INSURANCE (§ 669\*)—BREACH OF CONTRACT—INSTRUCTIONS—EVIDENCE.**

Where the policy sued on described the insured building as "occupied as a merchant tailor and steam sanitary cleaning establishment," but permitted the keeping of 10 gallons of gasoline for sale, storage, or use, and the only evi-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

dence claimed to be in support of defendant's contention that the building was used for "dry cleaning" and not for "steam cleaning" was evidence that gasoline was used in connection with steam for cleaning and that "in steam cleaning no gasoline is used," it was not error to instruct that "there is no testimony here showing that this building was used for a different purpose than that named in the policy," especially where the witness called to sustain this contention testified that "possibly all steam cleaning establishments use gasoline."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.\*]

**4. INSURANCE (§ 669\*)—ACTION ON POLICY—EVIDENCE—INSTRUCTION.**

Where, in an action on a fire policy, a witness testified without contradiction as to the cost of repairing the building and to the actual cash value of the property destroyed, and estimated the amount to be that for which the jury found a verdict, it was not error to instruct that the measure of damages was "what would be the cost to repair this building and put it in the same condition that it was in at the time of the fire."

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1771-1784; Dec. Dig. § 669.\*]

**5. INSURANCE (§ 654\*)—ACTION ON POLICY—EVIDENCE.**

In an action on a fire insurance policy issued December 23d and permitting 10 gallons of gasoline to be kept on the premises, evidence of the amount of gasoline delivered to the tenants on the premises between December 7th and December 28th when the fire occurred, was properly excluded, where there was no offer to prove that more than 10 gallons of gasoline were kept on the premises.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1677, 1680, 1681, 1683-1685; Dec. Dig. § 654.\*]

Appeal from Court of Common Pleas, Lycoming County.

Assumpsit on a joint policy of insurance, by Katharine Wanner, individually as widow of, and as executrix and trustee of and devisee under the last will and testament of, Adam Wanner, deceased, against the Manufacturers' & Merchants' Mutual Fire Insurance Company and others. From a judgment for plaintiff, defendants appeal. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZIS-KER, JJ.

H. B. Gill, of Philadelphia, J. T. Fredericks, of Williamsport, and W. B. Linn, of Philadelphia, for appellants. Seth T. McCormick, Jr., H. T. Janney, and Seth T. McCormick, all of Williamsport, for appellee.

POTTER, J. The four defendants here named were sued upon their joint policy of insurance, by which they insured the Adam Wanner estate against loss or damage by fire, to a one-story frame shingle and metal roof building, occupied as a merchant tailor and steam sanitary cleaning establishment. After the policy was issued, a fire occurred upon the insured premises. Notice was given to the insurance companies, and their adjuster inspected the damaged building. He made

an estimate of the net loss, which was not satisfactory to Katharine Wanner, the executrix of the last will of Adam Wanner, deceased; but she agreed to accept the sum named by the adjuster in full settlement, on condition, as she alleged, of prompt payment, and she then signed and swore to a proof of loss. This proof disappeared and was not offered in evidence. The loss was not paid promptly, and Mrs. Wanner was compelled to bring the present suit to recover the amount of the loss. The trial in the court below resulted in a verdict of \$1,525.65 upon which judgment was subsequently entered. Defendants have appealed. Their counsel have filed six assignments of error. The first five are to the charge and answers to points, and the sixth is to the exclusion of an offer of evidence made by defendants.

[1, 2] The first assignment of error is to a portion of the charge in which the trial judge mistakenly attributed certain testimony given upon the trial, to the plaintiff, when as a matter of fact the testimony to which reference was made was that of John Villinger, nephew and agent of the plaintiff. If, at the time, defendants' counsel had regarded this error in stating the source of the evidence as material, they should have called the attention of the trial judge to it before the jury retired in order that it might have been corrected. Not having done so, they cannot now take advantage of it. In *Newingham v. J. C. Blair Co.*, 232 Pa. 511, 516, 81 Atl. 556, 558, we said:

"If, in the opinion of counsel for defendant, a mistake was made (in quoting or referring to testimony) it should have been brought to the attention of the court, before the jury retired; otherwise, the matter is not properly assignable for error. *Kuntz v. N. Y., etc., R. R. Co.*, 206 Pa. 162 [55 Atl. 915]; *Com. v. Rasmus*, 210 Pa. 609 [80 Atl. 264]."

The witness Villinger testified that he and the adjuster looked the building over and discussed the amount of the damage. They had some argument about it, mainly as to the deduction made by the adjuster on account of damage from explosion. The adjuster made the net loss \$881.65. Witness stated, "He gave me to understand that the company would accept that and make a prompt settlement." Witness then went to see plaintiff and told her what had taken place between himself and the adjuster, and she said, "If that is the best they will do, and they will pay this promptly, I will accept it." The witness stated that she authorized him "to make that kind of a settlement." No objection seems to have been taken to this testimony of Villinger's, and it seems to fully justify the language used in the charge, with the exception that the trial judge mistakenly stated that the plaintiff had testified to these facts. It does not appear from the evidence that Villinger communicated what plaintiff had said to him either to the adjuster or to the companies. The adjuster

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was, however, called as a witness in behalf of defendants and he made no denial of the testimony offered by Villinger. As a matter of fact, the companies did not make a prompt settlement of the loss, but allowed themselves to be sued therefor. The verdict shows that the jury believed the testimony of Villinger, to the effect that the adjuster gave him to understand that the company would accept the adjustment, and would make a prompt settlement of the loss; and further that the adjustment was made upon the faith of this representation. If the agreement as to prompt settlement was not kept, the result was to release the plaintiff from the agreement. We see nothing in the so-called "nonwaiver" agreement, which in any way affects plaintiff's right to recover the full amount of her loss. Its effect was merely to preserve to both parties all rights which either might have under the policy, notwithstanding the adjustment of the amount of the loss. If the adjustment came to naught, by the failure of the defendants to make good the representation of the adjuster as to prompt payment, there is nothing in the "nonwaiver" agreement to prevent plaintiff from claiming the actual amount of her loss.

In the fourth assignment, error is alleged in the answer to defendants' first point in which the judge said to the jury:

"There is no testimony here showing that this building was used for a different purpose than that named in the policy."

[3] In the policy the building was described as "occupied as a merchant tailor and steam sanitary cleaning establishment." The evidence showed that gasoline was used in connection with steam for cleaning. It was contended that this made it a "dry cleaning" establishment and not a "steam cleaning" one. The witness, however, who was called to sustain this contention, merely testified "that in steam cleaning no gasoline is necessary whatever." But he admitted on cross-examination that "possibly all steam cleaning establishments use gasoline." The policy sets forth that:

"Permission is hereby given where not in violation of any law, statute or municipal restriction, to use gasoline \* \* \* in the building herein described, and to keep in the building or within five (5) feet of same for sale, storage or use, not to exceed ten (10) gallons of gasoline."

In *Franklin Fire Ins. Co. v. Brock*, 57 Pa. 74, it was held, as set forth in the syllabus, that "describing a building insured as a 'storehouse' is descriptive only, and not a warranty or representation that nothing should be done in it but keeping a store or a storehouse." In *Cumberland Valley Mut. Prot. Co. v. Douglas*, 58 Pa. 419, 422 (98 Am. Dec. 298), Mr. Justice Strong said:

"And even if the building be insured as an occupied dwelling house, even if application be made for a policy on an occupied dwelling house, while it might amount to a false representation if the property was unoccupied at the

time, it is not an assertion that it shall remain unoccupied. It is matter of description of the subject, rather than stipulation respecting its use."

We see no merit in the fourth assignment of error.

[4] In the fifth assignment it is alleged that the court erred in instructing the jury that the measure of damages was "what would be the cost to repair this building and put it in the same condition that it was in at the time of the fire." Counsel for appellant argued that the "actual cash value was the proper measure of damages" and says "that the plaintiff gave no evidence as to this." This statement seems to be a mistake. It appears from the record that the witnesses who testified to the cost of repairing the building also testified to the actual cash value of the property destroyed. They made two estimates of the same amount, \$1,475, and this was the amount of the verdict of the jury. Defendants offered no testimony in contradiction of these estimates, but relied entirely on their claim that the loss had been adjusted.

[5] The sixth assignment of error is to the exclusion of an offer made by defendants to show the amount of gasoline delivered to the tenant on the premises, between December 7 and December 26, 1911; the latter being the date of the fire. The offer was made "for the purpose of showing the quantity of gasoline which might have been or was upon the premises after the issuing of the policy." As the policy was not issued until December 23, 1911, this offer was clearly inadmissible and was properly excluded; but at any rate it would not have been sufficient for defendants to show the quantity of gasoline which might have been on the premises. In order to avail themselves of the defense that more than ten gallons were kept in the building in violation of the terms of the policy they must have made it appear by affirmative evidence.

The assignments of error are overruled, and the judgment is affirmed.

(244 Pa. 550)

THOMAS v. HERRING.

(Supreme Court of Pennsylvania. March 30, 1914.)

1. DEEDS (§ 211\*)—CANCELLATION—SUFFICIENCY OF EVIDENCE.

Evidence in a suit to cancel for fraud a deed executed by plaintiff, a woman nearly 70 years old, held to sustain a decree for plaintiff based on findings that she lacked mental capacity to appreciate the business transacted at the time of the transfer, and did not comprehend the nature and consequences of her act, and that the deed as drawn did not represent the intention of the parties.

[Ed. Note.—For other cases, see *Deeds*, Cent. Dig. §§ 637-647; Dec. Dig. § 211.\*]

2. EQUITY (§ 345\*)—VERIFIED ANSWER—EVIDENCE TO OVERCOME—SUFFICIENCY.

Where, in a suit to cancel a deed for fraud, the answer denied the material allegations of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the bill, and alleged that plaintiff had executed the deed with full knowledge of what she was doing, evidence that plaintiff was permitted to receive rents of the property, and that her consent was asked when the property was mortgaged by defendants, and that a covenant for support contained in the deed had no proper place therein, sufficiently corroborated plaintiff's testimony in support of her contention to satisfy the rule saved by Act May 28, 1913 (P. L. 358), that responsive averments in an answer under oath in a suit to cancel a written instrument can only be overcome by two witnesses, or by one witness and corroborating circumstances. [Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 715-724; Dec. Dig. § 345.\*]

### 3. WITNESSES (§ 198\*)—COMPETENCY—ATTORNEY.

Where, 'in a suit to cancel a deed for fraud, it appeared that one of defendant's attorneys had acted as plaintiff's counsel when the deed was executed, and accepted a fee from plaintiff, and the chancellor thereupon required such attorney to withdraw from the case, it was not error to refuse to permit such attorney to testify for defendant to conversations had with plaintiff while he was her attorney.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 747, 748, 753; Dec. Dig. § 198.\*]

### 4. APPEAL AND ERROR (§ 259\*)—PRESENTATION BELOW—EQUITY.

In a suit to cancel a deed, an objection that, in violation of equity rule 68, the exceptions in the court below were argued before the chancellor alone, and not before the court in banc, and that the final decree was entered without argument having been heard by the other judges, could not be considered on appeal, where no exception to such practice was taken below, and defendant suffered no material harm therefrom.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1498-1502; Dec. Dig. § 259.\*]

Appeal from Court of Common Pleas, Schuylkill County.

Bill in equity by Margaret A. Thomas against Sarah Ann Herring for cancellation of a deed. From a decree for plaintiff, defendant appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

W. F. Lyons, of Shenandoah, and Edmund D. Smith, of Pottsville, for appellant. M. M. Burke and P. H. Burke, both of Shenandoah, for appellee.

MOSCHZISKER, J. [1] The plaintiff, a widow with two children, a son and daughter, owned certain real estate in the borough of Shenandoah, Pa., worth about \$7,000. In 1910 she conveyed this property to her daughter, the defendant. The consideration named was "natural love and affection and the sum of \$1.00," but no value whatever was paid. The deed reserved to the grantor the right to use and occupy the rear part of one house, and contained the following covenant on the part of the grantee:

"The said Sarah Ann Herring, for the benefit of her personal estate and for the improvement and enlargement thereof and for the acquirement of the premises herein described as her separate estate, and in consideration of the premises, \* \* \* hereby covenants, grants, and agrees to and with the said Margaret

Thomas that she, said Sarah Ann Herring, will, during the life of Margaret Thomas, pay her debts, furnish her, free of charge, with good and sufficient meat, drink, victuals, and also washing and ironing of every description, clothing and shoes, medical attendance, and a servant girl, if need be, in case of illness, and in all and every respect provide and care for her in a comfortable and decent manner, \* \* \* and give her a decent Christian burial after death."

It likewise contained a similar covenant by the husband of the grantee, which recites that it was made "in consideration of the premises and the benefit that will accrue to my wife and children by reason thereof." After execution, the deed was put upon record by the grantee; but neither she nor her husband attempted to exercise any control over the properties, other than the collection of some rents, which they immediately turned over to the grantor; nor did they contribute to the latter's support or make any effort to comply with their covenants in that respect. The plaintiff continued to treat the property as her own, and received the rents as usual for about two years, when the grantee asserted a right as owner; whereupon her mother filed a bill in equity praying for a cancellation of the deed, upon the ground that she did not know what she was doing when she executed it; that she never intended to vest the property in her daughter in fee or to sign an instrument such as the one in question; and that her signature thereto was obtained by deception and fraud practiced by the defendant. The answer denied the material allegations of the bill, and averred that the plaintiff executed the deed with full knowledge as to what she was doing. When the case came on for hearing, the chancellor found the facts above narrated, and, in addition, that at the time of the execution of the deed the plaintiff was a physically and mentally weak and infirm old woman who "did not appreciate or understand that she was transferring \* \* \* all her property"; that there had been no understanding or agreement between the parties that, "as a further consideration for the property, the defendant should maintain the plaintiff, and that there was no authority or direction given to insert a covenant for such support in the deed"; that almost immediately after securing the transfer of the property to her name the defendant and her husband mortgaged it for \$1,800, and used the money for their own purposes; finally, "that the plaintiff was not of sound and disposing mind, that the signature to the deed was obtained by fraud, that the plaintiff did not intend to sign, and did not know that she was signing, a deed, and that no consideration passed for the transfer of said property." On these findings the court below concluded that the deed was a nullity, and decreed accordingly.

There was enough in the proofs to justify the conclusion that the defendant had taken

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

a fraudulent advantage of her mother's mental condition in order to procure the deed, and possibly to raise a strong suspicion of wrongdoing on her part in other respects; but we cannot agree with the chancellor that there was evidence to show a "deliberate and premeditated fraud" practiced upon the plaintiff which "smacks of collusion between the defendant and certain attorneys," nor can we agree that the grantor was not of "sound and disposing mind," in the technical legal meaning of that phrase. We do agree, however, that when the deed was signed the plaintiff's mind was so impaired that she could not properly understand such a transaction without an explanation of the effect of the instrument on her future rights in the premises, which does not appear to have been given. See *Polt v. Polt*, 205 Pa. 139, 54 Atl. 577. The plaintiff said that no explanation whatever was vouchsafed to her, and, while the defendant asserted that the deed was explained and her mother understood it, yet she failed to give the details of what actually took place at the time, and without these her conclusions have no weight as evidence, for we cannot tell whether, in point of fact, they were justified. The plaintiff was nearly 70 years of age, and had suffered two paralytic strokes; she had had some trouble with a tenant; and she appears to have thought that if the houses were put in the defendant's name the latter could adjust this difficulty and have the trouble maker ejected. The evidence justifies the conclusion that, in so far as the plaintiff appreciated the fact of the transfer of her property, she believed it but a temporary and revocable arrangement; but how a clause of revocation came to be omitted from the deed is not shown, nor is there anything in the evidence to indicate that the plaintiff was informed that she could have such a clause inserted. Moreover, it is clear beyond a doubt, from the testimony of both the mother and daughter, that there never had been any talk or agreement between them which warranted the insertion of the covenants for the support of the former; in fact, the defendant testified that at the time the deed was being prepared her mother said that the property was to go to her (the daughter's) children, that it was understood by both that the plaintiff was to have the rents as long as she lived, and that nothing whatever was said about her support. In answer to the question, "Before the deed was drawn there was no talk between you and your mother about her support?" she replied, "No, sir; because she was to have the rents as long as she should live, and that was sufficient support." And this, in substance, she reiterated several times in the course of her testimony. The plaintiff had previously testified that she could not read or write, that the deed had not been read or explained to her; that she did not know what she was signing at the time her mark was placed thereon; and

that she had been willing that her daughter's children should have the property, but not the daughter herself. Taking the proofs of both sides, two things appear: (a) That the plaintiff lacked mental capacity to appreciate the business in hand as transacted at the time of the transfer of the property, and did not comprehend the nature and consequences of her act; (b) that the deed as drawn did not represent the intention of the parties. This being the case, we cannot say there was error in declaring it a nullity; for, even if we were satisfied as to the plaintiff's appreciation and understanding of her act when she executed the deed, we could not reform the instrument, since the proofs are not sufficiently clear to show exactly what the parties wanted to accomplish thereby. It is plain, however, that the writing before us does not represent the intention of either of the parties, and, under the circumstances, it might have been canceled on that ground alone.

[2] So far as the general sufficiency of the evidence is concerned, it is true that the act of May 28, 1913 (P. L. 358), abolishing the rule that the averments of a responsive answer must be overcome by the testimony of at least two witnesses, or of one with corroborating circumstances, saves the old "requirements of proof in cases where it is attempted to reform or overthrow a written instrument"; but here the testimony of the plaintiff is supported by the undisputed fact that, despite the terms of the grant, she was permitted to receive the rents of the property as though it were absolutely her own. Again, if we accept the testimony of the defendant, then the plaintiff is supported by the circumstance that when the mortgage was created her consent was asked, or, if we take the word of the plaintiff, we have the suspicious circumstance that the creation of the mortgage was kept a secret from her, and it is clear from the testimony of both parties that the covenants for support have no proper place in the deed. From any view one may take there are "corroborating circumstances equivalent to the testimony of another witness"; hence the proofs were sufficient to sustain the decree.

[3] The only other important point concerns the refusal to permit a certain witness to testify for the defense. At the trial a member of the Schuylkill county bar appeared with another attorney for the defendant, and, while cross-examining the plaintiff, it developed that he had been paid a fee and acted as her counsel at the time of the execution of the deed under attack. Thereupon the chancellor required him to retire from the case. This incident is presented to us and alleged as error prejudicial to the defendant; but we cannot so view it. To begin with, the lawyer who retired was associated with other counsel, and further, although at first protesting, subsequently he voluntarily withdrew, apparently thinking that he might

thus qualify himself as a witness for the defense. The record shows that some time after the court had ordered him to retire, when another witness was under examination, he stated, "In deference to the court's ruling I do withdraw from this case;" and toward the close of the trial, when he was offered as a witness on behalf of the defendant, he said, "The record shows that I have withdrawn from this case." It appears, therefore, that the only question we have before us is whether or not the chancellor erred in refusing to receive the testimony of this witness. The act of May 23, 1887 (P. L. 158), provides that counsel shall not "be competent or permitted to testify to confidential communications made to him by his client, \* \* \* unless \* \* \* this privilege be waived upon the trial by the client." We feel that the witness came within this statutory prohibition, and that no error was committed in refusing to allow him to testify. This is not a case where such a personal attack was made upon the integrity of the attorney in question as would permit him to reply in his own defense, for here there was nothing which could properly be so characterized, and anything which at all savors of that nature was brought out by his own cross-examination of the plaintiff; nor is it a case where the attorney had previously represented both parties, and for that reason was privileged to disclose communications made by one to the other; nor, since the formal execution of the deed was admitted, did the fact that the attorney was a subscribing witness qualify him to give the evidence offered at the trial; finally, we see no reversible error, for as already indicated, even on the defendant's testimony, which we must assume the witness would have corroborated had he been permitted to testify, the court below was justified in declaring that the deed did not express the intention of the parties. No case has been cited to us, and we know of none, where an attorney who had previously represented the plaintiff in the very matter which gave rise to the litigation in court was permitted to act for the other side and cross-examine his former client, or to appear voluntarily as a witness against her, using to her prejudice information gained while under her retainer; yet that is this case, and all the general rules upon the subject must be viewed in their application to the circumstances at bar. For a full discussion of the subject under consideration see the opinion of Sharswood, J., in *Jeanes v. Fridenberg*, 3 Clark, 199, particularly at page 204. Also see *Barry v. Coville*, 53 Hun, 620, 7 N. Y. Supp. 36; *Foster v. Hall*, 29 Mass. (Pick.) 89, 95, 22 Am. Dec. 400; *Kaut v. Kessler*, 114 Pa. 603, 7 Atl. 586; *Moore v. Bray*, 10 Pa. 519. In conclusion, the testimony of the notary who took the acknowledgment really amounts to nothing more than that he made the usual inquiries as to whether the parties respec-

tively acknowledged the signatures as their act and deed, and received an affirmative reply; and the evidence given by several neighbors to the effect that the plaintiff had told them that she had conveyed the property to her daughter, although largely denied by her, is entirely consistent with the theory that she did not intend an absolute and irrevocable conveyance.

[4] After the case was presented here, counsel for the appellant filed an affidavit calling attention to the fact that the exceptions in the court below were argued before the chancellor alone, and not before the court in banc, and that the final decree was entered "without argument having been heard by the other judges." The appellant contends that this was a violation of equity rule 66, which provides:

"If exceptions shall be filed, they shall be heard upon the argument list as upon a rule for a new trial, and the judge or the court in banc shall have power to sustain or dismiss any of such exceptions and confirm, modify, or change the decree accordingly."

This rule clearly directs that exceptions shall be heard upon the argument list, and in counties having more than one judge it contemplates a review by the court in banc; that is, where possible, by the chancellor and one or more of his associates. It permits a review by the judge who heard the case, where he has no associates, but it does not contemplate such practice where there is more than one judge available. No exception, however, was taken in the court below to the practice now called to our attention, and, since the defendant did not suffer any material harm, she has no standing to complain. While a proper determination of the case does not require us to pass in detail upon each of the 43 assignments, yet we have considered all of them, and are not convinced of reversible error.

The decree is affirmed, at the cost of the appellant.

(244 Pa. 542)

#### IN RE HARRAR'S ESTATE.

Appeal of FUSSEL et al.

(Supreme Court of Pennsylvania. March 30, 1914.)

#### 1. WILLS (§ 733\*)—VESTED AND CONTINGENT INTERESTS—INTENTION.

Where an interest, whether by way of maintenance or otherwise, is given to a legatee without postponement, the legacy vests immediately on the death of the testator, though the gift itself appears to be postponed; the intention indicated being that the beneficial enjoyment shall begin at once, and payment only of the principal be postponed.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1819-1846; Dec. Dig. § 733.\*]

#### 2. TRUSTS (§ 61\*)—TERMINATION BY CONSENT.

Where all the parties interested in trust property are in existence and are sui juris, and consent that the trust shall be terminated, courts of equity will decree a termination and distribution of the trust fund, though the trust

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

may not have ceased by expiration of time, and though all its purposes may not have been accomplished.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 83-87; Dec. Dig. § 61.\*]

### 3. TRUSTS (§ 178\*) — TRUSTEES — CONTROL OF DISCRETION.

While the discretion placed in a trustee will not ordinarily be interfered with, yet, where the law determines that such discretion should be exercised in a particular manner, he will be required by a court of equity to act in accordance therewith.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 232; Dec. Dig. § 178.\*]

### 4. WILLS (§ 784\*) — CREATION OF TRUST — BENEFICIARIES—RIGHT OF ELECTION.

Where testator directed that his residuary estate be held in trust and the net income paid quarterly among his grandchildren, while living, at the expiration of the respective quarterly periods, and then to their lineal descendants, that when all the property should be sold the proceeds should be paid over and divided among all his grandchildren then living and the lineal descendants of any deceased grandchild, and that distribution should be made only when the property should be sold, the sale to be made at such time as the trustee should deem for the best interest of the estate, the grandchildren, being sui juris and the sole persons interested in the real estate, could elect to take it instead of the proceeds, especially where a continuation of the trust could be only for the benefit of the trustees, who would thereby retain the management of the property for an indefinite period and receive additional commissions.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 2010; Dec. Dig. § 784.\*]

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of John Harrar. Petition to require Henry M. Fussel and another, executors and trustees of the estate, to convey certain real estate to the legatees. From decree for petitioners, the trustees appeal. Affirmed.

Argued before MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Lewis Lawrence Smith and A. Lewis Smith, both of Philadelphia, for appellants. M. T. McManus, Harry D. Wescott, and John W. Wescott, all of Philadelphia, for appellees.

POTTER, J. This is an appeal by Henry M. Fussel and the Girard Trust Company, executors and trustees under the will of John Harrar, deceased, from a decree of the orphans' court of Philadelphia county directing them to convey to the grandchildren of the said John Harrar, deceased, as tenants in common, certain real estate which was of the said John Harrar, deceased.

From the history of the case, as presented by counsel for appellants, it appears that John Harrar died November 10, 1911, leaving about \$37,000 worth of personal estate, and real estate said to be worth \$165,000. By his will, made September 1, 1911, after providing for the payment of certain annuities, he gave the residue of his estate, real and

personal, to Henry M. Fussel and the Girard Trust Company, the appellants, as executors and trustees, in trust, among other purposes, to invest the personal estate and collect the income therefrom and the income of the real estate, until the sale thereof by the executors and trustees, at their discretion. The net income, after the payments of certain annuities, was to be divided quarterly among all his grandchildren, who should be living at the expiration of the respective quarterly periods, and the lineal descendants of any who should have departed this life, leaving lineal descendants then living. When the trustees should have disposed of all the real estate and personal property, then the residue was to be paid over and divided to and among all of the grandchildren who should be living, and the lineal descendants of any deceased grandchild. Testator provided that he did not wish to compel a sacrificing sale of his property, and desired distribution to be made only when it should be sold at prices which, in the best judgment and discretion of the trustees, were for the best interests of his estate and those who take under his will. The executors' account of the personal estate was audited January 8, 1913, and the residue of the personal estate awarded to the executors for the purposes of the continuing trust. On February 25, 1913, all of the grandchildren petitioned the court to order the executors and trustees to set apart a sufficient amount to protect the annuities, and then to distribute the balance, and to convey all the real estate to them, they having elected to take it as such. A citation having been awarded, the trustees filed an answer denying the right of the petitioners to a conveyance. The orphans' court granted the prayer of the petition with respect to the conveyance of the real estate, and entered a decree accordingly. From that decree the trustees have appealed.

[1] The opinion of the majority in the court below is based upon the view that, under the provisions of the will, the interests of the grandchildren were vested at the death of the testator, subject only to be divested in the event of their deaths before the time of distribution. If this view is correct, the decree was proper. The will provides that, when the executors have disposed of the real estate and personal property, they are, after providing for certain annuities, "to pay over and divide the same (residue) to and among all my said grandchildren who shall be living and the lineal descendants of any deceased grandchild." In his argument, to support his view that the interests of petitioners are contingent, counsel for appellants cites the cases of *Rosengarten v. Ashton*, 228 Pa. 389, 77 Atl. 562, and *Lewis' Estate*, 231 Pa. 60, 79 Atl. 921. But in each of these cases the trustee was to pay income to a cestui que trust for life, and, upon the death of the life

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

tenant, was to pay over the principal, in one case to the grandchildren of testator or their issue, and in the other to the children of the life tenant. It was held in both cases that the interests in remainder did not vest until the death of the life tenant. In the case which is now before us there is, however, no intervening life estate, but the gifts are made primarily to the grandchildren; the time of payment being determined by the sale of the estate. Meanwhile the grandchildren are given the income. Counsel for appellants also cited *Henry's Estate*, 53 Pa. Super. Ct. 57, and *Shirk's Estate*, 242 Pa. 95, 88 Atl. 873. In these cases there were intervening estates, and the legatees could not be determined until the termination thereof. *Derbyshire's Estate*, 239 Pa. 389, 86 Atl. 878, was also cited, but there the remainder was to a charity, and the will provided that the principal of the estate should be paid to the charity only upon the termination of certain life interests and annuities. The question of a vested interest was not there involved. The case now before us seems to fall within the exception to the rule as pointed out in *Provenchere's Appeal*, 67 Pa. 463, 466, where Mr. Justice Sharwood said:

"Thus it is true, as a general rule, that where the time or other condition is annexed to the substance of the gift, and not merely to the payment, the legacy is contingent; but a well-recognized exception to this rule is that, where interest, whether by way of maintenance or otherwise, is given to the legatee in the meantime, the legacy shall, notwithstanding the gift itself appears to be postponed, vest immediately on the death of the testator. This circumstance indicates an intention that the beneficial enjoyment shall begin at once, and payment only of the principal or capital be postponed."

In the case at bar the grandchildren were given the net income of the entire estate, after the payment of the annuities, from the death of the testator. A case very much like the present one, is *Reed's Appeal*, 118 Pa. 215, 11 Atl. 787, 4 Am. St. Rep. 588. There, as stated in the syllabus:

"A testator provided that his executors should keep the proceeds of land sold invested at interest, and pay over to each of his nine grandchildren one-ninth of the interest thereof annually, 'or if any of them have died, leaving heirs, then pay the same to said heirs, and at the full expiration of twelve years from the time of my decease, shall in like manner pay over the principal.' \* \* \* Held, that the legacies to the grandchildren were substantive gifts, with time of payment postponed, but certain and unconditioned, and therefore vested at the death of the testator."

In *Long's Estate*, 228 Pa. 594, 77 Atl. 924, in which the opinion of the Superior Court was affirmed by this court, the testator gave the residue of his estate to a trustee in trust for a period of 20 years, with ample powers to manage and invest. He also provided for the distribution of accumulated income in six shares, one to each of five children, and one share to the children of a deceased son. The shares of any children dying before the expiration of the 20 years without leaving

lineal descendants were to go to the other legatees. At the termination of 20 years, the trustee was to dispose of the property and divide the proceeds into six shares, and distribute in the same way as was provided for the income. It was held that all the legacies were vested, those to the children of testator being subject to be divested by death within 20 years without leaving lineal descendants, and those to his grandchildren being vested absolutely and unconditionally. The decision just cited clearly sustains the view of the orphans' court in the present case that the interests of the grandchildren were vested, subject only to be divested in the event of death before the period of distribution.

[2] If the interests of the grandchildren were vested at the death of the testator, then the rule of *Culbertson's Appeal*, 76 Pa. 145, 148, is applicable. Mr. Justice Mercur there said:

"It must now be considered a well-settled rule in equity that, although a trust may not have ceased by expiration of time, and although all its purposes may not have been accomplished, yet, if all the parties who are or who may be interested in the trust property are in existence and are sui juris, and if they all consent and agree thereto, courts of equity may decree the determination of the trust and the distribution of the trust fund among those entitled thereto. *Perry on Trusts*, §§ 274, 920; *Smith v. Harrington*, 86 Mass. (4 Allen) 566; *Bowditch v. Andrew et al.*, 90 Mass. (8 Allen) 339. The principle appears to be well recognized that, no matter what may be the nominal duration of an estate given to a trustee, it continues in equity no longer than the thing sought to be secured by the trust demands."

This rule was followed in *Sharpless' Estate*, 151 Pa. 214, 25 Atl. 44, and *Brooke's Estate*, 214 Pa. 46, 63 Atl. 411.

[3] Ordinarily there will be no interference with the discretion placed in the executors or trustees; but, whenever the law determines that the discretion of a trustee should have been exercised in a particular way, he will be constrained to act in accordance therewith. *Erisman v. Directors of the Poor*, 47 Pa. 509; *Stewart v. Madden*, 153 Pa. 445, 25 Atl. 803, 34 Am. St. Rep. 713; *Severns' Estate*, 211 Pa. 68, 60 Atl. 494.

[4] Nor do we have any doubt of the right of the appellees here, being all the persons interested in the real estate in question, to elect to take it, instead of the proceeds in the case of sale. As far back as *Smith v. Starr*, 3 Whart. 62, 31 Am. Dec. 498, Mr. Justice Rogers said:

"It is well settled that, when the proceeds of real estate are devised, the persons beneficially interested may elect to take the fund as real estate. The devisee may take it either as land or money."

Without regard to the question of the prior vesting of the interests of the legatees, it is apparent that, if the trustees, in the exercise of their discretion, were to make sale of the real estate, the rights of the appellees would be at once fixed, and their interests would clearly become absolutely vested.

They have, however, elected to take the real estate as such, and there is now no occasion whatever for its conversion into money. If the trustees convey the real estate to appellees, the estate will be finally distributed among the persons designated by the testator, and there can be no possibility of any future interests arising. It can make no difference that the grandchildren elect to take the real estate itself, instead of the money derived from its sale. Under the circumstances, the refusal by the trustees to convey the real estate to the appellees was an unreasonable exercise of their discretion, and the orphans' court very properly exercised its power to compel the trustees to take the action desired. A continuation of the trust could only be for the benefit of the trustees, who would thereby retain the management of the properties for an indefinite period, and would receive additional commissions. Such a consideration has, of course, no weight with a court.

The assignment of error is overruled and the decree of the orphans' court is affirmed.

(245 Pa. 64)

**FERRO-CONCRETE CO. v. NORTHAMPTON COUNTY.**

(Supreme Court of Pennsylvania. April 13, 1914.)

**1. BRIDGES (§ 20\*)—CONTRACT—ACTION BY CONTRACTOR—LIQUIDATED DAMAGES FOR DELAY—INSTRUCTION.**

In a bridge contractor's suit for the balance due for constructing a bridge, wherein defendant set up a counterclaim for liquidated damages for delay, it was admitted that the bridge was not completed within the stipulated time. The contract provided for an extension of time, in case of rock not being found at the estimated elevation, corresponding to the increased yardage of concrete construction required. Rock was not found, but by agreement piles were substituted for the additional concrete work. There was no contention that the construction by piles required any less time than would have been required for concrete. *Held*, that the court properly instructed that the additional time required for pile work was to be added to the time originally fixed for the completion of the work and that no damages for this delay were chargeable against plaintiff.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 37-44, 46, 47; Dec. Dig. § 20.\*]

**2. BRIDGES (§ 20\*)—CONTRACT—EXTENSION OF TIME—SUBMISSION OF ISSUES—CONFLICTING EVIDENCE.**

Where, in a bridge contractor's suit against a county for the balance due on the contract price for the construction of a bridge, it appeared that the contract required plaintiff to submit to a navigation company, whose canal was to be crossed by the bridge, plans for temporary bridges and false work to be used in removing the old bridge and building the new one and to build such temporary structures to the satisfaction of such company, and the evidence was conflicting on whether plaintiff had submitted to such company plans which had to be abandoned later because of demands made with respect to the width of the clearance, the trial court properly submitted to the jury whether the plaintiff company was entitled to

an extension of the time limit for completion of the contract in consequence of the facts disclosed by its evidence.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 37-44, 46, 47; Dec. Dig. § 20.\*]

**3. BRIDGES (§ 20\*)—CONTRACT—LIQUIDATED DAMAGES FOR DELAY—SUBMISSION OF ISSUES.**

In a bridge contractor's suit for the balance due on the contract, wherein defendant claimed liquidated damages for delay in completing the work, it appeared that adding to the time originally fixed in the contract the additional time to which plaintiff was entitled by reason of matters in respect to which it was not at fault extended the time to the middle of January, but that the bridge was not completed until the following August. Plaintiff's evidence tended to show that it could have completed the bridge by the middle of January, but that on December 30th previous it was served with a resolution of the county commissioners, directing it to suspend the work of concreting during freezing weather, and that in consequence of such order the work was suspended and not resumed until the following April, and then under circumstances, for which it was not responsible, which prevented a completion until the following August. Plaintiff prosecuted the work after resuming same in April with reasonable expedition, and the county made no complaint, but continued its payments regularly as the work progressed, and asserted no claim for liquidated damages for delay until after the bridge was completed and turned over. *Held*, that the court properly submitted to the jury whether the county had waived its right to liquidated damages.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 37-44, 46, 47; Dec. Dig. § 20.\*]

Appeal from Court of Common Pleas, Northampton County.

Assumpsit by Ferro-Concrete Company against the County of Northampton to recover balance due on bridge contract. From a judgment for plaintiff, defendant appeals. *Affirmed*.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and MOSCHZISKER, JJ.

James W. Fox, County Solicitor, of Easton, for appellant. Robert A. Stotz, of Easton, for appellee.

STEWART, J. [1] The action was for the recovery of a balance on the contract price for the erection and construction of a concrete bridge, with steel reinforcements, over the Lehigh river at Easton. Under the contract plaintiffs were to receive for the completed structure \$109,950. This sum, less 10 per cent. which under the terms of the contract was to become payable upon an inspection of the bridge by viewers appointed by law, and an approval by the court, has been fully paid to the plaintiffs. The controversy is over the 10 per cent. retained. The bridge has been fully completed, and accepted by the county, and the demand of plaintiffs is for the payment of the 10 per cent. retained. This demand is met by a counterclaim on the part of the county, based on a provision in the contract which requires that the work as outlined in the plans and specifications be completed within 180 days

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from the time the contract is awarded, and stipulates that in case of failure to complete the work within the prescribed time the contractors shall pay to the county the sum of \$50 for each day after the expiration of the said 180 days that the work remains unfinished, not as penalty, but as liquidated damages. The contention on part of the county was that plaintiffs instead of completing the bridge within the time limit, which expired October 23, 1911, did not complete it until August of the following year, and that for this delay the county was entitled to recover from plaintiffs the sum of \$14,800. That the bridge was not completed within 180 days from December, 1911, was admitted. The plaintiffs' reply to the counter demand was: First, that the 180-day provision in the contract was not absolute and unconditional, but was dependent on conditions which failed; that the contract by another section (90) provided that in case of such failure of conditions—rock not being found at the estimated elevation—an extension of time was to be allowed in the same ratio to the time limited as the increased yardage bore to the total yardage above the estimated elevation. It clearly appeared that rock was not found at the estimated elevation, and that in consequence a greater depth had to be reached than that originally contemplated. At the suggestion of the plaintiffs, for reasons which met the approval of the defendant, for this additional work, piles were substituted for concrete. It is admitted by appellant that had the concrete work been adopted the contractor would have been entitled to an extension of 47 days beyond the 180 because of the additional work required. It is not contended that the construction by piles required any less time than would have been required for concrete, but the argument is that this provision for an extension of time relates exclusively to concrete work, and that it was eliminated by the supplemental agreement substituting piles for concrete. The learned trial judge rejected this view of the case, as we think properly, and held that the 180-day limit was dependent on finding rock at the estimated elevation, and that the time of the completion of the bridge was thus automatically extended by the formula prescribed in the contract, and so instructed the jury.

[2] A further claim of extension of 36 days was made by plaintiffs for the reason that under the terms of their contract they were required to submit to the Lehigh Coal & Navigation Company, whose canal was to be crossed by the proposed bridge, plans of the two temporary bridges and false work which were to be used in removing the old bridge structure and building the new one before commencing the work, and to build the said temporary bridges and false work in all respects according to the requirements and to the satisfaction of the Lehigh Coal & Navigation Company, with the provision that

in case the conditions imposed by the latter company occasioned more expense than it would be reasonable that the plaintiffs should bear, they should be allowed a sum in addition to the contract price as should thereafter be mutually agreed upon. The contention on part of plaintiffs was that they had submitted plans to the Lehigh Coal & Navigation Company, which they were prepared to observe, but that these had to be abandoned later on as the work was progressing because of extraordinary demands made by the navigation company with respect to the width of clearance. The evidence, adduced by plaintiffs, if believed, sustained their contention that because of these demands made by the navigation company, which they were required by their contract to observe, they were delayed 36 days in the completion of the work. The evidence adduced by the defendant would have supported a contrary finding. The question was one of fact which does not concern us; the one question for our consideration being whether, conceding the facts to be as claimed by plaintiffs, they were entitled under the terms of their contract to an extension of the time limit in consequence. At the time the contract was entered into, it was not known what the requirements of the canal company would be, yet, whatever they might be, the plaintiffs obligated themselves to meet and fulfill them. A reasonable implication arising, in view of the time fixed for the completion of the work, would be that plaintiffs were to be made acquainted with the company's demands in time to permit them to proceed with the work of construction without interruption or delay. They were to build in accordance with these requirements whatever they might be. A change in the requirements involving the undoing of work already done and consequent delay in the completion of the bridge, except as plaintiffs were chargeable with some default in connection therewith, was a contingency not expressly provided against; nevertheless, to deny for this reason the plaintiffs a corresponding extension of the time limit in consequence would be so inconsistent with fair dealing and the general spirit of the contract, that, in the absence of express words requiring it a reasonable construction would be that for delay so occasioned plaintiffs were not to be chargeable. The question of whether plaintiffs were actually delayed on this account without themselves being in blame, and to what extent, was submitted to the jury with the result that the jury made an allowance of 36 days additional extension on this account.

[3] Allowing the several extensions above indicated, the period for the completion of the bridge would be extended to 14th January, 1912. But the bridge was not completed and turned over to the county until 14th August following. To relieve themselves from liability for this further delay, plain-



tiffs contended and offered evidence to show that on 14th January they were in position to have substantially completed the bridge by the first day of February following; that on the 30th of December previous they were served with a copy of a resolution adopted by the county commissioners directing and requiring them to suspend the work of concreting until freezing weather had passed, and to forbid the transit company from crossing the bridge and the use of the arches until certain things had been done; that in consequence of this order the work on the bridge was suspended and not resumed until some time in April following, and then under conditions and circumstances for which it is claimed they were not responsible, and which need not here be recited, which prevented a completion before the following August. Plaintiffs insist that this interference with and interruption of the work by the county constituted a waiver of the county's claim for liquidated damages for all subsequent delay. The competency of the evidence offered by plaintiffs in this connection is not open to question. Assuming its sufficiency, how stands the case? But for the order of the county commissioners suspending work the bridge would have been completed by 1st of February, 1912, which meant a delay of fifteen days after the time limit as enlarged by considerations before mentioned had expired, and for which delay the plaintiffs have been charged as directed by the court; the order was to suspend until freezing weather had passed; the suspension continued until in April following, presumably because the weather conditions, which in the judgment of the commissioners required a suspension, continued until that time, there being no evidence to the contrary and nothing to show any dissent on the part of the county; other conditions existing at the time work was resumed, and for which plaintiffs were not responsible, were unfavorable to a rapid completion of the work; plaintiffs thereafter prosecuted the work with reasonable expedition, the county making no complaint whatever, and continuing its payments regularly on account as the work progressed, never asserting any claim for liquidated damages on account of delay until after the bridge had been completed and turned over. We have thus briefly summarized the findings of the jury, for it was upon these very questions of fact that the case was submitted. The verdict is an unqualified affirmance, and is a distinct finding from all the evidence in the case that the county had waived its right to liquidated damages under the circumstances indicated. This conclusion was reached after the jury had been fully instructed in a very able and impartial charge in which the law of the case was most intelligently and correctly expressed, and the evidence most carefully reviewed, and we see

no reason why the verdict so rendered should not be the end of controversy. In *Coryell v. Dubois Borough*, 226 Pa. 103, 75 Atl. 25, where a like question was raised, we said:

"The evidence we think clearly shows such acquiescence on the part of the borough in the delay that the enforcement of its present claim would be unjust and inequitable. We have been compelled to search through the evidence for the facts. If it anywhere appears that dissatisfaction with the delay was expressed by the borough authorities for months after the extension expired, such evidence has escaped us. It was not until September, 1903, within two months of the completion of the work, that any formal notice was served on the plaintiff. Nothing whatever had been said or done until then indicating a purpose on the part of the borough to claim anything for delay; but, on the contrary, by its course of action it gave the plaintiff abundant ground for believing that the provisions of the contract would not be enforced against it."

The same considerations, even in a more marked degree, are present here in this case, and very properly they were allowed to work a like result.

The assignments of error are overruled, and the judgment is affirmed.

(244 Pa. 532)

**GRAFF FURNACE CO. v. SCRANTON COAL CO.**

(Supreme Court of Pennsylvania. March 30, 1914.)

**1. MINES AND MINERALS (§ 55\*)—CONVEYANCE OF MINERAL ESTATE — RIGHT TO SURFACE SUPPORT.**

While the owner of a mineral estate, separated from the surface, owes sufficient support to the superincumbent estate, yet, where the owner of the entire estate has granted the mineral estate and by apt words parted with his right of surface support, the grantee, or those claiming through him, may mine all the coal, even though the falling in of the surface estate results.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 153-165; Dec. Dig. § 55.\*]

**2. MINES AND MINERALS (§ 55\*)—CONVEYANCE OF SURFACE OF MINERAL LANDS—RIGHT TO SURFACE SUPPORT.**

Where the owner of the entire estate grants the surface, reserving the mineral estate and the right to remove minerals without liability for damages to the surface, the grantor or those claiming through him may remove all the minerals without supporting the surface.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 153-165; Dec. Dig. § 55.\*]

**3. MINES AND MINERALS (§ 55\*)—CONVEYANCE OF SURFACE OF MINERAL LANDS—RESERVATION OF RIGHT OF SURFACE SUPPORT.**

A reservation of the right to surface support, in a deed conveying the surface of mineral lands, is not invalid on the ground that it is as broad as the grant and destructive of it.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 153-165; Dec. Dig. § 55.\*]

**4. FRAUDS, STATUTE OF (§ 56\*)—DEED TO SURFACE OF MINERAL LANDS—RESERVATION OF RIGHT OF SURFACE SUPPORT.**

The statute of frauds does not require that the reservation of the right of surface support,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



in a deed conveying the surface of mineral lands, be signed by the grantee.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 83-89, 136-138; Dec. Dig. § 56.\*]

Appeal from Court of Common Pleas, Lackawanna County.

Bill in equity for injunction by the Graff Furnace Company against the Scranton Coal Company. From decree dismissing the bill, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and MOSCHZIS-KER, JJ.

Thomas P. Duffy, of Scranton, for appellant. J. E. Burr and Everett Warren, both of Scranton, for appellee.

MESTREZAT, J. This is a bill in equity by the owner of the surface to restrain the owner of the underlying mineral estate from mining and removing the mineral without leaving or erecting sufficient pillars and artificial supports to protect the surface of the land.

The Lackawanna Iron & Coal Company was the owner in fee of all the coal and surface of certain large tracts of land located on the west side of the city of Scranton, and on February 3, 1891, by warranty deed in fee simple, conveyed all the coal and minerals beneath the surface of the land to the Lackawanna Iron & Steel Company, "together with also all the rights of the said party of the first part to mine and remove the said coal herein conveyed by any subterranean process incident to the business of mining, with the right to open mine and air shafts in any portion of the surface not sold and conveyed, but not the right to open any mine or air shaft upon any part of the surface which may be hereafter conveyed by the said party of the first part before said mine or air shaft is opened." On February 1, 1899, the steel company conveyed to the defendant, the Scranton Coal Company, in fee simple all the coal and minerals beneath the surface of the lands, together with the mining rights described in the deed of February, 1891.

After disposing of its mineral estate in the tracts of land to the steel company in 1891, the coal company sold from time to time certain parcels of the surface. About four acres of the surface, now owned by the plaintiff in this case, were sold to John Timmes and Herbert Hecht by deed dated November 23, 1900, which contains the following exception and reservation:

"Excepting and reserving \* \* \* all the coal and minerals beneath the surface \* \* \* of said lot, with the sole right to mine and remove the same by any subterranean process incident to the business of mining, \* \* \* without thereby incurring in any event whatever any liability for injury caused or damage done to the surface of said lot or to the buildings or improvements which now are or hereafter may be put thereon; and the party of the second part, for themselves, their heirs, ex-

ecutors, administrators and assigns, does hereby expressly release and discharge forever the said party of the first part, its successors and assigns, and all persons who may have derived title to said coal or other minerals from said party of the first part of and from any liability for any injury that may result to the surface of said premises, or anything erected or placed thereon, from the mining or removal of said coal or other minerals," etc.

The conveyance to the plaintiff recites the deed to Timmes and Hecht and contains the following clause:

"This conveyance is made subject to all exceptions, reservations, and conditions in said deeds mentioned."

The plaintiff company has a manufacturing plant or foundry on its premises, and the defendant has mined and removed coal from underneath the plaintiff's land without providing absolute support, which has resulted in injury to the surface. The defendant proposes to continue its mining operations under the plaintiff's land, which will result in further injury to the surface. The learned court below refused the injunction and dismissed the bill, holding that the plaintiff took title to the surface, subject to the exception, reservation, and condition contained in the deed to Timmes and Hecht, waiving the right to surface support. The plaintiff company has appealed.

[1] It has long been settled in this state that, where there is a separation of the minerals from the surface, the owner of the mineral estate owes a servitude of sufficient support to the superincumbent estate. That principle was announced in *Jones v. Wagner*, 66 Pa. 429, 5 Am. Rep. 385, nearly a half century ago, and it has since been uniformly recognized and enforced. Equally true, however, is it that the owner in fee of the entire estate may grant the mineral estate and by apt words in the deed of conveyance may part with or release his right to surface support, and, where he does so, his grantee or those claiming through him may mine all the coal, even though it should result in the surface falling in.

[2] The owner of the entire estate may likewise grant the surface of the land and reserve the mineral estate with the right to mine and remove it without liability for any injury or damage done to the surface, and in such case the grantor or those claiming through him may mine and remove all the coal without being compelled to support the surface. These rights of the owners of the servient and superincumbent estates in land are settled by numerous and some very recent decisions of this court.

We do not deem it necessary to determine whether the grant to the steel company released or waived the right of surface support, as we agree with the learned court below that this controversy turns upon the clause in the Timmes and Hecht deed, subject to which the plaintiff took its title. It

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

is conceded that, if this clause had been contained in the deed from the coal company to the steel company, the present owner of the coal would have the right to mine and remove it all, regardless of the effect of the mining operations on the surface. This, we understand, is not denied. The clause not only excepts all the coal and minerals beneath the surface, but also the right to remove the coal without incurring any liability for injury done to the surface, and also contains a release and discharge from any liability for any injury that may result to the premises or anything thereon from the mining and removal of the coal. Under all our authorities this clause would exempt the coal operator from liability for any injury done to the surface and any buildings thereon in mining and removing the coal.

[3] It is contended by the plaintiff, however, that the clause in the deed of the coal company to Timmes and Hecht is illegal and void because: (1) It is as broad as the grant and destructive of it; (2) it is within the statute of frauds; (3) it would have the effect of causing a valuable right to be lost. We are not convinced, however, that either of these reasons can be successfully invoked here against the grantor or those holding the mineral estate under it to prevent injury to the surface by mining operations. The effect of holding with the plaintiff would be to ignore not only the rights in the surface specifically excepted and retained by the grantor in the conveyance of the surface but would give to the plaintiff company what neither it nor its predecessors in title obtained by their deeds. There is no doubt, and the plaintiff company could have had none when it took its title, that the deed did not convey the right to surface support. It is wholly immaterial whether the common grantor of the parties, holding, respectively, the surface and the coal, still retained the right of surface support or whether it had passed to the owner of the coal. The important fact is that it never passed to the plaintiff nor its predecessors in title. The deed of the coal company to Timmes and Hecht excepted from the grant in apt words all the coal and minerals with the right to the support of the surface, and in equally appropriate language released the grantor company and those claiming under it from any liability for injury to the surface by reason of the removal of all the coal. If, therefore, the plaintiff is permitted to avail itself of the right of surface support, it is without having acquired such right from the only party who could grant it and in denial of the express language of its deed, which clearly reserved the right to the grantor. It would defeat the intention of both parties, as clearly expressed in their contract.

The plaintiff's contention that the excep-

tion is as broad as the grant, and hence destructive of it, is not well taken. Timmes and Hecht's grantor, at the time it delivered the deed to them, owned the surface or superincumbent estate, and its grantee by an earlier deed owned the coal and the mining rights contained therein. If it be conceded that the coal company, the common grantor, did not waive the right of surface support in the deed conveying the coal to the steel company, it was a part and parcel of the surface of which the company was the owner and with which it could deal as it deemed proper. For reasons best known to the company, it did not desire to part with the right of surface support by conveying it to Timmes and Hecht. Whether it had already conveyed the right to the owners of the coal or anticipated doing so, or did not convey for some other purpose, is wholly immaterial. It was the owner and could dispose of the right as it saw proper. The right of support was not the surface, nor in conveying the right would the surface pass to the grantee. It is admitted that the coal company, by a proper exception in its deed, could have waived its right to surface support in favor of the coal grantee without the latter, by the same grant, taking the surface. If, however, it had done so, the logical conclusion from the plaintiff's argument would be that the coal company, having waived the right of support, could not thereafter convey the surface at all, as it could not be conveyed without the support. The exception in the Timmes deed is not as large as the grant, and hence is legal and enforceable against the plaintiff.

[4] The statute of frauds can have no application here. It was not necessary that the right of surface support should pass by the deed of the coal company conveying the surface to Timmes and Hecht to give effect to the grant of the surface, and the right did not pass. The grantees, therefore, were not required to sign the deed to reinvest the right in the grantor company, nor to execute and deliver a deed for the purpose. The other reason assigned by the plaintiff for a reversal of the judgment is equally without merit. It may be conceded that the surface support is a valuable right, and that the plaintiff company will not possess it under our conclusion as to its rights in the surface, but that is not sufficient to warrant the court in giving the right to the plaintiff company, when neither it nor its predecessors in title show any title to the right by the contracts under which they acquired the surface. They took title to the surface with full knowledge that they were not obtaining support for it from the mineral estate, and, as they never had the right, they cannot lose it.

The decree is affirmed.

(245 Pa. 118)

## In re JAMES' ESTATE.

## Appeal of COOPER.

(Supreme Court of Pennsylvania. April 20, 1914.)

## 1. PERPETUITIES (§ 4\*) — CONSTRUCTION — WILLS.

A testatrix having two daughters and three granddaughters, children of a deceased child, devised her residuary estate in trust for "the period of my grandchildren's lives and the life of the survivor of them," the net income to be paid "to all my grandchildren in equal parts"; should any grandchild die leaving issue, such issue to take the parent's share; and further provided that, after the death of the last surviving grandchild, "for \* \* \* my great-grandchildren until each arrives at the age of 21 years, when the principal of each one's share and all income not previously paid \* \* \* I give and bequeath such share \* \* \* to each great grand child as he or she attains the age of 21 years." By a codicil she directed that the net income be divided into five equal parts, and that one-fifth be paid to each of her two daughters for life, and the remaining three-fifths to the three daughters of her deceased daughter and to the survivors of them for life, and stated that she altered her will through a desire to do equal justice to her children. Subsequently by a codicil she directed her trustee to pay one-fifth of the income to each of her daughters, naming them, and one-fifth to each granddaughter, naming them, and the survivor of them for life "then to my great-grandchildren as provided in the foregoing will," and that, on the death of either of the daughters or granddaughters without leaving issue, her share should be equally divided among the survivors, and, should either of the daughters or granddaughters leave issue, such issue should take the parent's part. By a final codicil testatrix provided that, should neither of the daughters or granddaughters leave issue surviving her and living to the age of 21 years, the whole of the residuary and reversionary estate should go to certain charities. *Held*, that the will and codicils disclosed testatrix's intention to provide life interests for the grandchildren named by her and not for others who might subsequently be born, and that hence the rule against perpetuities was not infringed.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 4-44; Dec. Dig. § 4.\*]

## 2. WILLS (§ 447\*)—CONSTRUCTION—PERPETUITIES.

A doubt arising from the language of a will as to whether the rule against perpetuities has been transgressed should be resolved in favor of vesting the remainders within the required time, especially where it may be reasonably inferred from the entire will that such was testator's intention.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 963; Dec. Dig. § 447.\*]

Appeal from Orphans' Court, Philadelphia County.

Adjudication of the estate of Amanda James, deceased. From a decree dismissing exceptions to the adjudication, Anna N. Cooper appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKE, JJ.

E. Spencer Miller, of Philadelphia, for appellant. Eli Kirk Price, of Philadelphia, for appellee.

MOSCHZISKE, J. [1] The question involved is: Was error committed by the court

below in holding that the testatrix's disposition of the principal of her residuary estate did not infringe the rule against perpetuities?

Amanda James died December 22, 1889, leaving to survive her two daughters, Mary A. Conover and Anna N. James, and three granddaughters, Mary A. Jacoby, Anna M. Cooper, and Henrietta Cooper, children of a deceased child. The two daughters subsequently died without issue, and this left the three grandchildren, who likewise have no issue, as her only heirs and next of kin. Following several specific bequests to her two daughters and three granddaughters, in which they are designated by their respective names, the testatrix devises her residuary estate:

"In trust \* \* \* during all the period of my grandchildren's lives and the life of the survivor of them; all the net income therefrom to be paid to all my grandchildren in equal parts, should either grandchild die leaving issue, child or children, said issue to take the parent's share if one solely, if more, in equal parts the said net income to be paid to my granddaughters and not to be subject to the control or intermeddling of any husband either of my grand daughters may ever have. After the death of the last survivor of my grandchildren \* \* \* for \* \* \* my great-grandchildren until each arrives at the age of twenty-one years—when the principal of each one's share and all income not previously paid on account of the education or maintenance of the child in minority I give devise and bequeath such share or equal part to each great grand child as he or she attains the age of twenty-one years and to his or her heirs absolutely forever."

In 1872, by a codicil (No. 2), she provided:

"Of the residue of my estate, I direct the net income therefrom be divided into five equal parts. One equal fifth part thereof I direct my executor \* \* \* to pay to my daughter Mary A. Conover during all the period of her natural life. \* \* \* I give \* \* \* my daughter, Annie N. James \* \* \* and direct my executor \* \* \* to pay to her during all the period of her natural life one full equal fifth part. \* \* \* The remaining three-fifths \* \* \* I give \* \* \* to the three daughters of my deceased daughter Catharine H. Cooper and to the survivors and survivor of them \* \* \* to be paid to them, my granddaughters survivors and survivor in equal parts during all their and her natural life. In all other respects, except as altered by this codicil do I republish, confirm and fully ratify my foregoing last will and testament dated June sixth 1867. Desiring to do equal justice to all my children has induced me to make this alteration in my will."

In 1876, by a codicil (No. 3), she provided:

"I do now direct the whole net income from all the rest, residue and remainder of my estate \* \* \* be divided in five equal parts, one equal fifth part thereof, I direct him (her executor) to pay to my daughter Mary A. Conover during all her natural life. One equal fifth part thereof, I direct him to pay to my daughter Anna N. James during her natural life, the other three-fifths part of said net income, I direct the aforesaid executor and trustee to pay to my three granddaughters, Ann N. Cooper, Mary Jacoby (formerly Cooper) and Henrietta Cooper and the survivor of them during all of their and her natural life, then to my great-grandchildren as provided in the foregoing will, on the death of either of my aforesaid

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

daughters or granddaughters without leaving issue, her or their share to be equally divided among the survivors, should either of the aforesaid daughters or granddaughters leave issue such issue to take the parent's share, share and share alike."

In 1886, by a final codicil (No. 5) she provided:

"Should neither of my daughters or granddaughters leave surviving her a child or children to survive to twenty-one years of age to inherit and possess the principal of my estate after the death of my last child and grandchild —In that event I give devise and bequeath the whole of my residuary and reversionary estate to \* \* \* (charities)."

In finally determining that the rule against perpetuities did not apply, the orphans' court in banc accepted the view expressed on a prior occasion in an opinion written by one of its members and adopted by the auditing judge in the present instance, which reads, in part, as follows:

"This residuary estate was also given \* \* \* in trust for the survivor of her grandchildren's lives and the life of the survivor, the net income to be paid to the grandchildren, and in the event of death of either, to their issue, the income to be paid to 'my granddaughters,' not subject to the control of any husband either might have. On the death of the survivor of the grandchildren, the great-grandchildren were to receive the income until he or she, respectively, attains the age of 21 years, at which time they were to take their shares of the principal. It is apparent from a study of this residuary clause that testatrix used grandchildren and granddaughters interchangeably, and this is accentuated by her speaking of her great-grandchildren as 'he or she,' yet her language is comprehensive enough to embrace all granddaughters and is not necessarily limited to the children of her then deceased daughter, Catharine, though in all probability, judging from other gifts to them, they alone were in her mind. The codicil, that of May 28, 1872, materially changes the provisions of the will. Its purpose is significant: 'Desiring to do equal justice to all my children has induced me to make this alteration in my will. The net income of my residuary estate is to be divided into five equal parts.' A division into fifths is in itself noteworthy. There were then two living children and three living grandchildren, all women, and two and three make five. One-fifth was to be paid to the daughter Mary for life. \* \* \* Another fifth was given to the daughter Anna for life. \* \* \* The remaining three-fifths \* \* \* were given to the 'three daughters of my deceased daughter Catharine H. Cooper, and the survivors and survivor of them' and the trustee was directed to pay them, 'my granddaughters survivors and survivor, the three-fifths of the income during all their and her natural life.' In all other respects the will as originally written was republished. The limitation over to the great-grandchildren on the death of the survivor of the cestui que trusts, as defined by this codicil, was not illegal. Those who took equitable life interests were in terms defined; they were all living at the time of the execution of the codicil and of the decease of the testatrix. The third codicil \* \* \* directed \* \* \* the whole net income \* \* \* to be divided into five different parts; again, one is given to the daughter Mary for life, one to the daughter Anna for life, and the other three-fifths are to be paid to 'my three granddaughters, Anna M. Cooper, Mary Jacoby (formerly Cooper), and Henrietta Cooper, and the survivor of them, during all their and her natural life, then to my great-grandchildren as provided in the foregoing will.' This codi-

cil so drawn is also the result of deliberation. Testatrix concludes, 'having disposed of my estate as I believe right and just, I desire my dear children and grandchildren to accept the same harmoniously.' Though a will speaks from the time of one's death, it is impossible to infer that 'dear children' meant other than the two living daughters and grandchildren. \* \* \* The fifth and last codicil drawn ten years later, May 24, 1886, provides for a gift to five charities \* \* \* in case the equitable life tenants die without issue who should attain the age of twenty-one years. Little more need be said. The analysis is conclusive and compelling. \* \* \* The intent demonstrated by apt language is to give the three granddaughters, after the death of the two daughters, equitable life estates and no more, and the corpus must and does vest not later than 21 years after a life in being at the time of the creation of the trust. Gray (2d Ed.) § 201."

Thus it may be seen the court below held that the rule against perpetuities had not been infringed, because the will and codicils taken together (*Shalters v. Ladd*, 163 Pa. 509, 30 Atl. 283) show the testatrix merely intended to provide life interests for the grandchildren specifically named by her, and not for others who might subsequently be born. But the appellant contends that the disposition conflicts with the rule, in that a proper reading of the will and codicils shows a devise for life to grandchildren generally, and not exclusively to the particular grandchildren actually designated by name; in other words, that a child born after the death of the testatrix to either one of her two surviving daughters, would be entitled to a share of the income for life, and the ultimate distribution of principal would be postponed until the death of the last grandchild, including such after-born grandchildren, if any; hence, that there was a possibility of the rule being infringed, which is enough to avoid the whole disposition. The point involved is not free from difficulty; but, after consideration of the able argument of counsel for the appellant and much thought upon the subject, we are not convinced of error in the view taken by the court below.

In addition to what we have excerpted from the opinion of the orphans' court, it is to be noted that in the second codicil, immediately after the language already quoted, the testatrix provides:

"It is my desire that my household goods be \* \* \* equally divided between my daughters and granddaughters absolutely."

She then proceeds to set aside articles for each of her two daughters and three granddaughters, designating them by name. The significance of this is to show that, although in this particular instance the testatrix used the general phrase "granddaughters," nevertheless, she merely had in mind the then living granddaughters, and not granddaughters generally; so the strong probability is that in her other references to "grandchildren" she meant only those living and known to her. To get at the intent of the testatrix, we may properly take into consideration the circumstance that the will and codicils indi-

cate she did not think it probable her two living daughters would bear children, to add to the number of grandchildren she already had; and this may well account for the somewhat vague way in which several of the codicils deal with the possibility of such issue. The appellant urges, however, that certain parts of the third and fifth codicils prove conclusively that the testatrix contemplated this possibility; but conceding the point, and also that, under some circumstances, a mere "legal possibility of issue" may be sufficient to bring the case within the rule against perpetuities (*Rhodes' Estate*, 147 Pa. 227, 230, 23 Atl. 553), yet, when the codicils in question are carefully considered, they do not necessarily avoid the final conclusion reached by the court below. In the third codicil, after creating life estates for her two daughters and three granddaughters, the testatrix says:

"On the death of either of my aforesaid daughters or granddaughters without leaving issue, her or their share to be equally divided among the survivors, should either of the aforesaid daughters or granddaughters leave issue such issue to take the parent's share, share and share alike."

It would be difficult to determine from this language exactly what interest the testatrix intended possible children of her two living daughters to take, were it not for the following words in the fifth codicil:

"Should neither of my daughters or granddaughters leave surviving her a child or children to survive to twenty-one years of age to inherit and possess the principal of my estate after the death of my last child or grandchild," then, etc.

This introduction to the last codicil indicates that the testatrix intended that, should the unexpected happen and either of her two living daughters have issue, meaning children, then the grandchildren so born should not only receive a portion of the income during minority, but should, upon arriving at the age of 21 years, also take a share of the principal, the same as already provided for great-grandchildren who might be born through any of the three living children of her deceased daughter; and the grandmother probably thought she had made such intention plain in the third codicil to her will.

What we have just stated is a most likely explanation; for, although the testatrix definitely declares in the fifth codicil that the principal is not to be distributed until after the death of her last "grandchild," by this she must have meant the last of the three living grandchildren previously named by her, and not grandchildren generally, otherwise the language would be entirely inconsistent, in that she would be in the position of indicating that future grandchildren born to her two living daughters should take principal upon arriving at 21 years of age and at the same time providing they should only take after the death of the last of her grandchildren, which would present an im-

possibility. Hence, if the language denoting the testatrix's contemplation of the possibility of children to be born to and survive her two living daughters is to be given a rational interpretation, it must be that she meant, in the ultimate distribution of the principal of her estate, such after-born grandchildren should stand on a par with any children born to the three grandchildren she already had. This would accomplish "equal justice," in accordance with the "desire" expressed by the testatrix in the second codicil; moreover, it would be a natural distribution on her part, for, although members of different generations, great-grandchildren born through the children of her deceased daughter and grandchildren born through her two living daughters would, in all probability, be contemporaries, and this treats them in the distribution of principal as the testatrix did their respective parents in the distribution of income, i. e., as though of the same generation; furthermore, under this construction all the estates would be bound to vest within a life or lives in being and 21 years thereafter, an object which she seems to have striven to accomplish.

Of course, the two living daughters of the testatrix having died without issue, there is no possibility of grandchildren other than the three particularly named in the will, and therefore it is not essential actually to determine what rights other grandchildren would take if in being; all we have said upon that subject is simply to show that the language in the third and fifth codicils which indicates the testatrix had in mind the possibility of other grandchildren coming into being does not necessarily prove that she intended them, if born, to take life estates, or interests that would postpone the vesting of the ultimate remainders beyond the prohibitory period fixed by the rule. On the contrary, as we have endeavored to show, her language is readily susceptible of the other construction and suggests an intent to vest all remainders and bring about an ultimate distribution of principal within the required time.

[2] It is true, as contended by counsel for the appellant, that the rule against perpetuities is one of law and not of construction; further, there is authority for his argument that every part of a will should be read as though the rule did not exist and "then to the provisions so construed the rule is to be remorselessly applied." *Gray on Perpetuities* [2d Ed.] § 629. But notwithstanding these general principles, this court held, in *Coggins' App.*, 124 Pa. 10, 29, 16 Atl. 579, 581 (10 Am. St. Rep. 565), per Paxson, C. J., that:

"Where the language of a will leaves us in doubt whether this rule has been transgressed, we may well resolve the doubt in favor of vesting (the remainders within the required time), especially when, upon a careful examination of the whole will, we may reasonably infer such to have been the intent of the testator."

Again, in Rhodes' Estate, 147 Pa. 227, 231, 23 Atl. 553, 554, it is said by Judge Penrose, in an opinion adopted by this court, per curiam, that where the meaning of a will is not clear, and the construction contended for would lead to a perpetuity, this in itself is "a strong reason for supposing that it was not intended to be construed in that way." On the whole, as already suggested, we are not convinced that the learned court below erred in holding the rule had not been infringed in the present instance.

The assignments are overruled, and the decree is affirmed; the costs to be paid out of the estate.

(245 Pa. 73)

**COVINGTON et al. v. HAWES-LA ANNA CO.**

(Supreme Court of Pennsylvania. April 20, 1914.)

**1. APPEAL AND ERROR (§ 1022\*)—FINDINGS—AUDIT OF RECEIVER'S ACCOUNT.**

Where a receiver, on the audit of his account, is surcharged with various sums in consequence of findings of fact which are affirmed by the court below, such findings will not be disturbed on appeal, unless clearly shown to be erroneous.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4015-4018; Dec. Dig. § 1022.\*]

**2. RECEIVERS (§ 92\*)—LOSS IN OPERATION—RIGHT TO SURCHARGE RECEIVER.**

Where the bill seeking appointment of a receiver for a corporation stated that there were orders on hand for goods from which a handsome profit could be realized, and that the business, if undisturbed, would soon realize sufficient funds to pay creditors in full and save the property intact for stockholders, and where the receiver caused an appraisal of the property to be made by three appraisers selected by himself, and in his first account charged himself with the amount of the appraisal and claimed to have made a certain gain, and subsequently, in his answer to a petition to revoke his appointment, denied that the assets were growing less or that the business was conducted at a loss, and where his second and third accounts showed a profit, he was properly surcharged with a loss in the operation of the business, especially where the evidence showed that he was negligent and mismanaged the business.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 169; Dec. Dig. § 92.\*]

**3. RECEIVERS (§ 98\*)—SHRINKAGE OF ASSETS—RIGHT TO SURCHARGE RECEIVER.**

Where a receiver caused the assets on hand to be appraised by ten men, who made affidavit that the valuation of \$14,531.47 was correct, and shortly thereafter sold the assets for \$530, he was properly surcharged, after being allowed \$1,000 for expenses of the sale, with \$13,000 for shrinkage of assets, in the absence of proof pointing out in detail where the fault lay.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 182; Dec. Dig. § 98.\*]

**4. RECEIVERS (§ 196\*)—COMPENSATION—DISCRETION.**

Where a receiver was admittedly guilty of negligence in his management of the estate, re-

fusal of the court to allow him any compensation was not an abuse of discretion.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 387, 389-391; Dec. Dig. § 196.\*]

**5. RECEIVERS (§ 194\*)—ALLOWANCE FOR ATTORNEY'S FEES.**

Where a receiver was concededly guilty of negligence resulting in loss, the auditor properly refused to allow him anything for services rendered by counsel for the benefit of the receiver personally distinct from services rendered for the benefit of the creditors and stockholders of the corporation of whose assets he had charge.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 385, 386; Dec. Dig. § 194.\*]

**Appeal from Court of Common Pleas, Philadelphia County.**

Action by James C. Covington and others against the Hawes-La Anna Company. From decree dismissing exceptions to auditor's report, W. Winfred Nuss, receiver of the defendant company, appeals. Affirmed.

The account of W. Winfred Nuss, receiver, was referred to Arthur G. Dickson, auditor, who surcharged the receiver in amounts aggregating \$32,930.54, and refused to allow him compensation for his services, reduced the amount claimed as compensation for his counsel, and charged him with four-fifths of the expenses of the audit.

Argued before FELL, O. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Thos. Raeburn White and Howard W. Page, both of Philadelphia, for appellant, Hampton L. Carson, of Philadelphia, Wilton A. Erdman, of Stroudsburg, and Joseph Carson, of Philadelphia, for appellees.

POTTER, J. This appeal by W. Winfred Nuss, who was receiver of the Hawes-La Anna Company, is from the decree of the court below, affirming the report of an auditor who was appointed to pass upon the account of appellant as receiver. It appears that the Hawes-La Anna Company was a corporation formed under the laws of New York, and incorporated in that state on July 18, 1906, with an authorized capital stock of \$150,000. Its business was the manufacture of wooden novelties, principally toys, and it had two factories, one at La Anna, Pa., and the other at Towanda, Pa., and a business office in Philadelphia. On August 16, 1907, James C. Covington, W. Winfred Nuss, and George W. Ford, who were stockholders, filed in the court below a bill in equity against the company, in which it was alleged that, while the corporation was solvent, it was unable to meet its liabilities; that a judgment had been obtained against it, and various creditors were threatening suit; and that a receivership was necessary to prevent sacrifice of its assets. Upon this bill and accompanying affidavits, the court appointed as receiver W. Winfred Nuss, one of the complainants, who was a director in the company, and its

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

president and treasurer, as well as its active manager. Under authority of the court, the receiver continued the business of the corporation until 1910, when all its property was sold under orders of the court. On January 9, 1911, the receiver's account, which was his second account, was filed and referred to an auditor. On July 15, 1912, a third account was filed, which was referred to the same auditor. This last account showed a balance in the hands of the accountant of \$2,963.54 and a further debit, was admitted of \$147, making a total admitted balance of \$3,110. For various reasons fully set forth in his report, the auditor surcharged the accountant with a sum, stated by the court below to be \$32,930.54. He also refused to allow the accountant compensation for his own services, and reduced the amount allowed as compensation for his counsel. He was also charged with four-fifths of the expense of the audit.

[1] The findings of fact by the auditor, upon which these surcharges were based, were affirmed by the court below, and therefore they will not be here disturbed, unless it is clearly shown that they are erroneous.

[2] In the first assignment it is alleged that there was error in surcharging the receiver with losses in the operation of the business amounting to \$11,698.50. It appears that in the bill filed asking for the appointment of a receiver, appellant averred that a fair and reasonable valuation of the assets of the company as a going concern was \$150,074.91, and it was stated in the bill that there were orders on hand for goods to the amount of about \$150,000, which, if filled, would net a handsome profit to the corporation. It was averred in the affidavit that the business was conducted at a profit, and if undisturbed would soon realize sufficient funds to pay creditors in full and save the property intact for the stockholders. Shortly after his appointment the receiver had an appraisalment of the property made by three appraisers selected by himself. They figured the total value of all the property at \$135,505.60. This inventory and appraisalment was made August 16, 1907, but was not filed until July 28, 1908. On November 10, 1908, the receiver filed his first account, in which he charged himself with the amount of the inventory and appraisalment and claimed to have made a gain of \$1,680.01. After deducting all credits claimed, this account showed property in the hands of the receiver of the value of \$128,353.19. On June 3, 1909, certain creditors and stockholders of the company filed a petition asking for the revocation of the appointment of the receiver, to which he filed an answer, in which he denied that the assets of the corporation were growing less, or that its business had been conducted to the injury of the stockholders and creditors, and averred that the business had been conducted without loss. On

July 6, 1909, the court made an order directing that the business be closed up by the receiver not later than January 1, 1910, and that the property of the corporation, both real and personal, should be sold under the instruction of the court. The property was finally sold in March and April, 1910, for very small prices, and the second and third accounts of the receiver showed a net balance of \$2,963.54. The statement of the expert accountant employed by the auditor to go over the books and accounts shows that, taking the inventory and appraisalment of August 16, 1907, as a basis, there was an apparent loss in the operation of the business of \$11,698.50. Counsel for appellant argue that this was made to appear by the use of two inventories made for different purposes. But we do not find support for this suggestion in the evidence. As we understand it, both of the inventories were upon the same basis. Appellant testified that the same prices were used in fixing values in the later inventories as were used in the former one, and that this was purposely done, to avoid confusion. As we read the evidence, it sustains the conclusion of the auditor and of the court below upon this item. Furthermore, the testimony warrants the conclusion that the receiver did not give proper attention to the conduct of the business, and the auditor found, as a matter of fact, that the receiver neglected and mismanaged it.

[3] In the second assignment, it is alleged that there was error in surcharging the receiver with the sum of \$13,000 for alleged shrinkage of assets. In the order of the court of July 6, 1909, there was a direction that "the conduct of the business by the receiver is to be finally closed up not later than January 1, 1910, and immediately thereafter said receiver shall cause to be made a full inventory and appraisalment of the assets on hand." The business was not, however, finally closed up until after the date named, and the inventory and appraisalment was not made until March 26, 1910. It included the stock, tools, and other personal property at the factory at Towanda, which was appraised at \$14,531.47. This appraisalment was made by ten men, who all made an affidavit that the inventory was true and correct. Yet within two weeks the receiver sold this property for the sum of \$530 or at a loss of more than \$14,000 as compared with the sworn appraisalment. No wonder that the appellant himself characterized the transaction as absurd. It could hardly be termed a sale. It was essentially a giving away of the property. Surely a full explanation for such a sacrifice was called for. It is not enough to suggest that the values set forth in the inventory were inflated. An inspection does not indicate anything of the kind. If the inventory was not correct, the burden was upon the accountant to point out in detail

wherein the fault lay. We do not see that this was done. The discrepancy between the amount of the appraisal and that received at the sale was so great as to amount to a demonstration that something was wrong. It may have been the method of the sale. But, whatever it was, the burden of explaining such a sacrifice was upon the appellant, and he has not met that burden to the satisfaction of the auditor or of the court below. Goods appraised at over \$14,500 were sold for \$530 to a purchaser who afterwards conveyed the property to Nuss individually. It was therefore in substance a sale by the receiver to himself. The property was afterwards transferred to a new company, which employed Nuss as superintendent. After careful consideration of the evidence relating to the whole transaction, the auditor allowed a liberal sum, \$1,000, for the expenses of the sale, and surcharged the accountant with \$13,000 of the loss. Referring to this item and to loss from operation, the court below said:

"All that has been said by the learned auditor in his report in the discussion of the propriety of these two surcharges is more than justified by the facts. If a receiver can, under oath, present an account to the court based upon an inventory of a certain date, and then thereafter claim that no such inventory had ever been taken because he had not been able to find it or any trace of it, and if he can further delegate his authority while away from the country on a trip to South America, and from time to time give assurances to the court that the business conducted by him was at a profit, and during his administration utterly fail to keep any orderly system of accounting, but present books 'admittedly in a deplorable condition,' what protection will there be for either creditors or stockholders of a corporation in the hands of a receiver under such conditions? The auditor, in the judgment of the court, reached the only conclusion which could be reached under the law and the facts presented to him."

We agree that the testimony was sufficient to support the findings of the auditor.

[4] In the third assignment, counsel for ap-

pellant alleges error in refusing to allow compensation to the receiver. This was a matter largely within the discretion of the court below. The negligence of the receiver was conceded. His counsel admitted the propriety of, and did not contest, surcharges amounting to \$18,689.86. In view of these facts, it certainly cannot be said that there was any abuse of discretion upon the part of the court below in refusing compensation to the accountant. An officer of a court, when found guilty of inefficiency and willful neglect of duty, as this receiver was shown to have been, can have no just claim for compensation. The general rule upon the subject is summed up in 34 Cyc. 468, where it is said:

"Neglect, recklessness, or misconduct in the management of a trust estate in his hands may be sufficient to deprive the receiver of all right to compensation. So where a receiver shows want of capacity in the management of the property intrusted to him, and a lack of appreciation of his obligations as receiver, his claim for compensation may be rejected or reduced."

This statement of the law is supported by *Pangburn v. American Vault, Safe & Lock Co.*, 205 Pa. 93, 54 Atl. 508; *Schwartz v. Keystone Oil Co.*, 153 Pa. 283, 25 Atl. 1018.

[5] In the fourth assignment of error complaint is made of the disallowance of counsel fees. The auditor allowed what he considered a proper and reasonable fee for services rendered by counsel to the receiver, for the benefit and protection of the creditors and stockholders of the corporation; such an amount being, in his judgment, the sum of \$1,250. He refused to allow anything for services rendered for the benefit of the receiver personally. We see no reason whatever to differ from the judgment of the court below which sustained the action of the auditor in this respect.

The assignments of error are all dismissed, and the decree of the court below is affirmed.



(245 Pa. 17)

**In re AUDITORS' REPORT.**

(Supreme Court of Pennsylvania. March 30, 1914.)

**1. COUNTIES (§ 196\*) — AUDITOR'S REPORT — APPEAL—DUTY OF COUNTY COMMISSIONERS.**

Where an appeal by taxpayers from the report of county auditors settling the accounts of county commissioners is entered within the required time pursuant to Act June 12, 1878 (P. L. 208), the burden is then on the commissioners to bring the issue to trial and show that they legally disposed of the county funds; and where nothing further was done for four years after the filing of such an appeal, and the taxpayers then moved to proceed upon the appeal, it was error to dismiss such motion, and, on motion of the commissioners, strike the appeal from the records on the ground that appellants were guilty of laches.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.\*]

**2. COUNTIES (§ 196\*) — APPEAL FROM AUDITOR'S REPORT—MOTION TO DISMISS—PRESUMPTION.**

It is error to dismiss an appeal taken by taxpayers under Act June 12, 1878 (P. L. 208), from the report of county auditors settling the accounts of county commissioners on the ground that the essential records, including the books, papers, and vouchers explanatory of the acts complained of, have been destroyed or have become inaccessible to both parties, in the absence of evidence thereof, though four years have elapsed since the taking of the appeal; there being no presumption of such destruction or inaccessibility.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.\*]

**3. COUNTIES (§ 196\*) — APPEAL FROM AUDITOR'S REPORT—MOTION TO DISMISS—HEARING.**

In deciding a motion to strike from the record an appeal taken under Act June 12, 1878 (P. L. 208), from the report of county auditors settling the accounts of county commissioners, it was error for the court to consider a resolution passed by the successors of the commissioners by which they attempted to discredit the good faith of the appellant taxpayers and protested against any prosecution of the appeal.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 308; Dec. Dig. § 196.\*]

**Appeal from Court of Common Pleas, Bradford County.**

In the matter of the auditors' report for Bradford county for the year 1908. From a judgment striking from the record the taxpayers' appeal from such report, F. N. Moore and others appeal. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and STEWART, JJ.

W. G. Schrier, of Athens, and E. M. Dunham, of Sayre, for appellants. Rodney A. Mercur and Mial E. Lilley, both of Towanda, for appellees.

MESTREZAT, J. The auditors of Bradford county filed in the common pleas their annual statement or report of the settlement of the accounts of the several county officers for the year 1908, and on May 15, 1909, more than 325 taxpayers of that county, in behalf

of the county, filed an appeal from the report, "particularly from the report upon the accounts of Edson D. Harkness, Langdon H. Marsh and M. J. McNulty, late county commissioners of said county, and ex officio overseers of the poor, for the poor district composed of the county of Bradford." On the same day the appellants presented to the common pleas a bond, with sureties in the sum of \$1,000, which was duly approved, conditioned that the appellants should prosecute their appeal with effect, and pay all costs that might accrue thereon in case they failed to obtain a final decision more favorable to the county than the report from which the appeal was taken. On June 30, 1909, the appellants filed 15 exceptions to the report of the auditors, in which it was alleged that the county commissioners had misappropriated very large sums of the county's money. Nothing further was done in the proceeding until May 22, 1913, when counsel for the appellant taxpayers moved the court "to proceed upon the appeal and exceptions filed in the above case by directing an issue or otherwise as to the court may seem necessary and lawful in the premises." The court granted a rule upon the commissioners to show cause why the motion should not be allowed. No answer was filed, but the commissioners moved the court to dismiss the exceptions filed by the taxpayers and strike off their appeal, assigning as reasons the "want of due and timely prosecution" and that the exceptions were "too general, not specific." The learned court below refused the motion of the appellants to proceed upon the appeal, dismissed the exceptions filed in support of the appeal, and struck the appeal from the record. In its opinion the learned court says:

"We will dismiss these exceptions, refuse to direct an issue, and direct that the appeal be stricken off for the reasons that respondents (county commissioners) were justified in presuming an abandonment because of the laches of the appellants, and for the further reason that we are convinced that at this late date the respondents could not have the matters excepted to fairly adjudicated."

From that order or decree the taxpayers, appealing from the report of the auditors, have taken this appeal.

[1] From the reasons assigned by the learned court below for striking off the appeal from the report of the county auditors, we think it misapprehended the position of the parties on the record, and mistakenly attributed the default of the prosecution of the proceedings to the appellants. The act of April 15, 1834 (P. L. 537), authorizing the county auditors to settle and adjust the accounts of the commissioners and other county officers, requires their report to be filed in the court of common pleas. The fifty-sixth section provides as follows:

"An appeal may be made from such report to the court of common pleas of the same coun-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ty. either by the commonwealth, the county or the officer, and thereupon the court may direct an issue as the case may require, to be tried by a jury. upon whose verdict final judgment shall be entered."

The act of June 12, 1878 (P. L. 208), under which the appeal from the auditors' report was taken in this case, provides that any ten or more taxpayers of the county may, in behalf of such county, appeal from the report of the county auditors to the common pleas, and requires the appellants to give bond to pay all costs unless a final decision be obtained more favorable to the county than the report of the auditors.

The appeal in the present case was properly taken and entered in the court of common pleas by the appellants, and the statutory bond was given and approved by the court. The statute makes no provision for filing exceptions or specifications of error to the report of the auditors. It is the practice, however, in many counties to file such exceptions, and there certainly can be no objection, as it informs the alleged delinquent officer of the ground on which the appeal was taken. The court may direct, the act provides, an issue to be tried by a jury, which evidently contemplates, upon the application of either or both of the parties. If no such application be made, we can see no reason why the court should not hear and dispose of the appeal.

In the present case the appeal from the report was taken and entered in time. Within a few weeks thereafter the exceptions were filed by the appellants, setting out the items of the alleged misappropriation by the commissioners. This was the status of the record when the appellants moved the court "to proceed upon the appeal and exceptions filed in the above case by directing an issue or otherwise as to the court may seem necessary and lawful in the premises." The issue as made up on the record, with or without the exceptions, put the burden upon the commissioners of showing that they had legally disbursed the funds of the county. Whether the cause was heard by the court or before a jury on an issue directed by the court was wholly immaterial, as the burden of proof was on the commissioners affirmatively to make out a *prima facie* case as to all the items excepted to. *York County v. Thompson*, 215 Pa. 578, 64 Atl. 781. The commissioners were the plaintiffs, and the appellants were the defendants in the issue then before the court. The appellants had "prosecuted their appeal" without any laches, and an issue was formed which imposed upon the commissioners the duty of having it disposed of. The further delay was not in prosecuting the appeal, but in bringing the issue, formed by the pleadings, to trial before the court or before the court and a jury. The motion of the appellants was not, as the learned court thought, for an issue, but for the court to proceed to dispose of the appeal in such man-

ner as it deemed proper. The motion was certainly very appropriate under the circumstances. The commissioners who were charged with the misappropriation neglected to have the cause tried and the question determined whether they had misappropriated the funds. The position of the parties on the record required the commissioners to act, and, failing to do so, the taxpayers who had duly prosecuted their appeal cannot be charged with laches because they had not moved the court earlier to proceed and determine the issue. As we have already said, the learned court misapprehended the position of the parties on the record, and attributed laches in disposing of the question at issue to the wrong party.

[2] The reason assigned by the court for striking the appeal from the record—that the books, contracts, and vouchers under which the acts complained of may have passed out of the hands of the respondents and may have been destroyed as useless—is without merit. There is no presumption after so short a period that the official records have been destroyed or are not accessible to both parties. The commissioners knew within a very short time after the report was filed by the auditors that an appeal had been taken and was pending, and that a bond securing the costs had been approved by the court, and if they destroyed their vouchers or other papers necessary to their defense it was done with full knowledge that the taxpayers of the county were demanding an investigation of their official conduct by the court. The destruction of these papers, it will be observed, is simply a surmise by the learned court, and is not a fact disclosed by the evidence. The commissioners do not set it up in an answer, and much less do they attempt to establish it by evidence. A surmise of the existence of a fact, however important, is not sufficient to justify a court in denying the taxpayers of a county the right to have an investigation of the conduct of officials charged with such important duties as those of county commissioners.

[3] The learned judge in his opinion quotes a resolution passed by the present board of commissioners of Bradford county, which, he says, should be taken into consideration by the court in determining whether "any further proceedings in this case" should be taken. In the resolution it is resolved:

"That we are of opinion that if said appeal and said exceptions were really filed in good faith there has not been any due and timely prosecution of the same, and we do not believe that their present agitation is founded upon good faith, and we therefore object and protest against any issue now being framed for the trial of said exceptions in which the said county of Bradford shall be use plaintiff, as the same would make an unwarranted and unnecessary expense to said county of Bradford, in our opinion."

This is a remarkable resolution for any board of county commissioners to pass under the circumstances. It shows that the pres-

ent board was not properly advised as to its duties in the premises. It was this misconception of duty and the failure of the performance of their duties by public officials that prompted the passage of the act of 1878 under which this proceeding was instituted, and which authorizes ten or more taxpayers to prosecute or defend any suit or action in behalf of the county. It is the duty of the county commissioners to prosecute and defend all suits in behalf of the county. It is no less their duty to protect the taxpayers of the county by instituting suits against defaulting public officials. Unfortunately it has been the experience of taxpayers in many counties of the state that such duty is frequently not performed, and, in obedience to a demand arising from such failure of duty, the Legislature passed the act of June 12, 1878 (P. L. 208), which empowers taxpayers to institute and defend actions for the county, a duty which should be performed by the county commissioners. We said in *Bell v. Allegheny County*, 149 Pa. 381, 385, 24 Atl. 209, 210, that the act of 1878 "should be most liberally construed." When taxpayers are compelled to invoke the authority of the act to secure an investigation of the official conduct of public officers charged with the administration of the fiscal affairs of the county, the court should not be astute in finding technical reasons to defeat the purpose.

Two boards of county commissioners have succeeded the alleged defaulting board, and, so far as the record discloses, neither board has given any assistance in having the conduct of the former board of commissioners investigated. On the contrary, the present board of commissioners, ignoring the fact that over 325 taxpayers of the county charged the former board in its official capacity with the misappropriation of large sums of money, "object and protest against any issue being framed for the trial of said exceptions" averring official misconduct. If the present board does not wish to join the taxpayers in this investigation, the least it could do would be to keep its hands off. No statute authorizes it to interfere in behalf of the former commissioners as against the county and its taxpayers, and when it does so it shows an

entire misapprehension of its official duties. It would have been well for the present board of commissioners to have submitted its resolution to its counsel before it entered the resolution upon its minutes. He would have advised them that one of the grounds upon which they rest their resolution—to wit, that the prosecution of the case would make an unwarranted and unnecessary expense to said county of Bradford—was entirely incorrect, as the act of 1878 requires taxpayers, in taking an appeal from the report of county auditors, to "enter into recognizance with two sufficient sureties" to protect the county against the costs of the proceeding. This fully protects the county for the use of its name in the proceeding. Here a bond was given on the day the appeal was taken as required by the act in an amount and with sureties approved by the court. The groundlessness of this reason assigned by the present commissioners is apparent without further discussion. The other reason assigned by the commissioners for their intervention in behalf of their predecessors—to wit, that the appeal from the report of the auditors had not been duly and in good faith prosecuted—is a question for the court under the law and the evidence, and not for the present county commissioners to determine. The learned judge of the court below was clearly wrong in permitting the resolution to have any place in his consideration of the application of the appellants to have the cause proceeded with in his court. The statute does not recognize the present board as having any standing in the proceeding, and whether they desired it discontinued or not was wholly immaterial.

We think the court below should have granted the motion of the appellants and proceeded to a determination of the cause. If either party desires, he can make an application to the court to direct an issue. If no issue is desired, the court should dispose of the appeal from the report without any further delay.

The order or decree of the court below is reversed at the costs of Edson D. Harkness, Langdon H. Marsh, and M. J. McNulty, and a procedendo is awarded.

(2nd Pa. 467)

**WINSTON et al. v. MOORE et al.**

(Supreme Court of Pennsylvania. March 16, 1914.)

**1. CONSTITUTIONAL LAW (§ 48\*)—PRESUMPTION AS TO VALIDITY OF STATUTE.**

All presumptions are in favor of the validity of a statute.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 48; Dec. Dig. § 48.\*]

**2. ELECTIONS (§ 10½\*)—"FREE AND EQUAL."**

The declaration of the bill of rights that elections shall be "free and equal" means that the voter shall not be physically restrained in the exercise of his right of franchise, by either civil or military authority, and that every voter shall have the same right as every other voter.

[Ed. Note.—For other cases, see Elections, Dec. Dig. § 10½.\*]

**3. ELECTIONS (§ 5\*)—REGULATIONS—LEGISLATIVE POWER.**

The Legislature has power to regulate elections, to prescribe the form of the official ballot, and to provide in what manner candidates shall be chosen and what names shall be printed on the ballot as a result of the primary.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 4; Dec. Dig. § 5.\*]

**4. CONSTITUTIONAL LAW (§ 70\*)—LEGISLATIVE CONTROL OF ELECTIONS—JUDICIAL POWER.**

Errors of judgment in the execution of the legislative power to regulate elections, or mistaken views as to the policy of the law or the wisdom of the regulations, do not authorize the courts to declare invalid an election law which does not clearly violate some constitutional requirement.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129-132, 137; Dec. Dig. § 70.\*]

**5. ELECTIONS (§ 22\*)—PRIMARY ELECTION—BALLOT—VALIDITY OF STATUTE.**

The provision of Act July 24, 1913 (P. L. 1001), limiting the names of candidates to be printed on the official ballot to the two who polled the highest vote at the preceding primary, is not violative of the provision of bill of rights that all elections shall be free and equal.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 15; Dec. Dig. § 22.\*]

**6. ELECTIONS (§ 21\*)—CANDIDATE FOR NOMINATION—DUTIES IMPOSED—VALIDITY OF STATUTE.**

The requirements of Act July 24, 1913 (P. L. 1001), that a candidate for nomination shall file with his petition an affidavit stating his residence, post office address, election district, the name of the office for which he is a candidate, and other matters relating to his candidacy, which requirements enjoin a duty on the candidate rather than on the voter and only incidentally involve the voter's right, do not invalidate the act.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 15; Dec. Dig. § 21.\*]

**7. ELECTIONS (§ 21\*)—PARTY NOMINATIONS—VALIDITY OF STATUTE.**

Since the Constitution is silent on the right to make party nominations for offices, the Legislature has wide discretion in such matters, and Act July 24, 1913 (P. L. 1001), is not invalid because it abolishes party nominations for certain offices.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 15; Dec. Dig. § 21.\*]

**8. ELECTIONS (§ 22\*)—OFFICIAL BALLOT—VALIDITY OF STATUTE.**

The proviso to Act July 24, 1913 (P. L. 1001) § 13, that when only one person is to be elected to an office, and there are several candidates at the primary, the one receiving more than one-half the total vote for such office and also more than one-half of the ballots cast shall be the sole nominee on the ballot, does not discriminate against any elector in violation of his constitutional rights.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 15; Dec. Dig. § 22.\*]

**9. STATUTES (§ 71\*)—"UNIFORM" ELECTION LAWS—VALIDITY OF STATUTE.**

Act July 24, 1913 (P. L. 1001), which relates only to the office of judge and provides a method of electing judges throughout the commonwealth, does not violate Const. art. 8, § 7, providing that "all laws regulating the holding of elections . . . shall be uniform throughout the state"; a law being "uniform" when all persons placed in the same circumstances are treated alike.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 71; Dec. Dig. § 71.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7175, 7652.]

**Appeal from Court of Common Pleas, Philadelphia County.**

Action on case stated by John C. Winston and others against Robert J. Moore and others. From decree entering judgment for defendants, plaintiffs appeal. Affirmed.

The case stated was as follows:

The parties to this litigation agree as follows:

1. This case shall be decided as if the facts herein stated had been duly averred in a bill in equity and an answer thereto had been filed, admitting said facts, and submitting the questions of law involved to the court for decision.

2. Plaintiffs are citizens, residents, and taxpayers of the state of Pennsylvania, city and county of Philadelphia.

3. Defendants are county commissioners of the county of Philadelphia.

4. Defendants are about to, and unless restrained by the court will, spend money of the county in the printing of official nonpartisan ballots and other election material, under the provisions of the Act of July 24, 1913 (P. L. 1001), for use at the forthcoming primary election to be held within the state of Pennsylvania, on the third Tuesday of May, 1914, and in preparation for the nonpartisan nomination of judges at such primary under the terms of the said act.

5. It is agreed that if the Act of July 24, 1913 (P. L. 1001), entitled "An act to regulate nominations and elections for all elective offices of cities of the second class and all offices of judge of a court of record; providing for nonpartisan nominations and elections for said offices; abolishing certain existing methods of nomination in such cases and the use of party or political names or appellations at elections with respect to said offices; imposing certain duties upon the Secretary of the Commonwealth, county commissioners, and election officers and clerks; and providing penalties for the violation of the provisions hereof, and the punishment of certain offenses," is constitutional, judgment shall be entered for the defendants; if the said act is unconstitutional, an injunction shall issue to restrain defendants from printing any nonpartisan ballots or spending any money of the county under the provisions of the said act, either party to have the right to appeal as in other cases.

\*For other cases see same topic and section NUMBER in Dec. Dig. &amp; Am. Dig. Key-No. Series &amp; Rep'r Indexes

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHISKEER, JJ.

Thos. Raeburn White and John G. Johnson, both of Philadelphia, for appellants. James Gay Gordon and George Quintard Horwitz, Special Counsel, both of Philadelphia, and John C. Bell, Atty. Gen., for appellees.

ELKIN, J. [1] The purpose of this proceeding is to test the constitutionality of the Act of July 24, 1913 (P. L. 1001), known as the Nonpartisan Ballot Law. The learned court below sustained the act and refused the injunction. Does the act thus assailed represent a valid exercise of legislative power? If it does, courts cannot declare it invalid, because it may prove to be unwise, or of doubtful expediency, or that it may not be effective in correcting the evils intended to be remedied, or for any other reason not based upon a subversion of constitutional rights. In the consideration of this question we start with all presumptions in favor of the validity of the act. The burden is on those who assail it to show what provisions of the act are in conflict with the organic law, falling in this the statute stands. When the constitutionality of a statute is involved in a proceeding before the courts, the question of legislative power is fundamental to the inquiry, and in this connection it must not be overlooked that the power of the Legislature to make laws is supreme except as limited by the Constitution. When therefore the Legislature has passed an act, and it has been approved as required, it has binding force and effect, unless it is clearly in conflict with the fundamental law. With this understanding of the underlying principles applicable to a correct decision of the question raised by the present appeal, let us inquire how the case stands.

It is contended for appellants that the act is unconstitutional and void for two reasons: (1) Because it interferes with the freedom and equality of elections; and (2), as applied to nominations for the office of judge, it is special legislation. The first contention is based upon the provision of the bill of rights which declares that "elections shall be free and equal." It is argued for appellees that this provision of the Constitution has no application to a primary election held for the purpose of nominating candidates, and that it was intended solely to safeguard the rights of electors in the exercise of their franchise in voting for persons or candidates to be elected to public office at a general election. This view is not without force, and it finds support in the decisions of several common pleas judges and to some extent in the opinions of our appellate courts. *Com. v. Young*, 16 Pa. Super. Ct. 317; *Com. v. Tucker*, 23 Pa. Super. Ct. 632; *Com. v. Wells*, 110 Pa. 463, 1 Atl. 310. Primary elections such as have been provided for by the acts of 1906 and 1913 were unknown in our state when

the present Constitution was adopted, at which time nominations of candidates for public office were made as a general rule by conventions or caucuses authorized by the rules of political parties, and in some instances by popular vote; but, when this was done, the primary election officers were appointed or selected according to party rules. The regular election officers had nothing to do with the holding of primary elections under the old system. This is a recent innovation, and one to be commended, because it affords greater protection against fraudulent practices and requires primaries to be conducted by sworn election officers. But no matter how commendable and meritorious direct primaries may be in nominating candidates for office, the question still remains whether they are elections within the meaning of the Constitution. There is at least room for difference of opinion on this question, indeed it may be remarked that divergent views do exist; but, since the decision of this question is not vital to a proper determination of the rights of the parties to the present controversy, we refrain from finally deciding whether a primary election law comes within the purview of article 1, § 5, of the Constitution.

[2] Assuming, however, in order that we may consider broadly the questions of constitutional limitations and legislative power raised by this appeal, that a primary held under the provisions of the act of 1913 is such an election as is contemplated by the Constitution, and one in which freedom and equality are guaranteed in the exercise of the elective franchise, and thus treating the act in question as an election law, we are of opinion that nothing contained in its provisions is subversive of any right vouchsafed the individual elector by the bill of rights. The best discussion of the meaning of the words "free and equal" as applied to elections will be found in the opinion of Mr. Justice Agnew, who expressed the prevailing views of this court in *Patterson v. Barlow*, 60 Pa. 54. What was said in that case applies with convincing force to the case at bar. The learned jurist who wrote that opinion considered broadly and discussed elaborately the rights of electors under the "free and equal" clause contained in the bill of rights. It is true that case was decided in 1869, several years before the adoption of the present Constitution; but the provision relating to the freedom and equality of elections has remained practically unchanged since 1790, and therefore the meaning of the words "free and equal" as determined in the earlier cases should not be departed from now unless we are willing to say that what was then decided is clearly erroneous. This we are not prepared to do, nor has anything been suggested in the present argument to weaken our faith, in the soundness of the views then expressed. Among many other things, it was there said:

"How shall elections be made equal? Clearly by laws which shall arrange all the qualified electors into suitable districts (this being one of the questions involved in that case), and make their votes equally potent in the election; so that some shall not have more votes than others, and that all shall have an equal share in filling the offices of the commonwealth. But how shall this freedom and equality be secured? The Constitution has given no rule and furnished no guide. It has not said that the regulations to effect this shall be uniform (a question discussed in another part of the present opinion). It has simply enjoined the duty and left the means of accomplishment to the Legislature. The discretion therefore belongs to the General Assembly, is a sound one, and cannot be reviewed by any other department of the government, except in a case of plain, palpable, and clear abuse of the power which actually infringes the rights of the electors."

[3,4] The power to regulate elections is legislative, and has always been exercised by the lawmaking branch of the government. Errors of judgment in the execution of the legislative power, or mistaken views as to the policy of the law, or the wisdom of the regulations, do not furnish grounds for declaring an election law invalid unless there is a plain violation of some constitutional requirement.

The mandate of the Constitution is that elections shall be free and equal, but how shall they be made free and equal? The Constitution is silent as to the method of securing the desired result. The declaration itself would be a vain thing in the absence of positive law to make the mandate effective. Who makes the law? The Legislature. As was well said by Justice Agnew in the case above cited, the "Constitution has given no rule and furnished no guide" to determine how the freedom and equality of elections shall be enforced. It enjoins the duty in the abstract, but leaves the means of accomplishment in the concrete to the Legislature. This necessarily gives the Legislature a wide field for the exercise of its discretion in the framing of facts to meet changed conditions and to provide new remedies for such abuses as may arise from time to time. The power to regulate elections is a legislative one, and has been exercised by the General Assembly since the foundation of the government. *Patterson v. Barlow*, 60 Pa. 54-75. Legislation may be enacted which regulates the exercise of the elective franchise, and does not amount to a denial of the franchise itself. *Cusick's Election*, 186 Pa. 459, 20 Atl. 574, 10 L. R. A. 228; *De Walt v. Bartley*, 146 Pa. 529, 24 Atl. 185, 15 L. R. A. 771, 28 Am. St. Rep. 814. The declaration in the bill of rights that elections shall be free and equal means that the voter shall not be physically restrained in the exercise of his right of franchise by either civil or military authority, and that every voter shall have the same right as any other voter. *Com. v. Reeder*, 171 Pa. 505, 33 Atl. 67, 83 L. R. A. 141. The cases hereinbefore cited, and many others not cited, show conclusively that our courts have never undertaken to impale legislative

power on points of sharp distinction in the enactment of laws intended to safeguard the ballot and to regulate the holding of elections. Indeed, so far as we are now advised, no act dealing solely with the details of election matters has ever been declared unconstitutional by this court. This for the reason that ballot and election laws have always been regarded as peculiarly within the province of the legislative branch of government, and should never be stricken down by the courts unless in plain violation of the fundamental law.

[5] In the present case, it is pertinent to inquire: What provision of the Constitution has been clearly violated by the act of 1913? Appellants make answer by pointing to that clause of the bill of rights which requires "elections to be free and equal." We have already discussed this clause in a general way, but it remains to briefly consider the points now pressed upon us. It is contended that the act under consideration is discriminatory and restrictive in its operation because it limits the names of candidates on the official ballot to the two who polled the highest vote at the primary. There is nothing new or novel in the provision thus criticised. If there is to be an official ballot, there must of necessity be a limit to the number of names printed thereon, else such a ballot would mean nothing. If every one had the right to have his name printed on the official ballot, there would be no necessity or occasion to furnish such a ballot. The old law limited the number of names to be printed upon the official ballot, and the Legislature provided the method by which to determine what names should be so printed. Thus the Legislature prescribed the limitations and the courts declared this to be a valid exercise of legislative power. The act of 1913 simply prescribes another method of reaching the same result. The people vote directly for such persons as submit their names at the primary, and the two polling the highest number of votes are entitled to have their names printed upon the official ballot. There is no distinction in principle between this method of limiting the number of names entitled to be printed on the ballot, and the old system whereby the same result was secured through party nominations or by groups of citizens. In both cases the Legislature prescribed the limitations, and, in so doing, exercised a power clearly contemplated by the Constitution. We see no more abuse of the power in one case than in the other; its quality is the same under the new act as under the old law, but the methods provided for determining the result are different. Who can say that one method is lawful and the other unlawful? The Constitution says nothing about nominations, or how candidates shall be chosen, or how many names shall be printed on the ballot. It furnishes no rule by which to accurately determine what the Legislature may or may not do in

the enactment of laws relating to such details in the exercise of the elective franchise. In the absence of any express constitutional limitation upon the power of the Legislature to make laws regulating elections and providing for an official ballot, nothing short of gross abuse would justify a court in striking down an election law demanded by the people, and passed by the lawmaking branch of government in the exercise of a power always recognized and frequently asserted.

In a general way it may be said that elections are free and equal within the meaning of the Constitution when they are public and open to all qualified electors alike; when every voter has the same right as any other voter; when each voter under the law has the right to cast his ballot and have it honestly counted; when the regulation of the right to exercise the franchise does not deny the franchise itself, or make it so difficult as to amount to a denial; and when no constitutional right of the qualified elector is subverted or denied him. Judged by these tests, the act of 1913 cannot be attacked successfully on the ground that it offends against the "free and equal" clause of the bill of rights. It denies no qualified elector the right to vote; it treats all voters alike; the primaries held under it are open and public to all those who are entitled to vote and take the trouble to exercise the right of franchise; and the inconveniences if any bear upon all in the same way under similar circumstances and are made necessary by limiting the number of names to be printed upon the official ballot, a right always recognized in our state and not very confidently disputed in the case at bar.

[6] We cannot agree with the learned counsel for appellants that the provision of the act which requires a candidate to file with his petition an affidavit stating his residence, his post office address, his election district, the name of the office for which he is a candidate, and other matters relating to his candidacy, are such restrictions upon the rights of the elector as to justify the courts in declaring the act void. This duty is enjoined upon the candidate and not upon the elector. The rights of the voter are only incidentally involved. Under the old law certificates of nomination and nomination papers had to be verified by the affidavit, not of the candidate, but of those who had the authority or knowledge required to make it. The effect upon the rights of the individual voter was practically the same under the old law as it is under the new act. No man need be a candidate for office unless he chooses to be, and, if he desires to become a candidate, it is difficult to see what constitutional right of the individual elector has been subverted by requiring a candidate to make affidavit to facts pertinent to his candidacy. This is what the act of 1913 requires and certainly details of such a character relating to the nomination of candidates are

clearly within the proper exercise of legislative power. The argument on this branch of the case could be addressed very properly to the Legislature, but it is not convincing to us when asked to declare the act in question void on constitutional grounds.

[7] Again, it is urged that the abolition of party nominations for the office of judge is an unconstitutional restriction. But why? There is no provision of the Constitution which requires a party nomination for the office of judge. It is likewise true that there is no provision denying the right to make party nominations. The organic law is silent on the subject, and hence the Legislature necessarily has a very wide discretion in such matters. Party nominations have in some instances been authorized by statute, and, in the absence of statutory law, the courts have recognized and sanctioned the authority of political parties to make such nominations, not because the Constitution so requires, but as the most effective means of securing unity of political action. This is not a constitutional right, but rather a political privilege, depending upon the will of the people, as expressed through their representatives in the Legislature, or, in the absence of positive statutory law, upon the will of party adherents, expressed through conventions, or caucuses, or otherwise, in accordance with the rules and regulations of political organizations. This is another way of saying that matters of this character are clearly within the exercise of legislative power; but, if the Legislature does not choose to act, then within the rights of political parties properly and lawfully exercised.

[8] It is further suggested that the proviso to section 13 makes the provisions of the act unreasonable and discriminatory by providing in substance that when only one person is to be elected to a particular office, and there are several candidates at the primary, the one who shall receive more than one-half of the total vote polled for such office, and more than one-half of the number of ballots cast in the political district or division, such candidate shall be the sole nominee for the office, and his name alone shall be printed as a candidate upon the official ballot. With the wisdom of this provision we have nothing to do. Our only duty is to determine whether it was within the power of the Legislature to so provide. We have already decided that the Legislature did not exceed its power in limiting the number of names to be printed upon the official ballot to the two candidates who received the highest number of votes at the primary, but it is insisted that this rule should not be applied to the proviso in question. It is difficult to draw an arbitrary line and say that a certain number of names shall be printed upon the official ballot and that a less number may not be without infringing the rights of the elector. If the courts should say that it is a lawful exercise of legislative power to limit

the number of names to be printed on the ballot to the two candidates who received the largest vote at the primary, and that the printing of a less number of names is an unlawful limitation, this would simply mean the substitution of judicial for legislative judgment. Primarily this is a legislative and not a judicial duty. Courts can interfere only when the Legislature acts in plain disregard of constitutional rights. This court has decided that the limitations imposed must not amount to a denial of the franchise itself, and this is the extremest limit to which our cases have gone. It cannot be reasonably said that the exercise of the elective franchise is denied to the individual voter by the limitation contained in the proviso to section 13. The elector may vote for the name thus printed upon the ballot, or he may write in the name of any person for whom he may choose to vote, and thus he is not denied the right to exercise the franchise of voting in accordance with his convictions, preferences, or sense of public duty. It is true that the candidate who receives more than one-half the votes polled in the election district at the primary has an advantage over all others, but this is an advantage given him by the votes of a majority of the electors who performed their public duty by attending the primary and exercising their right to vote. The elector who fails to vote at the primary, and thus disregards the opportunity afforded him under the law, is not in position to complain because of an advantage given the successful candidate by a majority of the voters who did attend the primary and performed their duty in this respect. This advantage results from a direct vote of the people, and those who are dissatisfied with the nomination thus made are not concluded by it, but may vote for a defeated candidate, or for any other person for whom they desire to vote, by pursuing the method pointed out in the act. In view of the wide discretion which the Legislature has always exercised in the enactment of election laws, and the elective franchise not being denied any one, we are not prepared to say that this limitation makes the act unconstitutional and void. Even under the old system it often happened that there was only one candidate for the office of judge, and indeed it may be confidently said that such a situation will not more frequently arise under the new act than it did under the old law. This question in another form was very thoroughly discussed by our Brother Brown in *Oughton v. Black*, 212 Pa. 1, 61 Atl. 346, 4 Ann. Cas. 141. The underlying principle of that case is controlling here, and we need not reiterate what was there said by this court in sustaining the Act of June 10, 1893 (P. L. 419), as amended by the Act of April 29, 1903 (P. L. 338). After full consideration it was decided in that case that the Legislature had the power to regulate the exercise of the elective franchise, and to

prescribe the form of the official ballot and the manner in which it shall be voted.

[9] This opinion is already too long, but it is necessary to advert briefly to one more question. It is strongly urged that the act in question offends against article 8, § 7, of the Constitution, which provides as follows: "All laws regulating the holding of elections \* \* \* shall be uniform throughout the state." What is meant by the word "uniform" as here used? A law is general and uniform if all persons in the same circumstances are treated alike. *Davis Coal Co. v. Pollard*, 158 Ind. 607, 62 N. E. 492, 92 Am. St. Rep. 319. Uniform operation means that the same law shall apply to all persons placed in the same circumstances. *McCormick v. Rusch*, 15 Iowa, 127, 83 Am. Dec. 401; *McAunich v. Railroad Co.*, 20 Iowa, 338. A law is general and uniform, not because it operates upon every person in the state, but because every person brought within the relations provided for in the statute is within its provisions. *Arms v. Ayer*, 192 Ill. 601, 61 N. E. 851, 58 L. R. A. 277, 85 Am. St. Rep. 357. The same rule has been recognized and applied in our own state. The question was raised in *Dewalt v. Bartley*, 146 Pa. 529, 24 Atl. 185, 15 L. R. A. 771, 28 Am. St. Rep. 814, and decided adversely to the contention of appellants here. It is true that case did not consider the uniformity of an election law which applied only to the nomination and election of judges throughout the commonwealth. But the principle is the same because an act which applies to judges as a class cannot be said to be either special or lacking in uniformity. It applies to all persons in the same circumstances. It operates upon every person who is a candidate for the office of judge. It affects all candidates for the judicial office alike. Under the Constitution the judiciary is one of three co-ordinate branches of government, and certainly an act which relates to this entire body and operates upon the election of each member of it must be regarded as of general application and uniform operation throughout the state. In addition, it may be said that even if this be not the proper test, but that the question must turn upon the rights of individual electors, the act operates upon all voters alike in the election of judges. The vote of one elector is as potent as that of any other elector at the primary, and the same may be said as to the general election because even then there is no distinction as to the right of each elector to cast his ballot. We therefore conclude that the act of 1913, as applied to the office of judge, is a general law and of uniform operation throughout the state.

We rest this decision upon the ground that the Legislature had the power to prescribe the form of the official ballot, to provide in what manner candidates shall be chosen, what names shall be printed on the ballot as a result of the primary, and that



nothing contained in the act of 1913 is sufficient to justify this court in declaring that the Legislature abused its power by writing into the statute the limitations which it is here contended are unlawful restrictions of the elective franchise. If it were our duty to make the law, no doubt some of its provisions would be written differently; but we cannot declare an act void because in some respects it may not meet the approval of our judgment, or because there may be difference of opinion as to its wisdom upon grounds of public policy. Questions of this character are for the Legislature and not for the courts. If the restrictions complained of in this proceeding are found to be onerous or burdensome, the Legislature may be appealed to for such relief, or for such amendments, as the people may think proper to demand.

Decree affirmed. Costs to be equally divided between the parties.

(245 Pa. 47)

### FORTNEY v. BREON.

(Supreme Court of Pennsylvania. April 13, 1914.)

#### 1. MASTER AND SERVANT (§ 289\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

An employé injured in oiling machinery in motion is not guilty of contributory negligence as a matter of law, where, at the time of injury, he is performing his work in a way not obviously dangerous and no other reasonably safe way is known to him or readily available, and such as an ordinarily prudent man would have adopted under similar circumstances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1089, 1090, 1092-1132; Dec. Dig. § 289.\*]

#### 2. MASTER AND SERVANT (§ 274\*)—INJURY TO SERVANT—EVIDENCE.

Where, in an employé's action for injuries, the defense was that plaintiff was guilty of contributory negligence in doing work in an obviously dangerous manner when a safe way was open to him, evidence that he did the work in the customary way prevailing in defendant's shop was admissible.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 939-949; Dec. Dig. § 274.\*]

#### 3. MASTER AND SERVANT (§ 284\*)—INJURY TO SERVANT—DIRECTION OF VERDICT—EVIDENCE.

Where, in an employé's action for the loss of his hand which was torn off by an unguarded cogwheel, defendant's negligence in failing to provide guards pursuant to Act May 2, 1905 (P. L. 352), was apparent, and the evidence showed that the accident occurred while plaintiff was attempting to remove the cap of an oil box fastened near the moving cogwheel preparatory to oiling the machinery, but did not show that he could have had the machinery stopped, or that it could have been oiled while at a standstill, or that an ordinarily prudent man would have adopted such method under the circumstances, the court properly refused to direct a verdict for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1000-1090, 1092-1132; Dec. Dig. § 284.\*]

#### 4. APPEAL AND ERROR (§ 203\*)—PRESENTATION FOR REVIEW—RECORD—DEMONSTRATIVE EVIDENCE.

Where, in an employé's action for the loss of his hand from being torn off by an unguarded cogwheel, plaintiff as a witness used a model in describing the accident, counsel for defendant, if he deemed that the matter would be important on review, should have seen at the time or on subsequent cross-examination that the record clearly disclosed what was indicated by plaintiff in connection with the model.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1064; Dec. Dig. § 203.\*]

#### 5. MASTER AND SERVANT (§ 121\*)—NEGLIGENCE—FAILURE TO SAFEGUARD MACHINERY.

Failure of an employer to place guards on moving cogwheels as required by Act May 2, 1905 (P. L. 352), is negligence, where the guarding of such wheels is not impracticable.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*]

#### 6. APPEAL AND ERROR (§ 216\*)—INSTRUCTIONS—WAIVER OF OBJECTIONS—DAMAGES.

Where, in an employé's action for injuries, the charge on damages was inadequate in failing to direct attention to the evidence of "circumstances concerning the life of plaintiff" or to inform them regarding its place in their deliberations, but defendant made no special request for instructions on damages or the evidence relating thereto, and took no specific exception to the instructions given, he waived his right to object thereto.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216; Trial, Cent. Dig. § 628.]

#### 7. APPEAL AND ERROR (§ 216\*)—GROUND FOR REVERSAL—INSTRUCTIONS ON DAMAGES.

The giving of an erroneous instruction on damages in a personal injury case is ground for reversal, though no specific instructions were requested.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 216; Trial, Cent. Dig. § 628.]

Appeal from Court of Common Pleas, Lycoming County.

Trespass by Edward T. Fortney against George B. Breon for personal injuries. From judgment for plaintiff, defendant appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

John E. Cupp, of Williamsport, for appellant. Otto G. Kaupp, of Williamsport, for appellee.

MOSCHZISKER, J. The plaintiff had been employed in the defendant's box factory for about 3½ years prior to the accident which gave rise to this case, and for the last 3 months of that period it was one of his duties to oil certain machinery. On February 9, 1913, while preparing to oil a machine which was in motion, the plaintiff's right hand was torn off just above the wrist by an unguarded cogwheel. The cog was in close proximity to a small cup or receptacle for holding oil to lubricate the shaft, and the plaintiff was endeavoring to remove the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-Nb. Series & Rep'r Indexes

cap from this cup when "his hand was caught between the back of the wheel and the brace or timber upon which the shaft rested." He thus describes the accident:

"I reached my hand up to pull this cap off the cup. I could not pull it off with my left hand, and I took another position and I raised my right hand up and pulled it off, and when it came off, it came with such force that it threw my hand up against the gearing."

Immediately after this the notes of testimony show the following request made of the witness, "Now, step down here, if you will, Mr. Fortney, and explain it to us from this model?" The plaintiff took a position by the model and explained:

"This is the oil box; there is a cap that fits over that, and in raising that cap my hand went over it like that, and in pulling it off \* \* \* my hand went up like that (indicating), and my hand slipped over like that (indicating) and slipped right in between the cogs. My hand slipped in the gearing there, and it pulled my hand down between the bridge tree and the top gearing, and it tore my hand off in a moment."

The negligence averred was a failure to guard the "said cog gearing." The plaintiff recovered a verdict for \$4,650, upon which judgment was entered, and the defendant has appealed.

[1] Three errors are assigned: (1, 2) That the court erred in not giving binding instructions and subsequently in not entering judgment n. o. v. for the defendant; (3) that the trial judge erred in portions of his charge. On the first two assignments, the defendant contends that the plaintiff was plainly guilty of contributory negligence when he oiled machinery in motion, and that, under the rule stated in *Solt v. Williamsport Radiator Co.*, 231 Pa. 585, 80 Atl. 1119, the court below should have so held as a matter of law. In that case, we said:

"To do an act necessary to the performance of the duties of one's employment in a way which is obviously dangerous when one can perform the act in another way known to him, which is reasonably safe, is contributory negligence."

And the appellant contends that this principle controls the present appeal. But we cannot agree in the contention, for here the act being performed at the time of the injury was quite different from that in the *Solt* Case, and neither there nor in any other instance have we held that it is always and under all circumstances per se negligence for one to work at or around running machinery when it is possible to perform the same service with the machinery at a standstill; whether or not it be negligence so to do depends upon the surrounding facts. In some cases, such as *Snyder v. Longmead Iron Co.*, 90 Atl. 630, decided at this term, *Solt v. Williamsport Radiator Co.*, supra, and *Best v. Williamsport Staple Co.*, 218 Pa. 202, 67 Atl. 205, the plaintiff's proofs and admissions demonstrated contributory negligence so clearly that there was no issue for the jury; whereas, in others, such as *Rals-*

*ton v. Baldwin Locomotive Works*, 240 Pa. 14, 87 Atl. 299, the proofs, and the inferences to be drawn therefrom, did not plainly demonstrate contributory negligence, hence the issue had to go to the jury. The rule in the *Solt* Case cannot be applied by a trial judge as a governing principle of law that requires a nonsuit or binding instructions for the defendant, unless the evidence not only demonstrates that the plaintiff was performing work in a way which was obviously dangerous, when another reasonably safe way was known to him, but it also must show that this other way was clearly and readily available and such as the ordinarily prudent man would have adopted under similar circumstances; and it is far from plain that this was the condition in the present case.

[2] Where one is charged with contributory negligence in doing work in an obviously dangerous manner when a safe way was open to him, unless the manner of performance was so unusual and clearly careless that no two minds could reasonably disagree as to the alleged negligence, evidence that the injured person did the work in the customary way prevailing at his employer's shop is relevant. *Cramer v. Aluminum Co.*, 239 Pa. 127, 86 Atl. 654; *Lanahan v. Arasapha Mfg. Co.*, 240 Pa. 292, 87 Atl. 286. The testimony before us indicates that it was not the custom of the defendant's establishment to stop the machinery when work was being performed thereon of the character which the plaintiff was engaged upon when he was hurt; on the contrary, it rather suggests the reverse as the rule of the shop. Under such circumstances, although the plaintiff might be guilty of an assumption of risk (which defense was not available in the present case; *Jones v. Carmel Co.*, 225 Pa. 644, 652, 74 Atl. 613), yet, simply because he worked at machinery in motion, he would not be guilty of per se negligence. The testimony depended upon by the defendant to show that the injured man could have had the machinery stopped, had he so requested, is not by any means clear, and the plaintiff stated positively that he "absolutely did not have the right" to have the machinery stopped when doing the particular kind of work that he was engaged in at the time of the accident, and that the manner in which he "performed his duties at that time" was the usual and ordinary way; moreover, one of his fellow workmen testified that it was not the custom of the shop to shut down running machinery when such work was being done.

[3] But even beyond the evidence already referred to, the judge who heard the testimony states, in his opinion refusing a new trial, that the model which was produced before him plainly showed that ordinarily the work of placing oil in the cup in question could have been performed "while the machinery was in motion, with practically

no danger . . . of coming in contact with the cog." It appears that this model, although used at the trial by both sides, was not formally put in evidence; further, that, while the plaintiff was invited to use the model in describing the accident, yet, instead of the minutes in some way showing the various acts indicated by him in connection therewith, the notes simply contain the word "indicating"; so we have no such clear picture of the occurrence as would justify us in saying that the trial judge erred when he stated the model made it plain that if no unforeseeable slip intervened the machinery could be oiled when in motion with "practically no danger"; and, if this was the case, it could not be held as a matter of law that the plaintiff was guilty of contributory negligence.

[4] We recently had occasion to say, in *Wagner v. Standard Sanitary Mfg. Co.*, 91 Atl. 353, decided at this term:

"When a witness indicates anything that is important to the decision of an issue, counsel . . . should see that a proper description is placed upon the record at the time, showing not merely the bare fact that the witness indicated something, but exactly what he pointed out, so that the notes may be properly understood by one not present at the trial."

Here, counsel for the defendant, if he considered it important, should have seen at the time, or on subsequent cross-examination, that the record disclosed more clearly what was indicated by the plaintiff in connection with the model. On the proofs as presented, considering them as a whole, we do not feel that the facts, or the inferences to be drawn therefrom, were so plain that the issue as to the plaintiff's alleged contributory negligence could have been taken from the jury. It may well be that while the plaintiff was intent upon doing his work in the customary manner prevailing in his employer's shop, and therefore in a way which he had reason to believe his superiors approved and considered reasonably safe, his hand unexpectedly and accidentally slipped because of the unusual force he was obliged to apply to the cap and without carelessness on his part. *Fegley v. Lycoming Rubber Co.*, 231 Pa. 446, 448, 80 Atl. 870; *Cramer v. Aluminum Co.*, 239 Pa. 120, 126, 127, 86 Atl. 654; *Lanahan v. Arasapha Mfg. Co.*, 240 Pa. 292, 297, 87 Atl. 286.

[5] As to the negligence of the defendant, that is apparent; for had he obeyed the requirements of the Act of May 2, 1905 (P. L. 352), this unfortunate accident would not have resulted, but, instead of so doing, he left the cogs which caused the injury entirely unprotected, although there was no contention that it was impracticable to guard them; and, incidentally, it developed in the testimony, without objection from counsel for the defense, that some seven months after the injury to the plaintiff they still continued in the same unguarded state.

[6] The remaining question is: Granting

the case was for the jury, was reversible error committed in the course of its submission? The uncontroverted testimony upon the subject indicated that prior to the accident the plaintiff was a strong, healthy, industrious young man, 33 years old, who had been steadily employed since 17; that for some time he had been earning more than \$800 per year in wages from the defendant; that he would probably live at least 33 years more; that had he not been injured his earning power would have continued along average lines; and that the accident caused him, in addition to considerable actual expense and physical suffering, the loss of his right hand, with the consequent diminution of earning power ensuing to one dependent upon manual labor for a livelihood. The third assignment refers to a portion of the charge dealing with this evidence in connection with the measure of damages. Thereunder, the sole specific complaint is that the trial judge practically withdrew from the consideration of the jury the proofs affecting "the prior state of health, habits, and character, perils of employment, present characteristics and other circumstances surrounding the life of the plaintiff," and that his instructions on the question of the damages were likely to create the impression that the only testimony the jury had to consider was the evidence relating to the plaintiff's earning power before and after the accident. The excerpt contained in the specification of error, standing alone, may appear to justify the appellant's criticism; but not so, when this portion of the charge is taken in connection with its context. In the first place the judge, using our words in *Goodhart v. Penna. R. R. Co.*, 177 Pa. 1, 14, 35 Atl. 191, 55 Am. St. Rep. 705, informed the jury that, for the purposes of their consideration the damages could be divided into "three principal items": First, the expenses; second, compensation for pain, suffering, and inconvenience; and, third, loss of earnings and diminution of earning power; and the instructions relating to the last of these items is the only matter assigned for error. He said:

"It has been admitted that according to the Carlisle Tables this plaintiff's expectancy of life will be 33 $\frac{2}{100}$  years, and yet he may not live a year; this table cannot be taken as definitely establishing the plaintiff's expectancy of life, but may be considered with all the other elements in reaching a decision upon this question."

He then called attention to the testimony concerning the plaintiff's actual earnings, and stated:

"This testimony should be taken into consideration when deciding what the earning power of the plaintiff was, you should also take into consideration when fixing this item, what his earning power will be in the future; and from these facts, that is, from what his earning power was and what it will be, you should conclude what the loss of earning power will be because of the accident."

After this, he told the jury that, while the testimony concerning the wages the plaintiff was receiving at the time of the accident did not absolutely fix his earning capacity, yet it should be "given weight in determining what his actual earning power was." Finally, he said:

"In making up your verdict you only use the items which I have mentioned as the means or method of deciding what the total amount of damages is, if any, that should be allowed."

When we look at the part of the charge under consideration as a whole, it is evident that the final words employed by the trial judge, to the effect that the jury should "only use the items which I have mentioned," did not apply to items of proof, but to the "three principal items" into which he had divided and classified the damages at the beginning of his instructions, and it is clear that he did not intend a restriction upon the evidence the jury were to take into account in arriving at their final determination; for, at the very start, he told them that in deciding as to the probable duration of the plaintiff's life the "other evidence" in the case was to be considered, and this necessarily must have been intended and understood to mean the other evidence relating to the plaintiff's health, habits, etc. Of course, strictly speak-

ing, the attention of the triers ought to have been expressly directed to the evidence relating to the "circumstances concerning the life of the plaintiff," and they should have been informed regarding its place in their deliberations. Therefore, possibly, the portion of the charge assigned for error may be termed inadequate in this respect, and perhaps it is open to just criticism in other particulars, but it contains no positive misstatement of law or anything tantamount thereto. The defendant did not make any special request for instructions on the damages or the evidence relative thereto, and he took no specific exception to those given.

[7] Under such circumstances, the rule is:

"If an instruction is clearly erroneous upon the question of damages, it is ground for reversal, no matter whether specific instructions were requested or not; but, if the charge be only inadequate, it is the duty of counsel to ask for more definite instructions, and failure to do so will, as a rule, be deemed a waiver of any objections that might otherwise be made"—especially where it is obvious that no harm was done by the matter complained of. *Burns v. Penna. R. R. Co.*, 239 Pa. 207, 86 Atl. 786.

And this rule applies in the present instance.

The assignments of error are overruled, and the judgment is affirmed.

(88 Conn. 436)

**STATE ex rel. LEWIS v. BOARD OF EDUCATION OF NEW HAVEN et al.**

(Supreme Court of Errors of Connecticut. July 13, 1914.)

**SCHOOLS AND SCHOOL DISTRICTS (§ 146\*)—TEACHERS' RETIREMENT FUND—"TEACHER"—"PREVIOUS."**

A city public school teacher who, after nearly 50 years of service, resigned in 1908 is not entitled to an annuity from the teachers' retirement fund established by Act July 18, 1911 (16 Sp. Laws, p. 823), for the benefit of public teachers, and defining the word "teacher" to include all teachers regularly employed in the public day schools and giving a retired teacher an annuity of one-half of his annual salary for the five years prior to the date of his retirement, and providing for retired teachers who have taught in the schools for 40 years previous to the date of the act, the word "previous" being synonymous with "next prior to" or "next preceding" and not including a period before the date the act became effective.

[Ed. Note.—For other cases, see *Schools and School Districts*, Dec. Dig. § 146.\*

For other definitions, see *Words and Phrases*, vol. 8, pp. 6892, 7313; vol. 6, p. 5545.]

Case Reserved from Superior Court, New Haven County; William H. Williams, Judge.

Mandamus by the state of Connecticut, on the relation of John G. Lewis, against the Board of Education of New Haven and others to compel the board to pay and its president and secretary to sign and issue to relator an order on the retirement fund provided by 16 Sp. Laws, p. 323, for an annuity claimed to be due him. Cause tried on motion to quash the alternative writ issued, and reserved on stipulation of the parties for the advice of the Supreme Court of Errors on questions of law arising on the pleadings and the judgment to be entered thereon. Superior court advised to sustain motion to quash and render judgment for respondents.

Edward H. Rogers, of New Haven, and Ralph H. Clark, of Derby, for relator. Charles Kleiner and Henry H. Townshend, both of New Haven, for respondents.

**WHEELER, J.** An amendment to the charter of New Haven approved July 18, 1911 (S. L. vol. 16, p. 323) established a "teachers' retirement fund" for the benefit of the public day teachers of New Haven, to be made up of public and private gifts, of assessments upon the annual salaries of all such teachers, and of that portion of such salaries which had been appropriated for the fiscal year, but remained unpaid because of the illness, resignation, or absence of the teachers. The act constituted a board of retirement, and provided that, upon a majority vote of this board and of the board of education, the teachers of the public day schools who had served for varying named periods might be placed upon the retired list, and granted to the teacher so retired an annuity equal to one-half his or her salary for the 5 years last previous to the date of re-

tirement. It also provided for a disability list and for an annuity to be paid from such fund to the teacher placed thereon.

The relator had been a teacher in the New Haven day schools from September 1, 1858, to May 22, 1908, when the board of education accepted his resignation with regret.

On December 22, 1911, and subsequent to the approval of this amendment, the relator was, upon recommendation by a majority vote of the board of retirement and of the board of education, placed upon the retired list of teachers provided for by the amendment. The relator, if legally placed upon the retired list, was entitled to an annuity of \$800 a year, and this annuity was paid him from this fund from January 1, 1912, to December 1, 1912, when the respondents discontinued its payment, and have since refused to pay the same.

The relator duly made application for a writ of mandamus against the members of the board of education to compel payment of the annuity, and against its president and secretary to compel them to sign and issue to the relator an order on this fund for the annuity, claiming to be a teacher within subdivision 3 of section 5 of the amendment.

"Sec. 5. (1) Upon a majority vote of the board of retirement and a majority vote of the board of education, any teacher who has taught in public day schools for a period of thirty years, of which period the last twenty years shall have been in said public day schools of the New Haven city school district, shall be placed on the retired list. (2) Any teacher of the public day schools of the New Haven city school district who has reached the age of sixty-five years or over, and who has taught for a period of not less than thirty years, of which period the last twenty shall have been in the public day schools of the New Haven city school district, shall have the right to apply to the board of retirement to be placed on the retired list. If said application shall be approved by a majority vote of said board of retirement and a like vote of said board of education, the applicant shall be placed on the retired list. (3) Any teacher who has taught in the public day schools of the New Haven city school district for a period of forty years previous to the date when this act becomes operative shall, upon recommendation by a majority vote of the board of retirement and a majority vote of the board of education, be placed upon the retired list."

To the alternative writ the respondents filed their motion to quash upon practically two grounds, the decision of which controls the judgment to be rendered, since the parties stipulated that judgment should be entered without further pleadings. These grounds are: First, the relator ceased to be a teacher 3 years before the passage of the amendment, and therefore does not come within its terms; second, if this clause does include the relator, it is unconstitutional, because an attempt to grant exclusive privileges to a certain set of persons, and to give compensation to a former employé and to devote public funds to private uses. Our view of the act makes it unnecessary to pass upon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the second or constitutional ground of the motion to quash.

The purpose of the act is the establishment of a "teachers' retirement fund," for the benefit of the teachers of the public day schools of New Haven, section 1. Unless the act makes it clear that a different meaning was intended, the natural meaning must prevail. A fund for the benefit of teachers, in the natural use of the term, refers to active teachers, and not to retired teachers.

The relator ceased to be a teacher in the New Haven schools when his resignation was accepted. He could no more with propriety be called a teacher than one who had retired from business could be called a business man. Instead of indicating that the beneficiaries of this fund might be the retired, as well as the active, teacher, the act conveys unmistakably the contrary. It defines, in section 10, the term "teacher," as used in the act, to include "all teachers regularly appointed and employed in the public day schools, by the board of education." The teacher referred to in this act is one who is employed in the public day schools of New Haven. The relator was not so employed when the act took effect; his employment had ceased 3 years previous.

The act provides (section 9) that the employment of a teacher after the act becomes operative shall be made subject to its provisions. Section 12. The employment must refer to the active teacher; and, had the act contemplated the retired teacher, it would have made him also subject to its provisions.

Section 7 of the act gives the retired teacher an annuity of "one-half of his, or her average annual salary for the five years last previous to the date of his or her retirement." The annuity is based upon the salary for the 5 years prior to the date of retirement. The relator had had no salary for 3 years prior to the date of his retirement. The statutory basis for determining the annuity is in his case nonexistent.

The relator contends that subdivisions 1 and 2 of section 5 relate to the active teacher, while subdivision 3 relates to the retired teacher who has taught in the schools of New Haven for a period of 40 years previous to the date when the act became operative. The word "previous" in this connection is synonymous with "next prior to," or "next preceding." The period of time referred to did not include a period of time which ended 20, 10, or even 3 years prior to the date the act became effective. Such a construction would take from the language its ordinary significance.

The relator rests his claim mainly upon his inference that the third subdivision is meaningless, unless his interpretation of it is accepted. He urges that, if subdivision 3 relates to the active teacher, it was an unnecessary provision, since the teacher could have secured his retirement under subdivisions 1 and 2, 10 years earlier.

In order to make this subdivision effective,

the relator insists it must be held to comprise a distinct class—namely, the retired teacher—otherwise it cannot be held to comprise a distinct class. If this were the true interpretation of this subdivision, there would be much force in the argument.

We find nothing in the act which can give this subdivision a retroactive effect, and nothing in the act which was intended to form a class of the retired teachers. Nor are we permitted by the terms of the act to hold that this subdivision creates a class of the retired teachers. The retirement fund is in part made up of an assessment upon the salaries of all teachers. Section 1.

Under section 7 no annuity can be paid to teachers within the first two classes of subdivisions 1 and 2, unless the retired teacher has first paid into the fund a sum equal to the annuity paid him or her for the first year, and, if the retiring teacher shall not have paid such sum, the trustees of the fund are required to deduct 20 per cent. from the monthly annuity payments until these contributions to the fund by or for the retiring teacher shall equal this sum.

The class provided for in the third subdivision is specifically exempted from these contributions to the fund. The 40-year class may, immediately after the act becomes operative, secure the benefit of the annuity provided without having contributed anything to the fund either by assessments paid or by deductions made by the trustees. Such is the advantage accorded the teacher of 40 years' service over the teacher of 30 years' of the other two classes.

Clearly, then, though subdivision 3 does relate to the active teacher, it constitutes a class distinct from the other two classes provided for.

If the relator be correct that this subdivision does not relate to the active teacher, it follows that the active teacher who has taught 40 years must be retired under the two classes of subdivisions 1 and 2, and required to contribute to the retirement fund, as all other members of these two classes must. Under this interpretation the 40-year teacher retired prior to the operation of the act receives a greater benefit than the 40-year teacher retired subsequent to the operation of the act. The injustice of this is apparent. It would violate the cardinal feature of this act—equality of treatment of all teachers. It would give the teacher retired prior to the act an annuity in a fund to which he had contributed nothing, and compel all active teachers to help pay his annuity.

Reasonable considerations may be suggested to uphold the fairness of a requirement which compels all active teachers to contribute toward the annuity of one of their number who has spent 40 years in the common service. None have been presented to us or have occurred to us to justify a compulsory assessment upon all active teachers to help pay an annuity to one who had re-

tired from the service 3 years before the retirement fund was created.

The act before us is not, in our judgment, susceptible of the construction the relator accords it.

The superior court is advised to sustain the motion to quash, and render judgment for the respondents.

The other Judges concurred.

(88 Conn. 415)

**MUNSON v. DE TAMBLE MOTORS CO.**  
et al.

(Supreme Court of Errors of Connecticut. July 13, 1914.)

**1. APPEAL AND ERROR (§ 1010\*)—EVIDENCE—FINDINGS—REVIEW.**

Where the evidence, made a part of the record under Gen. St. 1902, § 797, providing that, when a finding of facts has been filed, either party may file a copy of the evidence and rulings, and the court shall thereupon certify a statement of the evidence and rulings, and the Supreme Court of Errors shall examine the whole record, showed that an automobile manufacturing company, keeping its account with a bank, drew a draft on a buyer of an automobile to the order of the bank, and delivered the same to the bank, which shipped, as consignor, the automobile to the buyer, that the buyer paid to the agent of the bank the agreed price before having had an opportunity to examine the automobile, which did not conform to the contract, and that the assistant cashier of the bank by letter admitted that the bank purchased the automobile from the company giving it credit therefor, the court on appeal would not disturb the finding that the bank became the purchaser and owner of the automobile and forwarded the same in performance of the contract of sale, and that the buyer paid the price, because there was evidence reasonably justifying the conclusion of the trial court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

**2. CARRIERS (§ 58\*)—BILL OF LADING—TRANSFER—RIGHTS OF PARTIES.**

Plaintiff ordered from a motor car company an automobile, and authorized a draft with bill of lading attached. The company drew a draft on plaintiff for the price, but prior thereto the company sold to the bank the automobile and the draft payable on surrender of the bill of lading, which stipulated that no inspection would be permitted. The buyer paid the draft before inspection, and he thereafter discovered that the car did not conform to the contract. Held, that plaintiff could recover from the bank the amount of the draft and freight charges paid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 179-190; Dec. Dig. § 58.\*]

**3. SALES (§ 226\*)—ASSIGNMENT OF CONTRACT—EQUITIES AGAINST ASSIGNOR.**

One who takes an assignment of a contract of a seller takes the contract subject to all equities that the buyer may have against the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 626-644; Dec. Dig. § 226.\*]

**4. EVIDENCE (§ 244\*)—ACTS OF AGENTS—ADMISSIBILITY OF EVIDENCE.**

Where the cashier of a bank wrote a letter as to a business in which he was employed, and while actually engaged in that business, a statement of fact in and about the business contained

in the letter was admissible against the bank and binding on it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 916-936; Dec. Dig. § 244.\*]

Appeal from Superior Court, New Haven County; Edwin B. Gager, Judge.

Action by Harvey S. Munson against the De Tamble Motors Company and the National Exchange Bank to recover for money had and received, and for damages for breach of contract. There was a judgment for plaintiff, and the National Exchange Bank appeals. Affirmed.

Leonard M. Daggett, of New Haven, for appellant. Ralph H. Clark, of Derby, and James H. Webb, of New Haven, for appellee.

RORABACK, J. The plaintiff resides in New Haven, Conn. The defendants, the De Tamble Motors Company and the National Exchange Bank, are corporations, and are both located in Anderson, in the state of Indiana. In April, 1912, the president of the bank was also the vice president of the De Tamble Motors Company.

The original complaint contained the common counts. On the return day the plaintiff filed a bill of particulars showing that his claim was for money paid, laid out, and expended for the defendants, and money had and received by the defendants, being \$1,141.20 paid by the plaintiff on a certain draft of the De Tamble Motors Company, payable to the order of the defendant the National Exchange Bank, for which the plaintiff received no consideration, and for freight on one automobile from Anderson, Ind., to New Haven, Conn., paid by the plaintiff, \$45.60, making a total of \$1,186.80. At the same time that the plaintiff filed his bill of particulars he also filed and made part of his complaint a special count by way of amendment. This special count contained an allegation that:

"The De Tamble Motors Company assigned or transferred to the defendant the National Exchange Bank, of Anderson, Ind., the said contract of the plaintiff to purchase said Model L automobile, equipped and furnished as aforesaid, upon the terms and conditions before set forth, and turned over and delivered to said the National Exchange Bank an automobile to be shipped to the plaintiff in pretended compliance with said contract."

[1] This evidence, which has been made part of the record under the provisions of the General Statutes (Rev. 1902, § 797), does not warrant this court in correcting that part of the finding in which the trial court states that:

"In and by the transaction hereinbefore set forth as understood and intended by said bank and said Motors Company, said National Exchange Bank became the purchaser and owner of said automobile and incidentals, as described in said bill of lading, and, as hereinafter stated forwarded the same because of and in performance of the undertaking for the order of an automobile given to the Motors Company hereinbefore set forth, and for payment of which said draft was made."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

It is conceded that the National Exchange Bank and the Motors Company are both located and doing business in the same town in Indiana. The president of the bank is also vice president of the Motors Company. The Motors Company when this transaction occurred kept its account with the National Exchange Bank. The Motors Company made draft on the plaintiff to the bank and delivered it to the bank, which credited the account of the Motors Company with the proceeds of the same, and the Motors Company thereafter drew against the deposit by check.

The bank was the consignor and shipper of the automobile; the plaintiff, supposing it to be such an automobile as he had ordered from the Motors Company, paid to the agent of the bank the agreed price thereof, and obtained from the bank in New Haven, the defendant's agent, the bill of lading that had been issued to the defendant bank, showing that it had shipped to its own order a certain automobile. The bill of lading contained the following:

"The surrender of this original order bill of lading properly indorsed shall be required before the delivery of the property. Inspection of property covered by this bill of lading will not be permitted unless provided by law or unless permission is indorsed on this original bill of lading or given in writing by the shipper."

No such permission was given, nor does it appear that the plaintiff saw or knew of this clause in the bill of lading until after he had made payment to the New Haven bank for the defendant.

Upon the trial of the case in the superior court the plaintiff offered and introduced in evidence a letter from the defendant to James H. Webb, the attorney for the plaintiff. This letter contained the following:

"National Exchange Bank (No. 4685), Anderson, Ind., June 27, 1912. James H. Webb, Al-ling, Webb & Morehouse, New Haven, Conn. Dear Sir: We beg to acknowledge receipt of your favor of the 24th, which was the first statement of the case of Mr. Munson against the De Tamble Motors Co. of this city we had ever rec'd. We have no means of knowing the understanding Mr. Munson should have with the De Tamble Motors Co. We purchased this property from the De Tamble Motors Co. giving them full amount for same to wit, \$1,200.00, and this property would not be subject to attachment by Mr. Munson as against our rights. But we do not desire to enter into any controversy or encourage the De Tamble Motors Co. here to attempt to evade any agreement they have heretofore made."

This letter was signed by Geo. S. Parker, assistant cashier of the National Exchange Bank. Mr. Parker was afterwards called as a witness for the defense, and examined by the defendant's counsel concerning the transactions in controversy, but the witness did not deny that the bank had purchased the car from the De Tamble Motors Company as claimed by the plaintiff.

The record shows that there was evidence from which the trial court could have reasonably reached the conclusions questioned by the motion to correct. Therefore the motion is denied.

[2] The finding as made, in substance, established the following facts: In April, 1912, the plaintiff ordered of the Motors Company, a car, Model L, fully equipped, and authorized a draft through the Yale National Bank, with bill of lading attached. On June 4, 1912, the Motors Company drew upon the plaintiff a sight draft for \$1,200, which was subsequently corrected to \$1,140, with exchange. On or prior to that date the Motors Company sold to the National Exchange Bank the car and furnishings, and also the draft of the plaintiff Munson payable at sight on surrender of the bill of lading. On June 4th or 5th this car was delivered to the carrier at Anderson, Ind., and a bill of lading was issued in which the defendant the National Exchange Bank was described as shipper, destination New Haven. The automobile was consigned to the order of the defendant the National Exchange Bank. The New Haven bank received the draft with the bill of lading attached, and notified the plaintiff, who thereupon paid the draft and exchange as corrected, \$1,140.20, received the bill of lading, and also paid the freight charges \$45.60. Upon opening the freight car he found that the car shipped was not the one ordered, and he refused to receive it. This action is brought to recover the amount paid by the plaintiff upon the draft and for freight of the defendant, as money had and received.

It is conceded that as between the plaintiff and the Motors Company the plaintiff had a right of action for breach of contract against the Motors Company.

The question now arises: Did the defendant bank become liable to the plaintiff for the money which he paid to it?

It may be observed that this is not the ordinary case where a bank discounts a draft in its favor with a bill of lading attached. In such a case the law is almost universal that:

"A bank which discounts a draft with bill of lading attached is not, in the absence of bad faith, answerable to the drawee for the performance of the consignor's contract." *Hawkins v. Alfalfa Products Co.*, 152 Ky. 152, 153 S. W. 201, 44 L. R. A. (N. S.) 600.

In the same case, upon page 603 of 44 L. R. A. (N. S.), it is stated that:

"To impose upon the transferee of a bill of lading, who takes it in good faith, for a valuable consideration, the duty of fulfilling the contract between the seller and the buyer would impair, if not destroy, the value of bills of lading as instruments of trade and commerce, in the transaction of which they play so useful a part. No bank would feel safe in advancing or lending money on a bill of lading, if the law burdened it with the performance of the contract between the seller and the buyer, that it was not a party to."

The law accords such protection to a holder of a bill of exchange taken in the course of business for value, and legislation in some of the states of the Union has extended to the same class of persons a similar protection in other contracts. But this concession is



made for the security and convenience, if not to the necessities and wants, of commerce, and is not to be extended beyond them. The party who claims the benefit of the exception to this principle must come within all the conditions on which it depends. If the bill is taken out of the course of trade, the rights of the holder are subjected to the operation of the general rule. *Combs v. Hodge*, 62 U. S. (21 How.) 397, 16 L. Ed. 116, 117.

The finding shows that the conveyance of the automobile and draft was absolute, and excludes all idea that it was the ordinary transaction of the discount of a draft with bill of lading attached.

The fact that the automobile and draft were sold to the defendant bank before the shipment of the car to Munson is very material and one of the controlling features of the present case. At that time it was the duty of the Motors Company to ship and deliver the car which the plaintiff ordered. This the trial court, in effect, has found that the defendant bank itself undertook to perform.

[3] Undoubtedly it is true, as the parties claim, that there is no case just like the present one, but the rule is well established that when one takes an assignment of an obligation like the one now under consideration he takes it subject to all the equities that the debtor would have had against the assignor; in other words, the assignee must abide the case of the person he takes. *American Thresherman v. De Tamble Motors Co.*, 154 Wis. 366, 141 N. W. 210, 49 L. R. A. (N. S.) 644, and cases cited in the note.

Owing to the clause relating to the inspection in the bill of lading, the plaintiff was unable to see the property until after he had paid the New Haven bank for the automobile, with the freight charges. After such payment the freight car was opened, and he then ascertained that the automobile was not of the type and equipment which he had ordered. His ignorance of a material fact misled him, and he made payment to the defendant bank, which he would not have done if he had known that the automobile which the bank undertook to deliver to him was not the one that he had ordered. The bank was not the assignee in the ordinary course of business and entitled to the same protection as a bank which had discounted a draft with a bill of lading attached. The facts found fully warranted the judgment by the court below.

Assuming it to be true, as the defendant concedes, that the Motors Company is liable to the plaintiff for the damages which he has sustained by a breach of the contract, yet, under all the circumstances surrounding the transaction, it would not be just and equitable to compel him to pursue a nonresident corporation into another jurisdiction in the effort, more or less experimental and expen-

sive, to collect such a claim. This certainly should not be done when the facts show that the money was paid by the plaintiff to the National Exchange Bank, and that it was received by this defendant under such circumstances that the law will imply an obligation to repay it.

[4] The letter of June 27, 1912, signed by the cashier of the National Exchange Bank, to James H. Webb, hereinbefore noticed, was properly admitted. It contained a statement of a fact in and about the business in which the cashier was employed, and when he was actually engaged in that business.

There is no error. The other Judges concur.

(88 Conn. 314)

#### MERRILL v. HODSON et al.

(Supreme Court of Errors of Connecticut. July 13, 1914.)

#### 1. INNKEEPERS (§ 3\*)—"RESTAURANT KEEPER"—STATUS.

A restaurant keeper differs from an innkeeper in that he furnishes only food, or food and drink, and not lodging or shelter, though, in so far as the character of the service performed by a restaurant keeper and by an innkeeper to their respective patrons is concerned, it is the same.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. §§ 3-5; Dec. Dig. § 3.\*

For other definitions, see *Words and Phrases*, vol. 7, p. 6181.]

#### 2. INNKEEPERS (§ 10\*)—LIABILITY—INJURY TO PERSON OF GUEST—IMPURE FOOD—"SALE"—IMPLIED WARRANTY—"GOODS"—"PROPERTY."

The Sale of Goods Act (Pub. Acts 1907, c. 212) § 1, defines a sale of goods as an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price. Section 76 defines goods to include all personal chattels other than things in action and money, and property to mean the general property in goods, and not merely a special property. Section 15 declares an implied warranty that the goods shall be reasonably fit for the purpose for which they are ordered. *Held*, that neither under the statute nor at common law, of which the statute is merely declaratory, was a restaurant keeper's service of food on a patron's order for immediate consumption a sale of goods, since the consumer does not become the owner of the food served, but has only a privilege of consuming what he needs; and hence there was no implied warranty that food so served was wholesome and fit for consumption.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. §§ 14-16; Dec. Dig. § 10.\*

For other definitions, see *Words and Phrases*, vol. 7, pp. 6291-6306; vol. 8, p. 7793; vol. 4, pp. 3130-3137; vol. 8, p. 7673; vol. 7, pp. 5693-5728; vol. 8, pp. 7768-7770.]

#### 3. INNKEEPERS (§ 10\*)—INJURY TO PERSON OF GUEST—IMPURE FOOD—REMEDY.

The remedy of a guest at a restaurant injured by impure food served to him must probably be based on the negligence of the proprietor.

[Ed. Note.—For other cases, see *Innkeepers*, Cent. Dig. §§ 14-16; Dec. Dig. § 10.\*]

Appeal from Superior Court, New Haven County; Lucien F. Burpee, Judge.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Action by Electa D. Merrill against James W. Hodson and others. Judgment for plaintiff, and defendants appeal. Error, and new trial ordered.

Robert C. Dickenson, of Hartford, for appellants. Ulysses G. Church and Edward B. Riley, both of Waterbury, for appellee.

PRENTICE, C. J. The complaint charges, and the plaintiff claims to have proved, that the defendants, as copartners, conducted a restaurant where they prepared and served to their customers food for immediate consumption on the premises; that the plaintiff visited their restaurant and ordered from the bill of fare for immediate consumption a dish designated thereon as "creamed sweet-breads"; that in response to the order a dish known by that name was served to her, prepared and ready to be eaten by her; that the food so served was not wholesome or fit to be eaten; that the plaintiff ate the food; and that as a consequence, and by reason of the unwholesomeness of the food provided, she was made sick, and suffered severely in her health. It is alleged that the food served was "sold" to the plaintiff, and that its sale was attended with the implied warranty that it was wholesome and fit for consumption. There is no allegation or pretended proof of either an express warranty of quality, or of knowledge on the part of the defendants of the unwholesome character of the food served, or of any of its ingredients, or of the defendants' negligence in the premises.

[1, 2] The plaintiff's right to recover was, in both pleading and proof, made to rest on the existence of an implied warranty of quality attending the furnishing of the food. If there was no such implied warranty, the plaintiff was not entitled to a verdict, and cannot recover under her complaint.

A question underlying the case is thus presented as to the existence of such warranty. This question was presented to the court in the defendants' motion for a direction of a verdict, in their request to charge, and in their motion in arrest of judgment. Upon each of these occasions the court was asked to rule in substance in the language of the requests to charge that:

"The furnishing of food to a customer by restaurant keepers like these defendants does not constitute a sale within the meaning of the Sales Act;" and that "there is no implied warranty by a restaurant keeper as to the quality of food furnished to a customer."

The court entertained a different view expressed in its instructions to the jury, in part, as follows:

"If, then, you do find those two things—first, that she made known in some way to these defendants the purpose for which she ordered this food, and that, next, she relied upon their skill or judgment to provide it—then the law is such that there is an implied warranty that the goods be fit and wholesome for the purpose for which she ordered them. To use the language of the statute, there is an implied warranty that the

goods shall be reasonably fit for such purpose; that is, for the purpose for which they were ordered."

This view conformed to the plaintiff's claim and contention, and to the theory upon which the complaint was framed, to wit: That the transaction in the course of which the food was supplied involved a sale of the food as goods within the meaning of our Sale of Goods Act (chapter 212 of the Public Acts of 1907), with the consequence that the provisions of section 15 of that act respecting implied warranty of quality were applicable to it. The court was mistaken in this fundamental proposition.

The act defines a sale of goods as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." Section 1. A transaction, to come under the provisions of the act, must therefore be one which concerns "goods," and one which involves a transfer to the purchaser of the property therein. "Goods" are, in the act, defined to include "all chattels personal other than things in action and money"; and it is added that the term "includes emblements, industrial growing crops and things attached to and forming part of the land which are agreed to be severed before sale or under the contract of sale." Section 76. By property is meant, "the general property in goods, and not merely a special property." Section 76. Transactions within the provisions of the act are thus limited to those embodying an agreement whereby a seller transfers the general property in chattels personal, as that term is defined, other than things in action and money, to a buyer for a consideration called the price.

A restaurant keeper differs from an innkeeper in that he furnishes only food, or food and drink, and not lodging or shelter. Beale on Innkeepers, §§ 35, 301. In so far as the character of the service performed by a restaurant keeper and innkeeper to their respective patrons is concerned, it is the same. In *Saunderson v. Rowles*, 4 Burrows, 2067, 2068, Lord Mansfield, commenting upon this fact, observed that:

"The analogy between the two cases of an innkeeper and a victualler is so strong that it cannot be got over."

In neither case does the transaction, in so far as it involves the supply of food or drink to customers, partake of the character of a sale of goods. The essence of it is not an agreement for the transfer of the general property of the food or drink placed at the command of the customer for the satisfaction of his desires or actually appropriated by him in the process of appeasing his appetite or thirst. The customer does not become the owner of the food set before him, or of that portion which is carved for his use, or of that which finds a place upon his plate, or in side dishes set about it. No designated portion becomes his. He is privileged to eat,

and that is all. The uneaten food is not his. He cannot do what he pleases with it. That which is set before him or placed at his command is provided to enable him to satisfy his immediate wants, and for no other purpose. He may satisfy those wants; but there he must stop. He may not turn over unconsumed portions to others at his pleasure, or carry away such portions. The true essence of the transaction is service in the satisfaction of a human need or desire—ministry to a bodily want. A necessary incident of this service or ministry is the consumption of the food required. This consumption involves destruction, and nothing remains of what is consumed to which the right of property can be said to attach. Before consumption title does not pass; after consumption there remains nothing to become the subject of title. What the customer pays for is a right to satisfy his appetite by the process of destruction. What he thus pays for includes more than the price of the food as such. It includes all that enters into the conception of service, and with it no small factor of direct personal service. It does not contemplate the transfer of the general property in the food supplied as a factor in the service rendered.

Prof. Beale, in his work on *Innkeepers*, § 169, well analyzes and states the situation as follows:

"As an innkeeper does not lease his rooms, so he does not sell the food he supplies to the guest. It is his duty to supply such food as the guest needs, and the corresponding right of the guest is to consume the food he needs, and to take no more. Having finished his meal, he has no right to take food from the table, even the uneaten portion of food supplied him, nor can he claim a certain portion of food as his own to be handed over to another in case he chooses not to consume it himself. The title to food never passes as a result of an ordinary transaction of supplying food to a guest."

For the reasons thus stated, the English courts have held that an innkeeper was not a trader, and so not within the provisions of existing bankrupt laws. In *Crisp v. Pratt*, 100 Car. 549, it was said, in connection with such a ruling, that:

"An innkeeper does not get his living by buying and selling, for, although he buy provisions to be spent in his house, he doth not properly sell it, but utters it at such rates as he thinks reasonable gain, and the guests do not take it at a certain price, but they may have it or refuse it at will."

In *Saunderson v. Rowle*, *supra*, Lord Mansfield, having observed as already indicated that a victualler and innkeeper stood in the same position in the matter of buying and selling, added:

"And we are all clear that this man [a victualler] is not within these laws upon the authority of a determined case of an innkeeper, and also upon the reason of the thing. He makes no particular contract like a trader; he cannot be said to get his living by buying and selling as a trader does. He buys only to spend in his house, and when he utters it again it is attended with many circumstances additional to the mere selling price."

In *Parker v. Flint*, 12 Mod. 254, it was said that:

"An innkeeper as such could not be a bankrupt, because he does not sell, but utters his provision."

Other cases to the effect that an innkeeper is not a trader are *Newton v. Trigg*, 8 Mod. 327, 330; *Harmon v. Clarkson*, 22 Upp. Can. C. P. 291.

The transaction between the plaintiff and the defendants did not involve a sale of goods, and the provisions of section 15 of the Sales Act, relied upon as creating an implied warranty of quality, furnishes no foundation for a right of action.

The situation was no different at common law. Our Sale of Goods Act has not, either in its definition of a sale or its provisions for implied warranty of quality, departed from the common law in any respect pertinent to this case. This becomes clear from a comparison of the common-law rule and those furnished by the act.

Benjamin, in his work on Sales, defines a common-law sale of personal property as "a transfer of the absolute or general property in a thing for a price in money." In the leading case of *Jones v. Just*, L. R. (1868) 3 Q. B. 197, 202, Mellor, J., stated at length the common-law rules touching the subject of implied conditions or warranties. The fourth he stated as follows:

"Where a manufacturer or dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is in that case an implied term or warranty that it shall be reasonably fit for the purpose to which it is to be applied. In such case the buyer trusts to the manufacturer or dealer, and relies upon his judgment, and not upon his own."

It is difficult to discover in what particular or present importance a substantial change in the law has been wrought by our recent legislation. This is not surprising since our act in its pertinent provisions does not differ substantially from the English act, either in its definition of a sale, or in respect to the subject of implied warranty of quality, and the English act was, as its author has said, the result of an endeavor to reproduce as exactly as possible the existing law. *Chalmers' Sale of Goods*, Introduction, VIII. While there is in our act some departure from the phraseology of the English touching these subjects, the changes in substance are slight, and they all concern matters irrelevant to the present situation. In fact the similarity in expression is such as to forcibly suggest that section 15 of our act, which deals with the subject of implied warranty of quality, was, with slight changes here immaterial, taken directly from its English predecessor.

[3] This being the case, we may safely look for light in resolving the question before us to common-law cases, as well as to any which may have arisen under the modern sales legislation. As far as we are aware no

case of the latter sort, save the present, has ever reached an appellate tribunal. Of common-law cases we find the following four: *Sheffer v. Willoughby*, 163 Ill. 518, 45 N. E. 253, 34 L. R. A. 464, 54 Am. St. Rep. 483; *Crocker v. Baltimore Lunch Co.*, 214 Mass. 177, 100 N. E. 1078; *Pantaze v. West*, 7 Ala. App. 599, 61 South. 42; *Doyle v. Fuerst & Kraemer*, 129 La. 838, 56 South. 906, 40 L. R. A. (N. S.) 490, Ann. Cas. 1913B, 1110. In all of them the right of action was based upon negligence. We know of no case, aside from the present, in which an attempt has ever been made in cases brought to recover for the harmful consequences resulting from unwholesome food or drink supplied by the keeper of an inn, restaurant, or boarding house in the line of his business to recover upon the strength of an implied condition or warranty of quality. Those which have grown out of a sale of provisions by a dealer are, of course, not in point. In the first of the cited cases the obligation of a restaurant keeper are discussed, and a statement of the law made which very plainly means, and has been generally understood to mean, that the only remedy for the consequences of eating unwholesome food supplied by an innkeeper or restaurant keeper in the regular course of his business is one for lack of due care. *Beale on Innkeepers*, §§ 169, 302, so states the law. See, to the same effect, 22 Cyc. 1081; 16 Amer. & Eng. Ency. of Law, 547.

In *Bigelow v. Maine Central R. Co.*, 110 Me. 105, 85 Atl. 396, 43 L. R. A. (N. S.) 627, action was brought against the defendant for the consequences to the plaintiff of his having eaten unwholesome canned asparagus served to him in the defendant's dining car. The declaration was in case, and its allegation was that the defendant was negligent. Notwithstanding this statement of the pleadings, the plaintiff contended that she was under no duty to show either privity of contract or negligence, since there was an implied warranty of wholesomeness, and the defendant was an insurer of the quality of the asparagus. The court held that in any event the defendant could not be held to be an insurer of the quality of canned goods or a warrantor of it, and for that cause directed judgment for the defendant. This case, followed by *Trafton v. Davis*, 110 Me. 318, 86 Atl. 179, presents an aspect of the subject of implied warranty under common-law principles which does not concern us, and in its disposition no light is shed upon the views of the court as to whether there would have been an implied warranty had the food served not been canned goods.

Reasons of appeal for other causes than that discussed call for no consideration, since the plaintiff must fail in her action.

There is error, the judgment is set aside, and a new trial ordered. The other Judges concurred.

(5 Boyce, 182)

# SAULSBURY et al. v. AMERICAN VULCANIZED FIBRE CO.

(Superior Court of Delaware. New Castle.  
June 11, 1914.)

## 1. EVIDENCE (§ 368\*)—PRODUCTION OF WRITTEN INSTRUMENTS ON NOTICE—EFFECT.

Where a party gives notice to the adverse party to produce a writing at the trial, and the adverse party without objection produces it, and the party inspects it, it becomes, at common law, evidence without further proof.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 444, 1540-1558; Dec. Dig. § 368.\*]

## 2. EVIDENCE (§ 368\*)—PRODUCTION OF WRITTEN INSTRUMENTS ON NOTICE—EFFECT.

The production of writings at the trial, pursuant to order of court under Rev. Code 1852, amended to 1893, p. 796, c. 107, § 13, as amended by 20 Del. Laws, c. 121, providing that in pending actions the court, on motion and due notice, may order a party to produce writings in his possession which contain evidence pertinent to the issue, merely makes available to the party applying for an order something that otherwise is beyond his reach; but to make the writing admissible he must prove it as though he had been in possession of it himself.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 444, 1540-1558; Dec. Dig. § 368.\*]

## 3. ATTORNEY AND CLIENT (§ 144\*)—COMPENSATION — CONTRACTS — CONSTRUCTION — "RETAINER."

A resolution by the board of directors of a corporation, which recites that attorneys named shall be retained on behalf of the corporation, to represent it in negotiations and in the prosecution of claims, and which directs payment to the attorneys of a specified sum as retainer, and a subsequent resolution, which fixes as compensation a contingent fee based on the amount of recovery, are, when accepted by the attorneys, separate contracts, and the attorneys are entitled to both the retainer fee and to the specified percentage on the amount recovered, without deduction of the amount of the retainer; a "retainer" being the act of a client by which he engages an attorney to manage for him a cause in which he is a party, or otherwise generally to advise him as counsel.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 832, 833; Dec. Dig. § 144.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6196, 6197.]

## 4. EVIDENCE (§ 389\*) — PAROL EVIDENCE — MODIFYING UNAMBIGUOUS CORPORATE RESOLUTIONS.

Parol evidence is inadmissible to change the effect of an unambiguous resolution of the board of directors of a corporation.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1717, 1718; Dec. Dig. § 389.\*]

## 5. ATTORNEY AND CLIENT (§ 148\*)—COMPENSATION—CONTINGENT FEE.

An attorney employed to act for a client for a percentage of the amount recovered in a litigation is entitled to a percentage on the amount awarded the client, and also on an amount which the client would have been obliged to pay, but for a decree releasing him from liability.

[Ed. Note.—For other cases, see *Attorney and Client*, Cent. Dig. §§ 852, 853; Dec. Dig. § 148.\*]

Action of assumpsit by Willard Saulsbury and others against the American Vulcanized Fibre Company. Judgment for plaintiffs.

Argued before WOOLLEY and RICE, JJ.

James I. Boyce, of Wilmington, for plaintiffs. William S. Hilles, of Wilmington, for defendant.

Action of assumpsit to recover compensation for professional services rendered the defendant by the plaintiffs in instituting and conducting for the defendant certain litigation in the Court of Chancery of the state of Delaware. The issues of fact as well as of law were tried by the court, pursuant to the statute which permits trial in this manner when agreed to by the parties.

In opening, the plaintiffs stated that their case was to be proved largely by documentary evidence.

Selecting one from a great number of books, documents and papers produced by the defendant upon an order of the court, made several days before the trial, Mr. Boyce said: I now offer this portion of these minutes in evidence, asked for by us to be produced by the defendant.

Mr. Hilles: We have not been asked to produce; they have been produced in the prothonotary's office by an order of your honors.

Mr. Boyce: As I understand, this book has never been produced in the prothonotary's office.

WOOLLEY, J. If the minutes were produced by the defendant at the trial on notice from the plaintiffs, and were by them inspected, they thereby become evidence. If they were not so produced, but were produced upon the order of the court, such production and subsequent inspection do not make them evidence. Being made available by the court's order, they are here to be proven according to the rules of evidence.

Mr. Boyce: These have been produced by the order of the court.

Mr. Hilles: I have never received from the plaintiffs a notice to produce. I have produced these minutes upon the court's order for the purpose shown by that order.

WOOLLEY, J. The record discloses that on May 14th counsel for the plaintiffs notified counsel for the defendant that on May 15th he would move the court—

"to order the defendant to produce the books or writings mentioned in the schedule hereto appended, which said books or writings are in the possession or control of the defendant and which contain evidence pertinent to the issue, such production to be made for use during the pendency and at the trial of said cause under such terms and at such times as the court may direct."

Upon the date named in the notice, counsel for the plaintiffs made the motion for production, in conformity with the terms of the notice. Counsel for the defendant waived any question of the pertinency of the papers demanded, and submitted to an order to pro-

duce the same, stating, however, that he reserved to himself all rights to object to their introduction into evidence when offered.

This proceeding was had under a statute of this state which provides that:

"At any time during the pendency of actions at law, the court on motion and due notice thereof, may order a party to produce books or writings, in his possession or control, which contain evidence pertinent to the issue, under circumstances in which production of the same might be compelled by a Court of Chancery." Rev. Code, c. 107, § 13, as amended by chapter 121, vol. 20, Laws of Delaware.

Upon the plaintiffs' petition and by authority of this statute, the court—

"ordered, that the defendant do produce on the 19th day of May, 1914, the books or writings mentioned in schedule appended to the said motion and marked Exhibit A, at the office of the prothonotary of this court at Wilmington for the use and inspection of the plaintiffs during the pendency and at the trial of the said cause."

We understand that pursuant to that order, all the books and writings therein described, excepting certain of them shown not within the control of the defendant, were produced at the time and place named in the order and that they have since been transferred to and are now in the presence of the court. We also understand that the only notice for production made by the plaintiffs upon the defendant was the notice preliminary to the motion to produce. This being the state of the record, we will hear argument, if desired.

Mr. Boyce: I offer as evidence the minutes of the meeting of the board of directors at which certain officers of the defendant company for the year 1913 were elected. Upon production by the defendant upon the court's order and after inspection by the plaintiffs, they are evidence under the decisions of this state, citing *Netter v. Stoeckle*, 4 Pennewill, 345, 56 Atl. 604; *Thomas v. Railroad Co.*, 2 Pennewill, 411, 47 Atl. 380; *Kelly v. Association*, 1 Marv. 183, 40 Atl. 954; *Frank v. Frank's Adm'r*, 1 Houst. 245; *Deringer v. Deringer's Adm'r*, 5 Houst. 148.

Mr. Hilles: I hold they are not in evidence. The order which your honors made in relation to these papers was that they were to be produced for the inspection of counsel on the other side prior to the trial of this case, and I think during the case. Unquestionably that is not a production of the paper or document upon notice given to the other side, which notice the counsel on the other side has the right to accept or decline to accept, as he sees fit. Consequently if he does voluntarily produce such documents upon notice, the production by him voluntarily makes them evidence without further proof. But certainly your honors' order upon a party does not make the documents evidence, nor does it prove the validity of the documents offered.

WOOLLEY, J. [1] There are two methods whereby a party may procure from his adversary documents and writings necessary to

the proof of his case. The first is the common-law method by giving the adverse party notice to produce the writing at the trial, and upon its production by the party notified and upon its inspection by the party calling for it, it becomes evidence without further proof.

The reason for this rule lies in the theory that the production of a writing on notice, without objection by the party producing it, amounts on his part to an admission of its genuineness and relevancy, and inspection by the party calling for it is in effect an offer of the writing as evidence, thereby dispensing with the necessity of formal proof.

Upon notice to produce a writing the party notified may object to its admission in evidence, and the question of its admissibility will be determined by the court before it is produced and submitted for inspection. But if he fails to produce, when not relieved by an objection sustained by the court, the party calling for the instrument is then free to make proof thereof by secondary evidence.

This method was found to have its hazards and limitations, as it carried the risk of inspecting a paper when its contents were unknown, and restricted the use of the papers so produced, to evidence at trial, hence the enactment of the statute.

[2] Under the statute the court may order a party to produce a writing shown to be pertinent to the cause, either for the inspection of a party before trial, or for use at trial, or, as in this case, for both purposes. Upon such an application, usually made long before trial, the court does not pass upon the admissibility of the paper as evidence. It makes the order upon being shown *prima facie* that the testimony sought is pertinent to the cause, and leaves the question of its admissibility to be determined when it is later offered in evidence at the trial. When the order is to produce before trial, the object of the party asking for the production may be to enable him, by inspection, to prepare his pleading or by making a copy to prepare for secondary evidence in the event of the failure of his adversary to produce on notice. When production is made for inspection before trial the order is obeyed when the production is made and the opportunity for inspection is afforded, after which the paper is returned to its owner and can be called for at trial only upon another order or upon notice to produce. If the party seeking the paper wants it at the trial, the court may so order its production. When in obedience to such an order it is produced at trial, it is by the order and the compliance therewith made available to the party calling for it. If he desires it simply for inspection, it is within his control for that purpose; if he desires it for evidence, it is for that purpose in his possession, and he may offer it in evidence upon such proof thereof as is required by the rules of evidence, in exactly the same way as though he gained possession of the instrument otherwise than

through the court's order. The party producing the paper under the court's order then has his first opportunity to object to its admissibility as evidence, and to except to the ruling of the court. In other words, the production of writings at trial, under an order authorized by the statute, simply makes available to a party something that otherwise is beyond his reach, and if he chooses to obtain it in this way, he must prove it just as though he had been in possession of it himself. We know of no rule, however, that prevents a party resorting both to an order of court to produce at trial and the common-law notice to produce at trial, which was not done in this case. Whether performance under the notice is possible because of compliance with an order of the court to produce would seem to depend upon whether the party notified has such possession and control over writings as to enable him to produce them on notice, when under the court's order he has already produced and surrendered them.

There are many cases in our Reports touching this statute, but in none of them has been decided the question whether a writing produced under the order of the court becomes evidence upon its production and inspection in the sense in which it becomes evidence under the common-law rule of production under notice and inspection. The question was approached, but not decided, in the case of *Taylor v. Jackson*, 5 *Houst.* 224, 226, where counsel seeking papers from his adversary, in an abundance of caution supplemented the order of the court to produce by the common-law notice to produce, and then proved the paper by the subscribing witness, thereby indicating that the court did not hold the paper to be in evidence upon the production under its order and the subsequent inspection.

As the minutes in question are not evidence by force of their production under the court's order and their subsequent inspection, they must be proved before they are admitted.

Upon proof by the secretary of the defendant company, who transcribed them, the minutes were admitted in evidence.

The evidence produced and admitted on the part of the plaintiffs and defendant that has a bearing upon the decision in this case appears in the statement by the court.

WOOLLEY, J. (announcing the decision of the court). Under authority of the statute and by agreement of the parties, the matters of fact at issue in this cause were tried by the court, judgment to be rendered upon its decision thereon as upon a verdict by a jury. Const. art. 4, § 23; chapter 270, vol. 11, *Laws of Delaware*; Rev. Code, p. 776. The case was tried, testimony offered, objections interposed, rulings made and exceptions noted in

all respects similar to like proceedings in a trial by jury.

In order to preserve to the parties the same right of exception they would have had, if the case had been submitted to a jury upon a charge by the court, we will state our opinion upon the law as applied to our finding of fact.

This is an action in assumpsit, brought by the plaintiffs to recover from the defendant the sum of \$20,350 with lawful interest thereon from the 3d day of February, A. D. 1914, as compensation for professional services rendered as solicitors for the defendant in certain litigation instituted, conducted and concluded in the Court of Chancery of the state of Delaware, pursuant to a contract in writing, disclosed by correspondence of the parties and by resolutions of the board of directors of the defendant corporation.

The claim of the plaintiffs is that by resolution of the board of directors of the defendant corporation, passed at a meeting held on the 8th day of April, 1913, they were retained as counsel and solicitors to represent the defendant in certain contemplated negotiations and impending litigation concerning the conduct and liability of one of its former officers, and that pursuant to another resolution of the board of directors of the defendant corporation, passed upon the 12th day of June, A. D. 1913, they were paid, as retainer, the sum of \$3,000.

It is further claimed that in response to a communication from the plaintiffs, asking the defendant corporation to fix the compensation and proposing the terms for which they would render professional services in the matter in which they had been retained, the defendant corporation, by resolution of its board of directors, passed on the 9th day of July, 1913, accepted the terms proposed and promised to pay the plaintiffs for their professional services, a sum of money which when calculated with reference to the contingency upon which the same was to be computed, amounts to the sum of \$20,350, for which sum, and the interest thereon from the day upon which it is claimed to have become due, they bring their suit.

The defendant does not controvert the correspondence and resolutions proven by the plaintiffs, and while not admitting does not deny its liability to pay the plaintiffs pursuant thereto the sum of \$17,000. As to its liability to pay this sum, it made no defense. For defense, however, to the balance of the claim of \$3,350, it maintains, first, that the sum of \$3,000 paid by it to the plaintiffs, nominally as retainer, was in fact a part payment for services rendered by the plaintiffs under the contract for services, and therefore should be deducted from the gross sum computed and demanded; and, second, that the sum of \$350, being a part of the sum claimed by the plaintiffs based upon a percentage of the amount recovered in the chan-

cery litigation, should be excluded from the demand, as it represents a sum estimated by percentage upon a principal sum never recovered, within the terms of the contract fixing the fee contingent upon the amount recovered.

The questions submitted for determination, therefore, are:

First, whether the \$3,000 paid by the defendant to the plaintiffs, pursuant to resolution of its board of directors of June 12, 1913, was paid as a retainer or in part satisfaction for services rendered; and

Second, whether certain accrued and unpaid dividends, amounting to \$1,750, payable to but released by one of the parties to the chancery litigation, were a part of the recovery in that litigation, upon which the plaintiffs under the contract here sued upon might estimate and demand, as a part of their contingent fee, the sum of \$350.

While there was a great volume of testimony introduced in the case, that which was offered in proof of the contract between the parties was really circumscribed in amount and mostly documentary in character.

[3, 4] The first act of the parties appears by a resolution of the defendant corporation, passed by its board of directors, at a meeting held on April 8, 1913. The preamble to this resolution recites a transaction by a deceased officer of the company, which, if proven, established in the company a right of action against his personal representative for a very considerable sum of money. Following the preamble, which has no important relation to the matter now in question, is the resolution:

"It is resolved, that the said Arthur J. Selfridge and the firm of Saulsbury & Morris, of Wilmington, Delaware, be retained by and on behalf of this company to represent it in negotiations with the personal representative of the late president of this company and in the prosecution of any claim or claims, action or cause, which may be necessary to obtain for this company proper restitution of any sum or sums which may be due from the estate of the late president by way of accounting or for a rescission of the contract by which such acquisition was made, and the officers of this company are directed to do and perform such acts and things as shall be necessary to carry this resolution into effect."

A copy of this resolution was transmitted by the vice president of the company to the plaintiffs.

At a meeting of the board of directors of the defendant corporation, held on June 12, 1913, the following resolution was passed:

"Resolved, that the treasurer of this company be and he hereby is authorized and directed to pay to Arthur J. Selfridge and Saulsbury & Morris, Esqs., as counsel for this company as retainer for services in the cause of this company" against the executor of the late officer and others, "the sum of \$3,000."

A copy of this resolution was forwarded the same day to the plaintiffs by the treasurer of the company, together with a voucher for \$3,000, as shown by the following letter:

"Wilmington, Del., U. S. A., June 12, 1913.

"Messrs. Saulsbury & Morris and Mr. A. J. Selfridge—Gentlemen: We herewith hand you a voucher to the amount of \$3,000.00 as retainer in the suit of equity in accordance with a resolution passed by the board of directors this day.

"Very truly yours,

"American Vulcanized Fibre Company,  
"D. W. Masters, Treasurer."

In acknowledgment of the receipt of the copy of the resolution and the check for \$3,000, the plaintiffs upon the same day mailed to the defendant company a letter of which the following is a copy:

"Received of American Vulcanized Fibre Company, at the hands of D. W. Masters, treasurer, check for three thousand dollars (\$3,000), as retainer for services in the cause of American Vulcanized Fibre Company, \* \* \* pursuant to resolution adopted by the board of directors of American Vulcanized Fibre Company on June 12, A. D. 1913.

Arthur J. Selfridge.  
"Saulsbury & Morris.

"June 12, 1913."

For the time being this ended the transaction whereby the plaintiffs were retained by the defendant to represent it in the negotiations and litigation adverted to. Thus far the transaction was simply one of retainer, whereby the defendant engaged the plaintiffs as counsel and paid them a retainer fee. The contract was a contract of engagement and the consideration which bound the plaintiffs to the defendant was the fee paid by the defendant to the plaintiffs. Up to this point nothing was said or done by either party respecting compensation for the services to be rendered in the matter in which the plaintiffs had been retained.

On July 2, 1913, the plaintiffs addressed to the defendant the first communication that appears, from the evidence, to have been made concerning compensation for services in the matter for which they had been engaged, and is as follows:

"July 2, 1913.

"American Vulcanized Fibre Company, Wilmington, Del.—Gentlemen: On the 8th day of April, 1913, by a resolution adopted by your board, we, with Arthur J. Selfridge, Esq., were retained by and on behalf of your company to represent it in negotiations with the personal representative of the late president of your company, and in the prosecution of any claim or claims, action or cause, which may be necessary to obtain for your company proper restitution of any sum or sums which may be due from the estate of the late president by way of accounting or for a rescission of the contract by which such acquisition was made.

"No compensation was fixed in said resolution for the services so to be rendered.

"We have considered this matter and request that you adopt a resolution fixing our fee for services under said resolution.

"Yours very truly, Saulsbury & Morris."

On July 9, 1913, the plaintiffs again wrote the defendant upon the subject of fixing compensation, stating the terms upon which they would render the services for which they had been engaged. Upon the same day, the board of directors of the defendant company passed a resolution, the preamble of

which embodied a copy of the plaintiffs' letter offering the terms, and by the remainder of which, accepted those terms in the precise language of the plaintiffs' offer. The resolution without the preamble is as follows:

"Resolved, that this company does hereby accept said proposition and does hereby agree to pay to said attorneys from time to time all the expenses incurred by them in connection with the preparation, prosecution and trial of this cause and compensation for their services at the rate of \$100 per day for each day spent by them in preparation, prosecution and trial thereof, from the inception to the termination thereof and in the event that twenty per centum of the amount recovered in said matters exceeds the amount so paid to them for their services, that they shall be paid a further sum equal to the difference between the sums so paid from time to time for their services and twenty per centum of the amount so recovered, and that the secretary be and is hereby instructed to deliver to said Saulsbury & Morris and Arthur J. Selfridge a certified copy of this resolution showing the acceptance of the terms set forth in their communication."

The minutes of the several meetings of the board of directors at which these several resolutions were passed were formally approved at subsequent meetings.

If a copy of this resolution, with nothing further, had been transmitted to the plaintiffs, the defendant's unconditional acceptance of the plaintiffs' offer to serve it upon the terms stated would have made a complete contract and the contractual transactions between the plaintiffs and the defendant would then have been, first, a contract of retainer for a fixed amount, and, second, a contract of services for a contingent amount. But when the secretary of the company forwarded a copy of this resolution to the plaintiffs, upon the day following its adoption, he sent with it the following letter:

"Wilmington, Del., U. S. A., July 10, 1913.

"Messrs. Saulsbury & Morris, 907 Market St., Wilmington, Del.—Gentlemen: In compliance with the instructions contained in a resolution of the board of directors of this company passed at their meeting of July 9th, I am inclosing herewith certified copy of said resolution.

"Very truly yours,

"American Vulcanized Fibre Co.,

"T. W. Campbell, Sec.

"P. S.—It is understood that the \$3,000.00 paid to you already by this company is part of the fees contemplated by this resolution."

Though not appearing to be a corporate act in the sense of a resolution of the board of directors, this letter was sent to the plaintiffs and received by them with the copy of the resolution, and was notice to the plaintiffs, at the instant the corporate act was communicated to them, of an understanding on the part of some one that the \$3,000 already paid to them was a part of the fees contemplated by the resolution. Whether that understanding was the understanding of the corporation, evidenced by an act contemporaneous with and of legal force equal to that of the resolution, was something of which, at that time, the court was not informed. We therefore admitted the letter



upon the theory that it would have a value as evidence according only as the authority for its contents and transmission should thereafter be shown. Over objections by the plaintiffs we also admitted testimony offered by the defendant as to the meaning of the postscript in the letter quoted, not to vary the terms of the resolution, but upon the theory that if the defendant could show that the resolution passed on July 9, 1913, did not constitute an absolute and unqualified acceptance of the plaintiffs' offer, but in fact at that meeting, or before the copy of the resolution reached the plaintiffs, the defendant, by a corporate act with legal force equal to that of the resolution, authorized the postscript made by the secretary in his letter, the plaintiffs would be bound by the notice in the postscript, and that it then devolved upon them to reject the counter offer, or accept it formally by word or conduct. But the evidence produced by the defendant showed no such thing. It developed that many, if not all, the directors thought, and the secretary so wrote, that the \$3,000 already paid was to be credited by the plaintiffs on account of services rendered and to be rendered; but no motion was put nor resolution proposed to that effect, nor other thing done to change the unqualified acceptance of the plaintiffs' proposition as evidenced by the resolution passed. In other words, it developed from the testimony that the only corporate act performed by the defendant with respect to the plaintiffs' offer was to accept it, and that while the understanding of the secretary in transmitting the resolution of acceptance to the plaintiffs may have been the understanding of the directors who voted for it, they did not express that understanding in the resolution, or by any other motion or act, nor did they convey their understanding to the plaintiffs so that in law there could have been a meeting of minds upon the point. Parol evidence to change the effect of an unambiguous resolution passed by an authorized board of a corporation is inadmissible, or, if admitted, is without effect. *Lipsett v. Hassard*, 158 Mich. 509, 122 N. W. 1091. We are therefore of opinion that the resolution of July 9, 1913, was a complete and unqualified acceptance of the plaintiffs' offer, and that its legal effect is not disturbed by the unexpressed understanding of the directors to the contrary.

Whether the \$3,000, paid as retainer, could in law be considered part payment for services performed, in the absence of an express agreement to that effect by both of the parties, is a question that depends upon the meaning of a retainer and the purpose for which the retainer fee was paid.

There are various definitions of a retaining fee or a retainer. While the habit to demand and the right to expect such a fee may vary with custom in different jurisdictions, nevertheless when a retainer is asked and

paid its purpose and its relation to payment for services subsequently rendered have a clear and certain meaning in the law.

A retainer is the act of a client by which he engages an attorney to manage for him a cause in which he is a party or otherwise generally to advise him as counsel. This act consists in paying to the attorney a preliminary fee to secure his services, or rather, as it has been said, to prevent the opposite side from engaging him. Unless there is an agreement or understanding between the attorney and the client at the time the retainer is demanded and paid that varies the purpose of the retainer, by stipulating that it shall be paid or received for some other or additional purpose as, for instance, that it shall not only bind the attorney to render the service, but it shall also be accepted by him in part payment for the same when rendered, the payment of a retainer has no relation to the obligation of the client to pay his attorney for the services which he has retained him to perform. In other words, a retaining fee is an engagement fee; that is, a fee to engage and hold an attorney to render services to a client in a particular case or generally as occasion may arise. In such a transaction a client gives money to insure the services of the attorney of his choice, and the attorney by accepting the retainer binds himself to that service and foregoes the opportunity of employment by the opposite party. This is the contract and these are the detriments which form the consideration thereof moving from one to the other. As such engagements are generally made without any idea, or any adequate idea, of the amount of services to be rendered, or the amount of compensation to be made therefor, the payment of a retainer fee in the absence of an express understanding to the contrary is neither made nor received in payment of the services contemplated, though undoubtedly the payment and the size of such a fee may be and frequently is considered by both parties as an ingredient entering into the contract which they may make with respect to the fee subsequently to be charged and paid for the services to be rendered. 4 Cyc. 926, 982; 34 Cyc. 1685, 1686, and cases cited; *Blair v. Columbian Co.*, 191 Mass. 333, 77 N. E. 762; *Union Surety Co. v. Tenney*, 200 Ill. 349, 65 N. E. 688; *Knight v. Russ*, 77 Cal. 410, 19 Pac. 698; *Perry v. Lord*, 111 Mass. 504; *Eggleston v. Boardman*, 37 Mich. 14; *Rhode Island Exchange Bank v. Hawkins*, 6 R. I. 198, 206.

We are of opinion, and therefore decide, that in this case there were two contracts between the plaintiffs and the defendant—first, a contract of retainer, entered into by resolution and completed by the payment of \$3,000; second, a contract for services, in which the plaintiffs are entitled to 20 per cent. of the amount recovered, without deduction of the amount paid as retainer.

[6] By the decree of the Chancellor in the

litigation prosecuted by the plaintiffs under their employment by the defendant, entered in the Court of Chancery at New Castle county on January 7, 1914, one of the defendants in that litigation was ordered to pay the defendant in this case \$100,000, and that amount having been recovered, the plaintiffs are entitled to 20 per cent. thereof, or \$20,000. The defendant in that litigation was likewise ordered by the Chancellor to release the defendant in this case from payment of accrued and unpaid dividends on 500 shares of the preferred stock of this defendant company, amounting to \$1,750, withheld by it pending the litigation, and which, but for the order of the Chancellor, this defendant company would have to pay. Release from this liability constitutes recovery by the defendant as completely as though it acquired in that litigation an equal amount of money in some other way. Upon this recovery, the plaintiffs are entitled to 20 per cent., or \$350.

And now, to wit, this 11th day of June, A. D. 1914, upon the decision rendered by the court in this case, it is ordered that judgment be entered in favor of the plaintiffs and against the defendant for the sum of \$20,784.07, with 6 cents costs, besides the costs in this suit expended.

(10 Del. Ch. 290)

**WILMINGTON MONTHLY MEETING OF  
ORTHODOX FRIENDS v. NINTH  
STREET CO.**

(Court of Chancery of Delaware. May 27, 1914.)

**1. RELIGIOUS SOCIETIES (§ 16\*)—VALIDITY OF  
GIFTS AND TRUSTS IN GENERAL.**

Act March 1, 1855 (11 Del. Laws, c. 275) § 2, declaring "that no grant, conveyance, devise or lease of any real estate, dedicated or appropriated, or intended to be dedicated or appropriated, to purposes of religious worship, \* \* \* shall vest any right, title or interest in the person or persons to whom made, unless made to a corporation organized under Rev. Code 1852, amended to 1893, p. 309, c. 39, applies to grants, conveyances, devises, and leases made after the act of real estate dedicated prior thereto as well as thereafter, and a deed of real estate held in trust for a religious society prior to the act to new trustees after the act, as well as a deed seeking to so dedicate real estate after the act, passed no title.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 103-108; Dec. Dig. § 16.\*]

**2. ESCHEAT (§ 2\*)—STATUTE—PROPERTY SUB-  
JECT TO ESCHEAT.**

Under Act March 1, 1855 (11 Del. Laws, c. 275) § 1, declaring that no grant to or in trust for any person and his successors in ecclesiastical office shall vest any estate in him or his successor, and that no grant to or for any such person by designation of his office shall vest any estate in his successor; section 2, declaring that no grant of real estate dedicated or to be dedicated to religious worship shall pass any title, unless made to a corporation organized under Rev. Code 1852, amended to 1893, p. 310, c. 39; section 3, declaring that any real estate within section 2, heretofore granted "to any person or persons in any ecclesiastical office by the desig-

nation of such office or otherwise" shall be held in trust for the society, and upon the death of the title holder vest in the society, provided it is then a corporation; section 4, declaring that if it is not so incorporated the title shall escheat to the state; and section 5, declaring that the Secretary of State shall convey it to the society, whenever it shall become incorporated—the quoted portion of section 3 relates to three classes of persons to whom real estate has been granted, and includes grants to laymen as trustees, as well as ecclesiastical officers, so that upon the death of the laymen trustees of an unincorporated society the title escheated to the state, and was returned by a grant from the Secretary of State upon its incorporation.

[Ed. Note.—For other cases, see Escheat, Cent. Dig. § 2; Dec. Dig. § 2.\*]

**Bill for specific performance by the Wil-  
mington Monthly Meeting of Orthodox  
Friends against the Ninth Street Company.  
Decree for complainant.**

**Bill for specific performance.** The bill is for specific performance of a contract for the purchase by the defendant of a tract of land from the complainant, situated at the north-east corner of Ninth and Tatnall streets, in the city of Wilmington. The land was apparently acquired in several parcels, and the defendant objects to the title of the complainant to part only of the land, though it claims that by reason thereof it should not be required to take the title to any of the land. By four deeds four separate parcels of land were conveyed prior to March 1, 1855, to James Canby and two other persons, and the survivor or survivors of them, as trustees, " \* \* \* in trust for the Wilmington Monthly Meeting of Friends as a place for holding their religious meetings and to build upon, improve and make use of for any uses or purposes which the said Monthly Meeting in that capacity should, from time to time, see fitting to order and direct, and upon this further trust that whenever they, the said Ashton Richardson, James Canby and Edward Tatnall, shall by death, removal or disownment become reduced in number or it shall from any cause whatever be deemed expedient by the said Wilmington Monthly Meeting of Friends to change the trustees of the estate and premises thereby granted and conveyed, then the survivors or survivor, as the case may be, of the said trustees above named should, on the receipt of an order to that effect in writing signed by the clerk of the said Monthly Meeting, convey and assure the said land and premises above mentioned and particularly described with the appurtenances unto such person or persons as the said Monthly Meeting should appoint for that purpose, to hold the same to and for the uses and purposes aforesaid; and also upon this further trust that if at any time or times hereafter the said Monthly Meeting should see fit and conclude to sell and dispose of the said lot of land, or any part or parts thereof, then in such case and upon receipt of a written order to that effect, signed by the clerk of said Monthly Meeting for the time being, they, the said Ashton Richardson, James Canby and Edward Tatnall, or the survivors or survivor of them, or the heirs of such survivor are hereby authorized and required to grant, convey and assure the said lot or piece of land or part or parts thereof, with the appurtenances and the absolute fee simple inheritance thereof to the purchaser or purchasers of the same, his, her or their heirs and assigns forever."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

In 1856 James Canby, being then the sole surviving trustee, granted and conveyed the four tracts of land by direction of the Wilmington Monthly Meeting of Friends, pursuant to the terms of said trust, unto three other persons, subject to the same trusts. In 1867 Henry F. Dure sold and conveyed another lot to the persons who held title to the other four lots in trust under the same terms. By several similar conveyances the title to all five lots was apparently passed on with the same trusts until 1913. In that year the religious society was incorporated under the then existing law relating to religious corporations, being the act of 1911 (chapter 89, volume 26, Laws of Delaware). This act was substantially a re-enactment of chapter 39 of the Revised Code, with one important omission and some unimportant additions. After this incorporation a deed was made by the trustees then holding the legal title to convey to the corporation without any trusts all five of the lots as one tract. Objection is made by the purchaser to the title to the land acquired before the passage of a certain act of the General Assembly on March 1, 1855 (chapter 275, volume 11, Laws of Delaware), which act applies to all the land referred to in the contract, except the small lot acquired from Henry F. Dure in 1867, as above stated.

The act of March 1, 1855, entitled "An act in relation to conveyances and devises of personal and real estate for religious purposes" (chapter 275, volume 11, Laws of Delaware), is as follows:

"Section 1. That no grant, conveyance, devise or lease of personal or real estate to, nor any trust of such personal or real estate for the benefit of any person, and his successor or successors in any ecclesiastical office, shall vest any estate or interest in said person or his successor; and no such grant, conveyance, demise, or lease to or for any such person by the designation of any such office, shall vest any estate or interest in any successor of such person. But this section shall not be deemed to admit the validity of any such grant, conveyance, devise or lease heretofore made.

"Sec. 2. That no grant, conveyance, devise or lease of any real estate, dedicated or appropriated, or intended to be dedicated or appropriated, to purposes of religious worship for the use of any congregation or society shall vest any right, title or interest in any person or persons to whom such grant, conveyance, devise or lease be made unless such grant, conveyance, devise or lease be made both in form and in fact, to a corporation organized according to the provisions of the laws of this state, as contained and provided in, and by, the 39th chapter of the Revised Code, under the title of 'Religious Societies.'

"Sec. 3. That any real estate of the description named in second section of this act, and which has been heretofore granted, devised or demised, to any person or persons in any ecclesiastical office by the designation of such office or otherwise, shall be deemed to be held in trust for the benefit of the congregation or society using the same, and shall upon the death of the person or persons in whom the title shall be vested at the time of the passage of this act, vest in the religious society occupying and enjoying such real estate as aforesaid: Provided such corporation organized according to the laws of this state shall be in

existence at the time of the decease of the person or persons holding the title thereto.

"Sec. 4. That in the event such corporation or society shall not be incorporated as aforesaid, then, and in that case, the title of such real estate shall escheat to the state of Delaware, in the same manner and with the same effect as if the person holding the title thereto had died intestate and without heirs capable of inheriting such real estate.

"Sec. 5. That whenever title to any real estate shall escheat to the state of Delaware under and by virtue of the last preceding section, it shall be the duty of the Secretary of State, and he is hereby authorized, upon his being satisfied of the due incorporation of the congregation or society who have occupied and enjoyed such real estate for the purpose of religious worship, under and according to the provisions of the law first named in the second section of this act, and a further production to him of a certified copy of the recorded certificate of the incorporation, under the hand and seal of the recorder of the county, in whose office the same is recorded, to grant and convey such real estate and all the right, title and interest of the state of Delaware therein and thereto to said corporation, which shall thereupon be vested with all the right, title and interest which became vested in the state by virtue of the provisions of this act."

Chapter 39 of the Revised Code, referred to in the second section was enacted prior to 1855, and was a very old statute, part of it being in existence as a statute of Delaware since 1787. In brief, it provided a simple method for incorporating religious societies and congregations of Christian people; transferred to the corporation the title to land held for the use of such society or congregation; invalidated grants of land to such religious corporations, except by deed made and recorded more than a year prior to the death of the grantor or for a valuable consideration; and by section 11 limited the income which such corporations could have from its property. Section 11 was repealed in 1909 and was not re-enacted in 1911.

For convenience the land mentioned in the contract is considered in two divisions, lot A being all but the Dure land and lot B being the Dure land. To meet an objection, or contention that because of the prohibition of section 2 of the act of 1855, the deed made by James Canby, who then solely held the title to lot A, and the deed made by Henry F. Dure, who then owned lot B, did not convey the legal title to the parcels of land therein described, and the contention that the land therefore descended to their respective heirs at law or devisees, a deed had been obtained by the complainant from James Canby, the eldest male heir at law of James Canby, the elder, for lot A, and also a deed from the heirs at law and devisees of Henry F. Dure for lot B. As a further precaution, a deed was obtained for both lots A and B from the Secretary of State under the provisions of section 5 of the act of 1855. It is claimed, then, by the complainant that under one or the other of the three methods, or by all three combined, the complainant acquired and can convey a good title in fee simple to the whole land.

The facts above stated were established by testimony heard orally before the Chancellor, and by exhibits and records proved, including the identity of the society or congregation as being also the religious congregation or society using, occupying and enjoying the land, and also including the establishment of the kinship of those who as heirs at law of James Canby, the elder, and Henry F. Dure, respectively, made conveyances to the complainant of parts of the land in question.

Another act referred to in the argument was the one approved March 14, 1911 (chapter 89, volume 26, Laws of Delaware), which was substantially a re-enactment of chapter 39 of the Revised Code, relating to the incorporation of religious societies. Section 4 of the old act was reproduced in the new act as section 5, and is as follows:

"All the estate, right and title which any such society, or congregation, may have in any property real or personal in themselves, or by trustees, or for their use before incorporation, shall upon incorporation, become vested in the said corporation, which may grant, demise or dispose thereof."

The case was heard on bill, answer, testimony and exhibits.

William S. Hillea, of Wilmington, for complainant. Christopher L. Ward and Robert H. Richards, both of Wilmington, for defendant.

**THE CHANCELLOR.** The bill is for specific performance of a contract for the sale by the complainant to the defendant of a lot of land therein described, and the defense is based on the invalidity of the complainant's title to all but a very small part of the tract. Obviously the defendant cannot be compelled to accept a deed for a tract of land if the title to all but a very small part thereof is not good. There is no dispute as to the facts. Part of the land (which will be called lot A) was acquired before the act of March 1, 1855, and the rest (which will be called lot B) was acquired thereafter. The trusts relating to the two tracts are the same and the beneficiary is the same, viz., the Wilmington Monthly Meeting of Friends, or, as the society was called in the incorporation thereof in 1913, the Wilmington Monthly Meeting of Orthodox Friends.

The trusts concerning all the land were valid, and were not within any prohibition of any statute of the state of Delaware. *Doughten v. Vandever*, 5 Del. Ch. 51. The beneficiaries of the trust were the members of the society from time to time, and all the intermediate conveyances, as well as the conveyance tendered to the defendant, conformed to these trusts.

[1, 2] The title to lot A and lot B will be considered separately.

Lot A. In 1856 James Canby, the elder, admittedly held the legal title to the portion of the land designated as lot A as sole surviving trustee under certain trusts for the

religious Society of Friends. During that year he undertook by deed to convey the land to three new trustees properly appointed and pursuant to the terms of the trust, and his grantees did likewise, and so on to the complainant in 1913. Before 1855 there was a simple proceeding for the incorporation of religious societies, and grants and gifts of real estate to religious corporations were invalid, except by deed made at least one year before the death of the grantor, and religious corporations were limited in the amount of income they could have from the real and personal property owned by them. These restrictions are called the "mortmain provisions." But gifts and grants of land might be made to trustees in trust for such corporations even by deed made less than a year before the death of the grantor. So also conveyances could be made to persons holding ecclesiastical offices and their successors in office. In these and perhaps other ways the mortmain provisions above referred to might be, and perhaps were, avoided and circumvented, intentionally or otherwise. Then came the act of March 1, 1855. The journals of the General Assembly do not disclose legislative purpose, and there is no assisting preamble. Nor has attention been called to any contemporary public discussion or evidence of public opinion respecting the subject-matter of that legislation. For the interpretation of its dubious provisions the act itself is the chief and perhaps the only guide, and there are no decisions of other courts that are helpful.

By section 1 it was enacted that a transfer of property to or in trust for any person and his successor in any ecclesiastical office should vest no estate in such person, or his successor; and no such grants to or for such person by designation of his office should vest any estate in any successor of such person. By this section, by way of illustration, a grant to or in trust for "A. B. and his successors as bishop of Delaware," or to or "in trust for the bishop of Delaware," were affected. In the first case the beneficiary named and his successor took nothing, and in the latter case the successor took nothing.

By section 2, all grants of real estate dedicated for religious worship must be made to a corporation incorporated under chapter 39 of the Revised Code, and a grant made for such purposes to any person would vest no title in the grantee.

Section 3 provides that real estate dedicated for religious worship and which had theretofore been transferred to any person "in any ecclesiastical office by the designation of such office or otherwise" should be deemed to be held in trust for the society using the same, and upon the death of the person holding the legal title, the property should vest in the society if then incorporated. If there were then no such corporation, then by section 4, in such cases, the land escheated to the state, and by section 5 a convenient

way was provided to pass over the title to the corporation when created.

It is probably correct to say that the purpose of the act was to encourage and perhaps enforce the incorporation of religious societies, in order that property held for or used by such societies should be held by the corporation and not by any ecclesiastical officer or by lay trustees. This may have been done either to protect the titles to land, or to bring such property within the mortmain restrictions imposed on such corporations, or both purposes may have existed.

In *Willin et al., Trustees, v. Wright*, 2 Boyce, 197, 78 Atl. 773 (1911), the court considered that the purpose was to "make conveyances of land for religious purposes to a person or ecclesiastical office impossible and to prevent a conveyance by indirection or the medium of a trust in violation of the spirit of said section 10." The section referred to is section 10 of chapter 39 of the Revised Code, and it invalidated unpurchased transfers of land to religious corporations unless made by deed more than a year before the death of the grantor. Except for the matter above quoted, that decision is not helpful in the case under consideration.

Two divergent views as to the purpose of the act of 1855 were urged by counsel for the parties. For the defendant it was urged that the act was a perpetuation in comparatively modern times of the ancient struggles between the church and state in England, concerning the holding of property by the church, and that it should be construed with that in view. His contention is that the deed of James Canby was ineffective as within the prohibition of section 2, so that James Canby at his death in 1858 held the legal title, and that section 3 did not apply to a case where land had been conveyed to laymen in trust for a religious society. The result claimed was that the land did not escheat to the state, and though the deed of the heirs at law of James Canby may have passed the legal title, the real equitable interest was in those persons who in 1855 were the members of the Wilmington Monthly Meeting of Friends as individuals, and their heirs and devisees, and not in the corporation, or in the society, as a collective body. According to this contention no provision was made in the act of 1855 to preserve the land for the Society as a collective body on the death of a sole surviving lay trustee then holding title.

For the complainant it was said that section 2 may not apply to land which had theretofore been conveyed to laymen in trust for a religious society, but only to such land as should thereafter have been so conveyed. If so, then the deed of James Canby to his successors as trustees and the other mesne conveyances down to that made to the complainant were valid and effective. An alternative contention was that if section 2 invalidated the conveyance by James Canby to the new trustees in 1856, the equitable interest was still

in the Society as a collective body and upon the incorporation thereof in 1913 that interest was vested in the corporation under section 5 of the act of 1911, and by the deed of the heirs at law of James Canby the legal title vested as well. Another alternative proposition was that if by section 2 the deed by James Canby in 1856 was invalid, then that section 3 applied to land dedicated to public worship by a religious society, whether held by trustees or granted to a person in an ecclesiastical office, and so applied to the land in question, and under sections 3, 4 and 5, at the death of James Canby in 1858, there being then no incorporation of the Society, the land escheated to the state and by the deed of the Secretary of State passed to the complainant. Undoubtedly there are difficulties in adopting either of these different views, owing to the ambiguity of the language used.

It is clear, as has been said above, that the act of 1855 was passed to encourage and perhaps enforce the holding of the title to land used for religious purposes by corporations organized under the then existing law, and to prevent the acquisition of unpurchased land for such purposes otherwise than by deed made more than a year before the death of the grantor and with limitations as to the amount of the yearly rents derivable therefrom. The then existing legislation on the subject was chapter 39 of the Revised Code. It is also evident that the act of 1855 not only did not aim to take from the religious societies any beneficial interest which they had in the land at the time the act was passed, but it expressly preserved such rights.

Section 2, as well as section 1, relates to future events. Conveyances of real estate dedicated, or to be dedicated, for religious worship for any society must thereafter be made to a corporation created under chapter 39, and if made otherwise would vest no title in the grantees. This relates to future conveyances, but it in terms surely relates also to land which before the passage of the act had been dedicated or appropriated to religious worship for a society, as well as lands to be thereafter so dedicated or appropriated. It, therefore, distinctly applies to and affects any conveyance of the greater part of the land in question, for it had theretofore been acquired by the Monthly Meeting of Friends for such purpose. James Canby under this section could not convey it to the new trustees, or any other person, or otherwise than to a corporation of this Monthly Meeting created under chapter 39. There was no such corporation until 1913. Therefore no title passed under the deed which James Canby made in 1856.

Section 3, and indeed the whole act, is not clearly phrased, and much ambiguity exists as to the meaning thereof. By a hard, strict and unyielding interpretation of the words used, the section is capable of being so construed as not to refer to, or include in its

operations, land held as James Canby held the land in question, and to relate only to land held by an ecclesiastical officer, which Canby, as trustee, surely was not. This is the contention of the defendant, who urges that it applies only to conveyances theretofore made to an ecclesiastical officer by the designation of his office, and certainly does not include grants to laymen as trustees for an unincorporated religious society. If this be true, then in 1858 on the death of James Canby (whose conveyance in 1856 was ineffectual under section 2) the title did not escheat to the state and did not pass to the complainant by the deed of the Secretary of State. The consequences of so holding were bewildering even to the solicitor for the defendant, who made what was even to him a very unsatisfactory explanation as to the devolution of the beneficial title on the death of James Canby. It leaves the question in a hopelessly confused and incomplete condition.

The most reasonable view of section 3, and the one adopted, is this: Section 3 relates to all land dedicated or appropriated, or intended to be dedicated or appropriated, to purposes of religious worship for the use of any congregation or society, whether the dedication or appropriation be made to laymen as trustees in trust for the society, or whether it be transferred to any person in any ecclesiastical office by the designation of such office or otherwise. It was intended to apply to matters referred to in section 1 and section 2. This is obviously the purpose of the act. It was not to pull down, confuse or invalidate rights in land, but to secure them for the use of the religious society or congregation, and also subject the land to certain existing restrictions. This purpose was effected by treating the act in one or the other of several ways, and so far as the particular case in hand is concerned it is unimportant which one of several inconsistent views is correct, so long as by some the title is considered good. Three interpretations of this section are urged:

(1) The complainant urges that the word "or" be substituted for the word "and" where it first occurs in the section, so that it would read thus:

"That any real estate of the description named in the second section of this act, *or* which has been heretofore granted," etc.

There is authority for such substitution in some cases in construing laws in deference to the meaning of the context, the popular use of the words "or" and "and" being so loose and frequently inaccurate. 2 Lewis on Statutory Construction, § 397. This is plausible and perhaps correct, but is not as satisfactory an interpretation as another to be hereafter considered.

(2) The insertion of the words "also real estate" after the word "and" where first used would be in harmony with the general purpose of the act, and would make the section apply to real estate held by laymen in trust

for religious bodies as well as land held by ecclesiastical officers. The section would read:

"That any real estate dedicated," etc., "and *also real estate* which has been heretofore granted," etc., "to any ecclesiastical officer," etc.

This is open to objection, as is the prior suggestion, in that it changes the verbiage of the act.

(3) By the use of the words "or otherwise," the section applies to real estate transferred to persons other than ecclesiastical officers for the use of a religious society, and makes the section apply to the matters referred to in section 1 and section 2 of the act. The section makes three classes of persons when read thus:

"That any real estate dedicated or appropriated, or intended to be dedicated or appropriated, to purposes of religious worship for the use of any congregation or society, and which has been heretofore granted, devised or demised to any person or persons (1) in any ecclesiastical office (2) by the designation of such office (3) or otherwise, shall be deemed to be held in trust for the benefit of the congregation or society using the same," etc.

Section 1 of the act mentions transfers (1) to or for any person in any ecclesiastical office and (2) to or for any person by the designation of any ecclesiastical office, and section 3 includes both of these as shown above. The words "or otherwise" must refer to something else than ecclesiastical officers or ecclesiastical offices. Naturally, it relates to transfers to laymen for the benefit, of the society. This view of the act is consistent with the general purpose of the act, and its adoption does not involve the substitution or addition of words. For these reasons it seems correct, and is adopted in interpreting the section.

The result would be that by section 2 no title to lot A vested in the new trustees as grantees of the deed made in 1856 by James Canby, but he continued to hold the same until his death in 1858, and as at that time the religious society using, occupying and enjoying the real estate was then unincorporated, the title escheated to the state of Delaware under section 4, and by the deed of the Secretary of State vested in the complainant by virtue of section 5 of the act.

Lot B. The deed from Dure to trustees for the Society being made subsequent to 1855 was clearly within the prohibition of section 2 of the act of that year, and no right, title or interest vested in the persons the grantees therein, but remained in the grantor, and on his death passed under his will. Upon the incorporation of the Society in 1913 the legal and equitable title thereto either passed under section 5 of the act of 1911, or was conveyed by the deed to the corporation from the heirs and devisees of Dure. It is conceded by the solicitor for the defendant that a good title to this relatively small part of the land was conveyed by the deed from the devisees of Dure.

In view of the conclusions stated above;

and because of the facts of this case, it is not necessary in this case to consider the bearing and effect on either branch of the title of section 5 of the act of March 14, 1911 (chapter 89, volume 26). This act was substantially a re-enactment of the very old statute constituting chapter 39 of the Revised Code; but being enacted subsequent to the act of 1855, with its stringent and radical provisions, it may have an important bearing, and perhaps a controlling influence, on titles to land granted, devised and demised to or for religious societies before and perhaps after 1855. Its provisions were not relied on by the complainant, or much discussed, by him and not at all by the solicitor for the defendant. The need to invoke the benefit of the act to obtain the legal title did not here arise, because there were actual conveyances of both branches of the title made to the complainant as a corporation by the holders of the legal title under James Canby or Henry F. Dure, or by the Secretary of State.

The conclusion reached as to the effect of the act of March 1, 1855, on title to land for religious societies are these: (1) Section 2 of that act applies to grants, conveyances, devises and leases of real estate made after the passage of the act of real estate dedicated prior to the passage thereof to religious worship. (2) Section 3 applies to such real estate so granted, conveyed, devised or leased before the passage of that act, whether the transfer be made to an ecclesiastical officer, or to laymen as trustees for the congregation or society, or otherwise.

Transfers made to a person after 1855 of real estate theretofore or thereafter dedicated or appropriated to purposes of public worship for the use of any congregation or society were made ineffective to vest any title in the person to whom the transfer was made, but all such were valid if made to a religious corporation created under the particular law relating to such corporations. But the beneficial use of real estate which before the act was passed had been so dedicated and appropriated, was preserved for the society or congregation until it became incorporated. This applied to real estate whether it had been theretofore transferred to a person in an ecclesiastical office, or to a person by the designation of such office, or to laymen or trustees, or otherwise. In all such cases the persons holding the title transferred to them prior to 1855 could thereafter transfer it only to a religious corporation so incorporated, but during their lives held it in trust for the congregation or society using it. If no such transfer be made in the lifetime of the transferee the property at the death of the transferee would vest in the religious corporation, if there be one, and if not, then it escheats to the state. If the congregation occupying and enjoying the property afterwards becomes incorporated, the Secretary of State could convey the property to the corpo-

ration, which will thereupon be vested with the title to the property.

The complainant is entitled to a decree for specific performance of the contract.

Let a decree be entered accordingly.

(123 Md. 497)

**FITZJARREL v. BOYD. (No. 5.)**

(Court of Appeals of Maryland. June 25, 1914.)

**1. ACTION (§ 8\*)—INDEMNITY INSURANCE — RIGHT OF ACTION.**

Where plaintiff, while a guest in defendant's automobile, was injured through defendant's negligence, and defendant was protected by liability insurance, that the insurance company was ultimately liable and would have to reimburse defendant for any recovery against him does not deprive the court of jurisdiction of an action by plaintiff against defendant, though it might not have been brought but for the fact of the insurance, and would affect the rights of insurer, who was not a party.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 9, 41; Dec. Dig. § 8.\*]

**2. NEGLIGENCE (§ 4\*)—AUTOMOBILE—DUTY OF OWNER.**

The owner of a motor car who invites a guest is liable for injuries received by the guest through his negligence; such guest being entitled to demand the exercise of ordinary care.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 6; Dec. Dig. § 4.\*]

Appeal from Superior Court of Baltimore City; Chas. W. Heulsler, Judge.

"To be officially reported."

Action by J. Cookman Boyd against Harry A. Fitzjarrel. From a judgment for plaintiff, defendant appeals. Affirmed.

Defendant's prayers 2 and 7 are as follows:

(2) The defendant prays the court to rule, as a matter of law, that it appears from the uncontradicted evidence in this case that the plaintiff does not intend to enforce the collection of any judgment against defendant, and it further appearing that it is not the object or purpose of this suit to have adjudicated by this court any rights as between the plaintiff and the defendant, and it being undisputed that the object and purpose of this suit is solely and entirely to determine and fix the liability on a corporation, which is not a party to this proceeding, that therefore this court has no jurisdiction over the subject-matter, and the verdict of the court shall be for the defendant. (Refused.)

(7) The defendant prays the court to rule, as a matter of law, that if it shall believe from the evidence that the plaintiff has brought this suit against the defendant with the purpose and object of attempting to fix the liability of some corporation not a party to this suit, and if the court shall find that there is no controversy between this plaintiff and this defendant with regard to the sum sued for, and that the plaintiff has no intention of making the defendant pay any verdict which may be rendered against him, then the subject-matter of this suit is beyond the jurisdiction of this court, and the verdict of the court shall be for the defendant. (Refused.)

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Walter L. Clark, of Baltimore, for appellant. Peter J. Campbell, of Baltimore, for appellee.

**BRISCOE, J.** This is an action brought by the appellee against the appellant to recover damages for injuries sustained while riding in the defendant's automobile, as his guest, caused by the alleged negligence of the defendant. The case was tried in the superior court of Baltimore city, before the court sitting as a jury, and, from a judgment in favor of the plaintiff for \$1,750, the defendant has appealed.

The declaration contains but one count, and it is as follows:

That the defendant on or about the 16th day of October, 1912, was the owner of and operated an automobile in the city of Baltimore and in Howard county, Md. That this plaintiff, at the invitation of the defendant, entered the automobile for the purpose and with the intention of being carried therein to Laurel, Md. That while riding in the automobile, and while exercising due care and caution on his part, the same was caused to skid and strike against a telegraph pole and overturn, and this plaintiff was thereby thrown from the automobile, his left arm was broken between the shoulder and elbow, his left ankle was sprained, his head was severely cut, his left forearm was badly bruised, he received severe bruises and contusions all over his body, he was severely injured in the left groin, he suffered from general shock to his system, and was further caused to suffer great physical pain and mental anguish. As a result thereof he was put to great cost for medical services, surgeon fees, and hospital charges; he was prevented for a long space of time from attending to his usual avocation, as an attorney at law, and thereby sustained great monetary loss, and other great, serious, and permanent wrongs and injuries were by him thereby sustained. That the said automobile was caused to skid, strike said telegraph pole and overturn by reason of the recklessness, want of care, default and negligence of the defendant, his servant and employé, in attempting to pass a vehicle upon the road on which they were traveling at a high rate of speed and against the protest of this plaintiff made to said defendant immediately before the happening thereof and in time to have avoided the same.

The record contains a single exception, and that is to the ruling of the court upon the defendant's prayers.

The plaintiff offered no prayers, but the defendant presented eight. Two of these were granted, and six were refused. The exception to the fifth and sixth prayers is waived by the defendant in his brief, so the questions for our consideration are presented by the rulings of the court upon the defendant's first, second, seventh, and eighth prayers.

[1] The defendant relies upon two grounds as a basis of defense: First, that the court has no jurisdiction, because the proceeding is amicable and pretended and only for the purpose of affecting the rights of strangers not parties to the suit; and, second, because there is no evidence of actionable negligence, on the part of the defendant.

The objections to the jurisdiction were raised by a motion to dismiss and by the de-

fendant's second and seventh prayers, offered at the conclusion of the whole evidence. The motion was overruled, and the two prayers were refused. As these prayers will be set out by the reporter in his report of the case, and will be hereafter discussed by us, they need not be set out here in extenso.

It appears that, prior to the alleged accident, the Maryland Casualty Company had issued to the defendant a policy of automobile insurance, indemnifying him from and against loss on account of suits for personal injuries similar in character to the present suit, according to the conditions and provisions of the policy. The policy contains, among others, the following provisions:

"In consideration of one hundred and seventy-six dollars (\$176.00), the Maryland Casualty Company, of Baltimore, herein called the company, agrees to indemnify Harry A. Fitzjarrel, of Baltimore, state of Maryland, herein called the assured, against loss from liability imposed by law upon the assured for damages on account of bodily injuries, including death resulting therefrom, accidentally suffered, or alleged to have been suffered, by any person or persons and caused by the automobile vehicles owned or operated by the assured. \* \* \* No action shall lie against the company to recover for any loss under this policy unless it shall be brought by the assured personally for loss actually sustained and paid in money by the assured in satisfaction of a final judgment after trial of the issue; nor unless such action is brought within (90) days after such judgment by a court of last resort against the assured has been so paid and satisfied."

While it may be conceded in this case that the result of the litigation will necessarily affect the interest of a third party, the casualty company, who is not a party of record, it does not follow because this is so that the suit is collusive and fictitious, as alleged. If the real and primary object of the suit is to redress the grievance of the plaintiff, and there is an actual controversy, involving real and substantial rights between the parties to the record, the suit would not be dismissed. It is only when the sole object of the suit is to affect third parties, and when the interest of the parties to the suit is not adverse, and when there is no real and substantial controversy between those who appear as adverse parties, that the principles invoked by the appellant here apply.

This case is clearly distinguishable in its facts from those cited and relied upon, in the appellant's brief. 2 Ency. of P. & P. 342, and cases there cited.

If the defendant is primarily liable for the negligence that caused the injury, then it seems clear that the plaintiff would have a right of action for such negligence against the defendant, notwithstanding the fact that the casualty company would be ultimately liable. *Eyler v. Co. Com'rs*, 49 Md. 257, 33 Am. Rep. 249; *Ches. & Ohio Canal Co. v. Allegany Co.*, 57 Md. 201, 40 Am. Rep. 430; *Balto. & Ohio R. R. Co. v. Howard Co.*, 111 Md. 180, 73 Atl. 656, 40 L. R. A. (N. S.) 1172.

Such being our view of the law, the motion to dismiss this suit was properly overruled,



and there was no error in refusing the second and seventh prayers.

[2] The second proposition, as to what duty the owner of an automobile owes to his guest who accepts an invitation to ride with him, is raised by the defendant's eighth prayer. The prayer is as follows:

The defendant prays the court to rule, as a matter of law, that it appears from the uncontradicted evidence in this case that the plaintiff was traveling as an invited guest in the private automobile of the defendant, and that, unless the court shall believe from the evidence that the plaintiff was injured by reason of the gross or willful negligence of the defendant, the verdict of the court shall be for the defendant.

While the reported cases upon the legal status of a guest who voluntarily accepts an invitation to ride with the owner of an automobile are somewhat limited, the rule adopted by the later decisions as to the degree of care required is against the appellant's contention in this case.

Mr. Huddy in his work on Automobiles, § 113, says:

"Although he pays nothing for riding, he is, nevertheless, in the care and custody of the owner or driver of the machine and is entitled to a reasonable degree of care for his safety. If the driver has negligently run into some obstacle on the highway and thereby injured the guest, undoubtedly the owner and the driver would be liable to civil suit for damages. One who voluntarily accepts an invitation to ride as a guest in an automobile does not relinquish his right of protection from personal injury caused by carelessness, and it should be understood by owners of motor vehicles that they assume quite a serious responsibility when they invite others to ride with them, especially persons who by reason of weaknesses are subject to injury from slight causes."

In *Patnode v. Foote*, 153 App. Div. 494, 138 N. Y. Supp. 221, the Supreme Court of that state held, as stated in the syllabus of the case, where in an action to recover for personal injuries to the plaintiff resulting from defendant's negligence it appears that the defendant invited the plaintiff, who was a witness in an action to which he was a party, to ride with him to the place of trial in an open buggy drawn by one horse driven by himself, that the defendant drove at a reckless speed, against the plaintiff's protest, and that a collision with another wagon which threw the plaintiff violently to the ground was the result of defendant's careless driving, a judgment for the plaintiff should be affirmed. The plaintiff was a licensee, and it was the duty of the defendant to use ordinary care not to increase the danger of riding with him or to create any new danger.

In *Beard v. Klusmeyer*, 158 Ky. 153, 164 S. W. 319, decided by the Court of Appeals of Kentucky, on March 20, 1914, where the facts are very similar to those in this case, the court held that it was the defendant's duty, upon inviting plaintiff to ride as a guest in defendant's automobile, to use ordinary care not to increase plaintiff's danger or to create any new danger, such as by fast and reckless driving, so that defendant would

be liable for injuries to plaintiff resulting from driving the automobile recklessly.

The reasoning in *Foote's Case*, supra, was adopted and followed in the Kentucky decision. The cases of *Pigeon v. Lane*, 80 Conn. 237, 67 Atl. 886, 11 Ann. Cas. 371, *Birch v. City of New York*, 190 N. Y. 397, 83 N. E. 51, 18 L. R. A. (N. S.) 595, *Mayberry v. Sivey*, 18 Kan. 291, and *Lochhead v. Jensen* (Utah) 129 Pac. 347, are also in point and to the same effect. The rule announced in these cases, we think, is the true and correct rule, and is controlling on this appeal.

The rule of gross or willful negligence sought to be applied by the defendant's eighth prayer was not the correct rule applicable to the case, and this prayer was properly refused.

The defendant's first prayer was a demurrer to the evidence, and, as the evidence was legally sufficient to show actionable negligence, it was properly rejected.

Finding no error in the rulings of the court, the judgment will be affirmed.

Judgment affirmed, with costs.

(123 Md. 628)

BARTLETT v. CALVERT BANK. (No. 34.)

(Court of Appeals of Maryland. June 25, 1914.)

PRINCIPAL AND AGENT (§ 100\*) — POWER OF ATTORNEY—CONSTRUCTION.

A power of attorney executed by a stockholder, whereby he transfers the stock and appoints an attorney to sell, hypothecate, or dispose of in any manner and for any purpose assign and transfer, empowers the grantee in the power to pledge the stock, not only for a debt evidenced by a note contemporaneously executed by the grantee, but also empowers the grantee to pledge the stock for other debts, in the absence of any notice by the creditor of any restrictions placed by the stockholder on the grantee.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 262-273, 345, 364, 368-373; Dec. Dig. § 100.\*]

Appeal from Superior Court of Baltimore City; Chas. W. Heuveler, Judge.

"To be officially reported."

Action by J. Kemp Bartlett against the Calvert Bank. From a judgment for defendant, plaintiff appeals. Affirmed.

The following is plaintiff's first prayer:

If the court, sitting as a jury, shall find that the plaintiff delivered to one Edgar M. Noel the certificate for 30 shares of stock of United States Fidelity & Guaranty Company standing in the name of and belonging to the plaintiff, offered in evidence, and that at the time of said delivery it was distinctly agreed between the plaintiff and the said Noel that Noel was not to borrow upon the said certificate from the defendant a sum exceeding \$3,000, and that at the time of said delivery and presentation to the defendant of said certificate by said Noel, if the court, sitting as a jury, shall so find, the assignment and power of attorney appearing upon the back of said certificate was not filled in but merely signed in blank by the plaintiff, and that the defendant loaned to said Noel \$3,000 upon the said certificate as collateral therefor, with actual knowledge that the said certificate was

\*For other cases see same topic and section NUMBER in Dec. Dig. & Ann. Dig. Key-No. Series & Rep'r Indexes

not the property of said Noel but of the plaintiff, and that subsequently the said original certificate for 30 shares was split up into two certificates, one for 20 shares and the other for 10 shares, the latter certificate being returned to the plaintiff and the former being retained by the defendant, and that the plaintiff subsequently, after the maturity of said loan, and while the said certificate for 20 shares was still in the possession of the defendant, tendered to the defendant \$3,000 and all accrued interest unpaid thereon, and thereupon demanded a return of said certificate, and that the defendant refused to return the same unless the plaintiff made a payment also on account of an indebtedness of the said Noel to the said defendant contracted subsequent to the making of the said \$3,000 loan, and that the plaintiff had not authorized the pledge of said certificate as security in whole or in part of said second loan of the said Noel, then the verdict must be for the plaintiff.

The following is defendant's second prayer:

If the court, sitting as a jury, find that the plaintiff signed the power of attorney dated March 20, 1912, attached to the certificate for 20 shares of stock of the United States Fidelity & Guaranty Company offered in evidence, and delivered said power of attorney and certificate of stock to E. M. Noel, and that the same were delivered by E. M. Noel to the Calvert Bank, together with the collateral note of July 23, 1912, offered in evidence, and that said note was signed by E. M. Noel and delivered to said Calvert Bank for a valuable consideration, then the court rules, as a matter of law, that the legal effect of the delivery by E. M. Noel of said stock and said power of attorney attached thereto and said collateral note was to pledge said stock not only for the \$3,000 mentioned in said collateral note of July 23, 1912, but also for any other indebtedness then or thereafter owing by the said E. M. Noel to said Calvert Bank. And if the court sitting as a jury find that, at the time of said delivery of said collateral note of July 23, 1912, and said power of attorney and certificate of stock, the said E. M. Noel was indebted to the Calvert Bank upon another note for \$3,000, dated July 1, 1909, and that both said notes, with certain interest thereon, remain unpaid, then the court rules, as a matter of law, that the tender made by the plaintiff to defendant, as testified to by him, was not sufficient to entitle the verdict of the court, sitting as a jury, should be for the defendant.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

Edgar Allan Poe, of Baltimore, for appellant. S. S. Field, of Baltimore, for appellee.

BRISCOE, J. This action was brought by the appellant against the appellee bank, in the superior court of Baltimore city, to recover the possession of a certificate dated May 20, 1912, for 20 shares of stock of the United States Fidelity & Guarantee Company, which had been pledged to the appellee bank by one Edgar M. Noel, now deceased, as collateral security for certain loans, made by the bank to Noel, in his lifetime. The certificate of stock belonged to the appellant but had been loaned to Noel, for the purpose of pledging it to the appellee bank, as collateral security, under a blank power of attorney dated the 20th day of May, 1912. The case was tried before the court, sitting as a jury, and, from a judgment in favor of the

defendant, the plaintiff has taken this appeal.

During the trial two bills of exception were taken by the appellant, one to the granting of the defendant's motion to strike out certain testimony which had been admitted subject to exception, and the second to the ruling of the court, in rejecting the plaintiff's first prayer, and in granting the defendant's second prayer. These two exceptions bring up for review the only questions presented by the record, and which will now be considered by us.

As the plaintiff's second exception contains the rulings upon the prayers, and as these present the substantial questions in the case, we will consider it first.

The defendant's second prayer, which was granted by the court, we think, correctly states the law of the case. It ruled as a matter of law, under the facts of the case, that the legal effect of the delivery by E. M. Noel of the stock, and the power of attorney attached thereto, and the collateral note, was to pledge the stock not only for the \$3,000 mentioned in the collateral note of July 23, 1912, but also for any other indebtedness then or thereafter owing by E. M. Noel to the defendant bank.

The plaintiff's first prayer was the converse of the defendant's second prayer, and was properly rejected. The Reporter will set out these two prayers in his report of the case.

The substantial facts of this case are practically undisputed, and may be thus stated: The record discloses that some time in July, 1908, the plaintiff loaned Edgar M. Noel 30 shares of the capital stock of the United States Fidelity & Guaranty Company, belonging to him. Noel subsequently secured a loan of \$3,000 from the defendant bank by pledging the stock as collateral security for the loan. This loan was renewed from time to time; the last renewal note being dated July 23, 1912. The note which was delivered to the bank and signed by E. M. Noel is as follows:

"\$3000.00 Baltimore, July 23, 1912.  
"Four months after date I promise to pay to the Calvert Bank or order, at the banking house of said bank, three thousand xx-100 dollars, for value received, having deposited as collateral security for the same following named securities: 20 shares U. S. F. & G. Co.

"..... agree that the above-named securities, and any others needed to or substituted for them, all cash at any time to the credit of our account, and all notes and drafts deposited by us for collection, and all other property of the undersigned in said bank, may be held as collateral security for all the obligations and liabilities of the undersigned and of the indorsers hereof, due to the said bank or to become due, or that may hereafter be contracted, with the understanding that a margin of ..... per cent. on the market value of the collateral security shall be maintained on demand, and if said demand for margin is not promptly met, or said obligations and said liability are not promptly paid at maturity, ..... hereby authorize said bank or its president or its cashier to sell the collateral security, or the property represented by the same, either at private or

public sale, at any time thereafter, without advertisement or notice to . . . . ., and with the right on the part of said bank to become purchasers thereof at such sale, freed and discharged of any equity of redemption, the proceeds to be applied to the payment of the above-mentioned obligations and liabilities, any excess or deficiency to be paid or received by . . . . . as the case may be, and . . . . . further authorize the said bank, or its president or its cashier to use, transfer or hypothecate the collateral security, they being required on payment or tender at maturity of the amount of the said obligations and liabilities to return an equal amount of said securities, and not the specific securities pledged.

"T/D50.25 Demand. E. M. Noel."

Reverse Side.

"For value received . . . . . hereby agree to become surety for the faithful performance of the obligations contained in the within note."

The certificate for the 20 shares of stock is in the name of J. Kemp Bartlett, dated the 20th of May, 1912, and is in the usual form. It was delivered to the bank as collateral security for the note of July 23, 1912. To this certificate of stock was attached the following power of attorney dated the 20th day of May, 1912, and signed by J. Kemp Bartlett:

"Know all men by these presents, that I, J. Kemp Bartlett, for value received, have granted, bargained, sold, assigned, and fully and irrevocably transferred, and do by these presents, grant, bargain, sell, assign and fully and irrevocably transfer for all purposes unto . . . . . twenty (20) shares of the capital stock of the United States Fidelity & Guaranty Co., standing in . . . . . name, on the books of . . . . . and do hereby constitute and appoint . . . . . irrevocably for . . . . . to be . . . . . true and lawful attorney, and in . . . . . name and stead, to sell, hypothecate or dispose of in any manner and for any purpose, assign, transfer and set over to any person or persons the whole or any parts of said stocks at once or from time to time, and for that purpose to make all necessary acts or assignment or transfer, and with power to substitute one or more persons in . . . . . stead, as to the whole or parts of said stock, with all the powers herein mentioned . . . . . hereby ratify and confirm all acts that . . . . . said attorney, or any substitute or substitutes under . . . . . shall lawfully do by virtue hereof.

"In witness hereof, have hereunto set my hand and seal this twentieth day of May, A. D. 1912.

"J. Kemp Bartlett. [Seal.]

"Signed, sealed, and delivered in the presence of: F. Aloysius Michel."

The bank also holds a demand collateral note of Noel's, dated July 1, 1909, for an additional loan of \$3,000. The collaterals held by the bank are insufficient to pay this last-named note, and it claims the right to hold the 20 shares of stock as collateral security for the payment of both notes, under the terms of the contract and pledge by Noel, at the time of the loan. The facts and history of the two loans are thus stated by the appellee in his brief:

"The notes which the bank now holds are a four months' collateral note of July 23, 1912, for \$3,000 and a demand collateral note of July 1, 1909; each note being for \$3,000. The specific certificate of 20 shares sued for in this case was pledged and delivered with the note of July 23, 1912, but the note of July 23, 1912, evidenced a debt which originated in July, 1908, at which time there was pledged a certificate for 30 shares of stock of the United States Fi-

delity & Guaranty Company. The bank held this certificate for 30 shares of stock at the time when the loan of July 1, 1909, evidenced by the demand note for \$3,000, was made, and Mr. Page, the president of the Calvert Bank, testified that it was part of the inducement for making the loan of July 1, 1909, that there was considerable margin in the 30 shares held as collateral for the first loan. The original note of July, 1908, was renewed from time to time; the last being the note of July 23, 1912. In the early part of 1912, the appellee permitted the certificate for 30 shares to be withdrawn and a certificate of 20 shares substituted in its place. At that time the stock had advanced so much in value that the 20 shares were worth about as much as the 30 shares were when originally pledged."

There is no dispute as to the loan of the stock by the appellant to Noel, but it is contended there was a distinct understanding and agreement between them that Noel should not borrow upon the stock a sum in excess of \$3,000.

While this restriction and limitation may have been understood between the appellant and Noel, there is no evidence whatever that it was ever communicated to the bank or to any of its officers. The plaintiff testified that he never informed the bank of the agreement, and the testimony as to what Noel in his lifetime told the appellant, which had been admitted subject to exception, was properly stricken out at the conclusion of the testimony.

The evidence upon the part of the defendant was to the effect that the bank never had any notice of the agreement between the appellant and Noel that the stock should not be pledged for more than a \$3,000 loan.

The witness Page, president of the bank, testified as follows:

"Q. Did you or the bank have any notice of any agreement that the stock should not be hypothecated for more than \$3,000? A. No, sir; on the contrary, I figured to Mr. Noel when the second loan was made the margin on it; when the second loan was made I figured it; I went and got the envelope and figured it up; and he was thoroughly conversant of the fact that we were holding it for that purpose. Q. He never told you Mr. Bartlett said it was not to be pledged generally, but only for that loan of \$3,000? A. No, sir; never; as I said a moment ago, he knew it could be pledged for more, because he knew it could be figured on the margin."

It is very manifest, we think, that under the power of attorney, given Noel by the appellant, he had the right and power to pledge the stock as collateral security, not only for the loan of \$3,000, but also for any other debt he might owe the bank. The very face of the instrument itself shows that Noel had this power. The language of the power of attorney is:

"Do by these presents, grant, bargain, sell, assign and fully and irrevocably transfer for all purposes unto . . . . . twenty (20) shares of the capital stock . . . . . and do hereby constitute and appoint . . . . . true and lawful attorney, . . . . . to sell, hypothecate or dispose of in any manner and for any purpose, assign, transfer and set over . . . . ."

There was nothing upon the face of the certificate of stock, the collateral notes, or

the power of attorney that would put the stock in jeopardy or impart notice that Noel was limited or restricted in any way in the disposition of the hypothecation of the stock. On the contrary, any one examining the power of attorney would see that he had power to transfer the stock "for all purposes," and to sell, hypothecate, or dispose of it in any manner and for any purpose.

The cases of *Tallaferris v. Bank*, 71 Md. 204, 17 Atl. 1022, and *German Savings Bank v. Benschaw*, 78 Md. 475, 25 Atl. 251, relied upon by the appellant, will be found upon an examination to be unlike this case. In those cases there was no power "to hypothecate or dispose of in any manner and for any purpose," as in this case, but the power was merely to sell, transfer, and set over to bank but not to pledge for debt.

In *Merchants' Bank v. Williams*, 110 Md. 202, 72 Atl. 1117, it is said:

"This stock was pledged not for the \$216.45 only, the amount required by Mrs. Williams to complete her purchase, but also for the general debit account of Mr. Williams with the firm of Wilson, Colston & Co., and therefore the defendant is entitled to have deducted such amount, with interest to date of trial, as Mr. Williams may owe that firm."

In the absence of any notice by the bank of the alleged restrictions which the appellant claims he placed upon Noel at the time of the transfer of the stock to him, we think it is clear that the bank has the right to rely upon and to hold the stock here in question, not only for the \$3,000 mentioned in the collateral note of July 23, 1912, but for all other indebtedness of Noel to it.

It follows, for the reasons stated, that the court below committed no error in rejecting the plaintiff's prayer and in granting the defendant's second prayer. There was no error in granting the defendant's motion to strike out the testimony set out in the first bill of exception. The judgment will be affirmed.

Judgment affirmed, with costs.

(122 Md. 561)

**UNITED RYS. & ELECTRIC CO. OF BALTIMORE v. STATE ROADS COMMISSION. (No. 27.)**

(Court of Appeals of Maryland. June 25, 1914.)

**1. RAILROADS (§ 98\*)—CHANGE OF GRADE—AUTHORITY OF STATE ROADS COMMISSION—STATUTE.**

Laws 1908, c. 141, established a system of public roads and appointed a state roads commission, and by section 32b authorized the commission to maintain a general system of improved state roads, including roads within the city of Baltimore, by section 32c provided that the commission might take over any county road, etc., and accept by gift or surrender and acquire by purchase any existing turnpikes or interests therein, subject to any outstanding occupation or use by any electric railway company, and by section 32e provided that no elec-

tric railway company in operation upon any public or private road, "when acquired hereafter" shall be disturbed in its operation or maintenance, and Laws 1910, c. 116, supplementary thereto, declared that nothing therein should change the provisions of the prior act as to the rights of electric railway companies upon any public or private road, and authorized the commission to contract with them for the construction of bridges, etc., for overgrade or undergrade crossings at the cost of the commission. *Held*, that the commission could not require defendant electric street railway company at its own expense to make changes ordered in the grade and section of its railway, whether operated on its private rights of way or upon public roads, and escape liability for such expense on the ground that the city might require the railway to make its tracks conform to changes in the grade of a city street, and an agreement between the city and the railway as to changing the railway under the acts and ordinances relating to the city's park tax, by which the railway agreed to accept a nominal award for its easement in one of such streets, was not a waiver of its rights as against the commission.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 291, 322, 335; Dec. Dig. § 98.\*]

**2. RAILROADS (§ 98\*)—CHANGE OF GRADE—AUTHORITY OF STATE ROADS COMMISSION—EXERCISE OF POLICE POWER—PRESUMPTION.**

The powers of the state roads commission, established by Laws 1908, c. 141, as supplemented by Laws 1910, c. 116, under the denomination of police powers, must be derived from the Legislature by express grant or by fair intendment, and there could be no presumption in favor of a grant to it of the power to order changes in the grade and location of the roadbeds and overhead system of an electric street railway at the expense of the railway.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 291, 322, 335; Dec. Dig. § 98.\*]

Appeal from Superior Court of Baltimore City; Chas. W. Heusler, Judge.

"To be officially reported."

Action by the State Roads Commission against the United Railways & Electric Company of Baltimore. Judgment for plaintiff, and defendant appeals. Reversed, without awarding a new trial.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, and CONSTABLE, JJ.

Joseph C. France, of Baltimore (J. Stanislaus Cook, of Baltimore, on the brief), for appellant. S. S. Field and Isaac Lobe Straus, both of Baltimore (Leon E. Greenbaum, of Baltimore, on the brief), for appellee.

THOMAS, J. In 1908 the Legislature passed an act (chapter 141)—

"providing for the establishment of a system of public roads and highways in Maryland, and providing for the appointment of a commission to be known as the 'state roads commission,' with full powers to construct, improve and maintain public roads and highways in the several counties of this state; and providing also the ways and means, and making the necessary appropriations of money and for a bond issue for the construction, improvement and maintenance thereof, and for the expenses of such commission in the execution of its powers and duties."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

By section 32b of the act the state roads commission, hereinafter referred to as the commission, was given full power and charged with the duty to select, construct, improve, and maintain such a general system of improved state roads and highways as could "reasonably be expected to be completed" with the funds therein provided "in and through all the counties of this state," and was required to make the selection of the roads to be improved before the 1st of May, 1909. The commission was authorized to make such preliminary investigation, to do such preliminary work, and to adopt such means or system of roads construction, etc., as in its judgment was best calculated to promote the objects of the act—

"condemn, lay out, open, establish, construct, extend, widen, straighten, grade and improve, in any manner, any main road, of the system, in any county of this state and establish or fix the width thereof; cause to be prepared such surveys, plans, drawings or maps as it may deem proper in the course of its work; acquire for the state of Maryland, by agreement, gift, grant, purchase or condemnation proceedings, \* \* \* any private road or roads whatsoever, or private property or rights of drainage for public use, whether belonging to private individuals or to turnpike companies or other corporations, and including any avenues, roads, lanes or thoroughfares, rights or interests, franchises, privileges or easements, that may be, in its judgment, desirable or necessary to complete said system of roads or to carry out the purposes of this act; contract with any person or persons, company or corporation, either private or quasi public, or municipal, in furtherance of the duties and objects of this act or any of the same," etc.

This section authorized and directed the commission to include in its work of improving the system of main roads of the state the improvement of such portions of the main roads selected by said commissions as a part of such system "as lie inside the limits of the city of Baltimore, up to the old city limits, provided that on completion of such improvements, the portions of the roads so improved within the city limits shall be city streets under the provisions of the city charter," and provided that:

"Where rights, easements and franchises of the United Railways & Electric Company of Baltimore, its successors and assigns, exist upon any turnpike or private right of way in the annex which may be improved hereunder, then said rights, easements and franchises may (if the mayor and city council of Baltimore and said Railways Company, its successors and assigns fail to agree upon terms of purchase or surrender) be condemned by the mayor and city council of Baltimore under the provisions of chapter 274 of the Acts of 1904, and chapter 566 of the Acts of 1906, or in the exercise of its general powers of condemnation, the cost thereof to be defrayed out of the loan provided for in said first mentioned act, or out of the ordinary proceeds of municipal taxation: Provided, however, that the provisions of said act of 1906 shall be obligatory upon, and not discretionary with, the mayor and city council of Baltimore and the board of estimates, and the price to be charged for new rights, franchises and easements similar to those condemned, shall be the same as the amount of the condemnation award."

Section 32c is as follows:

"If the state roads commission shall determine that the public necessity or convenience, or that the purposes of this act require that any turnpike, or part thereof, whether maintained as such by any turnpike company or otherwise, or whether formerly maintained as such and now abandoned by any turnpike company, or that any public road in whole or in part in any county or counties, and forming a section of a through route or continuous thoroughfare between two or more important points in this state, should be taken charge of by said commission for the state, for the purposes of this act, then, as to such public road or abandoned or acquired turnpike, whether acquired by purchase or condemnation, the said commission shall file a certified copy of the plan thereof in the office of the county commissioners for the county or the several counties in which said section or sections of road or turnpike may be situated, and setting forth its purpose to acquire and to take over the same, and said commission thereupon, without any further procedure, shall acquire and take over any such and all county roads, turnpikes or sections thereof or interests or rights therein, as in its judgment, may be necessary or proper for the purpose of this act, and with full power to widen, relocate, change or alter the grade or location thereof; and said commission shall have full power so to take over and take possession of any county road or abandoned turnpike, and to accept by gift or surrender, and to acquire by purchase or condemnation, any and all existing turnpikes or any sections thereof, or any rights or interests therein, subject to any outstanding occupation, use or franchise of any electric railway company or other public service corporations; and thereafter all highways, however acquired hereunder, shall be state highways and shall be constructed, improved and maintained by said commission for the state and at its expense, except as provided in section 32b."

Section 32e provided:

"That said commission shall keep all state highways reasonably clear of brush and maintain same in good condition; shall cause suitable shade trees to be planted thereon, if practicable, and may establish and maintain watering troughs upon said highways. No opening shall be made in any such highway, nor shall any structure be placed thereon, nor shall any structure which has been placed thereon be changed or renewed, except in accordance with a permit from the commission, which shall exercise complete control over such highways, except as herein otherwise provided. No state highway shall be dug up for laying or placing pipes, sewers, poles, wires or railways, or for other purposes, and no trees shall be planted or removed or obstruction placed thereon without the written permit of the state roads commission, or its duly authorized agent, and then only in accordance with the regulations of said commission; and the work shall be done under the supervision and to the satisfaction of said commission; and the entire expense of replacing the highway in as good condition as before shall be paid by the persons to whom the permit was given or by whom the work was done: Provided, however, that no electric railway company in operation upon any public or private road or existing or abandoned turnpike when acquired hereunder shall be disturbed in its operation or in the maintenance of its roadbed and overhead construction and all necessary repairs, together with the maintenance of the space between its tracks and two feet on each side thereof shall be performed by such railroad company under the supervision and to the satisfaction of said commission. Said commission may give suitable names to the state highways and may change the name of any highway which

becomes a part of a state highway. They shall erect suitable guide posts at convenient points along state highways."

In 1910 the Legislature passed an act (chapter 116) "enlarging the powers of the state roads commission as created by chapter 141 of the Acts of" 1908, and "providing, also, for the enlargement of the work of said commission and making the necessary appropriations of money; and for an additional bond issue for the purpose of carrying out the provisions of this act." This act authorized the commission to acquire, construct, and maintain bridges for the purpose of making connection between any highways or parts of any highway constructed and improved by it, to acquire by purchase, condemnation, or otherwise the Conowingo bridge across the Susquehanna river, to build a bridge across the Nanticoke river, and to construct a highway to be known as the Annapolis and Baltimore boulevard, and provided that:

"Nothing in any of the foregoing sections or in the provisions of any act adding to or supplementing chapter 141 of the Acts of 1908 (creating the state roads commission) shall be construed as modifying or changing the provisions of said last named act, in so far as the same define and regulate the rights of any electric railways company in operation upon any public or private road or existing or abandoned turnpike."

And further providing that:

"Whenever any state road crosses the grade of the line of any railroad worked by steam or other power, the state roads commission shall have the power to contract with such railroad for the construction of any bridge, archway, or culvert that may be needed for the purpose of any overgrade or undergrade crossing; and to provide by contract or otherwise for the maintenance thereof: Provided, that one-half of the construction cost of such bridge, archway, culvert or roadbed shall be paid for by the railroad and one-half by the state roads commission."

On the 29th of April, 1909, the commission and the United Railways & Electric Company of Baltimore City entered into an agreement by which the Railways Company, "to the extent of its ownership and interest in the Harford, the Baltimore and Jerusalem, and the York Turnpike Roads," agreed that the same should be transferred to the commission without charge other than the cost, if any, of perfecting the title, "subject, however, to any and all railway easements and rights of way now existing," and subject to the further provisions of the contract, among which were the following:

"Where any tracks owned or operated over by the company now exist on any road which the commission may acquire and improve, all changes made necessary by the work of the commission shall be done by the company to the satisfaction of the commission and the expense incurred shall be paid by the commission."

"The company shall duly keep in repair the space between the rails of its tracks and the two-foot adjacent space, as provided by the State Roads Law; but, except by mutual agreement, it shall not be disturbed in the use of or required to change, the existing character of its rails, ties, ballast, roadbed or overhead construction; but the company will, at the request of the commission, lower or raise its

tracks so as to conform with the adjacent roadway, the expense incurred by any such change to be borne by the commission."

"The word 'tracks' shall be taken to include switches, turnouts and electrical construction, unless such inclusion would be unreasonable. The formal deed or acts or instruments of surrender by and on behalf of the several turnpike companies to the commission shall in terms recite and reserve the rights of the company hereunder."

The agreement of counsel filed in the case states that, after the execution of the above agreement, "certain members of the state roads commission took the position that its terms were broader than they had intended them to be; that they had not intended to bind the commission in regard to roads other than the three roads specified by name in said contract, namely, York, Baltimore and Harford, and the Baltimore and Jerusalem Turnpike Roads; that they thought that the Railways Company ought to enter into a supplemental agreement so that, as to the roads other than the three roads which the Railways Company had agreed to procure to be turned over to the commission, the rights or obligations of the commission in regard to the Railways Company's structures thereon should be passed upon and determined by the courts. The Railways Company's position was that the agreement of April 29, 1909, was understood by the parties thereto and was intended to be exactly as it was. The company agreed, however, to make a supplemental agreement as requested by the commission." The Railways Company and the commission accordingly entered into a supplemental agreement on the 7th of July, 1910, by which they agreed that the agreement of April 29, 1909, should be applicable to the roads referred to, "and that, as to all other roads on which the United Railways & Electric Company has or operates any tracks, the state roads commission shall proceed with such improvements or works as it may determine to make, subject to the provisions of chapter 141 of the Acts of 1908 and any acts of the General Assembly supplementary thereto; it being particularly agreed that as to all such other roads last aforesaid the said commission shall, in the first instance, pay the costs and expenses of all changes in the tracks, roadbed and overhead construction of the said Railways Company, caused by the works or improvements made by the said commission, and that the ultimate liability for the costs and expenses of said changes shall be determined by the courts according to law." The agreement further provided that, as to all other roads than those mentioned in the agreement of April 29, 1909, the work of changing said tracks, roadbed, and overhead construction of the company should be done by the company under the supervision and to the satisfaction of the commission; that the payments to be so advanced by the commission should be made on the 15th day of each month, and for the amount of the costs and expenses as shown

by vouchers, approved by a responsible official of the company and furnished by the company to the commission not later than the 8th day of each month, and approved by the commission, "to have been actually incurred for the changes in the tracks, roadbed, and overhead construction of said Railways Company during the calendar month last preceding the 15th day of each month aforesaid caused by the works and improvements made by the commission upon said roads, and the further and additional sum of 10 per cent. upon the amount of said actual costs and expenses for each said calendar month for tools and supervision provided by said Railways Company."

Under the supplemental agreement referred to, the commission undertook the improvement of the Falls Road, in Baltimore county and Baltimore city; the Baltimore and Liberty Turnpike Road, within the present limits of Baltimore city, known as Garrison avenue; First street in Brooklyn, Anne Arundel county; and Maryland avenue, in Westport, Baltimore county. In reference to each of these roads, the commission and the Railways Company entered into a further agreement specifying the changes to be made by the Railways Company in the location, grade, rails, and construction of its railway, so as to conform to the specifications and requirements of the commission, and further agreeing that the cost of said changes should be paid by the commission, and that the ultimate liability therefore should be judicially determined.

This suit was brought by the commission in the superior court of Baltimore city to recover from the Railways Company the amounts paid by the commission to the company in accordance with the agreements referred to.

In the agreement of counsel it is stated that the commission expended, for the relocation of the tracks and structures of the Railways Company on the roads mentioned, the following amounts: On Falls Road, in Baltimore county, \$25,209.75; on Falls Road, within the present city limits, \$4,306.32; on the Baltimore and Liberty Turnpike Road, now Garrison avenue, \$40,972.54; on First street, Brooklyn, \$10,616.66; on Maryland avenue, Westport, \$6,811.44—which amount in the aggregate to \$87,916.68; and it was agreed that if the court should find for the plaintiff, "in whole or in part," the above figures should be used by the court "as a basis upon which the amount" of its judgment should be ascertained. It was further agreed that, by reason of the changes and relocations of the company's tracks, roadbed, and structures required by the commission, the company incurred the cost of additional changes in its tracks, etc., for which it makes no claim against the commission, to the following amounts: On Falls Road, \$16,382.39; on the Baltimore and Liberty Turnpike Road (Garrison avenue), \$12,972.31; on First street,

Brooklyn, \$3,839.66; on Maryland avenue, Westport, \$5,112.82; miscellaneous, labor and material, \$589.89—amounting in the aggregate to \$38,897.03; that the changes and relocations referred to above as having cost \$87,916.68, the amount which the commission now seeks to recover, were necessitated by the plans and specifications adopted by the commission for the improvement of the several roads mentioned; and that the work was done in compliance with said specifications and the orders of the commission.

Prior to the passage of the act of 1908 (chapter 141), "and until the time the structures of the railways were removed at the instance of the state roads commission, the Railways Company maintained its tracks and structures upon" the roads hereinafter mentioned, as to which the "agreement as to facts" contains the following statements:

"The defendant's structures in Baltimore county were located under and in accordance with grants executed in 1897 from the president, managers, and company of the Falls Turnpike Road, the said grants setting forth a consideration of \$5,000 and purporting to convey the right to the Falls Road Electric Railway Company to construct, maintain, and operate its railway, and also under and in accordance with the charter of said company. The charter of the Maryland Traction Company, which was incorporated under the General Law, was amended by the act of 1896 (chapter 360), which changed its name to the Falls Road Electric Railway Company, and gave certain additional powers to that company. The rights of this company, as well as the rights of the other railway companies referred to in this agreement, are now vested in the defendant, the United Railways & Electric Company of Baltimore. The Falls Road Turnpike Company was chartered by the act of 1804 (chapter 91), for the purposes set forth in its charter. Some years thereafter the Falls Road Turnpike Company abandoned the turnpike road, moving its gates therefrom, and the state roads commission took over and acquired it as an abandoned road. \* \* \* The mayor and city council of Baltimore acquired the portion of Falls Road within the present city limits by deeds from the president, managers, and company of the Falls Turnpike Road to the mayor and city council of Baltimore. The railway structures upon the Falls Road, within the present city limits, were constructed and maintained under an ordinance of the mayor and city council of Baltimore, Ordinance No. 105 of 1896, p. 53."

"One of the tracks of the Railways Company on the Baltimore and Liberty Turnpike Road in Baltimore city, now known as Garrison avenue, was constructed under and in accordance with grants from the Baltimore and Liberty Turnpike Road in 1894 to the Baltimore Traction Company, said grants purporting to convey to the said company the right to construct, maintain, and operate its railway, and under and in accordance with the charter of said company. The Baltimore & Liberty Turnpike Company was chartered by the act of 1860 (chapter 274). This charter was amended by the act of 1902 (chapter 203). The other track of the Railways Company, upon what is now Garrison avenue as widened, was located and maintained along and to the side of the turnpike under and in accordance with grants acquired from property owners of the property abutting upon the turnpike road. Where the Railways Company's structures have been relocated along the Liberty Road (that is, upon Garrison avenue as widened), the structures have been moved, so that both tracks are now located in the center of the



bed of Garrison avenue as widened; the space which was formerly occupied by the track of the defendant, which was located under grants acquired from the abutting property owners before said tracks were relocated, having been included in the widened Garrison avenue as improved by the state roads commission. By deed dated May 21, 1910, the Baltimore & Liberty Turnpike Company conveyed, assigned, released, and quitclaimed under the state roads commission all its rights, title, interest, and estate in, to, and over that portion of its turnpike road within the present limits of the city of Baltimore. The agreement for the work on Garrison avenue was entered into by the Railways Company and the roads commission on October 17, 1910, and the work, including the relocation of the tracks of the company, was commenced on the 19th day of October, 1910, and was finished on the 14th day of December, 1911. Garrison avenue, as at present widened, was widened by the commissioners for opening streets, acting as the annex improvement commission, under the act of 1904 (chapter 274), and Ordinance No. 216, of March 6, 1905. With respect to the franchise and structure of the Railways Company upon said Garrison avenue, the agreement or arrangement embraced in the following correspondence and resolution of the board of estimates was made by the company and the city of Baltimore, to wit:

"December 10, 1910.

"Edgar Allan Poe, Esq., City Solicitor—Dear Sir: In order to remove any possible doubt as to our understanding relative to the Garrison avenue situation, I am giving below a memorandum outline of plan, and will be obliged if you will look it over and let me know whether or not it conforms to your ideas. The city is endeavoring to secure quitclaim deeds or deeds to the reversion from the owners of the 10-foot strip to the side of the turnpike over which this company has an easement. When the city has obtained as many deeds as practicable, it will acquire the remaining portion of this strip through condemnation proceedings. The city will institute condemnation proceedings against the rights and easements of this company upon the Liberty Road or Garrison avenue as widened or intended to be widened, excepting from the effect of such condemnation all of this company's structures and removable property of every kind, and, before the final confirmation of the condemnation proceedings, the city will have introduced and passed an ordinance bringing the tracks under the graduated park tax, such ordinance to be on the general outline of the Seventh street or Bloomingdale Road ordinance, as far as the latter is applicable. Of course, the provision as to the subgrading and ballast will not apply, as the work is to be done by the state roads commission. The city to take care of any claim or claims of Mr. Marburg or others growing out of, or in connection with, the yearly rental or charge of \$250 for a single track on the Liberty Road, \* \* \* by making Mr. Marburg or the proper person or persons parties to the condemnation proceedings. This company is not to oppose a nominal award in the condemnation proceedings after the passage of the above mentioned ordinance, and is to receive no compensation other than this nominal award for its rights along the Liberty Road or the 10-foot strip adjacent thereto. Very truly yours, J. Pembroke Thom, Assistant General Counsel."

"December 13, 1910.

"J. Pembroke Thom, Esq., Assistant General Counsel, United Railways & Electric Co., Baltimore—Dear Sir: I have your favor of the 10th, relating to the Garrison avenue situation, in which you outline the plan proposed to be followed. The plan as outlined in your letter meets with my approval, and is in accordance with the understanding reached between us. I will take the matter up before the board of es-

timates and let you know whether the plan is also acceptable to the board. Truly yours, Edgar Allan Poe, City Solicitor."

"Baltimore, December 14, 1910.

"Edgar Allan Poe, Esq., City Solicitor—Dear Sir: Your letter of the 13th instant, confirming the understanding as outlined in my letter to you of the 10th instant, in regard to the Garrison avenue situation, to hand. I will be glad to receive advice from you that the plan is acceptable to the board of estimates, after the matter has been laid before that body. Very truly yours, J. Pembroke Thom, Assistant General Counsel."

"Copy of minutes of board of estimates, December 20, 1910:

"City Solicitor Poe presented letter of Mr. J. Pembroke Thom, assistant general counsel of the United Railways & Electric Company, relative to the institution of condemnation proceedings upon Garrison avenue. Upon motion of Mr. Hooper, seconded by Mr. Mahool, it was moved that the plan for the condemnation proceedings on Liberty Road or Garrison avenue be approved by the city, the city to take care of any claim or claims of Mr. Marburg, or others, growing out of or in connection with the yearly rental or charges of \$250 for a single track on the Liberty Road, by making Mr. Marburg or the proper person or persons parties to the condemnation proceedings."

"February 8, 1911.

"J. Pembroke Thom, Esq., Assistant General Counsel, United Railways & Electric Co., Baltimore—Dear Sir: I write to state that your letter in which you outlined the understanding that had been reached between you and myself, in reference to the plan of procedure in connection with the laying of the railway tracks, etc., on Garrison avenue, was submitted by me some time ago to the board of estimates, and the board gave the plan its approval. Truly yours, Edgar Allan Poe, City Solicitor."

"Baltimore, February 4, 1911.

"Edgar Allan Poe, Esq., City Solicitor—Dear Sir: I beg to acknowledge receipt of your letter of the 3d instant, in which you state that the understanding outlined in my letter to you of December 10, 1910, reached between you and myself, in reference to the plan or procedure in connection with the laying of railway tracks, etc., on Garrison avenue, was submitted to the board of estimates and that the board gave the plan its approval. Very truly yours, J. Pembroke Thom, Assistant General Counsel."

"The proceedings were begun by a notice inserted in the papers by said annex commission on November 10, 1911, and have been completed; that is, all appeals have been disposed of at the date of this agreement. In the proceedings for condemning and opening Garrison avenue, a nominal award was made to the United Railways & Electric Company for their pre-existing rights and franchises; no award being made to William A. Marburg, who held an outstanding obligation for the payment of \$250 a year, redeemable at \$5,000, connected with said rights and franchises as to one track. Appeals were taken by both Marburg and the United Railways Company. In the Marburg appeal there has been an award of \$3,250, to be paid him by the city, and the nominal award to the Railways Company has been confirmed, in pursuance of an agreement entered into in the Marburg case between the city solicitor, the counsel for the Railways Company, and counsel for Marburg, by virtue of which the United Railways & Electric Company is to be given a new franchise under the act of 1906 (chapter 563), the three years' exemption from the park tax to date from January 1, 1912, and the question whether or not the United Railways shall be charged the \$3,250 to be adjusted between the Railways Company and the board of estimates,



or, in default, to be submitted to arbitration. It is expected that the ordinance will be introduced and passed in a short while."

"The Railways Company's tracks and structures on First street, Brooklyn, Anne Arundel county, were located and maintained in accordance with the charter provisions of the Baltimore & Curtis Bay Railway Company and under and in accordance with a deed from the South Baltimore Harbor & Improvement Company of Anne Arundel county to the Baltimore & Curtis Bay Railway Company, which deed purported to grant the right to the Railways Company to construct and maintain a railway over and upon First street. The Baltimore, South Baltimore & Curtis Bay Railway Company was chartered by chapter 505 of the act of 1890, and its name was changed to the Baltimore & Curtis Bay Railway Company by the amendatory Act of 1892 (chapter 574)."

"The Railways Company's structures located on Maryland avenue, Westport, were laid in accordance with the provisions of chapter 203 of the Acts of 1894; under and in accordance with a deed from the South Baltimore Company to the Shore Line Electric Railway Company and the Baltimore Traction Company, executed May, 1896, and under and in accordance with orders of the county commissioners of Baltimore county, dated September 25, 1895, and January 21, 1896."

In addition to the facts stated in the above agreement of counsel, the plaintiff introduced evidence to show what changes the Railways Company was required to make in its railway and appliances on the several roads referred to in order to comply with the plans, specifications, and orders of the commission; that these changes consisted in raising and lowering the company's road-bed and tracks, moving its tracks from the side to the center or from the center to the side of said roads, repaving the space between its tracks and two feet on either side of its tracks, and in some instances repaving the space referred to with vitrified brick, and in the substitution of new and different rails, poles, and appliances for the ones then used by the company. The commission also offered evidence tending to show that the plans adopted by it, in accordance with which the work referred to was done by the company, were necessary for the proper improvement and construction of the roads; that at the time the company's railway was constructed on First street, Brooklyn, said street was a public road of Anne Arundel county, and that Maryland avenue, Westport, at the time the company's railway was located thereon, was one of the public roads of Baltimore county.

The Railways Company offered evidence tending to show that some of the changes the company was required to make in the location, construction, etc., of its railway, in order to comply with the requirements of the commission, were not necessary for the proper construction or improvement of the roads in question, were very expensive, and were not justified by the conditions and circumstances under which they were made; that no condemnation proceedings have been instituted by the commission for the acquisition of any of the roads referred to in this case, or

for the acquisition of any of the defendant's rights in or properties on said roads; that, at the time the bill, which became the act of 1908 (chapter 141) was introduced in the Legislature, the defendant and other companies operated railway lines upon the roads and turnpikes of the state; that the bill, as originally introduced, did not provide for the improvement of public highways within the limits of the city of Baltimore; and that section 32b was amended in the Senate so as to authorize the improvement of such portions of the main roads of the state as lie within the limits of Baltimore city, and was further amended by adding that part of section 32b which authorizes the mayor and city council of Baltimore to condemn, etc., the right of way of the Railways Company upon any turnpike improved by the commission. The company also offered in evidence the agreement between the South Baltimore Company, the Shore Line Electric Railway Company, and the Baltimore Traction Company, dated the 18th of May, 1896, and the orders of the county commissioners of Baltimore county, under which its railway was originally constructed upon Maryland avenue, Westport, and the deed from the South Baltimore Harbor Company to the Baltimore & Curtis Bay Railway Company, dated March 13, 1893, for its right of way on First street, Brooklyn.

At the conclusion of the testimony the court below granted the plaintiff's seventh, eighth, ninth, and eleventh prayers, and rejected the prayers of the defendant, and from the judgment in favor of the plaintiff for \$87,916.68, the total amount paid by the commission to the defendant for the work, etc., done by the company upon the several roads in question, the defendant has appealed.

The granted prayers of the plaintiff are as follows:

Seventh. "The plaintiff prays the court to rule, as a matter of law, that by a true construction of the act of 1908 (chapter 141), and amendments thereof, the duty rests upon the United Railways & Electric Company of Baltimore, in the event of the improvement by the state roads commission, under said act or amendments thereof, of any public road upon which there had been constructed, prior to such improvement, tracks and other railway structures of said company, at its own expense, to shift, adjust and take care of its said tracks and structures so as to conform to the said road as improved by said commission. And if the court find that Maryland avenue, Westport, and First street, Brooklyn, were public roads under the eighth prayer of the plaintiff, then under plaintiff's ninth prayer, and by a true construction of the agreement of facts offered in evidence at the trial of this case, the verdict of the court sitting as a jury should be for the plaintiff for the amount mentioned in said agreement, to wit, \$87,916.68."

Eighth. "The plaintiff prays the court to rule, as a matter of law, that if the court find that Maryland avenue, Westport, and First street, Brooklyn, had been uninterruptedly used by the public as public highways for more than 20 years prior to the construction thereon of the railway tracks of the defendant, and prior to said time has been repaired by the county com-

missioners of Baltimore county and Anne Arundel county, respectively, and during all of said time had been open, free, and unobstructed for the use of the public, and so used by the public, then the said roads were public roads at the time the railway tracks were laid thereon."

Ninth. "The plaintiff prays the court to rule, as a matter of law, under the acts of assembly relating to the Falls Road and the Liberty Turnpike, referred to in the evidence, that the said turnpikes were public roads at the time of the laying of the railway tracks thereon, in the meaning of the principle of law; that, where the right to use any public road is granted to any railway company, such right is subject to the superior right of its use as a public road and subject to the duty of the railway company, upon any improvement of said roads, to shift and adjust its tracks and structures at its own expense, so as to accommodate them to the improved condition of said roads."

Eleventh. "The plaintiff prays the court to rule, as a matter of law, that by the agreement between the city and the United Railways & Electric Company, relating to Garrison avenue, as shown by the correspondence included in the agreed statement of facts, offered in evidence, the United Railways & Electric Company was obliged, at its own expense, to remove and relocate its tracks and readjust them to the new Garrison avenue, as then contemplated and subsequently constructed."

The contentions of the appellee are: (1) That all of the roads and turnpikes in question were public roads and highways, and that the state, in the exercise of its police power to improve its public highways for the convenience and welfare of the public, may require a railway company using such highways, at its own expense, to relocate its tracks and make such changes in its roadbed and structures as are necessary to enable the state to make such improvements and to conform with the improvements when made; and (2) that the act of 1908 (chapter 141) conferred upon the state roads commission the right to exercise that power. In support of the first proposition, counsel for the commission have presented a very elaborate and instructive brief, citing and quoting many cases, federal and state, to the effect that, where a corporation obtains from a municipality the privilege of using a street for its corporate purposes, its use of the street is subject to the power of the municipal authorities to make such improvements and changes in the street as they may deem necessary for the public welfare, without liability to the corporation for any interruption of its use or expense to which it may be subjected in consequence of such changes or improvements, and among the cases relied on are *Kirby v. Citizens' Railway Co.*, 48 Md. 168, 30 Am. Rep. 455; *N. Balto. Pass. R. R. Co. v. Balto.*, 75 Md. 247, 23 Atl. 470; and *M. & C. C. of Balto. v. Turnpike Co.*, 80 Md. 535, 31 Atl. 420.

On the other hand, the appellant contends: (1) That the changes it was required to make in its railway are not within the scope of the police power of the state; (2) that, where a railway company has acquired an easement or right of way prior to the opening of a street, it cannot be deprived of that right by

the municipality or the state in the exercise of the police power; and (3) that the act of 1908 did not confer upon the commission the authority to interfere with the use by the Railways Company of the roads and turnpikes in question. In support of the second contention, counsel for the appellant, in their carefully prepared brief, cite and rely upon the cases of *N. C. R. R. Co. v. Balto.*, 46 Md. 425; *Baltimore City v. Cowen*, 88 Md. 447, 41 Atl. 900; *Balto. & Ohio R. Co. v. Baltimore City*, 98 Md. 535, 56 Atl. 790; and *Anne Arundel County v. U. Rys. Co.*, 109 Md. 377, 72 Atl. 542.

[1, 2] In the view we take of the case, it will not be necessary to consider the propositions presented by the appellee's first and the appellant's first and second contentions, for, after a very careful examination of the provisions of the act of 1908 (chapter 141), we think it is clear the Legislature never intended to confer upon the commission the power upon which it now relies.

In section 32b the commission was empowered to select, construct, improve, and maintain a general system of improved state roads and highways through all the counties of the state, and was directed to include in its work the improvement of such portions of the main roads selected by it as a part of the system as lie inside the limits of the city of Baltimore, "up to the old city limits." To that end the commission was given power to "condemn, lay out, open, establish, construct, extend, widen, straighten, grade and improve \* \* \* any \* \* \* road of the system, in any county of the state," and, in order to enable it to exercise the powers thus conferred, it was given the further power to "acquire for the state of Maryland, by agreement, gift, grant, purchase or condemnation proceedings, \* \* \* any private road or roads whatsoever, or private property or rights of drainage for public use, whether belonging to private individuals or to turnpike companies or other corporations, and including any avenues, roads, lanes or thoroughfares, rights or interest, franchises, privileges or easements, that may be, in its judgment, desirable or necessary to complete said system of roads or to carry out the purpose of this act." In this careful enumeration of the many powers granted to the commission for the purpose of enabling it to accomplish the ends desired, there is not a suggestion of a power to take, acquire, or disturb any interest, easement, or right, of any individual or corporation, however obtained, except by "agreement, gift, grant, purchase or condemnation"; and the fact that the act expressly states the manner in which all property, rights, and interests necessary for the purposes of the act may be acquired negatives the idea that the Legislature intended to confer upon the commission the power to disturb these rights under the authority of the police power of the state.

Again in section 32c it is provided that,

when the commission shall determine that public necessity or convenience or the purposes of the act require that any turnpike, or part thereof, whether maintained as such or abandoned, or any public road should be taken charge of by the commission for the state, it "shall acquire and take over" such "county roads, turnpikes, or sections thereof or interests therein," and that section further provides:

"And said commission shall have full power so to take over and take possession of any county road or abandoned turnpike, and to accept by gift or surrender, and to acquire by purchase or condemnation, any and all existing turnpikes or any sections thereof, or any rights or interests therein, subject to any outstanding occupation, use or franchise of any electric railway company or other public service corporation."

While this section authorizes the commission to take over any county roads or abandoned turnpikes, it requires it to acquire by purchase, etc., all existing turnpikes and any rights or interest therein, and distinctly recognizes the right of an electric railway to continue its occupation and use of such roads and turnpikes.

The legislative intent that railway companies occupying the roads and turnpikes acquired and taken over by the commission should not be disturbed in the maintenance of their roadbeds and use of their rights and easements is even more clearly expressed in section 32e of the act. That section, after declaring that the commission shall have complete control of the state highways, "except as herein otherwise provided," that no state highway shall be dug up for any purpose, or any obstruction placed thereon without the "written permit" of the commission, and that, when a permit is given, the work shall be done under the supervision of the commission at the expense of the person to whom the permit is given, then says:

"Provided, however, that no electric railway company in operation upon any public or private road or existing or abandoned turnpike when acquired hereunder shall be disturbed in its operation or in the maintenance of its roadbed and overhead construction and all necessary repairs, together with the maintenance of the space between its tracks and two feet on each side thereof shall be performed by such railroad company under the supervision and to the satisfaction of said commission."

It is urged by the appellee that the language of the section we have just quoted should, by reason of its context, be construed as only applying to the highways after the improvements thereof by the commission have been completed; but, apart from the fact that the section referred to, as we have construed it, is in entire harmony with the other provisions of the act, it is clear that the language used is not open to the construction claimed by the appellee. The provision is:

"No electric railway company in operation upon any public or private road or existing or abandoned turnpike when acquired hereunder shall be disturbed," etc.

That cannot be held to refer to an electric railway in operation upon the highway after it is completed, when the section expressly says an electric railway in operation upon a "private road," etc., "when acquired." If the contention of the appellee that under the act the Railways Company may be required, at its own expense, to change the location of its roadbed whenever in the judgment of the commission public convenience, etc., requires it is sound, then the provision referred to would be meaningless, for it could not change the location of its roadbed without being "disturbed in its operation or in the maintenance of its roadbed." As suggested by counsel for the appellant, the contention of the appellee is further answered by the provision of the supplemental act of 1910 (chapter 116), which declares that nothing in that act or any act adding to or supplementing the act of 1908 "shall be construed as modifying or changing the provisions of said last-named act, in so far as the same define and regulate the rights of any electric railways company in operation upon any public or private road or existing [or] abandoned turnpike." In the act of 1910 there is no such context as that relied on by the appellee, and the railways there referred to, as in the section we are now considering, are the railways in operation "upon any public or private road," etc. The provision of section 32e, requiring the railway companies to keep in repair the space between their tracks and two feet on each side thereof, was doubtless borrowed from an old act (section 383 of article 23 of the Code of 1912), and inserted to save, to that extent, the expense imposed upon the state by other provisions of the act of 1908 of maintaining the improved highways. That the act of 1908 does not give to the commission the powers claimed by it is, we think, also shown by the further provision of the act of 1910 (chapter 116), which authorizes the commission, where a state road crosses a railroad, to contract with the railroad company for the construction of a bridge or archway for an "overgrade" or "undergrade" crossing, and provides that the commission shall pay one half of the cost of such bridge or archway, and that the other half shall be paid by the railroad company. If it was the purpose of the Legislature to impose upon railway companies the expense of changing the grade of their roadbeds and location of their tracks on the public roads and turnpikes improved by the commission, there is no good reason why railroads should have been relieved of one-half of the cost of constructing an "undergrade" or "overgrade" crossing.

Even if there was any doubt about the meaning of the act of 1908, certainly there could be no presumption in favor of a grant of such powers as the appellee claims in this case. In the case of *State v. Mott*, 61 Md. 297, 48 Am. Rep. 105, Chief Judge Alvey said:

"Whatever power can be properly exercised by the municipal authorities of the city of Baltimore over the rights and property of the citizen, under the denomination of police regulations, must be derived from the Legislature of the state. It must be by express grant, or by fair and reasonable intendment, for otherwise the trades and business of the people would be at the mercy, and be made dependent upon the caprice, of those who might exercise municipal power, instead of being governed and regulated by the general law of the land. Within the power granted, the degree of necessity or propriety of its exercise rests exclusively with the proper corporate authorities; but in all cases the power exercised, or attempted to be exercised, must depend upon the nature and extent of the power granted, and whenever the question of existence or limit of the power is raised, it becomes the plain duty of the courts to see that the corporate authorities do not transcend the authority delegated to them." *Heiskell v. Baltimore*, 65 Md. 148-149, 4 Atl. 116, 57 Am. Rep. 308; *Hagerstown v. Balto. & O. R. Co.*, 107 Md. 188, 68 Atl. 490, 126 Am. St. Rep. 382.

As the commission was not authorized by the act of 1908 to require the Railways Company, at its own expense, to make the changes referred to in the grade and location of its railway, it can make no difference in this case whether its roadbeds were constructed on its private rights of way or upon the public roads and highways of the state.

The agreement of counsel shows that the mayor and city council of Baltimore acquired that part of the Falls Road which is located within the city limits by deeds from the Falls Road Turnpike Company, and that the railway of the appellant on that part of the turnpike was constructed under the provisions of ordinance 105 of 1896. The appellee, relying upon the case of *M. & C. C. of Balto. v. Turnpike Co.*, supra, insists that that part of the Falls Road Turnpike, after it was ceded to the city, became a public street of the city, and that, under the provisions of said ordinance, the Railways Company was bound to make its tracks conform to any change in the street at its own expense. The act of 1908 provides that the roads and highways to be improved by the commission shall be first taken over and acquired by it for the state, and after requiring the commission to improve such parts of turnpikes as are within the city limits, between the present and old city limits, declares that the same, when the improvements have been completed, shall become "city streets" and subject to the provisions of the city charter. It would seem, therefore, that under the act of 1908, if we assume that a city street may be improved by the commission, turnpikes within the present city limits, while in the course of construction or improvement by the commission, must be regarded as belonging to and under the control of the state, and that all contracts made by the commission for such construction or improvement must be construed with reference to the powers, duties, and liability of the commission under the act creating it. As the contract under which the Railways

Company made the changes referred to was made with the commission, and the work was done in compliance with its requirements, the liability of the parties to that contract for the costs of that work must be determined by the provisions of the act of 1908, and the commission cannot escape liability for such expense on the ground that the city can require the Railways Company to make its tracks conform to any change the city may make in the grade of said street.

The agreement of counsel as to the Baltimore and Liberty Turnpike (Garrison avenue) shows that the commission acquired all of the rights of the turnpike company by a deed dated May 21, 1910; that the contract between the commission and the Railways Company, under which the changes in the railway was made and the work was done, was executed on the 17th of October, 1910; and that the work was commenced on the 19th of October, 1910, and completed in December, 1911. At the time the expense which the appellee now seeks to recover was incurred, the turnpike belonged to the state, and was under the control of the commission as the agency created by the state for the improvement of the highway, and the change in the company's railway was made and the work was done in accordance with the contract with the commission. The contract contained in the correspondence between the representatives of the city and Railways Company makes no reference to the contract between the Railways Company and the commission, or to the work to be done or the liability of the parties under it, but relates only to the acquisition of the right of way and easement of the Railways Company in Garrison avenue, and to bringing the Railways Company under the provisions of the acts and ordinances relating to the park tax. The agreement on the part of the Railways Company not to oppose a nominal award for its easement in the proposed condemnation proceedings cannot be construed as a waiver of any rights it had under its contract with the commission, and to give it such a construction would be to import into the agreement terms it does not contain, and which would be entirely foreign to the subject-matter of the contract. That the parties to this correspondence were not dealing with the liability of the company for the work to be done by it under its contract with the commission is further indicated by the following statement in the letter of Mr. Thom of December 10, 1910, where, referring to the "Bloomingdale Road ordinance," he says:

"Of course, the provision as to the subgrading and ballast will not apply as the work is to be done by the state roads commission."

There is nothing in section 32b to justify a different construction of the agreement contained in the correspondence, or to support the contention of the appellee. That section, as we have said, provides that, when the improvement of a turnpike within the city lim-

its has been completed by the commission, the turnpike shall become a city street, and the city is authorized by the concluding provision of that section to condemn any right of way or easement of the Railways Company upon or in such turnpike; the costs thereof to be paid by the city. That section does not authorize the commission to require a railway company to move its tracks, at its own cost, and the changes made by the appellant in its railway tracks and structures under its contract with the commission, and in compliance with its plans, were practically completed before the proceedings referred to in the correspondence were begun.

The evident intention of the Legislature, as expressed in the provisions of the act of 1908, was to provide for the entire cost of the construction and improvement of such roads and turnpikes as might be selected by the commission as part of the system of main roads and highways of the state, and there is nothing in the act to suggest that any part of that expense was to be borne by electric railway companies, whose rights the act expressly declares shall not be disturbed.

It follows, from what we have said, that there was error in the ruling of the court below in granting the plaintiff's seventh and eleventh prayers; that the defendant's first prayer, which asserted that "under the pleadings there is no evidence legally sufficient to entitle the plaintiff to recover, and the verdict should be for the defendant," should have been granted; and that the judgment appealed from must be reversed without granting a new trial.

Judgment reversed, with costs to the appellant, without awarding a new trial.

(123 Md. 532)

**WILMER v. PLACIDE. (No. 20.)**

(Court of Appeals of Maryland. June 25, 1914.)

**1. APPEAL AND ERROR (§ 1099\*)—FORMER APPEAL—LAW OF THE CASE.**

On a bill for an accounting, an exception to the decision excluding interest on a mortgage would not be discussed on appeal, where the appellate court has on a prior appeal sustained the lower court in excluding interest.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.\*]

**2. APPEAL AND ERROR (§ 1099\*)—FORMER APPEAL—LAW OF THE CASE.**

On a bill for an accounting, a decision on the last of two former appeals refusing to allow defendant commissions upon the receipt and disbursement of certain moneys of the plaintiff was the law of the case on a subsequent appeal raising that issue.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4370-4379; Dec. Dig. § 1099.\*]

Appeal from Circuit Court of Baltimore City; Walter I. Dawkins, Judge.

"To be officially reported."

Bill by Susan E. Placide against Edwin M.

Wilmer. From an order finally ratifying an auditor's report and account, defendant appeals. Affirmed.

See, also, 118 Md. 305, 84 Atl. 491; 119 Md. 49, 86 Atl. 43.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

David Ash, of Baltimore, for appellant. John L. Sanford and Charles F. Stein, both of Baltimore, for appellee.

**PATTISON, J.** This is an appeal from an order finally ratifying an auditor's report and account. It is the third time that this case has been before this court. The original bill was filed by the appellee against the appellant on the 10th day of November, 1910. The appellant had instituted proceedings for the foreclosure of a mortgage from the appellee, Susan E. Placide, to Alice B. Wilmer, trustee, dated November 3, 1890, upon property located at 1300 Madison avenue, Baltimore City, where both the plaintiff and defendant at such time resided, and which was conveyed unto the plaintiff by the defendant and George W. Lindsay, trustees, by deed dated the 16th day of June, 1887. The mortgagee, Alice B. Wilmer, wife of the appellant and sister of the appellee, assigned said mortgage to the Mercantile Trust & Deposit Company, by which it was thereafter assigned unto the appellant. The prayer of the bill not only asked that the defendant be restrained from foreclosing said mortgage and that it be annulled and set aside, but it also asked for an accounting of the money alleged in the bill to be in the hands of the defendant belonging to the plaintiff and for which he had not accounted to her; and further asked that the defendant be required to vacate the mortgaged premises. After the filing of the bill, the defendant on the 8th day of December, 1910, filed for record in the superior court of Baltimore City a deed from the plaintiff, Susan E. Placide, to her sister, Alice B. Wilmer, dated July 29, 1887, by which it was claimed by the defendant that the mortgaged premises aforesaid were conveyed by the plaintiff to the said Alice B. Wilmer, and thereafter he filed his answer to the plaintiff's bill denying that she was the owner of said mortgaged property. The plaintiff being thus informed for the first time, as she alleges, of the existence of the deed aforesaid, filed her second bill asking that the said alleged deed be declared void. The defendant filed his answer thereto, and the cases were thereafter consolidated by order of the court. After hearing a great volume of testimony, the court below by its decree annulled and set aside said deed and ordered an accounting, as prayed in the original bill, and the papers were referred to the auditor with directions to him to state an account between the said Susan E. Placide and the said Edwin M.

Wilmer "in which there shall be the following and no other charges and allowances:

"The said Susan E. Placide shall be charged with said mortgage debt, to wit, the sum of \$3,959.89, cost of recording \$4.25, making a total of \$3,964.14, and she shall not be charged with any interest thereon. She shall be credited with the two sums (\$834.47 and \$854.56) arising from the estate of Jennings Placide, deceased, amounting to \$1,689.03, with interest on each sum from the date of its receipt by Edwin M. Wilmer. The auditor shall credit Miss Placide with the sum shown by said books to have been charged against her as board, and shall deduct therefrom any overpayment made by Edwin M. Wilmer if said board had been a proper charge, and in making such credits and debits the auditor shall be confined to the entries in said books. She shall be credited in such account with interest on each sum so improperly retained by Edwin M. Wilmer as board. She shall be credited with whatever sum the said Wilmer has received as one-half of the rent of No. 1001 E. Pratt street, less all proper allowance to Wilmer for taxes, water rents, and repairs for which proper vouchers shall be produced and as one-half of the rent of \$100 issuing out of No. 1901 McCulloh street and not accounted for by the said Wilmer to the date of the audit. She shall be credited with interest on each of the said last above-named sums. She shall be credited with any taxes, water rents on No. 1300 Madison avenue not paid by the said Wilmer since August 12, 1897."

It was further adjudged, ordered, and decreed that the defendant, Wilmer, was to have 20 days to produce his vouchers and accounts before the auditor, and the plaintiff, Susan E. Placide, was to have 10 days to produce her vouchers and examine said account, and that each party might take such testimony before the auditor as might be necessary "with reference to the above-named items only." The defendant appealed from that portion of the decree setting aside the aforesaid deed from the plaintiff to Alice B. Wilmer and declaring the property therein mentioned—the mortgaged premises—to be the property of Susan E. Placide, and also from that part of the decree ordering an accounting and referring the papers to the auditor with directions as above stated; while the plaintiff appealed from that part of the decree declaring the existence of the aforesaid mortgage and directing the auditor to charge the principal thereof, without interest aforesaid, to her. These appeals (*Wilmer v. Placide*, 118 Md. 305, 84 Atl. 491) resulted in an affirmance of the decree of the court below, and Edwin M. Wilmer was directed to pay the costs above and below in both cases, except the clerk's costs and appearance fee in plaintiff's appeal, which were to be paid by her.

Pursuant to the said order or decree of the lower court passed on the 27th of October, 1911, and affirmed, as we have said, by this court, the papers were referred to the auditor, and he, after taking testimony as authorized and directed by said order, stated an account between the plaintiff and defendant, to the ratification and confirmation of which exceptions were filed by the defendant. These exceptions were heard and overruled

and the auditor's report and account were finally ratified and confirmed by an order of the court below passed on the 31st of January, 1912. From that order an appeal was taken to this court. *Wilmer v. Placide*, 119 Md. 49, 86 Atl. 43. The aforesaid exceptions numbered 25. Of these we will only mention and refer to those that are involved in the decision of this appeal. They are as follows:

(1) To the exclusion of interest on the mortgage debt after the assignment of the same to the defendant. (2) To the exclusion of amounts said to have been paid by the defendant as interest on the mortgage debt before the assignment to him. (3) To the exclusion of commissions to the defendant on moneys collected and disbursed by him for and on behalf of the plaintiff. (4) To the failure of the auditor to allow to the defendant certain credits to which he claims to be entitled in his account with the plaintiff for money of hers paid to him from the estate of Jennings Placide. (5) To the charges against the defendant for taxes and water rents on property known as 1001 East Pratt street, and to the allowance of costs to the plaintiff that were paid by the defendant to the auditor, amounting to \$144.80. We sustained the ruling of the court below upon the first, second, and third exceptions as we have here numbered them, but reversed the court in its rulings on the fourth and fifth. The reversal upon the fourth exception was because the account as state allowed to the defendant, out of the money paid to him from the estate of Jennings Placide, a credit of only \$400 with interest, when, as we thought, he should have been allowed a credit of \$678.05, with interest; and the reversal upon the fifth exception was because, in our opinion, the account wrongfully charged the defendant, first, with costs amounting to \$144.80 that had been paid by him to the auditor, and, second, with the sum of \$58.78 for taxes and water rent for the Pratt street property. The order appealed from was therefore affirmed in part and reversed in part, and the case remanded that an order might be passed in conformity with that opinion. Upon the return of the case to the court below, an order was accordingly passed and the papers again referred to the auditor and the account restated by him; to the confirmation and ratification of which the appellant again excepted, but this time the exceptions numbered only 17. They were, however, overruled, and the report and account finally ratified and confirmed, and the appellant again appealed to this court from the order ratifying and confirming said report and account.

The corrections directed by us to be made in the restatement of the account were few and simple and were as follows:

1. The amount to be credited the defendant upon the sums received by him at different times from the estate of Jennings Placide was to be increased from \$400, with interest,

to \$678.05, with interest. In the former account he was credited upon this fund with but \$400, with interest from November 6, 1899, the date when it was paid by him. By the account when restated he was to be credited upon said fund with an additional sum of \$278.05, with interest thereon. This the auditor did, allowing him interest thereon from the date of the payment of the \$400, November 6, 1899, to the day of the filing of the audit. This allowance of interest, as disclosed by what is known as the "Estate Account" made out by the defendant and filed by him as his Exhibit No. 10, showing the dates upon which the various payments upon this fund were made, the last one being made so late as December 11, 1902, appears to be exceedingly fair and liberal to the defendant, and especially so as the interest thereon is computed to the day when the audit was filed, when the interest on the debits of said account were computed to a much earlier date.

2. The costs amounting to \$144.80, that we said were improperly charged against the defendant in the first account, were not to be included among the charges against the defendant in the account when restated, and we find upon examination of the account, as restated, that these costs have been eliminated therefrom and not charged against the defendant.

3. The amount of \$58.78 charged against defendant for taxes and water rents on the Pratt street property, which we said was improperly charged against the defendant, was to be omitted in the account when restated, and we find that it was omitted therefrom by the auditor in the restatement of his account.

The item of \$80 which appears in the account, as restated, to have been taken from the money of the plaintiff in the hands of the defendant to be disbursed by him, is erroneously stated. It should have been \$110, so as to have given to the defendant, out of the said moneys of the plaintiff, an amount sufficient to pay all costs with which he is charged in the account; but as the auditor, whose mistake it was, has paid \$30 to the clerk of the court below in payment of so much of said costs, and has thereby relieved the defendant of paying more costs than he has money in hand with which to pay them, we do not find such error a reversible one. This amount so paid to the clerk may be saved to the auditor by the plaintiff paying to him a like sum, without loss to her, inasmuch as the amount coming to her by the restated account was not further reduced by the allowance of said \$30 for the payment of costs as it should have been.

[1] The defendant again excepts to the exclusion of the interest upon the mortgage, although this court has sustained the lower court in excluding such interest in each of the former appeals, and therefore we shall not further discuss it.

[2] Again, the defendant excepts to the account because of its failure to allow to him

commissions upon the receipt and disbursement of certain moneys of the plaintiff more particularly referred to in his exception. The original order of the lower court, passed on the 27th day of October, 1911, stated with great particularity that with which the plaintiff should be charged and that with which she should be credited in stating the account. Nowhere in the order is the auditor directed to allow to the defendant the commissions above referred to. In it the parties are extended the privilege of taking testimony before the auditor as to the items therein mentioned, but are specially restricted to such items. The record in the first case, which is a voluminous one, contains many written statements made by the defendant in which many and various charges were made against the fund in his hands belonging to the plaintiff, yet in none of them and nowhere in the testimony is there disclosed any claim for commissions upon the receipts and disbursements of money made by him for and on behalf of the plaintiff. The only time that commissions are even mentioned is in a letter from the defendant to the plaintiff, dated November 4, 1910, in which he says:

"Herewith I hand you your passbooks of account from one to nine inclusive, covering your property collections and personal accounts with myself to November 2, 1910. \* \* \* You will notice that I have neither charged you the usual agent commission for collecting and services, nor for payments nor disbursements. These commissions, etc., would have amounted to \$1,200 or \$1,500, if charged."

This letter, it seems, was written in response to a demand from her upon him to account for the moneys that he had received for her and for which he had not accounted. It was not offered in connection with any claim then made for commissions. No reference was made to such claim until after the passage of the decree by the court below, in which commissions were not allowed. The first reference thereto was found in the appellant's brief, wherein he assigned the failure to allow commissions to him as one of the many reasons why the decree or order of the court below should have been reversed. This court affirmed the order of the court below, in which commissions were not allowed, and remanded the case in order that the directions contained in the order could be carried out by the auditor in stating his account. A motion was thereafter filed in this court asking for a reargument of the case, and one of the grounds of the motion was the failure of the court to allow such commissions. That motion, again presenting the question of commissions, was duly considered by this court and was overruled by it. When the case came here the second time, after the account had been stated by the auditor, in which such commissions were not allowed, the record disclosed an exception to the auditor's account because of his failure to allow such commissions. This exception was passed upon and overruled by us, and our reasons



for so doing are stated in the opinion reported in 119 Md. 49, 86 Atl. 43.

Whatever may be said as to the binding effect upon us of what we then said in the first appeal upon the question of commissions, we cannot escape the binding and controlling effect of our decision in the second appeal, where the question of commissions was specifically raised in the lower court by an exception to the report and account of the auditor ratified and confirmed by such court, and where we, upon that appeal, sustained the ruling of the lower court in overruling such exception.

Under all the facts and circumstances of this case—the relation of the parties to each other, the fact that, at the time of the collection and disbursement of the moneys by the defendant for the plaintiff, she was acting as the head of his household and as mother to his children, without charge therefor, so far as the record discloses—we have no reason to change our opinion in relation to the question of commissions, not only when considered in a purely legal aspect, but also when considered in the light of what is fair and equitable between the parties. And should we in cases of this character, where specific directions are given to the auditor in the statement of his account, permit new and distinct items of charges or credits to be introduced each time that the case is remanded to the auditor, to be considered and acted upon by him in stating the account, with the right of the parties thereto to appeal from the decision of the court in allowing or disallowing such items, such practice would make the proceedings interminable. And were we to follow the course suggested by the learned counsel for the appellant of reconsidering the decisions which we had reached in former appeals, it would result more in the exercise of this court's appellate powers over its own proceedings and judgments than over those of the inferior courts.

As we find no error committed by the court below in its final ratification and confirmation of the auditor's report and account, we will affirm the order appealed from.

Order affirmed, with costs to the appellee.

(123 Md. 355)

REYNOLDS v. EVANS. (No. 1.)

(Court of Appeals of Maryland. June 24, 1914.)

**1. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

In an action for damages for false and fraudulent representations inducing plaintiff to purchase stock, the exclusion of evidence as to whether, if plaintiff had known that defendant was selling his own stock, he would have bought it without inquiring further, was harmless, where it appeared that plaintiff was not induced to make the purchase by any statement by defendant as to his ownership.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193, 4207; Dec. Dig. § 1056.\*]

**2. FRAUD (§ 25\*)—LIABILITY—INJURY FROM FRAUD.**

To constitute ground for an action for damages for deceit, fraud must work an actual injury to the party complaining.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 24; Dec. Dig. § 25.\*]

**3. FRAUD (§ 20\*)—LIABILITY—RELIANCE ON REPRESENTATIONS.**

In order for fraudulent representations to constitute ground for an action for deceit, it must appear that plaintiff not only in fact relied upon them, but had a right to rely upon it in the full belief of their truth.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 17, 18; Dec. Dig. § 20.\*]

**4. FRAUD (§ 33\*)—EVIDENCE—OTHER FRAUDS.**

In an action for damages for fraudulent representations, the rule is that, although defendant is shown to have been guilty of other frauds, yet, if the particular transaction involved is not tainted with fraud, it cannot be affected by the other frauds unless connected with or forming a part of them.

[Ed. Note.—For other cases, see Fraud, Dec. Dig. § 33.\*]

**5. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

In an action for damages for false and fraudulent representations inducing plaintiff to buy stock in a company in which a witness testified fully as to its financial condition, and evidence as to such condition had been shown by its books, the exclusion of a question as to the condition of the company and the value of its stock was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187–4193, 4207; Dec. Dig. § 1056.\*]

**6. FRAUD (§ 11\*)—FRAUDULENT REPRESENTATIONS—FACT OR OPINION.**

General assertions by a vendor that the property offered for sale is valuable, although untrue, are not misrepresentations of existing facts upon which an action for deceit may be based, but are rather expressions of opinions.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.\*]

**7. FRAUD (§ 13\*)—REPRESENTATIONS—FALSITY AND KNOWLEDGE THEREOF.**

A seller's misrepresentations of existing material facts is not established unless it appears that such misrepresentations were made with the knowledge that they were untrue; but, where they are material and are made to be acted upon and relate to matters which he is bound or presumed to know, his actual knowledge of their falsity is not essential.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 3–5; Dec. Dig. § 13.\*]

**8. FRAUD (§ 18\*)—FRAUDULENT REPRESENTATIONS—OWNERSHIP OF STOCK.**

In an action for damages for false and fraudulent representations inducing the purchase of stock of a company, a representation that it was pledged and had to be sold at once to repay a loan was not material, where plaintiff's own testimony showed that the ownership was not a material fact upon which he relied in the purchase of the stock and was not an inducement thereto.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 16; Dec. Dig. § 18.\*]

**9. FRAUD (§ 45\*)—PLEADING—KNOWLEDGE OF FALSITY.**

Plaintiff in an action for deceit must expressly allege and prove defendant's knowledge of the falsity of the statements alleged, or

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



there must be such allegations and proof as will import knowledge.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. § 40; Dec. Dig. § 45.\*]

**10. FRAUD (§ 64\*)—REPRESENTATIONS—OPINION—QUESTIONS FOR JURY.**

In an action for damages for defendant's fraudulent representations inducing plaintiff's purchase of stock, where it appeared that defendant had reasonable grounds for making and for his belief in the truth of such statements, the question of fraud vel non was for the court.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 65½, 67-71; Dec. Dig. § 64.\*]

Appeal from Superior Court of Baltimore City; Chas. W. Heuveler, Judge.

"To be officially reported."

Action by George Reynolds against John A. Evans. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

John L. G. Lee, of Baltimore, and J. J. Archer, of Bel Air (Bonsal & Lee, of Baltimore, on the brief), for appellant. Stevenson A. Williams, of Bel Air, and Shirley Carter, of Baltimore (Harry S. Carver, of Bel Air, on the brief), for appellee.

BRISCOE, J. This suit was instituted by the appellant against the appellee, in the circuit court for Harford county, but was subsequently removed to the superior court of Baltimore city, where it was tried. The action is one of deceit, to recover damages alleged to have been sustained by the plaintiff by reason of alleged false and fraudulent representations made to him by the defendant, by which he was induced to purchase 20 shares of the capital stock of the De Ran Lumber Company, a corporation doing business in the state of West Virginia, at and for the sum of \$185 per share; it having a par value of \$100 per share. The declaration contains four counts, but all of them aver, in substance, that, in consequence and by reason of the false and fraudulent statements and representations set out in the counts, the plaintiff was deceived and defrauded by the defendant in the purchase of the stock, to his damage and injury. At the trial of the case in the court below, the plaintiff reserved 19 bills of exception, 18 of which were to the rulings of the court upon the admissibility of evidence and one to its rulings, in granting the defendant's second and seventh prayers, at the close of the plaintiff's case, which withdrew the case from the consideration of the jury and instructed a verdict for the defendant. From the judgment entered upon this verdict, an appeal has been taken.

While the record contains 18 separate bills of exception, relating to the rulings of the court, upon the admissibility of testimony, some of them involve similar questions and will be considered together. It is conceded

by the appellant that "they resolve themselves into six propositions," and they are so treated and discussed in his brief.

[1-3] The first exception is to the refusal of the court to permit the following question to be asked and answered by the plaintiff, who was being examined in chief:

"If you had known that Mr. Evans was selling his own stock, would you have bought that stock without looking into it further?"

It is clear, we think, that the plaintiff was not injured by the ruling of the court on this exception because it appears from the plaintiff's own testimony that he was not influenced in making the purchase of the stock by any statement made by the defendant as to its ownership. The matter of the ownership of the stock was therefore immaterial, and the ruling was correct.

It is well settled by all the authorities that the fraud must work an actual injury to the party complaining, and it must appear that he not only did in fact rely upon the fraudulent statement, but had a right to rely upon it in the full belief of its truth, for otherwise it was his own folly or fault, and he cannot ask of the law to relieve him from the consequences. *Cahill v. Applegarth*, 98 Md. 493, 56 Atl. 794; *McAleer v. Horsey*, 35 Md. 439.

The second, third, fourth, fifth, and sixth exceptions present the same questions, and will be considered together. They all in effect relate to whether the witness Hanway ever owned any stock in the De Ran Lumber Company in 1908, and whether it ever was pledged to the Harford National Bank of Bel Air, as collateral for a loan.

What has been said in regard to the ruling on the first exception will equally apply to the exceptions now considered. The inquiry as to the witness' ownership of the stock and whether he pledged it or not was immaterial under the facts of the case, and the court properly sustained the objection to these questions.

It is apparent, from the record, that the plaintiff was not injured by the rulings of the court in the seventh, eighth, ninth, tenth, eleventh, and twelfth exceptions, under the facts of this case.

[4] The rule as to the evidence of other alleged frauds and transactions is said, by the Supreme Court in *Clarke v. White*, 12 Pet. 193, 9 L. Ed. 1046, to be this: If the person against whom fraud is alleged should be proved to have been guilty of it in any number of instances, still, if the particular act sought to be avoided be not shown to be tainted with fraud, it cannot be affected with the other frauds, unless in some way or other it be connected with or form a part of them. *Conard v. Nicoll*, 4 Pet. 297, 7 L. Ed. 862.

[5] The thirteenth exception was taken to the refusal of the court to permit the witness McComas to be asked the following question, "What was the condition of the company and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the value of the stock on July 21, 1908?" This witness had testified at great length as to the financial condition of the company, and the evidence sought to be admitted had been proven by the books of the company and the previous testimony of the witness. There was no injury in the ruling on this exception.

The rulings on the fourteenth, fifteenth, sixteenth, seventeenth, and eighteenth exceptions present the same questions and are correct for the reasons stated in support of the rulings on the former exceptions. We are of opinion that the rulings upon the evidence did not operate in any way to the prejudice or injury of the plaintiff's case, and we will not further discuss them.

The nineteenth exception presents the ruling of the court upon the prayers. The court below, at the conclusion of the plaintiff's testimony, granted the defendant's second and seventh prayers.

The second prayer instructed the jury as a matter of law that, under the pleadings in this case, there is no evidence legally sufficient to entitle the plaintiff to recover in this case, and the verdict of the jury must be for the defendant.

The seventh prayer instructed the jury that under the pleadings in this case there is no evidence legally sufficient to prove either: (1) That the lumber stock in question was valueless or substantially so on July 21, 1908; or (2) that the De Ran Lumber Company was not reasonably prosperous up to July 21, 1908; or (3) that defendant had not sold lumber stock to James W. Wilson at \$200 per share; or (4) that there was no expectation on the part of the company of paying its expenses or a large part thereof from its offal or by-products; or (5) that any statements made by the defendant to the plaintiff in reference to the sale of stock were not reasonable expectations of said company at the date of said sale; or (6) that said statements were made by the defendants with intent to deceive the plaintiff; or (7) that the plaintiff materially relied on those statements to his prejudice and damage—and therefore the plaintiff is not entitled to recover, and the verdict must be in favor of the defendant.

Upon a careful examination of the record now before us, we agree with the court below that there was no evidence legally sufficient to entitle the plaintiff to recover in this case, and, as the plaintiff failed to make out a case for the jury, the defendant's prayers were properly granted.

The principles of law, applicable to an action of deceit, such as this, are fully considered and announced by this court in a number of cases, and need not be reviewed in this case. *McAleer v. Horsey*, 35 Md. 489; *Robertson v. Parks*, 76 Md. 118, 24 Atl. 411; *Cahill v. Applegarth*, 98 Md. 495, 56 Atl. 794; *Donnelly v. Baltimore Trust Co.*, 102 Md. 1, 61 Atl. 801.

The plaintiff's declaration, it will be seen,

contained four counts. All of the counts contain and allege in substance the same alleged false statements, and as set out in the first count of the declaration are as follows: That the defendant when he made said sale asserted and stated to the plaintiff that said stock was worth \$200 per share; that said stock was pledged to the Harford National Bank, of which defendant was cashier, for a loan, and had to be sold at once, and the said bank had to sell the stock to get said loan repaid, and D. B. Reckord, agent of the defendant, then stated to the plaintiff, in the presence of the defendant, that said stock belonged to one David Hanway. And that the said De Ran Lumber Company, of which defendant was an official, was prosperous; that it was making its expenses from its offal or by-products; that the defendant had sold stock of the same company to one James W. Wilson for \$200 per share; that the plaintiff having great confidence in the defendant, and believing the statements to be true, and not knowing the contrary thereof, but relying on the truth of the statements, bought said 20 shares of the De Ran Lumber Company stock, which said 20 shares he since has discovered were the property of the defendant; that the plaintiff has since discovered, to wit, on or about the 5th day of May, 1911, that said stock was valueless at the time of said sale and is valueless at the present time, and also has discovered that all of said statements made as aforesaid were false, that the defendant knew at the time he made said statements that they were untrue, and he made them with the intent and purpose of inducing the plaintiff to buy said 20 shares of De Ran Lumber Company stock for \$3,700; and therefore the plaintiff has been deceived and imposed upon and has lost the sum of \$3,700.

It will be seen that there is no evidence legally sufficient to show that some of the statements alleged in the declaration were made by the defendant at all, or, if untrue, that they were such representations as would amount to deceit and upon which an action for deceit may be based.

If it be conceded that the statement was made to the plaintiff by the defendant that the stock was worth \$200 a share, there is no evidence to show that this statement was false at the time the sale was made, or that the plaintiff had a right to rely on it.

[6, 7] In *Zinc & Iron Co. v. Bamford*, 150 U. S. 673, 14 Sup. Ct. 221, 37 L. Ed. 1215, it is said:

"General assertions by a vendor or lessor that the property offered for sale or to be leased is valuable or very valuable, although such assertions turn out to be untrue, are not misrepresentations, amounting to deceit, nor are they to be regarded as statements of existing facts, upon which an action for deceit may be based, but rather as expressions of opinions or beliefs; that, as a general rule, fraud upon the part of a vendor or lessor, by means of representations of existing material facts, is not established, unless it appears such representations

were made for the purpose of influencing the purchaser or lessee, and with knowledge that they were untrue; but where the representations are material and are made by the vendor or lessor for the purpose of their being acted upon, and they relate to matter which he is bound to know, or is presumed to know, his actual knowledge of them being untrue is not essential." *Gordan v. Butler*, 105 U. S. 553, 26 L. Ed. 1166; *Robertson v. Parks*, 78 Md. 118, 24 Atl. 411.

[8] As to the statement that the stock was pledged at the Harford Bank and had to be sold at once to repay a loan, the defendant testified, when called as a witness for the plaintiff, that the stock was not hypothecated at the bank, and that it belonged to him at the time of the sale. He further testified that he did not tell the plaintiff that the stock was hypothecated at the bank, and that it did not belong to him. According to the plaintiff's own testimony, the ownership of the stock was not a material fact upon which he relied in the purchase of the stock and was not an inducement to the purchase. He testified, in answer to the question:

Q. Suppose Mr. Evans had not said it belonged to Mr. David Hanway, would you have bought it? A. Oh! I do not know. He might have said something else that amounted to the same thing. I do not know whether I would or not. Q. You don't know whether you would or not? A. No, sir.

In *Cahill v. Applegarth*, 98 Md. 498, 56 Atl. 794, it is said a false statement as to the ownership of property sold by the defendant to the plaintiff is not necessarily fraudulent in law, since it may not have induced the plaintiff to make the purchase.

There is no evidence to show that the statement set out in the declaration that the defendant had sold stock of the same company to one James W. Wilson for \$200 per share was false in fact, much less was it fraudulent, and it need not be further considered by us.

The remaining alleged false statement set out in the declaration is "that the said De Ran Lumber Company, of which the defendant was an official, was prosperous, that it was making its expenses from its offal or by-products," and must be controlled by the same principles of law, applied in the discussion of the previous statements alleged in the declaration.

[9] In *Cahill v. Applegarth*, 98 Md. 502, 56 Atl. 794, it is said the general rule undoubtedly is that in actions for deceit there must be knowledge of the falsity, by the party making the representation, and hence scienter must be expressly alleged and proven, or there must be such allegations and proof as import knowledge.

[10] In the case at bar, as the undisputed facts show that the defendant had reasonable grounds for making and for his belief in the truth of the statements here complained of, we think it would have been error for the court, under the facts of the case,

to have submitted the question of fraud vel non to the jury. *Melville v. Gary*, 78 Md. 221, 24 Atl. 604; *Weaver v. Shriver*, 79 Md. 530, 30 Atl. 189; *Donnelly v. Baltimore Trust Co.*, 102 Md. 32, 61 Atl. 301.

It follows, for the reasons stated, there was no reversible error in the rulings of the court below, and the judgment will be affirmed.

Judgment affirmed, with costs.

(123 Md. 475)

KNABE et al. v. BOWLES. (No. 13.)

(Court of Appeals of Maryland. June 24, 1914.)

1. EVIDENCE (§ 445\*)—PAROL EVIDENCE—VARYING WRITTEN INSTRUMENTS.

Parol evidence is inadmissible to show a new agreement different from a sealed instrument sued on, or to vary, extend, enlarge, or contradict the terms thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052-2065; Dec. Dig. § 445.\*]

2. CONTRACTS (§ 324\*)—ACTIONS—NATURE AND FORM—ASSUMPSIT.

A party to a sealed instrument, who relies on a new and independent parol contract, must sue in assumpsit.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1549-1557; Dec. Dig. § 324.\*]

3. EVIDENCE (§ 445\*)—PAROL EVIDENCE—VARYING INSTRUMENT UNDER SEAL.

Where a contract of sale, under seal, of stock which recited a sale of a specified number of shares, and if possible an additional number, at a price specified, and that it was understood that the stock was pledged, and that the buyer agreed to accept delivery thereof on orders of the seller to the pledgees, but which was silent as to the time for delivery, a subsequent parol agreement as to delivery was admissible as proving an agreement consistent with the written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2052-2065; Dec. Dig. § 445.\*]

Appeal from Baltimore Court of Common Pleas; Thos. Ireland Elliott, Judge.

"To be officially reported."

Action by Ernest J. Knabe, Jr., and another, for the use of the National City Bank of Baltimore, against Thomas H. Bowles. From a judgment for defendant, plaintiffs appeal. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, STOCK-BRIDGE, and CONSTABLE, JJ.

Albert E. Donaldson, of Baltimore (Robert Crain and O. F. Hershey, both of Baltimore, on the brief), for appellants. Stuart S. Janney, of Baltimore (Ritchie, Janney, Griswold & Hamilton, of Baltimore, on the brief), for appellee.

CONSTABLE, J. This is an appeal from a judgment in an action in covenant, whereby the appellants sought to recover damages from the appellee for breach of a contract under seal. The action was instituted by Ernest J. Knabe, Jr., and William Knabe, and on the same day marked to the use of the National City Bank of Baltimore. The dec-

laration alleges that the appellants, the Knabes, entered into a contract, under seal, with the appellee, whereby the appellants sold and agreed to deliver, and the appellee purchased, not less than 3,145, and, if possible, 3,500, shares of the capital stock of the United Surety Company of Baltimore, at a price of \$59 per share; that the appellee in part performed his contract by accepting and paying for 3,328 shares, but had refused to fully complete his contract by accepting the remaining 167 shares, although the appellants were at all times able, ready, and willing to deliver the said 167 shares, in accordance with the terms of the contract. The appellee pleaded performance, and also filed special pleas, which, in substance, alleged that the appellants were not at all times able, ready and willing to deliver the 167 shares of stock, but, on the contrary, the appellants had declined to deliver the same, because of the fact that they had previously sold these same 167 shares to other persons for a sum in excess of \$59 a share, who however had refused to take the stock, and that the appellants had brought suit against them, and had to retain the stock to await the outcome of that suit; and that the appellee had accepted and paid the appellants for 3,328 shares in full performance of his obligations under the contract; and that the appellants and the appellee had agreed, subsequent to signing of the agreement sued upon, that the amount of stock to be delivered thereunder should be 3,328. The appellants joined issue upon the plea of performance and filed replications which traversed the special pleas. The case was tried before the court, sitting as a jury, and at the conclusion of the testimony for the appellants the appellee offered a prayer that under the pleadings there was no evidence sufficient to entitle the plaintiffs to recover. During the examination of witnesses, testimony as to an agreement between the parties as to the time of delivery of the 167 shares had been admitted subject to exception. A motion was made to strike out all oral testimony of the plaintiffs' witnesses, which tended to modify, vary, change, or extend the terms of the written contract sued upon. The court granted both the motion to strike out the testimony and the prayer instructing a verdict for the defendant. From the judgment entered upon the verdict this appeal was taken.

[1,2] The main question arises upon whether the lower court was correct in its ruling in striking out the testimony admitted subject to exception. If the testimony offered sought to establish a new agreement different from the sealed instrument sued upon, or if it were offered to vary, extend, enlarge, or contradict the terms of the written contract, then, unquestionably, under all the authorities, it was inadmissible. The suit being in covenant, the plaintiffs had to stand by the terms of instrument which they set up.

If they wanted to rely upon a new and independent contract, the suit should have been in assumpsit. *Watchman v. Crook*, 5 Gill & J. 239; *Franklin Ins. Co. v. Hamill*, 5 Md. 170; *Rice v. Forsyth*, 41 Md. 389; *Kribs v. Jones*, 44 Md. 396; *Balto. Perm. B. & L. S. v. Smith*, 54 Md. 187, 39 Am. Rep. 374; *Orem v. Keelty*, 85 Md. 337, 36 Atl. 1030; *Kendrick v. Warren Bros.*, 110 Md. 47, 72 Atl. 461.

[3] But the contention of the appellants is that the testimony rejected by the court did not tend to vary, extend, or contradict the terms of the sealed instrument, but was offered as to a point upon which the contract was silent—that of time of delivery. It is very often a matter of some nicety to determine whether, in a particular case, the parol evidence offered falls within the general rule, and few subjects have given rise to more difficult and perplexing questions for decision. It will be necessary, therefore, to examine in some detail the contract and the evidence offered and admitted, as well as that excluded.

It appears from the testimony that the Knabes were possessed of the majority of the capital stock of the United Surety Company, and that the corporation, in the year 1910, was in financial difficulties. All of the stock owned by the Knabes was deposited in various banks of New York, Philadelphia, and Baltimore as collateral for loans amounting, in some instances, to \$125 per share. One hundred and sixty-seven shares, then hypothecated with the entire holding, had been sold to a New York firm at a price of \$150 per share, and a suit was then pending to compel the purchaser to comply with its purchase. After numerous conferences, the Knabes, on the 16th of April, 1910, entered into a written contract with the appellee for the sale and purchase of not less than 3,145, and, if possible, 3,500 shares of this stock. At the time of signing the contract, a statement was given the appellee, showing the amount of the holdings of the Knabes, where deposited, and the amount for which each block was pledged. The entire holding, including the 167 shares, appears therefrom to have been 3,490 shares.

The contract is herewith set out in full:

"It is hereby agreed by and between Ernest J. Knabe, Jr., and William Knabe, of the first part, and Thomas H. Bowles, of the second part, as follows:

"1. Ernest J. Knabe, Jr., and William Knabe do hereby sell and agree to deliver to Thomas H. Bowles not less than three thousand one hundred and forty-five shares (3,145), and if possible three thousand five hundred (3,500) shares of the capital stock of the United Surety Company at the price of fifty-nine dollars (\$59) per share.

"2. The said Thomas H. Bowles agrees to purchase and does hereby purchase said stock at said price, his undertaking in this regard being subject to a satisfactory examination of the outstanding risks of the company, said examination to be begun on Saturday, April 16, 1910, and concluded as soon thereafter as possible, but in no event later than May 1, 1910.

"3. It is agreed that the sale to the said Knabe Brothers of certain "nonadmitted assets," as per resolution appearing on the minutes of the executive committee of the United Surety Company, shall remain in full force and effect with the following exceptions, to wit: The said Messrs. Knabe shall be relieved from the payment of the deferred payment of \$25,000—therein provided for, and after the repayment to them of any balance due on the \$75,000—paid on account of the purchase of said "nonadmitted assets," with interest, they shall be entitled to receive one-third ( $\frac{1}{3}$ ) of any amount that may be realized by the company out of said "nonadmitted assets" over and above the original \$75,000—with interest up to \$25,000—as their share; the management and control of said assets to be in the company exclusively.

"It is further agreed that if the United Surety Company shall realize from the demand notes receivable now owing to it a sum in excess of twenty-three thousand five hundred dollars (\$23,500), then three-fifths ( $\frac{3}{5}$ ) of such excess shall be paid to the Knabes as and when received.

"It is understood that the stock of the said Knabes is pledged with certain banking institutions, and said Bowles agrees to accept delivery of said stock on the orders of said Knabes to the said banking institutions, directing them to deliver the same upon the payment of fifty-nine dollars (\$59) a share, such orders being accepted in writing by said banking institutions. And said Knabes do agree that they and their counsel will use their utmost endeavors to procure the delivery of said stock on the above terms.

"As a part of this agreement, the said Ernest J. Knabe, Jr., and William Knabe have placed their resignations as directors in the hands of O. F. Hershey, and have given to Stuart S. Janney and O. F. Hershey, jointly, an irrevocable proxy to vote the stock herein referred to pending the transfer of the said stock to the name of Bowles or his assignee.

"Witness the hands and seals of the parties hereto this 16th day of April, 1910.

"Ernest J. Knabe, Jr. [Seal.]

"Wm. Knabe. [Seal.]

"Thomas H. Bowles. [Seal.]

"Test: O. F. Hershey."

It will be noticed that the contract contains no provision as to the time the stock was to be delivered.

On April 25, 1910, the appellee wrote the Knabes the following letter:

"April the 25th, 1910.

"Messrs. E. J. and William Knabe, Baltimore, Maryland—Gentlemen: Referring to the contract between us of April 15th, for the purchase from you by me of 3,490 shares of the capital stock of the United Surety Company, beg to say that I will pay for the said stock at \$59.00 per share, if delivered at the National Mechanics Bank on Thursday, April the 28th, 1910. It must be borne in mind that while you are to make every effort now and hereafter to deliver the full amount of 3,490 shares, at the same time the minimum amount to be delivered must be 3,145 shares. I call your attention also to the fact that partial deliveries will not be accepted and no part of the purchase money will be paid until all the stock—3,145 shares—is delivered.

"Very truly yours, [Signed] T. H. Bowles."

The Knabes advised the different banking institutions, holding the stock, of the sale, and directed them to deliver same to the appellee, upon his paying \$59 per share upon their loan. A great deal of difficulty was encountered in prevailing upon the banks to give up stock for this figure, when they had

loaned so much money upon it, but by May 26, 1910, 3,328 shares had been delivered, being all of the Knabe holding with the exception of 167 shares. It will be noticed that if the entire holding had been 3,490 shares, according to the statement made at time of signing contract, that would have left but 162 shares, but the correct number appears to have been 3,495 shares.

The testimony admitted subject to exception was given by Ernest J. Knabe, O. F. Hershey, attorney for the Knabes in all the negotiations covering the deal, and who assisted in preparing the written contract, and John F. Sippel, president of the National City Bank of Baltimore, one of the appellants. In substance the testimony of the first two was that on the day the contract was signed, before and after, and on several occasions afterward the condition of the 167 shares, subject of the New York suit, was discussed by them and the appellee, and it was agreed that those shares should be delivered after the termination of that suit, in accordance with the terms of the written contract, provided the Knabes lost that suit and then would be in a position to deliver them. Before the termination of that suit it was necessary to take up the block of 167 shares from the bank where it was hypothecated, and the appellee was asked to advance the \$59 a share upon it, and hold it subject to the result of the suit. Mr. Hershey testified as follows in reference to that:

"Q. What agreement, if any, was made as to the final taking of the stock by Mr. Bowles? A. Mr. Bowles not only agreed that he would take the stock, but was very anxious to have it, and impressed on me the fact that under the contract existing between himself and the Knabes, if the Catlin & Powell suit were lost, we were compelled to deliver to him. Q. Was there any question raised at that time of any kind as to the willingness or agreement by Mr. Bowles to take that stock upon the termination of the Catlin & Powell Company suit? A. None whatever. Q. And you say he insisted that he was entitled to it? A. Yes; that the Knabes should absolutely get out of the surety business and not control a share of the stock."

After the refusal of the appellee to aid in financing the 167 shares, an effort was made to get a loan upon them from the National City Bank, and this was accomplished after a conversation had by Mr. Sippel with the appellee, who testified as follows:

"I explained to Mr. Bowles that Mr. Knabe wanted to make this loan on 167 shares at \$59 per share, aggregating nine thousand and odd dollars, and that we didn't want to take this loan unless we were assured by him that he would take this stock upon the termination of the suit—that is, if they lost it. If the suit should be decided against them, he was to take it at \$59 a share. If the suit should be won, we were to have the right to deliver it to Catlin & Powell, or whoever the party might be, at \$150 per share. I asked him if that was the agreement, and he said, Yes, and then I furthermore said I remember Dr. Carroll requested that—will you take this stock if the suit is decided against Knabe at \$59 a share? And he said, Yes."

Mr. Hershey testified as follows, as to the absence from the written agreement of a time for delivery:

"Q. In drawing the contract which provided for the sale and delivery of not less than 3,145 shares of stock of the United Surety Company, and if possible 3,500 shares, no time appears. Will you state, if you know, why no time of delivery was named? A. Because in the then existing condition of Mr. Knabe's affairs particularly in reference to the holding of that stock, it was impossible to know how soon delivery could be, and even uncertain whether delivery could be, made at all at that price."

In January, 1912, the New York suit was finally decided against the Knabes, but in the meantime, January, 1911, the United Surety Company had gone into receivership, and upon the demand, February, 1912, of the appellants that the appellee take up the 167 shares of stock the appellee refused.

Did this testimony as to the agreement, as to when the 167 shares were to be delivered vary, extend, enlarge, or contradict the terms of the written agreement? We are of the opinion that it did not, and that therefore it was admissible testimony, and its exclusion was an error. The fact that the contract provides for a minimum and maximum number of shares to be delivered is an indication, when coupled with the further statement in the contract, that all the stock of the Knabes was hypothecated; that difficulty of delivery was to be anticipated. It is clear that the appellee had full knowledge of the whereabouts of each and every share of the Knabes' holdings and its susceptibility of delivery. The contract is totally silent upon the question of time for delivery. If, therefore, the parties had agreed subsequent to the signing of the contract as to when the subject-matter of the contract was to be delivered, we do not understand that proof of this is inadmissible because it is not embodied in the instrument. This proof would not tend to vary, extend, enlarge, or contradict; for in any terms of the contract there is no provision of time whatever for delivery. And in the absolute absence of such terms such proof is entirely consistent with the terms of the written instrument. The fact that delivery of these 167 shares was contingent upon the Knabes losing the New York suit we do not think makes this verbal agreement an entirely new and distinct contract from the written one. All of the stock was out of the hands and practical control of the Knabes; therefore a great many contingencies must, from that very fact, have been contemplated, both as to the ability to deliver and the time of delivery. And in our opinion this oral agreement did not create any new contract distinct from the written one, but merely, in effect, said that 167 shares of the whole number they had contracted about were involved in litigation, and as soon as they are released they were to be delivered under their contract.

The cases of *McCreary v. McCreary*, 5 Gill

& J. 147, *Creamer v. Stephenson*, 15 Md. 211, *Bladen v. Wells*, 30 Md. 577, *Paul v. Owingo*, 32 Md. 402, and *Stallings v. Gottschalk*, 77 Md. 429, 26 Atl. 524, are authority for the principle that parol evidence is admissible, in a suit upon a written instrument, to prove some collateral, independent fact, or agreement, between the parties about which the written contract is silent. In the case of *McCreary v. McCreary*, supra, this court said in speaking of parol evidence in relation to a suit upon a written contract:

"Even if this were the case of a written contract signed by the parties themselves, the authorities are clear that parol evidence is admissible to prove any collateral, independent fact upon which the written agreement is silent, because such proof is perfectly consistent with, and does not in the least tend to contradict, vary, or explain, the written instrument."

We have examined all the authorities cited by the appellee upon this point, and have found them to be in harmony with the above principle; they being cases where the proof was rejected because its admission would have had the effect to change the terms of the writing.

With this rejected testimony, as to the time of delivery, in the case there would have been legally sufficient evidence tending to support a verdict for the appellants, and we will therefore reverse the judgment.

Judgment reversed, and new trial awarded, with costs to the appellants.

(123 Md. 465)

**AFRO-AMERICAN ORDER OF OWLS,  
BALTIMORE NEST NO. 1, v. TAL-  
BOT et al. (No. 12.)**

(Court of Appeals of Maryland. June 24, 1914.)

**1. CORPORATIONS (§ 49\*)—NAME—UNFAIR COMPETITION—RIGHT TO INJUNCTION.**

Where unfair competition is alleged as ground for enjoining defendant from using a name similar to that of plaintiff, plaintiff is entitled to the relief sought only where the public has been so misled by the similarity that an ordinarily careful person would be deceived thereby.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 137; Dec. Dig. § 49.\*]

**2. CORPORATIONS (§ 49\*)—NAMES—UNFAIR COMPETITION—INJUNCTION.**

Where, in an action by a secret society which had adopted the name of "Order of Owls" to enjoin a corporation from using the name "Afro-American Order of Owls," there was no evidence, other than a mere expression of opinion and of an apprehension, that any one had been misled by the similarity of names or that plaintiff's membership had been thereby decreased or prevented from increasing, plaintiff was not entitled to the relief sought in respect to the name.

[Ed. Note.—For other cases, see *Corporations*, Cent. Dig. § 137; Dec. Dig. § 49.\*]

**3. CORPORATIONS (§ 49\*)—SYMBOLS—UNFAIR COMPETITION—RIGHT TO INJUNCTION.**

A secret society which has adopted as its symbol three owls seated on a limb of a tree running horizontally, each with the letter "O" appearing indistinctly on its breast, may enjoin a subsequently organized secret society from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

using an emblem consisting of three owls seated on a horizontal bar and having the letters AA above the letters OOO; the similarity of number, position, and attitude of the owls being calculated to deceive ordinary persons proceeding with ordinary care.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 137; Dec. Dig. § 49.\*]

Appeal from Circuit Court of Baltimore City; Henry Duffy, Judge.

"To be officially reported."

Injunction by John W. Talbot and others against the Afro-American Order of Owls, Baltimore Nest No. 1, a body corporate. From decree for plaintiffs, defendant appeals. Reversed and remanded, with directions.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

W. Ashbie Hawkins, of Baltimore (Geo. W. F. McMechen, of Baltimore, on the brief), for appellant. Carlyle Barton, of Baltimore (Randolph Barton, of Baltimore, on the brief), for appellees.

STOCKBRIDGE, J. On the 20th November, 1904, there was organized in the city of South Bend, Ind., a beneficial secret society, which adopted the name of "Order of Owls." A form of organization or government was then agreed upon under which the organization has continued to the present time, but the order has never been incorporated. It established in various states and places subordinate bodies, to which were given the name "Nests," prefixed with the number of the Nest, while the parent organization was known as the Home Nest. Several of these subordinate Nests were established in the state of Maryland. By the terms of its Constitution the qualifications for membership were:

"Any person *not of African descent* and who is over sixteen years of age is eligible to membership herein. Any Nest may raise the age of eligibility to that Nest."

The membership of the organization has grown from the time of its foundation until at the latest date for which definite figures appear in the record the order contained 78,861 members.

On the 14th March, 1911, there was formed under the general laws of this state a corporation under the name of the "Afro-American Order of Owls, Baltimore Nest No. 1." The purpose of the organization was declared in the certificate to be "the paying exclusively sick and funeral or death benefits or dependents."

On November 11, 1912, the Afro-American Owls gave a ball at the New Good Hope Hall on Lexington street, in the city of Baltimore, and a month and a day later the bill of complaint in this case was filed to enjoin the defendant corporation from using the name "Afro-American Order of Owls" as a name of a fraternal, benevolent order, and from using any name of which the name "Order of

Owls" forms a part, or using the words "Order of Owls" for any purpose, whether alone or in conjunction with any other words, and for such other and further relief as their case or the case of any of them might require.

Testimony was taken to prove the allegations of the bill as to the organization of the order, its objects and the size of its membership, and also that it was not until about the time of the giving of the ball before mentioned that the Indiana Order of Owls, or their members in the city of Baltimore, had any knowledge whatever of the existence of the Afro-American body using in part the same name. This last evidence was, of course, given to avoid the possibility of a successful defense on the ground of laches, and, as the evidence in this respect is entirely uncontradicted, it must be taken as true, and, since it is so to be regarded, the plaintiffs cannot be accused of laches when their suit was instituted less than 60 days after the knowledge of the supposed imitation of their name was first brought to their attention. The evidence on behalf of the defendants was directed to two points: First, that at the time of the incorporation and down to or shortly before the filing of the bill of complaint they were in ignorance of the existence of the other Order of Owls. The purpose of this was manifestly to prove their good faith in the formation and conduct of their organization; nor is any evidence offered to contradict this, except such as may result inferentially from the symbol or emblem of the two bodies. This symbol is not identical. In the case of the voluntary association it consists of three owls in a sitting posture upon the limb of a tree which runs horizontally and contains a few twigs at one end, and upon the breast of each owl appears what is described by the witnesses as the letter "O." In the case of the Afro-American body three owls seated on a horizontal bar are also used, with the letters A. A. above, and beneath the letters OOO. The chief point of similarity in the symbol is the identity in the number of birds and their general position. Under such a condition of facts and proof, the case must necessarily be determined by the rule of law, and the briefs of counsel abound with citations from, and references to, adjudicated cases of unfair competition.

[1] In all cases where unfair competition is alleged, the test of whether the party applying for the injunction is entitled to the relief sought is whether the public has been misled by a similarity of name, style, of package or representations so that an ordinarily careful person desiring to procure an article of given make or manufacture would, by such similarity, be deceived into taking the competing article or preparation, or firm or corporation producing the same.

How far the cases relating to unfair com-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

petition are necessarily controlling of a case like the present may be a doubtful question, for different courts seem to have regarded it differently; but there are a sufficient number of cases which have arisen growing out of a supposed imitation of name in organizations similar to those litigant here that it is possible from them to deduce something in the nature of a guide for the present case, and reference will be made, therefore, chiefly to cases of this character.

In some states statutes have been passed under which it is forbidden to the state authorities to grant incorporation to those applying for it, in cases where the name proposed is so similar to one in use by an existing corporation, or even voluntary association, as to tend to mislead the public. So in the case of *Society of the War of 1812 v. Society of the War of 1812*, 46 N. Y. Supp. 568, 62 N. Y. Supp. 355, the injunction was granted because of the liability that the public might be misled by the similarity of the name, and the fact of the statute under which the court seemed to be of opinion that the incorporation should never have been granted. And this same principle was further emphasized in the *Benevolent & Protective Order of Elks v. Improved Benevolent & Protective Order of Elks*, 60 Misc. Rep. 223, 111 N. Y. Supp. 1067. The direct question which is here presented was before the Supreme Court of Tennessee in *Benevolent & Protective Order of Elks v. Improved Benevolent & Protective Order of Elks*, 122 Tenn. 141, 118 S. W. 389, in which case the most noticeable improvement was that the Improved Order was for persons of African descent, when the original order excluded that class. In deciding it, the court said:

"While the complainant was not engaged in business for profit, in the sense of commerce and trade, yet it employed certain business activities for the purpose of maintaining itself and to procure funds to carry out the purpose of its organization, and it maintained certain business institutions, its clubhouses, and its home for aged and invalid members. The name it had acquired and appropriated had become very valuable in the nature of a trade-name."

And upon this ground an injunction was issued against the supposed Improved Order. The extreme case sustaining the right of injunction in such cases is *Knights of Maccabees of the World v. Searle*, decided by the Supreme Court of Nebraska, and reported in 75 Neb. 285, 106 N. W. 448. In that case the plaintiffs had been incorporated under the above title, and the defendants were making application to incorporate as "The Western Maccabees." They were sought to be enjoined from using the word "Maccabees" as any part of their name, and the injunction was granted, not upon the ground that anybody had been misled, but because in the view of the court it might mislead the public, the court saying:

"It was sufficient to allege and prove that there would be a tendency to so mislead the public. The statute requires that such tendency

be avoided. \* \* \* It was not necessary for the plaintiff to allege and prove that the public would be misled by the use of a part of plaintiff's name in the way proposed."

A similar question to the one here involved arose in *Grand Lodge Ancient Order of United Workmen v. Graham et al.*, 96 Iowa, 592, 65 N. W. 837, 31 L. R. A. 133, where it was held that the right to use the name could not be claimed by a seceding body which had become incorporated to the exclusion of the unincorporated body from which the secession had taken place. In this case, however, the seceding body could not claim the adoption of the name in good faith, as they had been previously members of the original body.

As opposed to this line of cases are such cases as *Supreme Lodge Knights of Pythias v. Improved Order Knights of Pythias*, 113 Mich. 133, 71 N. W. 470, 38 L. R. A. 658, where the application for injunction was refused, the Supreme Court of Michigan saying that:

"Where the name was not chosen for the purpose of deception, and has not been used under circumstances intended or calculated to deceive, the similarity of names must be such as to deceive ordinary persons proceeding with ordinary care to justify the interference of a court."

The case of *Creswill v. Knights of Pythias* has been cited and relied on by the appellants in this case. That case arose in Georgia between white and colored bodies each claiming to be entitled to the use of the name "Knights of Pythias." In that case, as in this, the rules of the one body precluded the admission of colored members, and those of the other excluded white members. The Supreme Court of Georgia, however, granted the injunction which was asked. 133 Ga. 837, 67 S. E. 188, 134 Am. St. Rep. 231, 18 Ann. Cas. 453. The case was then taken on appeal to the Supreme Court of the United States, and is reported in 225 U. S. 246, 32 Sup. Ct. 822, 56 L. Ed. 1074, the opinion being by White, C. J. The decision of the Georgia court was reversed, upon the ground of the laches of the plaintiff in making their application for the injunction. But in the course of his opinion the learned Chief Justice said:

"On examining the evidence we are compelled to say we do not think it has any tendency to prove an intent on the part of the defendant order by the adoption of the designation given to their body or the use of the emblems, insignia, etc., employed to make it appear that their order and that of the complainant is one and the same, or that it tends to show that the use of the corporate name or the distinctive words 'Knights of Pythias' and the emblems, etc., of that order operated in any degree to deceive the public or to work pecuniary damage to the complainant order within or without the state of Georgia."

This decision rendered in 1912 is the latest in point of time of any of the cases thus far cited. If we turn to the commercial unfair competition cases, there is a considerable difference of decision, the result manifestly of the different views of different courts as



to the liability of the public to be misled, and therefore it is difficult to deduce any other rule than that where, in the opinion of the court, the similarity of names was such as was shown to have deceived the public, or to be liable to deceive the public, the injunction has been granted, and where this was not the case the injunction asked has uniformly been refused. As was said by Lord Chief Justice Halsbury, in *North Cheshire Brewing Co. v. Manchester Brewing Co.*, L. R. App. Cases 1899, 83:

"The real question is in a single sentence: Is this name so nearly resembling the name of another firm as to be likely to deceive?"

In all these cases the question is broader than the mere intent of the parties, for, as was said in *American Clay Manfg. Co. v. American Clay Manfg. Co.*, 198 Pa. 189, 47 Atl. 936:

"Irrespective of his intent [where the effect of the defendant's action] is to produce confusion in the public mind," the injunction is granted."

And it was this same principle which underlay the decision in the *Plant Seed Co. v. Michel Plant & Seed Co.*, 37 Mo. App. 313, where the attempt to restrain the use of the name failed, but the defendants were required to so modify the form of their printed matter to be issued to the public as not to be a colorable imitation of the plaintiff's matter, and so tend to mislead the public.

[2] The evidence in this case does not show that any one has in fact been misled, either within or without the state of Maryland. Nor can it fairly be said to have operated to the detriment of the plaintiff, as the quarterly report shows a continually increasing number of members of the original order. Nor is there any positive evidence of a substantial character that any one has been deterred from joining the original order by reason of the existence of the Afro-American body. It is true that the witness Beroth, one of the plaintiffs, did say:

"It has resulted in confusion in the public mind and in the belief of many persons that the defendant corporation was a part of the Order of Owls."

But the whole context of his evidence shows this to have been in the nature of an opinion of the witness, rather than a statement of a fact. The most that can be said is that there exists apprehension on the part of some of the members of the white order that individuals may be deterred from joining by reason of the existence of the colored order. There is no evidence that the colored order has ever made use of the term without prefixing to it the words "Afro-American," words which in and of them-

selves are indicative of a colored organization. It is difficult, therefore, to see how it can be fairly claimed that the public has been, or is liable to be, misled, and, unless such tendency is manifest to the court either as the result of evidence showing deceptions to have occurred, or such close identity in name as to almost inevitably lead to the same result, it fails to meet the test laid down by Chief Justice White in *Creswell v. Knights of Pythias*, supra.

[3] As much, however, cannot be said for the use of the symbol of the three owls, which is at present the emblem of both bodies. The O's upon the breast of the three birds appearing in the symbol of the Indiana Order are not, as shown by the exhibit, clearly defined, and the letters AA and OOO appearing in connection with the symbol of the Afro-American Order are so easily omitted, and, whether omitted or not, will be less quickly caught by the eye than the representations of the birds themselves that the public might well be misled thereby. Moreover, there has been no explanation made or attempted of the reason for the adoption of the same number of birds and in the same relative position by the colored organization as appears in that of the white order. Such a symbol as the one composed of the representations of the owls more readily attracts the eye than do the letters of the alphabet, and is something which can be understood even by those unable to read. The emblem is, therefore, far more likely to deceive than is the name, and the similarity of number, position, and attitude all tend to the same result. We do not decide that the Afro-American Order is to be precluded entirely from using any figure of an owl as an emblem, but only that the one shown in the evidence is so close a simulation of that of the Indiana Order that its continued use would tend to a deception of the public, and should therefore be enjoined.

The decree below will accordingly be reversed, and the cause remanded, to the end that a proper decree may be entered enjoining and restraining the appellant body, its officers, agents, servants, and employes from in any manner using as the symbol of said corporation the figures of the three owls placed upon a horizontal limb or rod, or any such modification thereof as may be an imitation of or likely or liable to mislead and deceive the public with reference to the organization of which the device is a symbol or emblem, but dismissing the bill so far as the use of the name is concerned.

Decree reversed, and cause remanded; costs to be paid by the appellees.

THE NEW YORK

INSURANCE & CASUALTY CO., OF NEW YORK & LONDON, INC.

1. *INSURANCE & CASUALTY CO., OF NEW YORK & LONDON, INC.*

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28. *INSURANCE & CASUALTY CO., OF NEW YORK & LONDON, INC.*

not, on the property insured; (f) a statement as to the purposes for which and the persons by whom the premises were occupied at the time of the loss. The delivery or withholding of any form by the company or the receipt or retention of any form of proof by the company, or any act of the company or its representatives in the investigation of any claim, shall not waive any of the company's rights."

On February 20, 1913, Mrs. Dulany filed with appellant a statement and proof of loss under which she claimed \$790 for the loss of the following articles: Gold cigarette case, with diamond monogram J. C. D., \$350; embroidered dress, Irish lace, \$125; fine white dress, hand embroidery, band of fillet, Irish lace, \$150; one black satin dress, \$60; one white serge suit, \$50; one riding coat, \$25; and portierre, \$5.

On April 11, 1913, the appellee filed with the appellant a second statement and proof of loss, covering, however, different and distinct articles from those enumerated in her first claim. The articles and their respective values specified in the second claim were as follows: One child's gold and pearl bracelet, \$11; one enamel pin, \$3; one table cloth, \$5; twelve napkins, \$3; two vests, \$20 apiece; one vest, \$10; six silk shirts, \$8 apiece—total value \$120. Although due, no doubt, to an error in addition, the total value of the various articles was stated in the proof of loss to be \$119.

The articles specified in the first proof of loss, except the gold cigarette case, which was afterwards recovered, and is not claimed for in this case, were stored in a locked storeroom in the basement of the Washington apartment, and which storeroom had been provided for the exclusive use of the appellee. For the loss of those articles the liability of the appellant under the express provisions of the policy was limited to \$50.

[1] Mrs. Dulany testified that the basement room in which the articles were packed had a door which was locked, and a window which was also locked; that the key of the door was kept in her apartment, and was the only key to her knowledge; that the goods were packed in unlocked trunks; that the persons in the apartment who would have occasion at any time to go to the trunks were herself and her maid; that she had not examined the trunks since they were packed in the fall of 1912 until the discovery of their loss in the latter part of January or the first part of February, 1913; that she then "found the room in utter confusion, the trunks opened, and those things missing." On cross-examination she said that what she meant by "utter confusion" was that "everything was pulled around in the trunks and the trunks were not in the place where they were usually kept," the goods were disarranged as if some one had gone to the bottom of the trunks and pulled things out. None of the articles taken from the basement were recovered. Some time after the discovery of their loss Mrs. Dulany lost from her rooms

in the apartment the articles enumerated in the second proof of loss. None of these goods have been found, except the cigarette case, above mentioned.

The record shows that in the fall of 1912, Mrs. Dulany employed a butler named Francois Gindre, who continued in her employ until January 9, 1913, on which date he was discharged by Mr. Dulany because of a quarrel the butler had with another servant. Gindre returned in three weeks, and remained some time with Mrs. Dulany, how long the record does not show. Mrs. Dulany had decided to lease her apartment in the Washington for two months. Gindre said he would like to take a position in New York for two months, and would let Mrs. Dulany know his address so she might get him back when she again occupied the apartment. He left on Sunday afternoon in the latter part of February, having notified Mrs. Dulany on the preceding Saturday of his intention to go.

Mrs. Dulany testified she missed the goods mentioned in the second proof of loss after she had put in the claim for the first goods, in which was included the gold cigarette case, but she did not recollect how long afterwards; that her husband's vests disappeared the same day the butler left. They were found missing the following morning. The cigarette case was picked up by an employé at Union Station, in the valley of Jones Falls, the morning following the departure of the butler.

Mrs. Dulany testified:

"He left on Sunday, and I have never heard from him since. That was the latter part of February. He said he would write me and let me know his address, that he would come back to me when I opened the apartment again, but I have never heard from him since, and in going over his room I found his mattress had been slit in a place that big (indicating). I made no effort afterwards to locate him. I placed it in the insurance company's hands. The detectives did not think at that time that he was guilty. Q. Did you have any reason to think of him guilty of the larceny of any of those articles? A. Yes; I certainly think so; the fact of finding the cigarette case in Jones Falls the day after he left and finding the cut in the mattress were two reasons; and another reason for suspecting him was in going to New York without letting me hear from him again. Q. You do not know that he threw the cigarette case in Jones Falls. A. No; I do not know he did, but I certainly think he did. He left on Sunday, and it was found on Monday by an employé at the Union Station. Q. This cut in the mattress—describe exactly how the mattress was cut. A. He had a single bed in his room, and the mattress was cut at the top and bottom; a slit that long (indicating) where it was bound around with tape and the hair had been pulled around. I had to have the mattress mended before it could be used again."

These facts came to her knowledge after she had filed the first proof of loss, in which she stated, "I do not know who to suspect," and there is nothing to show that this statement of hers was not entirely truthful.

The appellant refused to pay for any of the losses, and the appellee brought suit on the policy. The declaration contained two

counts: The first claimed for the goods lost from the rooms in the apartment, and the second for the loss from the storeroom in the basement, and each count charged that the goods had been stolen. The defendant filed the general issue plea and one special plea, which averred that it was expressly provided in the policy sued on that it should cover only "for direct loss by burglary, larceny, or theft," and that it also provided that the mere disappearance of any article should not be deemed sufficient evidence of its loss by burglary, larceny, or theft, and that "the articles mentioned in said declaration were not lost as a result of any burglary, larceny, or theft." The plaintiff joined issue upon the first and second pleas, and replied to the third plea that the articles mentioned were lost as a direct result of burglary, larceny, or theft. Issue was joined upon the replication. The case went to trial before a jury, and resulted in a verdict and judgment for the plaintiff for \$180, and from this judgment the defendant has brought this appeal.

[2] During the course of the trial two exceptions were reserved by the appellant—one to the ruling of the court on a question of evidence, and the other to its ruling on certain prayers, and on a motion to strike out evidence. As the important questions in the case arise under the second exception, that will be first considered. The burden was upon the plaintiff to adduce evidence that would satisfy the minds of the jury that the loss of the articles mentioned in the declaration was directly caused by burglary, larceny, or theft. The contentions of the appellant are:

"There is no evidence in the case legally sufficient to show that the loss of any of the articles mentioned in the declaration was the result of burglary, larceny or theft. There is no evidence in the case legally sufficient to show that the plaintiff ever filed with the defendant any sufficient proof of loss, as required by the policy. There is no evidence in the case legally sufficient to show that the defendant gave immediate notice to the police authorities in regard to the alleged losses."

The first contention was submitted to the court at the close of the testimony of both parties by the defendant's first, second, and third prayers, which the court refused. Its second contention was presented by its fourth and seventh prayers, which the court also refused, and by motion to strike out the second proof of loss, which was overruled. Its third proposition was presented by its fifth prayer, which was rejected. By the defendant's sixth prayer, which was granted, the jury were instructed that the burden of proof was upon the plaintiff to establish by a fair preponderance of evidence that the articles which she claims to have lost were lost as the result of burglary, larceny, or theft, and that the mere disappearance of the articles was not in itself, under the terms of the policy on which the suit was brought, sufficient evidence of its loss by burglary, larceny, or theft, and, unless the jury found

some fact or facts offered in evidence in addition to the mere disappearance of the articles mentioned in the evidence that there was some burglary, larceny, or theft of the articles alleged to have been lost, their verdict should be in favor of the defendant.

We have set out the facts and circumstances attending the loss of the articles sued for, and we are of opinion that the jury might have reasonably concluded that they were lost by larceny or theft. Indeed, when the number and character of the goods and the circumstances under which they disappeared are considered, it is difficult to account for their loss upon any other hypothesis. The appellant relied upon the cases of *Schindler v. U. S. Fidelity and Guarantee Co.*, 58 Misc. Rep. 532, 109 N. Y. Supp. 723; *Gordon v. Aetna Indemnity (Sup.)* 116 N. Y. Supp. 558; *Hart v. American Fidelity Co. (Sup.)* 121 N. Y. Supp. 605; and *Duschenes v. National Surety Co.*, 79 Misc. Rep. 232, 139 N. Y. Supp. 881. These cases announce the correct rule of law applicable to cases of this kind, but, if we were disposed to concur with the conclusions reached by the court upon the facts in each of those cases, we should not regard them as controlling in this case, because, in addition to the fact of disappearance of the articles, there are facts, in our opinion, which tend to show that the articles were stolen.

[3, 4] The defendant's fourth and seventh prayers attacked the sufficiency of the proofs of loss filed by the plaintiff. The fourth asserted that, because of the defects in the proof of loss stated in the prayer, the plaintiff was not entitled to recover "for any of the articles on account of which the suit was brought"; and by the seventh prayer the court was asked to tell the jury:

"That there is no evidence in the case sufficient to show that any sufficient proofs of loss were ever filed by the plaintiff or her agents with the defendant as to the articles mentioned in the first count of the declaration, and therefore there can be no recovery for said articles."

It would have been obvious error to have granted either of these prayers: First, because there was evidence tending to show a waiver as to the sufficiency of the first proof of loss; secondly, that the defendant denied its liability for the losses specified in the second proof of loss. Under such circumstances, the law will not permit an insurer to defeat a recovery upon the mere ground of insufficiency of the proofs of loss. It was said in *Spring Garden Ins. Co. v. Whayland*, 103 Md. 699, 64 Atl. 925:

"These preliminary proofs of loss are required for the benefit of the insurer, and for his or its benefit exclusively, in order that the nature, extent, and character of the loss may be ascertained. Since this is the case, there is no reason why the insurer may not waive a compliance with the provision thus inserted for his or its sole benefit. Indeed, the adjudged cases are numerous in which the proposition just stated has been announced and applied. It is not necessary that an express agreement to waive the preliminary proof should be shown. Such a

waiver may be inferred from the acts and conduct of the company, if those acts and that conduct are inconsistent with an intention to insist upon a strict performance of the condition. Good faith demands of an insurance company frank and open dealing with its policy holder, and if there be any withholding or failure to disclose an objection to preliminary proofs beyond a reasonable time after they are furnished, or if a refusal to recognize the obligation to pay a loss be placed on other and distinct grounds than an alleged insufficiency of, or defects in, the preliminary proofs, the company will be regarded as having waived all objections that could have been taken to such preliminary proofs. These principles have been so repeatedly enforced that they must be regarded as definitely declared settled in this state and we need not pause to quote from decided cases in support of them."

In *Bakhaus v. Caledonian Ins. Co.*, 112 Md. 676, 77 Atl. 310, Judge Thomas, speaking for the court, said:

"Provisions relating to proofs of loss are, as has been stated, inserted in the policy for the exclusive benefit of the insurer, in order that it may be informed of the nature, character, and extent of the loss, and, while the insurer may stand on its contract and exact compliance with its terms, there is no reason why these provisions may not be waived by it. The business in which insurance companies are engaged is one in which the security and protection of the insured are largely intrusted to the honesty and fairness of the insurer, and this court has frequently said that good faith demands of them 'frank and open dealing with their policy holders.' Any acts or conduct of the insurer, or its representatives, that are, under the circumstances, calculated to mislead the insurer and to induce him to believe that the performance of the condition will not be required, or that proofs of loss would be ineffectual and nugatory, will, if he is thereby misled, amount to a waiver."

Mr. Henry P. Hynson, Jr., who was an attorney for the defendant company, and who occupied the position of examiner of claims made against the company, testified that he did not object to the first proof of loss, and his testimony shows that the company had determined to resist the payment of the claim on other and distinct grounds. He said:

"I think this explanation is due to the court and jury. I do not object to the proof of loss as a proof of loss, as to its incompleteness; my objection was as to the proof and the evidence, that has been brought to my knowledge, which made me deny the claim. \* \* \* Reports made to me by my investigations were of such a nature as to lead me to believe that the articles covered could have been very well given away or stolen, or could have disappeared, and, in fact, there was no direct evidence that there was any theft or loss."

[5] In view of the testimony tending to show a waiver of defects in the proof of loss and of the denial of responsibility under the policy, we are of opinion that the case was fully and fairly submitted to the jury by the defendant's sixth prayer, and that there was no reversible error, under the facts, in overruling the motion to strike out the proof of loss covering the articles lost from the apartment proper. The defendant's fifth prayer was properly refused. It asked the court to direct a verdict for the defendant, for the reason that the plaintiff had offered no evidence legally sufficient to show

that she gave immediate notice to the police authorities in regard to the alleged loss of any of the articles. The reason assigned was not supported by the facts. Referring to the articles lost from the storeroom, Mrs. Dulany testified that the police were notified by her husband, and that the detectives visited the premises.

[6] The record contains one bill of exception taken to the ruling of the court in refusing to admit in evidence a letter from Edgar K. Legg, resident manager of the defendant company, to W. J. C. Dulany, the husband of the plaintiff, dated June 3, 1910. This letter was written more than a year prior to the issuance of the policy sued on, and it was not pretended that it ever came to the knowledge of the plaintiff. It simply informed the husband of the plaintiff that the policy issued by the defendant and referred to in the letter covered "only losses from within your house, and then only when occasioned by the commission of a burglary, theft, or larceny." This knowledge was imputed to the plaintiff by the policy sued on, and there was no suggestion that she was not fully aware of the restricted liability under the terms of the policy. The ruling on this exception was correct.

It follows that the judgment must be affirmed.

Judgment affirmed; appellant to pay the costs.

CONSTABLE, J., absent.

(123 Md. 447)

WILLARD et al. v. HIGDON. (No. 10.)

(Court of Appeals of Maryland. June 24, 1914.)

1. LANDLORD AND TENANT (§ 63\*)—ESTOPPEL TO DENY LANDLORD'S TITLE—APPLICATION OF RULE.

Where on a conveyance of leased land the landlord's interest in a growing crop is reserved, the rule that a tenant cannot deny his landlord's title does not prevent the tenant from defending an action by the grantee for the value of such crop on the ground that it has been delivered to the grantor.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 159-163, 165-167, 169, 172-176; Dec. Dig. § 63.\*]

2. FRAUDS, STATUTE OF (§ 72\*)—SALES OF GROWING CROPS—"GOODS."

Growing crops, if fructus industriales, such as a crop of wheat, are chattels, and may be sold without complying with the requirements of the statute of frauds, especially in view of Uniform Sales Act (Code Pub. Civ. Laws, art. 83), § 97, providing that "goods" includes all chattels personal other than things in action or money, and that the term includes emblements, industrial growing crops, and things attached to or forming a part of the land which are agreed to be severed before sale or under the contract of sale.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 116-118, 146; Dec. Dig. § 72.\*]

For other definitions, see *Words and Phrases*, vol. 4, pp. 3130-3137; vol. 8, p. 7673.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 91 A.—37

## 2. FRANCHISE STATUTE OF § 254—SALES OF CHATELAIN—DELIVERY AND ACCEPTANCE—PART PAYMENT.

Within the provision of the Uniform Sales Act Code 2d, Civ. Laws, art. 254 that a contract to sell or a sale of goods of the time of 254 or upward shall not be enforceable by action unless the buyer shall accept part of the goods and actually receive them or give something in earnest to bind the contract or in part payment, etc., if a reservation of a growing crop by a grantor amounted to a contract to sell or a sale, the grantor both accepted and received the crop and gave something in part payment, where the crop was subsequently delivered to him by a tenant; the consequences of the property constituting payment in full.

[Ed. Note.—For other cases, see *Franchise Statute of*, Cent. Dig. §§ 140-143; Dec. Dig. § 45.\*]

## 4. FRANCHISE STATUTE OF § 141—AVAILABILITY AS DEFENSE.

A party may rely upon an oral contract as a defense, though the contract could not be enforced on account of the statute of frauds, especially in view of the provision of the Uniform Sales Act Code 2d, Civ. Laws, art. 254 that a contract to sell or a sale "shall not be enforceable" unless the buyer shall accept part of the goods and actually receive them, etc.

[Ed. Note.—For other cases, see *Franchise Statute of*, Cent. Dig. §§ 242; Dec. Dig. § 141.\*]

## 5. FRANCHISE STATUTE OF § 74—SALES—GROWING CROPS—PAROL RESERVATION.

As a growing crop may be sold by parol, a parol reservation of such a crop upon a conveyance of land is valid, since a crop may be so dealt with as to make it personal property, and therefore does not necessarily pass with the land upon which it is growing.

[Ed. Note.—For other cases, see *Franchise Statute of*, Cent. Dig. §§ 82, 122-131; Dec. Dig. § 74.\*]

## 6. APPEAL AND ERROR (§ 1056)—HARMLESS ERROR—RULING ON EVIDENCE.

In an action by the grantee of leased premises against the tenant to recover the value of a growing crop delivered by the tenant to the grantor, defended on the ground that the crop was orally reserved by the grantor, where the jury found for defendant, the exclusion of a question asked the grantee as to what steps he took to protect himself against the delivery of the crop was harmless.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

Appeal from Circuit Court, Frederick County; Hammond Urner, Glenn H. Worthington, and Edward C. Peter, Judges.

"To be officially reported."

Action by Charles F. Willard and others against Henry W. Higdon. From a judgment for defendant, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, STOCK-BRIDGE, and CONSTABLE, JJ.

Charles McC. Mathias and Albert S. Brown, both of Frederick (Emory L. Coblenz, of Frederick, on the brief), for appellants. Milton G. Urner and John S. Newman, both of Frederick (Benjamin F. Reich, of Frederick, on the brief), for appellee.

BOYD, C. J. The appellee rented a farm from David H. Roelkey from April 1, 1910, to April 1, 1911, by an agreement in writing

which contained various provisions, amongst others that Mr. Roelkey was to have one-half of all the wheat, corn, clover seed, timothy seed, rye, and hay raised on the farm, which the appellee agreed to deliver to any point within five miles therefrom free of cost to Mr. Roelkey. On December 27, 1910, Mr. Roelkey agreed to sell the farm to the appellants. At that time the following note was given to him:

"*Knorrville, Md., Dec. 27, 1910.*

"Ninety days after date we jointly and severally promise to pay to David H. Roelkey five hundred dollars for value received as part payment of purchase of farm known as Forest Grove, containing 234 acres, more or less, except part reserved between two farms of about two or three acres, more or less, purchase price to be \$18,000."

That was signed by C. F. Willard, R. H. Willard, and M. L. Willard. On the same day Mr. Roelkey gave the appellants a receipt as follows:

"*Knorrville, Md., December 27, 1910.*

"Received of C. F. Willard, R. H. Willard, and M. L. Willard five hundred dollars in form of note as forfeit on farm known as Forest Grove, price to be \$18,000."

"\$500.

David H. Roelkey."

On March 25, 1911, Roelkey and wife executed a deed to the appellants for two tracts of land described by courses and distances, which in the aggregate contained 234 acres, more or less, and it seems to be conceded that the land conveyed by the deed was the same intended to be sold as referred to in the note and receipt above. There is no such reservation in the deed, but Roelkey claims that it was at the time of the sale distinctly, but orally, agreed that he was to have the half of the wheat crop then growing, which, under the terms of the lease to the appellee, he was entitled to. The appellants deny that there was such an agreement, and contend that there could be no binding reservation made by parol, as it would be in contradiction of the written agreement and of the deed. Roelkey claims that he positively refused to sell the farm for less than \$18,000 and the reservation of the half of the wheat crop, and that, when he insisted upon there being inserted in the agreement provisions that the appellee was to remain on the farm and that he reserved the growing wheat crop, Charles F. Willard, who wrote the papers, said:

"It is not worth while; it is not like strangers; we have been friends all our lives; we want only what is right."

He had made a mistake in one of the papers, which had to be written over again, and Roelkey claims that he again insisted upon those provisions being inserted, and said his son did not understand the omission, and Willard then turned to the son, and, addressing him, said:

"Dave, Mr. Higdon is to stay on there and your father reserves the growing wheat crop; is that plain enough to you?"

Roelkey claims that the reservations were accordingly omitted at the instance of Willard.

The appellee delivered the half of the wheat to a mill for Roelkey, instead of delivering it to the appellants who notified him of their claim to it. The appellants sued him, and at first simply had six of the usual common counts in the narr., but amended by adding a seventh count:

"For money due for the use and occupation of the plaintiffs' lands in Frederick county, Maryland."

The plaintiffs finally abandoned all of the counts in the declaration except the seventh. There are 12 bills of exception containing rulings as to the admissibility of evidence, and the thirteenth embraces the prayers; the plaintiffs having offered 7, all of which were rejected excepting the fourth, and the defendant 8, the first and second of which were rejected, and the third granted. The case resulted in a judgment for the defendant, and from that this appeal was taken.

[1] As the important question in the case is whether there could be a valid reservation of the wheat crop by parol, notwithstanding the agreement of December 27, 1910, and the deed in evidence, we will consider that question before referring to the exceptions and prayers separately. Before doing so, however, it will be well to say that we do not understand how the question whether a tenant can deny his landlord's title is involved in this case. That was argued at some length orally and in the brief of the appellants, but there can be no difficulty about the law on that subject. If it was validly agreed between the appellants and Roelkey that the latter was to have the one-half of the wheat crop, it could hardly be contended that the appellee could not defend against this suit by reason of the fact that he is the tenant of the appellants. If, for example, the deed had contained such a reservation, the right of the appellee to defend on the ground that he had delivered the wheat in pursuance of that reservation could not have been questioned, and therefore we say that the important question is whether there was a valid reservation of the wheat crop.

[2] It cannot be doubted that in this state growing crops, if *fructus industriales*, such as a crop of wheat, are regarded as chattels, and can be sold without complying with the requirements of section 4 of the statute of frauds. *Purner v. Piercy*, 40 Md. 212, 17 Am. Rep. 591; *Wilson v. Fowler*, 88 Md. 601, 42 Atl. 201, 42 L. R. A. 849, 71 Am. St. Rep. 452. In this state even a sale of growing trees to be presently cut and removed by the vendee is not within the operation of that section. *Smith v. Bryan*, 5 Md. 141, 59 Am. Dec. 104; *Leonard v. Medford*, 85 Md. 666, 37 Atl. 365, 37 L. R. A. 449. If prior to the passage of the Uniform Sales Act in 1910 there could have been any doubt about growing crops being chattels, that statute dispels

it. In section 97 of article 83 it is declared that:

"'Goods' include all chattels personal other than things in action or money. The term includes emblements, industrial growing crops, and things attached to or forming a part of the land which are agreed to be severed before sale or under the contract of sale."

As that act took effect June 1, 1910, it is applicable to this agreement, which was made December 27, 1910.

[3] Under the decisions in *Elchelberger v. McCauley*, 5 Har. & J. 213, 9 Am. Dec. 514, and *Rentch v. Long*, 27 Md. 188, a sale of a crop not yet thrashed, shucked, or gathered was not within the seventeenth section of statute of frauds, because, work and labor being necessary to prepare it for delivery, it was not a sale of goods, wares, and merchandise within the meaning of that section, but that has been changed by the Uniform Sales Act, § 25, which reads as follows:

"A contract to sell or a sale of any goods or choses in action of the value of fifty dollars or upward shall not be enforceable by action, unless the buyer shall accept part of the goods or choses in action, so contracted to be sold, or sold and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract or sale be signed by the party to be charged or his agent in that behalf.

(2) The provisions of this section apply to every such contract or sale, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract or sale be actually made, procured or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery; but if the goods are to be manufactured by the seller especially for the buyer and are not suitable for sale to others in the ordinary course of the seller's business, the provisions of this section shall not apply.

(3) There is an acceptance of goods within the meaning of this section when the buyer, either before or after delivery of the goods, expresses by words or conduct his assent to becoming the owner of those specific goods."

Although subsection (2) has changed the rule announced by our predecessors, if the alleged agreement as to the crop between the appellants and Mr. Roelkey can be said to amount to a contract to sell or a sale, then the latter is the buyer, and the further question arises as to whether he had done any of the things which are a compliance with the statute. That must be answered in the affirmative, as Roelkey did actually accept and receive the wheat, and he did give something in part payment—indeed, in payment in full—as he conveyed the property for which the consideration was the \$18,000 and the reservation of the wheat crop, if his contention in that respect be correct.

[4] Moreover, section 25 says that a contract to sell or a sale shall "not be enforceable by action, unless," etc. Under our decisions a party may defend, although the contract cannot be enforced on account of the statute of frauds. *Crane v. Gough*, 4 Md. 333; *Webster v. Le Compte*, 74 Md. 258, 22 Atl. 232.

See, also, 29 Am. & Eng. Ency of Law, 818, 822.

[8] We must therefore consider the question of the validity of a reservation by parol, with the understanding that a growing wheat crop may be treated as a chattel, and that the statute of frauds does not stand in the way of the defense in this case of such a reservation. The authorities are not uniform on the subject, but, inasmuch as the growing crop can be treated as a chattel, and the owner of the land can undoubtedly sell it as such, we are of the opinion that it is more reasonable and more in accord with the spirit of the decisions in this state to hold that such a crop can be reserved by parol. Of course, if a third party deals with the vendee of the real estate, without knowledge of the reservation, another question might arise, but as between the vendor and vendee it seems to us to be more logical to hold that such a crop can be reserved by parol, without infringing upon the rule that the terms of a written instrument or a deed cannot be varied by parol, although there are many decisions to the contrary in other jurisdictions. In 2 Devlin on the Law of Real Property and Deeds, § 980C, it is said:

"On the ground that parol evidence is inadmissible to contradict or alter the terms of a written instrument, the rule announced in many cases is that it cannot be shown by parol that the grantor reserved the growing crops upon the land conveyed. But in a number of cases a contrary rule is announced. In the first class of cases it is said that to admit the reservation by parol of growing crops would be in direct conflict with the rule forbidding the introduction of parol evidence to vary the terms of a written instrument. In the other class it is said that the allowance of a parol reservation of a growing crop is not to contradict the deed, but to show what, in some instances, would pass with the land as a part of the realty has, by the agreement of the parties, been transformed into personality."

The case of *Grabow v. McCracken*, 23 Okl. 612, 102 Pac. 84, is annotated in 23 L. R. A. (N. S.) 1218, and also in 18 Ann. Cas. 503, and in both of those volumes many authorities are cited in the notes. In that case it was held that a matured crop of corn and wheat standing ungathered upon a tract of land may be specifically reserved by parol in the sale of the land as a part of the contract price or consideration of the deed. The court cited a large number of cases in which it had been permitted to prove by parol that there was a consideration in addition to the one mentioned in the deed, as that was not contrary to the general doctrine that parol evidence could not be admitted in contradiction of or to vary a written instrument or deed.

In the notes referred to cases on both sides of the question are cited; among those holding that the vendor may avail himself of a parol exception of growing crops and that parol evidence is admissible to show that a crop growing on the land was excepted from the operation of the deed are *Heavilon v. Heavilon*, 29 Ind. 509; *Harvey v. Millon*,

67 Ind. 90; *Benner v. Bragg*, 68 Ind. 338; *Hisey v. Troutman*, 84 Ind. 115; *Bourne v. Bourne*, 92 Ky. 211, 17 S. W. 443; *Flynt v. Conrad*, 61 N. C. 190, 93 Am. Dec. 588; *Walton v. Jordan*, 65 N. C. 170; *Baker v. Jordan*, 3 Ohio St. 438; *Youmans v. Caldwell*, 4 Ohio St. 72; *Backenstoss v. Stahler*, 33 Pa. 251, 75 Am. Dec. 592; *Harbold v. Kuster*, 44 Pa. 392; *Kerr v. Hill*, 27 W. Va. 576. Without now quoting from any of these cases, we are of the opinion that they sustain the position apparently adopted by the lower court that in this state a reservation of a wheat crop can be validly reserved by parol agreement of the parties, and the fact that the deed does not include the reservation does not defeat it. There can be no doubt that under our law this wheat crop could be treated by the parties as personal property, and, if they did agree that it should be reserved by the vendor when he executed the deed, it is manifest that it was not intended to convey it.

While Roelkey was the owner of the reversion, he could undoubtedly have sold his interest in the growing crop of wheat by parol, and after the appellants became such owners they could have sold the landlord's interest in the crop, if it was not reserved by Roelkey. As, then, it is permissible for a vendor to sell such a crop by parol before he conveys the land, and as the vendee can sell it, if still his, by parol after he becomes the owner of the land, it seems to us to be illogical to hold that, although before executing the deed the vendor and vendee agreed that it should be reserved to the vendor, yet, because it was not reserved in the deed itself, the execution and delivery of the deed operate to so reattach this chattel to the real estate as to make it realty, and not personality, and thereby convey to the grantee what was expressly, and at the time validly, agreed should not go to the grantee. An interest in a growing crop is of a temporary character, and it uselessly burdens a deed in fee simple to insert such a reservation in it. If a growing crop would necessarily pass by a deed of real estate, regardless of what had been done with reference to it before the deed was made, that would be a good reason for requiring it to be reserved when the deed for the real estate is executed, but, as the sale of a growing crop such as this is not the sale of an interest in land, but of a chattel, and is now so declared by statute, a deed for the land does not necessarily convey the crop. If Roelkey had sold his interest in this wheat crop to the appellee, or to some other third person, and the appellants knew it, could it be pretended that they could nevertheless, in an action for use and occupation, recover from the appellee one-half of the value of the wheat, simply because the deed did not reserve it? Certainly not; and why then can they recover it, if they agreed that it should be paid to Roelkey? If the appellee



had a valid lease, of which the appellants had notice, could they eject him because there was no reservation in the deed in favor of his lease? A tenant may have property so attached to the land as to appear to be a part of the realty, but, if it was such property as a tenant has the right to remove, there can be no doubt of his right to prove that it was his, and remove it, notwithstanding a deed had been made which made no such reservation. The case of *Baker v. Jordan*, 3 Ohio St. 438, is so well reasoned out and, in our judgment, announces such a wise and correct rule that we will quote at some length from it. It concludes as follows:

"A deed purports to convey the realty. But what is the realty? Growing corn may be part of it, for some purposes, but it is generally to be considered as personalty. If the parties to a deed either by words or their behavior signify their understanding that as between them it is personalty, the law will so regard it, and will respect their intention in the construction of the deed. When the evidence of such understanding is produced, it is not to contradict the deed, for with that it is perfectly consistent; but it is to show that what in some instances would go with the lands as part of the realty was, in that case, converted into personalty by the will of the parties, and thus to hold the deed to its true meaning and effect."

Without deeming it necessary to determine whether under our decisions it could be shown that the reservation of the wheat crop was a part of the consideration for the deed, and therefore parol evidence was admissible on that ground, we are satisfied to base our conclusion on the ground announced in *Baker v. Jordan*, supra, and other cases adopting the same view. We understand the position taken by such cases in effect to be that a conveyance of land may or may not have been intended by the parties to include growing crops, such as wheat, corn, etc., and hence that such a crop does not necessarily pass by a deed for the land, but, on the contrary, if before the conveyance it has been by the action or agreement of the parties converted into personalty, parol evidence is admissible to prove that fact. That is so for the obvious reason that when a deed for real estate is made it does not convey personal property on or in the land, and, if a crop has been so dealt with by the parties before the execution and delivery of the deed as to make it personal property, the parties did not intend the crop to pass with the land. In other words, the crop is not included in the sale of the land, and, if it be not permitted to prove the previous dealings of the parties, the deed would convey what was not sold. A growing crop of wheat is not such a character of property, under our decisions, or under our statutes, as to necessarily pass with the land in which it is growing, in the absence of a reservation in the deed of conveyance.

We therefore hold that it was permissible to submit to the jury the question whether it was agreed between the appellants and Roelkey before the sale was consummated that

the latter should have the growing crop of wheat, and that if they so found (as they did) this action could not be maintained against the appellee.

[8] We will briefly refer to the exceptions. The first and second are not pressed. The third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth were to the admission of testimony in reference to the parol agreement about the wheat crop. From what we have said it will be seen that such testimony was admissible. The eleventh was to the action of the court in sustaining an objection to a question asked Charles F. Willard: "What steps did you take to protect yourself against the delivery of the wheat?" We do not understand how that ruling could have injured the appellants, in view of our conclusion on the main question. There was no error in the twelfth exception.

Without discussing the prayers separately, we are of opinion that the plaintiff's fourth and the defendant's third, which were granted, were sufficient to fairly present to the jury the real question involved in the case, and we will affirm the judgment.

Judgment affirmed, the appellants to pay the costs.

(123 Md. 223)

PARKS et al. v. GRIFFITH & BOYD CO.  
GRIFFITH & BOYD CO. v. PARKS et al.  
(Nos. 16, 17.)

(Court of Appeals of Maryland. April 8, 1914.)

1. SALES (§ 1\*) — CONTRACT—CERTAINTY OF TERMS.

A contract consisting of an offer to sell various fertilizers at prices ranging from \$10.50 to \$28 per ton, supplemented by the seller's offer to meet a competitor's prices on alkaline and acid goods, the buyer to handle only the seller's products, and by the buyer's letter ordering a shipment, stating that the seller would get a big tonnage from him if he met such prices, was too vague and uncertain in respect to the alkaline and acid goods, and as to the amount to be purchased, to sustain an action to recover the difference between the contract price of fertilizers sold by the buyer, but not purchased from the seller, and the cost of its manufacture to the seller.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1, 3-5; Dec. Dig. § 1.\*]

2. SALES (§ 50\*)—PERFORMANCE—ACCEPTANCE.

Accepted orders for goods sold under a contract void for uncertainty, vagueness, or lack of mutuality may constitute sales of the goods so ordered at the prices named in the contract, but do not validate the contract as to articles which one of the parties thereto refuses to sell or deliver, or the other refuses to purchase, since neither party is bound to take or deliver any quantity of the articles thereunder.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 109-114; Dec. Dig. § 50.\*]

3. SALES (§ 382\*)—ACTION FOR DAMAGES—ADMISSION OF EVIDENCE—LETTER OF ACCEPTANCE.

In an action to recover damages measured by the difference in the value of fertilizers, manufactured by others than plaintiff, sold by defendant, and the cost of manufacture of a similar amount to the plaintiff, defendant's letter accompanying an order which was set out in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the falsification was material as establishing the price for the goods shipped, and as warranting upon a claim of satisfaction of the said contract of sale by just performance.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 218; Dec. Dig. § 217.]

4. **TRIAL § 252\*—RECOVERY IN EXTORTION—RECOVERY AGAINST THE PART.**

To recover damages for any purpose was properly admitted over a merely general objection.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 252; Dec. Dig. § 251.]

5. **APPEAL AND REVERSE § 158\*—HARRISON KERR—ADMINISTRATOR OF ESTATE.**

Where evidence as to whether plaintiff had approved a contract to sell goods to defendant was already in the case without objection, its subsequent admission was not prejudicial.

[Ed. Note.—For other cases, see Appeal and Reverse, Cent. Dig. § 158, 159, 412-415, 416; Dec. Dig. § 157.]

6. **CUSTOMS AND DUTIES § 17\*—PAROL EVIDENCE IN VARY WRITING.**

In an action to recover the difference between the value of fertilizers sold by defendant, but not purchased from plaintiff, and the cost of the manufacture of that amount to the plaintiff, based on an alleged contract of defendant to purchase from plaintiff all the fertilizers he might need, provided plaintiff met a competitor's price, evidence of a custom in the business, according to which the purchaser under such a contract was only expected to buy what he saw fit, was not admissible, since it would have varied the terms of the instrument purporting to constitute the contract sued on, and which had been offered in evidence.

[Ed. Note.—For other cases, see Customs and Duties, Cent. Dig. § 24; Dec. Dig. § 17.]

7. **CONTRACTS § 16\*—SALES § 21\*—CONSTRUCTION—CERTAINTY AS TO QUANTITY—CONSIDERATION.**

A contract for a future delivery of goods is void for want of consideration and mutuality if the quantity to be delivered is conditioned by the will, wish or want of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 21-40; Dec. Dig. § 10; Sales, Cent. Dig. §§ 22-28; Dec. Dig. § 21.]

8. **SALES § 21\*—CONTRACTS—QUANTITY—AMOUNT NEEDED BY BUYER.**

An accepted offer to deliver such goods as may be needed or required or consumed by the established business of the acceptor during a limited time is enforceable, because containing the implied agreement to purchase all the goods required in his business during such time; but an accepted offer to sell or deliver goods at specified prices during a limited time in such quantity as the acceptor may want or desire in his business, or without any statement as to quantity, is without consideration and void, because the acceptor is not bound to want or take any of the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 33-38; Dec. Dig. § 21.]

9. **TRIAL § 252\*—INSTRUCTIONS—APPLICATION TO EVIDENCE AND ISSUES.**

In an action for the difference between the amount of fertilizers sold by defendant, but not purchased from the plaintiff, and the cost of the manufacture by the plaintiff of a similar quantity where the contract as to the amount purchased was so uncertain as to be unenforceable, prayers that, if defendant entered into the contract declared on and refused to order and receive part of the fertilizer mentioned therein, though plaintiff was ready to sell and deliver it,

plaintiff might recover, and upon the measure of damages in the same theory were properly refused as unnecessary to the issues and evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 252; Dec. Dig. § 251.]

10. **TRIAL § 252\*—ACTION FOR DAMAGES—RECOVERY.**

In such action, a prayer conceding the plaintiff's right to recover for services shipped, and excluding damages for a breach of the shipment contract, was proper.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 218; Dec. Dig. § 217.]

11. **TRIAL § 252\*—INSTRUCTIONS—EXTORTION.**

In such action, where there was evidence in defense that plaintiff had refused to sell and deliver such goods to meet a competitor's price, as agreed by the contract, defendant's prayer based on that line of defense should have been granted.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 252-253; Dec. Dig. § 252.]

Appeals from Circuit Court, Queen Anne's County; Wm. H. Atkins and Phileas R. Hopper, Judges.

"To be officially reported."

Action by the Griffith & Boyd Company against Rufus F. Parks and another, trading as Rufus F. Parks & Son. Judgment for plaintiff, and all the parties appeal. Reversed and remanded for new trial, or further appropriate proceedings.

See, also, 117 Md. 494, 83 Atl. 539.

Argued before BOYD, C. J. and BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

R. Groome Parks and Lewin W. Wickes, both of Chestertown (J. H. C. Legg, of Centreville, on the brief), for R. F. Parks & Son. L. Wethered Barroll and Hope H. Barroll, both of Chestertown (Thomas J. Keating, of Centreville, on the brief), for Griffith & Boyd Co.

STOCKBRIDGE, J. On May 25, 1910, R. F. Parks & Son, of Chestertown, wrote a letter to Griffith & Boyd Company, of Baltimore, as follows:

"We are inclosing order for phosphate. Please ship promptly. Must have fall prices at once. A party in our employ wants to start at once. Advise."

The receipt of the letter by the addressee was acknowledged, with the assurance that the order should have attention, and that:

"We note that you desire prices at once for the fall season; but owing to the unsettled condition of the chemical market we are not quite in a position to quote prices, but we will do our very best to do so within a short time. Just as soon as we can do so we will have our Mr. Noble call to see you."

On the 17th June Mr. Noble called on Parks & Son in Chestertown and then and there presented a list of 20 fertilizers, offering to sell them at various prices ranging from \$10.50 to \$28 per ton. There appears to have been considerable discussion in regard to the prices, growing out of the question as to the prices for which the same or equivalent goods could be purchased from

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Martin & White Company. But either on that same day or upon the morning following an acceptance of the proposition was signed by R. F. Parks & Son. Contemporaneously with this, or probably preceding the signing of the contract, a letter was written to Messrs. Parks & Son by Mr. Noble, which concludes as follows:

"On alkaline and acid goods we will meet Martin & White Co. prices."

These various papers will be found fully set out on the first appeal in this case. 117 Md. 496, 497, 83 Atl. 559.

Three days later than this interview between Mr. Noble and Mr. Claude Parks, the acting member of R. F. Parks & Son, the following letter was written to the Griffith & Boyd Company by Claude Parks:

"We are inclosing herewith order which we desire to have shipped on next steamer. Please prepay fgt. We also want this order to go on full contract. Kindly see that the goods are in a good mechanical condition. You will get a big tonnage from us this fall if you will do as we were assured you would do—to impress this on your mind we are sending you our very first order. Please forward us at once 3 sets samples memorandum book, etc. Tell Mr. Noble that Fields has not shown up yet."

Accompanying this letter was an order for the shipment of  $2\frac{1}{2}$  tons of fertilizer, and on June 24th there was a second order for an additional ton to be shipped to another person from the one to whom the shipment contained in the order of June 20th was to be made. Beyond these two orders aggregating  $3\frac{1}{2}$  tons no further shipments of fertilizer were ordered by Parks & Son from the Griffith & Boyd Company. Accordingly on the 12th December, 1910, the Griffith & Boyd Company instituted a suit against Rufus F. and Claude F. Parks to recover for the goods sold, and for the alleged violation of the contract. That suit was before this court at the October term, 1911; but the record contained none of the testimony nor the prayers, which had been offered during the trial of the case, and the case was decided solely upon a question of pleadings, the sufficiency of the declaration, and will be found reported in 117 Md. beginning at page 494, 83 Atl. 559.

The declaration as then filed contained the six common counts and a seventh or special count, under which it was sought to recover for the breach of the alleged contract, and a demurrer having been filed to one of the pleas, counted up to the first error in pleading, which, as was pointed out in that decision, was in the seventh or special count of the declaration; it being held that the allegation of the contract therein contained did not show a valid enforceable contract, and that if the contract was invalid it necessarily followed that there could be no breach of it for which damages were recoverable. The verdict in that case having been for \$1,861.79, the judgment was reversed, and the case remanded for a new trial.

[1] After the case had been so remanded, the plaintiff filed an amended declaration

which contained, as did the original declaration, the six common counts and two special counts, numbered as 7 and 8. Thereupon the defendant, Parks & Son, filed the general issue plea and a demurrer to the seventh and eighth counts of the amended narr. These demurrers were severally sustained, whereupon the plaintiff filed a ninth count to the amended declaration, which was in like manner demurrer to, and the demurrer sustained. In each of these three counts, the seventh, eighth, and ninth, the theory of the plaintiff was that the defendants had sold in the neighborhood of 1,600 tons of fertilizer during that season, and that it was entitled to recover the difference between the cost of manufacturing such fertilizer and the contract price for 1,600 tons, under the clause, "You agree to handle our goods exclusively." In response to a demand for a bill of particulars an account was filed for the  $3\frac{1}{2}$  tons sold, which was said to be filed to each count in the declaration. After the sustaining of the demurrer to the ninth count, an amended ninth count was filed, in which the plaintiff sets forth in full the alleged contract between the parties, consisting of the offer made on the 17th June, the acceptance of it, the accompanying letter of the same date allowing certain abatements in price on all ammoniated goods except bone meal, soft ground bone, and dissolved animal bone, and a lesser discount on dissolved animal bone, together with the statement that on alkaline and acid goods the plaintiff would meet Martin & White Company prices; also the letter of June 20th, already quoted, and the accompanying order. The amended ninth count then goes on and alleges the additional order of June 24th, the refusal of the defendant to order or accept more than  $3\frac{1}{2}$  tons of fertilizer, the readiness and willingness of the plaintiff to carry out his contract, that the defendant sold more than 1,600 tons not made by the plaintiff, whereby the plaintiff had suffered great damages. A demurrer was also filed to this amended count; but the demurrer was overruled. This presents the case as made out by the declaration.

The contract sought to be set up by the pleadings thus far was vague and uncertain in two respects, viz.: On the acid and alkaline goods upon which the plaintiff agreed in the letter of June 17th to meet the Martin & White Company prices, there is no allegation that these ever had been met and the vagueness as to the amounts of fertilizer to be purchased of the different kinds remained as it was under the original seventh count, and so the rulings of the trial court in sustaining the demurrers to the seventh and eighth counts of the amended declaration filed after the remand, and to the ninth count as originally filed, were correct for the reasons set out by Judge Pattison in the former opinion and *Wheeling Steel Co. v. Evans*, 97 Md. 305, 55 Atl. 373, and *Thomson v. Gortner*, 73 Md. 482, 21 Atl. 371, in each of which agreements

as full and complete as the one in this case were held void and unenforceable. It is suggested that these cases have in effect been overruled by *Kirwan v. Roberts*, 99 Md. 341, 58 Atl. 32. But we do not so interpret that case. The agreement there was for the sale of cans of different sizes to be delivered along from time to time by the vendor. The prices for the various sizes were different; but the deliveries were to be made in accordance with certain fixed percentages of the entire amount of the order monthly, the vendee to designate the sizes and number of each desired at the commencement of the month. The contract was attacked upon that ground, inasmuch as it did not embody the total number of each size of cans to be sold, and which the vendee was to receive, that it was therefore too vague to furnish the basis for an action for its breach. This is sometimes treated as an option, not ripening into a contract until such time as the designation is made; but there was evidence in that case tending to show that a designation and selection of sizes had been made by the bookkeeper, thus rendering certain the only element of the contract which by any possibility could theretofore have been regarded as uncertain. The present case is therefore rather in line with the two earlier cases cited than with the case of *Kirwan v. Roberts*.

[2] With regard to the amended ninth count the situation is somewhat different. The same elements of vagueness and uncertainty remain, but there is the added element of an allegation of the sale of  $3\frac{1}{2}$  tons of fertilizer under the alleged contract, and that these have not been paid for. With respect to this joinder of two matters, the appellants, *Parks & Son*, contend that this count was thereby rendered bad upon the principle announced by Judge Burke in *White Automobile Co. v. Dorsey*, 119 Md. 251, 86 Atl. 617. The distinction between that case and the present is a very plain one; the rule applicable here being that laid down by Judge Sanborn in *Cold Blast Trans. Co. v. Kansas City Bolt & Nut Co.*, 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696, that accepted orders for goods under contracts void for their uncertainty, vagueness, and lack of mutuality may constitute sales of the goods so ordered at the prices named in the contract, but they do not validate the agreement as to articles which one of the parties to the agreement refuses to sell or deliver or the other refuses to purchase under the void contract, because neither party is bound to take or deliver any amount or quantity of the articles thereunder. See, also, *Ashcroft v. Butterworth*, 136 Mass. 511; *Thayer v. Burchard*, 99 Mass. 508; *Hoffman v. Maffoli*, 104 Wis. 630, 80 N. W. 1032, 47 L. R. A. 427; *Crane v. Crane & Co.*, 105 Fed. 869, 45 C. C. A. 96. Nor is this view obviated by the fact that for goods actually sold and delivered a recovery might be had under the common counts. Such a recovery was sought on the basis of a contract,

the price named in the contract would control, and in this case the order of June 20th had expressly asked that the order "go on the fall contract." The action of the trial court in overruling the demurrer to the amended ninth count was therefore proper, and will be sustained.

To the amended ninth count the defendant filed two pleas, the first admitting a promise as to the sum due the plaintiff for the  $3\frac{1}{2}$  tons, \$70.25, and the tender to the plaintiff of \$81.42; while in the second plea they endeavored to set up a usage by which under similar contracts it had been made a practice only to order and pay for such and as much goods as they might see fit. These pleas were in like manner demurred to, and the demurrer to the first plea was overruled, and that to the second sustained. The case then proceeded to trial, and at the conclusion of the evidence the plaintiff offered six prayers, and the defendant three, the rulings of the court on which constitute the first bill of exceptions.

Other exceptions were taken upon questions of evidence during the progress of the trial; but by a curious and unusual method of arrangement these all appear at the end of the record, and are arranged numerically to follow the action of the court on the prayers. In order to see the applicability of the prayers it is necessary to understand something of the course of the evidence, and the exceptions relating to evidence will be considered at the points where they were severally raised in the progress of the case.

[3, 4] After testifying to the circumstances under which the offer of June 17th and the letter of that date were prepared and signed, the introduction of the letter of June 20th in evidence was objected to by the defendant, and its admission is the basis of the second bill of exceptions. This letter had been included in the declaration and was a part of the plaintiff's case, certainly to the extent of showing that the goods which were ordered upon that date were ordered upon the basis of the supposed contract, and at the prices contained in the offer of June 17th. It was material, first, as establishing the price to be charged for the goods which had been shipped, and also upon which to make a claim of ratification of the contract by part performance. The objection to it was general, and, if it was admissible for any purpose at all under such an objection, the court was clearly right in admitting it; this is so familiar a rule of evidence that a citation of authorities in support of it is needless.

[5] The third exception was taken to a question put to Mr. Griffith, the president of the plaintiff, whether Griffith & Boyd Company approved the contract, to which he replied, "We did." Exactly why this question should have been objected to when it was it is difficult to understand, as the same question had been substantially asked and answered without objection only a few mo-

ments before. The evidence was already in the case without objection which the question sought to elicit and did elicit, and certainly under such circumstances no prejudicial error can be predicated upon this ruling of the court.

The fourth bill of exceptions was taken to the action of the court in permitting the same witness, Griffith, to answer the question, "Tell what orders you filled under it." The declaration had set out the orders of June 20th and 24th, and the rules applicable alike to the sufficiency of the declaration and of this question have been considered in discussing the demurrer, and from what was then said it will be apparent that there was no error committed by the court in its ruling upon this.

[6] The fifth and sixth bills of exception both involve the same question, namely, whether it was competent for the defendant to prove upon cross-examination of the plaintiff's president a usage of custom of the business, in accordance with which, under contracts similar to that in this case, the purchaser is only expected to buy what he sees fit. Evidence of usage may be and frequently is a pertinent element in cases arising on implied contracts. Where, however, the terms of an express contract are clear and specific, parol evidence can never be admitted to contradict or vary those terms, and the only possible effect that the evidence here sought to be introduced could have had would have been to vary the express terms of the instrument or paper supposed to constitute a contract which had been offered in evidence. These exceptions cannot be sustained.

On June 24th or 27th Mr. Noble returned to Chestertown for the purpose of ascertaining what the Martin & White Company prices were, but was unable to obtain from the Parks the desired information, so that he might conform to the undertaking in the letter of June 17th to meet those prices. Not getting the information on this visit, he returned a third time to Chestertown, between the 24th and 27th July. On the occasion of this visit he saw a Martin & White Company contract in the hands of Claude F. Parks, and the latter occupied in erasing and altering some of the figures contained in that contract. Why Mr. Parks did this it is difficult to understand, that he did do it is not denied, but, whatever the reason may have been, Mr. Noble declined to accept the altered figures of Parks. He did, however, obtain the prices in the contract from Mr. Barton, the salesman for the Martin & White Company. On July 30th the Griffith & Boyd Company wrote to Parks & Son, as follows:

"We hereby accept contract made with you for the fall season by our Mr. Noble, dated June 17, 1910, and will allow you the following rebates on alkaline and acid goods to conform with the Martin & White Co. prices as per agreement.

Then follows a list of rebates on eight different brands of fertilizers, rebates ranging

from 60 cents to \$1.55 per ton, thus for the first time making certain the prices upon all of the goods mentioned in the offer of June 17th. The receipt of this letter was first denied by Mr. Parks, Sr., but admitted upon being confronted with the letter.

[7, 8] No evidence, however, was offered to show that at any time was there any attempt to designate the number of tons of each or any of the brands named in the offer of June 17th other than in the case of the 3½ tons ordered upon June 20th and 24th.

In considering the prayers, no better or clearer guide can be followed than the rules laid down by Judge Sanborn in the case of the Cold Blast Trans. Co. v. Kansas Bolt & Nut Co., supra, and which are the same rules that were applied by Judge McSherry in the case of the Wheeling Steel Co. v. Evans, supra:

"A contract for the future delivery of personal property is void for want of consideration and mutuality if the quantity to be delivered is conditioned by the will, wish, or want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty. An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer. \* \* \* But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration and void, because the acceptor is not bound to want, desire, or take any of the articles mentioned."

The first prayer of the plaintiff, which was granted by the court, had relation only to the 3½ tons which had been delivered, and from what has been said already the granting of this prayer was entirely proper.

[9] The second and third prayers as they appear in the record are in inverted order. The third prayer is in these words:

"If the jury shall find from the evidence that the defendants entered into the contract with the plaintiff that is recited at length in the plaintiff's declaration for the delivery of certain fertilizers manufactured by the plaintiff, and if the jury shall further believe from the evidence that the plaintiff was ready and willing to comply with the terms and conditions of the said contract of sale upon its part to be performed, and if the jury shall further believe from the evidence that the defendants upon their part ordered and received part of said fertilizers mentioned in said contract, and failed, neglected, and refused to order and receive part of said fertilizers mentioned in said contract of sale offered in evidence and set forth in the declaration, then their verdict should be for the plaintiff."

This was granted. It assumes the sufficiency of the papers set out in the pleadings and evidence as constituting a valid contract, if their genuineness was found by the jury. For the reasons stated this was erroneous, and the prayer should have been rejected. The plaintiff's second prayer was upon the

measure of damages, and these were upon the theory contained in the plaintiff's third prayer. Since it was error to have granted that, it was likewise error to have granted the second prayer.

The plaintiff's fourth prayer was on the question of discounts, and was correct. The plaintiff's fifth and sixth prayers were both based upon the theory of the validity of the contract, and were properly rejected.

[10] By the defendant's first prayer, the right of recovery by the plaintiffs was conceded to the amount of \$70.25, with interest in the "discretion of the jury from December 1, 1910, to May 18, 1912." This excluded the element of damages for a breach of the so-called contract from the consideration of the jury, and was correct in principle, and should not have been wholly rejected. Just why the jury should have been limited on the matter of interest to May 18, 1912, is not clear; but the error was one which could have been readily corrected by the court.

[11] The second and third prayers of the defendants were both based upon the same line of defense, namely, the theory of a refusal of the Griffith & Boyd Company to meet the prices of the Martin & White Company. Mr. Claude F. Parks did testify to such a refusal, notwithstanding the letter of the plaintiff of July 30th; and, as the first prayer of the defendants had at that time been rejected by the trial court, they were entitled to have the verdict of the jury upon this defense. Of the two prayers the second was less open to criticism than the third, and no reversible error can be ascribed to the court for its ruling on these two prayers.

What has been said sufficiently disposes of both the appeals contained in this record, and the judgment appealed from will be reversed, and the cause remanded for a new trial, or such further proceedings as may be appropriate.

Judgment reversed and cause remanded, the costs in both appeals to be paid by the Griffith & Boyd Company.

(36 N. J. L. 75)

#### STATE v. BOYD.

(Supreme Court of New Jersey. July 27, 1914.)

(Syllabus by the Court.)

#### 1. JURY (§ 29\*) — RIGHT TO JURY TRIAL — WAIVER.

A party indicted for a high misdemeanor who waives trial by jury and is tried before the court without a jury by his own consent is not entitled to a reversal on the ground that his right to a trial by an impartial jury was infringed.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 197-203; Dec. Dig. § 29.\*]

#### 2. INDICTMENT AND INFORMATION (§ 116\*) — INCITING TO DESTRUCTION OF PROPERTY — SUFFICIENCY.

Under Crimes Act, pl. 5e (2 Comp. St. 1910, p. 1744; P. L. 1908, p. 577), denouncing the inciting to the unlawful burning or destruc-

tion of public or private property, the language used by defendant as charged in the indictment held, in connection with the results of the acts advocated as disclosed by the evidence, to amount to the destruction of private property.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 309; Dec. Dig. § 116.\*]

#### 3. INDICTMENT AND INFORMATION (§ 139\*) — OBJECTION—WAIVER.

The question whether the indictment should have specified the owner or owners of property whose destruction was advocated, in violation of P. L. 1908, p. 577, not considered because not raised before the jury was sworn, as required by section 44 of the Criminal Procedure Act (Act June 14, 1898 [P. L. p. 881]).

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 473; Dec. Dig. § 139.\*]

#### 4. CONSTITUTIONAL LAW (§§ 90, 250, 258\*) — CRIMINAL LAW (§ 45\*) — SPEEDY TRIAL — PREPARATION FOR TRIAL — DUE PROCESS — EQUAL PROTECTION — FREEDOM OF SPEECH.

The act P. L. 1908, p. 577, does not violate the constitutional provisions: (a) Const. U. S. Amend. 6, (b) Const. U. S. Amend. 14, (c) Const. U. S. Amend. 1, or Const. N. J. art. 1, § 5 (liberty of speech, etc.).

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 172, 711-713, 748; Dec. Dig. §§ 90, 250, 258.\* Criminal Law, Cent. Dig. § 52; Dec. Dig. § 45.\*]

#### 5. CRIMINAL LAW (§ 45\*) — INCITING TO CRIME — ELEMENTS OF OFFENSE.

To constitute a violation of P. L. 1908, p. 577, it is not necessary that the destruction of property advocated shall have taken place in fact.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 52; Dec. Dig. § 45.\*]

Error to Court of Quarter Sessions, Passaic County.

Frederick Boyd was convicted of inciting to the destruction of property in violation of Crimes Act, pl. 5e (2 Comp. St. 1910, p. 1744; P. L. 1908, p. 577), and brings error. Affirmed.

Argued February term, 1914, before GUMMERE, C. J., and PARKER and KALISCH, JJ.

Henry Marelli and Gustav A. Hunziker, both of Paterson, and Gilbert E. Roe, of New York City, for plaintiff in error. Michael Dunn, Prosecutor of Pleas, of Paterson, for the State.

PARKER, J. The defendant was indicted under the statute of 1908, set out in 2 Compiled Statutes 1910 as section 5e of the Crimes Act, p. 1744, providing that any person who shall in public or private by speech, etc., advocate, encourage, justify, praise or incite the unlawful burning or destruction of public or private property, etc., shall be guilty of a high misdemeanor. There were two indictments, both of which charge that there was a public meeting during the strike of silk mill workers, and that at this meeting the accused did unlawfully and willfully and by speech advocate, encourage, and incite the said persons so assembled at said meeting to the unlawful destruction of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

private property situate in the city of Paterson. The indictments then go on to quote what the defendant said, and in both of them it is averred that he recommended the use by the strikers of what is called sabotage, consisting of injury to the material or to the machine on which they were employed. In the first indictment he recommended that they "put a kink into the warp" and "fix up a little something in the dye box." The second indictment alleges that he recommended the use of vinegar on the reeds, sandpaper on the spindle of silk, and a certain chemical in the dye box, all for the purpose of making the product unmerchantable, and preventing nonunion workers from doing their work.

[1] The case is submitted on briefs. The first point made by the plaintiff in error is that the court did not have jurisdiction of the cases, in that, though the record proper shows that the defendant, after being indicted in the quarter sessions, waived trial by jury and was tried before the court of special sessions in due form as provided by the statute, the stenographic transcript and the judge's certificate, pursuant to section 136 of the Criminal Procedure Act, show that, instead of being tried in the special sessions before the court, the trial was had in the quarter sessions without a jury. This is alleged for error. Evidently the trial was conducted in the special sessions as stated in the record; and the stenographer's entry that it was in the quarter sessions, as well as the judge's certificate, are mere clerical errors, and could be amended; but if, in fact, the trial was in the quarter sessions, the case of *State v. Stevens*, 84 N. J. Law, 561, 87 Atl. 118, a decision by this court, is in point, and decisive against the present contention.

[2] The second point is that the indictments do not charge the commission of any crime, in that the language quoted did not incite the destruction of property, but merely the injuring of property; but it appears by the evidence in the case that resort to the measures advocated by the defendant would result in the destruction of property, and we think there is no merit in this point, or in the point that the second indictment does not charge that the unlawful destruction of property was sought. The quoted language disposes of this claim.

[3] It is also alleged that the indictments do not specify, nor does the evidence disclose, any owner of the property to be injured, or that there was any owner of it. The point might perhaps be material if it had been made at the proper time, but it was not. Section 44 of the Criminal Procedure Act provides that every objection to an indictment for form or substance apparent on its face shall be taken by demurrer or motion to quash, before the jury shall be sworn, and not afterwards; and our cases hold that an objection not so taken is barred thereafter. *Mead v. State*, 53 N. J. Law, 601, 23 Atl. 264; *State v. Alderman*, 81 N. J. Law, 549, 79

Atl. 283. There was a motion to quash, but an examination of the grounds then urged shows that the point now made was not specifically presented to the court. The general proposition was stated that the indictments failed to charge a crime, but no specific defect was pointed out. We therefore find it unnecessary to consider whether the indictments were defective in failing to designate the owner of the property referred to.

It is further urged that the evidence failed to establish the commission of a crime. The principal claim made under this point is that there was no evidence to indicate that, if the advice of the speaker had been followed, there would have been a destruction of property. We think that this ignores some of the evidence, and that it is very clear that, if the jury believed the state's witnesses there would have been in such case a destruction of property.

[4] The fourth point is an extended discussion of the proposition that the statute, as construed by the prosecutor, is unconstitutional, as in conflict with the following constitutional provisions:

(1) The sixth amendment to the United States Constitution, providing for speedy trial of the accused, information of the accusation, right to procure witnesses, etc. No specific transgression of this amendment by the act in question is pointed out, and we know of none.

(2) The fourteenth amendment (due process of law and equal protection of the laws). The point made, as we understand it, is that "inciting" to a crime is of a psychologic and imaginative character, and that the act is void for uncertainty. What this has to do with the fourteenth amendment we fail to see. Generally considered, if acts denouncing incitement to crime are void, the theory of accessory before the fact, aiding, abetting, and encouraging crime, and the great mass of criminal legislation of this and cognate character, would have to be erased from the books.

(3) The sixth paragraph of the first amendment of the United States Constitution. There is no such paragraph.

(4) The first amendment, and section 5 of article 1 of the New Jersey Constitution (liberty of speech and of the press).

The same point was made in *State v. Quinlan*, argued at the November term, 1913, of this court (91 Atl. 111), and what was said in the opinion in that case by Mr. Justice Kalisch is pertinent here. The Quinlan indictment was based upon the same statute, and the language charged therein advocated personal violence instead of injury to property. The fundamental answer to the point raised is that free speech does not mean unbridled license of speech, and that language tending to the violation of the rights of personal security and private property, and toward breaches of the public peace, is an abuse of the right of free speech, for which,

by the very constitutional language invoked, the utterer is responsible. Incitement to the commission of a crime is a misdemeanor at common law, whether the crime advocated be actually committed or not (*State v. Gorman*, *supra*); and this by the weight of authority; whether the crime advocated be a felony or a misdemeanor (12 Cyc. 192, and cases cited). That the right of free speech is not unlimited is well settled. 8 Cyc. 592. And in *People v. Mont*, 171 N. Y. 422, 64 N. E. 175, 54 L. R. A. 350, it was expressly held that freedom of the press was not protected by the Constitution to the extent of justifying newspaper articles advocating the murder of public officials. We reach the same result upon the point now raised.

[5] The last point made is as follows:

"Properly construed, the statute may be held constitutional, but, so construed, it has not been violated by the defendant."

We understand the argument made under this point to mean that the statute should be read as making criminal the advocacy of destruction of property, etc., only when coupled with some acts of destruction in pursuance of such advocacy, and that the evidence does not show that any such act was committed. There appears to be no evidence to show that any such act was committed, but, as has been said already, the act of incitement is criminal whether the crime advocated be committed or not. This disposes of all the points that are urged against the conviction.

The judgment will be affirmed.

(38 N. J. Eq. 616)

In re ALPAUGH'S ESTATE.

(Prerogative Court of New Jersey. July 14, 1914.)

EXECUTORS AND ADMINISTRATORS (§ 17\*) —  
RIGHT TO APPOINTMENT—"NEXT OF KIN"—  
MOTHER OF DECEDENT.

Orphans' Court Act (P. L. 1898, p. 724) § 27, provides that if any person die intestate, or if the executor renounces, then administration shall be granted to the widow or next of kin, or to some of them; otherwise to such other person as will accept the same. Held that, where decedent died leaving a widow and two minor children, and the widow renounced her right to administration, decedent's mother, though of kin, was not "next of kin," which means one entitled to distribution, and she was not entitled to administration as against a stranger nominated by the widow.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 43-59; Dec. Dig. § 17.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4798-4804; vol. 8, p. 7732.]

Appeal from Orphans' Court, Hunterdon County.

Judicial settlement of the estate of John M. Alpaugh, deceased. From an order appointing John Young, a stranger, administrator of the estate on the nomination of the widow, decedent's mother appeals. Affirmed.

H. R. Herr, of Flemington, for appellant.  
WILLARD C. PARKER, of Flemington, for respondent.

**BACKER, Vice Ordinary.** John M. Alpaugh died intestate, leaving a widow and two minor children. The widow renounced her right to administer, and upon her request letters were granted to John Young, a stranger. The mother of the deceased, whose application for a grant was denied, now appeals, and by agreement of counsel a single question is presented for determination, viz., whether the mother was entitled to administer. Paragraph 27 of the Orphans' Court Act (P. L. 1898, p. 715) provides that:

"If any person die intestate, or if the executor named in any testament renounce the executorship, or neglect, for the space of forty days after the death of the testator, to prove such testament, then administration of the goods, chattels and credits of such intestate or of such testator with the testament annexed, shall be committed or granted to the widow or the next of kin of such intestate or testator, or to some of them, if they or any of them will accept the same; and if none of them will accept thereof, then to such other proper person or persons as will accept the same."

The resignation of the widow and the disability of the children—the next of kin—rendered entirely inapplicable the mandate of the statute, and left the probate court free, in the exercise of a sound discretion, to appoint any proper person to administer the estate. While the mother was of kin, she was not the next of kin of the deceased, within the meaning of the statute; i. e., next of kin entitled to distribution. The imperative command of this legislation is limited and restricted in its operations to a class to which the appellant does not belong. It does not require the grant to be made to the nearest of kin qualified to act. *Woodruff v. Snoover*, 45 Atl. 980.

The *Degnan's Case*, 75 N. J. Eq. (5 Buch.) 197, 71 Atl. 668, is cited by the counsel of the appellant as holding an opposite view. I do not so understand it. In that case the husband of the deceased, who was entitled to her personal property, failed to apply for letters. After his death his executor and the deceased wife's brother, respectively, petitioned to be appointed. Chancellor Walker directed the orphans' court to issue letters to the brother, because of his statutory right. He was the next of kin, in fact, within the definition of the statute. The present appellant occupies no such position.

That the probate court's discretion was judiciously exercised is not brought into question. The court's appointee was selected by the widow and the natural guardian of the next of kin. *Wms. on Ex. \*363*; *Cramer v. Sharp*, 49 N. J. Eq. (4 Dick.) 558, 24 Atl. 982.

The decree under review will be affirmed, with costs.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



(88 N. J. Eq. 560)

**DOLTON v. PUBLIC SERVICE ELECTRIC CO.**

(Court of Chancery of New Jersey. July 10, 1914.)

**1. ELECTRICITY (§ 9\*)—POLES AND WIRES—MAINTENANCE—RIGHTS IN STREETS.**

Where an electric company was under contract to light the streets of a township, it was authorized under its franchise to construct and maintain in the streets poles and wires of sufficient size to enable it to perform its contract, but it had no authority, as against abutting property owners, to install and maintain in the streets poles of much greater size than would be required to sustain its wires necessary for its public service contract, in order to maintain a high-tension transmission system for the sale of electricity for private use.

[Ed. Note.—For other cases, see *Electricity*, Cent. Dig. § 4; Dec. Dig. § 9.\*]

**2. ELECTRICITY (§ 6\*)—STREETS—ERECTION OF POLES—PROPERTY OWNERS—INJURY TO REVERSION.**

Where an electric company wrongfully erected massive poles in a street in order to carry a high-tension transmission system, the trespass was permanent, and constituted an injury to the reversion for which an action would lie.

[Ed. Note.—For other cases, see *Electricity*, Dec. Dig. § 6.\*]

Suit by William Dolton against the Public Service Electric Company. Bill sustained, but injunction denied.

Richard S. Wilson, of Trenton, for complainant. Frank Bergen, of Newark, for defendant.

**BACKES, V. C.** As a part of its general plan of construction for the distribution of electricity for light, heat, and power, the defendant erected two poles on the highway in front of the complainant's lot in the township of Hamilton, county of Mercer, and strung upon them wires for public and private lighting, as well as the wires of a high-tension transmission system, of a voltage of 13,200 volts; all without the complainant's consent. After the filing of the bill the defendant moved the poles to adjoining properties, from which the wires now suspend in front of the complainant's house.

[1] The defendant is under contract with the township to light some of its highways with electricity, and for this purpose it undoubtedly has statutory power to erect poles and string wires; but, in massiveness, the poles put on the complainant's property are out of all proportion to the requirements for local lighting, and as to them this case is governed by *Thropp v. Public Service Electric Co.*, 91 Atl. 318, docket 36, just decided.

The right to maintain in front of the complainant's property the high-tension wires and wires for private lighting raises another question which is suggested by the complainant, but is not argued or supported by authorities in his brief, and which is erroneously assumed by the defendant's counsel to have been settled in this state. In the five

cases submitted in the brief of defendant's counsel as "absolutely decisive upon this point," the question of the invasion of the property rights of abutting owners by the swinging of telegraph, telephone, or electric lighting lines in front of their properties was either not involved or the observations of the judges thereon were obiter.

The legislative grant to corporations like the defendant of the right to use the highways of the state for the purpose of erecting poles to sustain the necessary wires upon first obtaining the consent in writing of the owners of the soil (P. L. 1896, p. 322) was, in *Summit v. New York & N. J. Tel. Co.*, 57 N. J. Eq. (12 Dick.) 123, 41 Atl. 146, and in *East Orange v. Suburban Electric Light & Power Co.*, 59 N. J. Eq. (14 Dick.) 563, 44 Atl. 628, held to be, so far as the complaining municipalities were concerned, a grant within the public easement, and regarding which they had no standing to complain. In the first-mentioned case the wires were strung *across* streets, and in the second they were hung along an avenue upon the poles and right of way of a telephone company. In neither case was private property involved, and in the latter case Vice Chancellor Pitney points out that the rights of the owners of the soil were not brought in question and could not be invoked by the municipality in support of its proposed action to tear down the wires, to restrain which the suit was brought. His views, that the permission given by the act of 1896 is quite sufficient of itself to authorize the mere act of suspending wires *across* the street, and that no action on the part of the municipal authorities was necessary to authorize it, were intended only to meet the claim of the municipality of the right to obstruct and interfere with the sovereign grant.

*Roake v. Am. Telep. & Teleg. Co.*, 41 N. J. Eq. (14 Stew.) 35, 2 Atl. 618, and *Blanchard v. Eastern Pennsylvania Power Co.*, 80 N. J. Eq. (10 Buch.) 10, 83 Atl. 505, were on motions for preliminary injunction to restrain the stretching of wires (one for the telephone, the other for electric lighting) in front of the complainant's properties. The motions were denied because the complainant's rights which were sought to be protected were doubtful. It is true that in the former Chancellor Runyon remarked that "the Legislature of this state appears to have considered that the use of the street, so far as the wires are concerned, was not a violation of the rights of the owner of the soil in the street; for, while it recognizes such rights as to the erection of poles, it does not do so as to the wires"; although he added that he did not intend to express any opinion at that time upon the merits of the case, and that in disposing of the motion it was enough that it appeared that the complainant's right was not clear. In the latter case Vice Chancellor Emery gives his impressions of the con-

struction to be given to the statute of 1896, above quoted, as requiring the consent of the owners of the soil over which the wires are suspended, as well as the owners of the soil on which the poles are located.

The last case cited by the defendant is that of *Paterson Railway Co. v. Grundy*, 51 N. J. Eq. (6 Dick.) 213, 26 Atl. 788, in which the question was whether a street railway had the right to stretch feed wires in front of an abutting owner's property without his consent, and in concluding that, if authorized so to do by statute, it was not such an invasion of the defendant's right of adjacency as to entitle him to compensation, he points out the distinction of the use of streets by telephone and telegraph (electric light) companies and street railways to be that the latter is, and the former are, not consistent with the character of a highway, and cites *Halsey v. Rapid Transit Street Ry. Co.*, 47 N. J. Eq. (2 Dick.) 380, 20 Atl. 859.

I have analyzed these cases, in order to persuade counsel that the question which was so nonchalantly—perhaps unthinkingly—handed up, and which to me seems to be one of great importance, both to property owners and public service corporations, remains undecided in this state, and that it should not be finally passed upon until after a careful examination and full discussion by counsel; and therefore I decline to express an opinion at this time.

The opinions of the courts of other states are irreconcilable on the proposition as to whether grants such as conferred by the act of 1896 are consistent with the use of highways, but in this state our highest tribunal has held that such grants to telegraph and telephone lines, a fortiori electric lighting lines, are not within the public easement. *Nicoll v. New York & N. J. Tel. Co.*, 62 N. J. Law, 733, 42 Atl. 583, 72 Am. St. Rep. 666. The solution of the problem then, depends upon whether an exercise of the power given by the act of 1896 invades the constitutional rights of abutting owners, and if it does not, whether the Legislature intended that the grant may be enjoyed without the consent of the owner of the soil over which wires only are stretched.

[2] In the briefs of counsel it was argued pro and con that, because the complainant was not in the actual possession of the premises at the time the poles were erected, he was not injured, and cannot maintain this action. The bill of complaint sets up, and the answer admits, that he was tenant in possession of the premises at the time he commenced his suit. I do not recall any testimony (a transcript was not furnished) which disputes this allegation; but, however that may be, the poles were unlawfully erected. The trespass was permanent in character and an injury to the reversionary interest (if that was the estate of the complainant), for which an action will lie. *Tinsman v. Rail-*

*road Co.*, 25 N. J. Law (1 Dutch.) 255, 64 Am. Dec. 415; *Todd v. Jackson*, 26 N. J. Law (2 Dutch.) 525; *Carlisle v. Cooper*, 21 N. J. Eq. (6 C. E. Gr.) 576; *Taylor v. Public Service Corporation*, 75 N. J. Eq. (5 Buch.) 371, 73 Atl. 118.

If counsel for the complaint desires further argument, I will fix a day. If not, a decree may be entered denying an injunction to remove the poles and wires, but otherwise sustaining the bill, with costs.

#### HOLLINSHEAD v. WOOD et al.

(Court of Chancery of New Jersey. July 10, 1914.)

#### WILLS (§ 570\*)—CONSTRUCTION—BONDS—CERTIFICATES OF INDEBTEDNESS.

Testator bequeathed to his daughter all bonds and mortgages covering real estate which he possessed at the time of his decease, and also money on deposit in bank to his credit. Among testator's personal effects were bonds secured by mortgages conveying individual tracts of land; also bonds of a railway company secured by a mortgage made to a trustee on all the corporation's property, real and personal, and two trust certificates of an electric company and one trust certificate of a traction company, these being secured by deposits of corporate stock held by trustees. *Held*, that the bonds secured by mortgages on land and the bonds of the railway company, but not the trust certificates, passed to the daughter under such provision.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 1243; Dec. Dig. § 570.\*]

Bill by Edward B. Hollinshead, as executor of the will of Joseph C. Hollinshead, deceased, against Mary B. Wood and others for the construction of the will. Decree for complainant.

William D. Lippincott and E. Lawrence Dudley, both of Camden, for complainant. William F. Kelly, of Camden, and Thomas B. Hall, of Philadelphia, Pa., for defendants.

BACKES, V. C. By the second paragraph of the will, Joseph C. Hollinshead, deceased, provided as follows:

"I give, devise, and bequeath unto my daughter Mary Wood, absolutely, all bonds and mortgages covering real estate, which I may possess at the time of my decease; also money which may be on deposit in bank to my credit at that time."

Among his personal effects the deceased left bonds secured by mortgages conveying individual tracts of land; also four bonds of the Camden and Suburban Railway Company, secured by a mortgage made to a trustee upon all of the property, real and personal, of the company; two trust certificates of the Philadelphia Electric Company, and one trust certificate of the Electric and People's Traction Company. The bonds and certificates were each of the par value of \$1,000, and the latter were secured by deposits of corporate capital stock held by trustees.

The question for determination is whether the four bonds and three certificates were

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

bequeathed by the second paragraph of the will. The four bonds of the Camden Company, which were a part of a larger issue, being secured by a mortgage on realty, are embraced within the definition and meaning of "all bonds and mortgages covering real estate which I may possess at the time of my decease," as employed by the testator. The circumstance that the mortgage was made to a trustee to secure the entire issue of bonds is immaterial. The testator was pro tanto the beneficial owner and possessor. The fact that the mortgage covered personality, as well as real property, is of no moment. There is nothing to indicate that the testator intended to limit the bequest to "mortgages covering real estate" exclusively. *Hammell v. Swan*, 61 N. J. Eq. (16 Dick.) 179, 47 Atl. 801.

The three trustee's certificates are not bonds within the broadest sense of that word, nor are they secured by "mortgage covering real estate," and hence are not included in the bequest.

A decree will be advised in accordance with these views.

#### STRATER v. FLYNN et al.

(Court of Chancery of New Jersey. July 8, 1914.)

#### 1. SPECIFIC PERFORMANCE (§ 92\*)—RIGHT TO RELIEF.

Complainant sold certain property to defendant, agreeing to pass title October 1, 1910, by deed of full covenant. Defendant went into possession October 3d, but no conveyance was made, because of the existence of a bail bond executed by a prior owner, which was a cloud on the title. Complainant returned defendant's deposit and procured a return of the receipt therefor, and on December 2, 1910, conveyed the property to N., who continued to hold the title until he reconveyed it to complainant March 21, 1913, at which time complainant succeeded in removing the cloud. *Held*, that complainant was not entitled to enforce specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 233-244; Dec. Dig. § 92.\*]

#### 2. VENDOR AND PURCHASER (§ 126\*)—RESCISSI—ACCOUNTING—RENTS AND PROFITS.

Where, pending performance of a contract for the sale of real property under which the vendee was let into possession, the vendor conveyed the land to another, who held title from December 20, 1910, until March 31, 1913, when he reconveyed the same to the vendor, the latter, on rescission of the contract, could not compel the vendee to account to her for rents and profits during the period, while the vendor did not hold the title.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 229, 230, 232; Dec. Dig. § 126.\*]

Suit by Catherine Strater against Mary Flynn and others. Decree for defendants.

Frederic W. Smith, of Newark, for complainant. Philip W. Grece, of Jersey City, for defendants.

GRIFFIN, V. C. (at the close of the proofs after hearing counsel). Catherine Strater, the complainant in this suit, being the owner of a tract of land known as 809 Summit avenue, Jersey City, entered into an agreement for the sale of that property to Mrs. Mary Flynn for the sum of \$2,000, the title to pass on the 1st day of October, 1910, the deed to be a full covenant, warranty deed. The contract is not signed by Mrs. Flynn, but is admitted by her to have been a binding contract. Mr. William Grece, since deceased, searched the title and discovered a bail bond about ten years old, executed by a former owner of the property, Mrs. Strater's husband. Mrs. Strater discussed the matter of the removal of this bail bond with Mr. Grece, the attorney of Mrs. Flynn. There was at the same time a mortgage held by the Sun & Evening Sun Building & Loan Association of New York upon which there was about \$800 due.

On October 3d Mrs. Flynn entered into possession with the consent of the complainant. About a week after she entered into possession Mrs. Strater came to her, and, under representations, procured her to accept the return of the \$100 deposit and procured a return of the receipt. I am satisfied that it was not the intent of Mrs. Flynn to abandon her contract at that time; and I am not so certain that the receipt was not procured by Mrs. Strater from Mrs. Flynn in a fraudulent manner. Be that as it may, the parties appeared to be in negotiation for two or three months regarding this property, when, finally, the check of \$1,500 which Mrs. Flynn was to receive from the building and loan association, from which she had borrowed money to make up the purchase price of \$2,000 (she having \$500 of her own), was returned, and in the same month, after the return of this receipt, an action of ejectment was brought by Mr. Nonnebacher, of whom mention will be hereafter made. It seems that the Sun & Evening Sun Building & Loan Association called the attention of Mrs. Strater to the fact that her dues were in arrears, and threatened legal proceedings. This was about October 5, 1910. Apparently with the idea of paying off this building and loan mortgage, Mrs. Strater executed a mortgage to Hieronymus Nonnebacher for \$850, and with the moneys she received from this mortgage she paid off the Sun & Evening Sun Building & Loan mortgage. This mortgage was afterwards canceled on March 24, 1913. On the 2d of December, 1910, Mrs. Strater made a deed to Hieronymus Nonnebacher for the sum of "one dollar and other consideration," which was acknowledged December 3, 1910, and recorded in the register's office of Hudson county on the 5th day of December, 1910. Having this deed for the property (which divested Mrs. Strater of the power to carry out her contract and apparently without

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

any information being given by Mrs. Strater to Mrs. Flynn that she did not intend to carry out the contract, or had put the property out of her possession so that she could not do it, by means whereof Mrs. Flynn did not return the money to the building and loan association until some time in January, Mr. Nonnebacher brought a suit in ejectment in the Hudson County circuit against Mrs. Flynn, and, according to the statement of counsel on both sides, Mr. Nonnebacher's attorney offered in evidence upon the trial not only his deed, but also this receipt given to Mrs. Flynn, and, on the case being submitted to the jury, the jury decided in favor of Mrs. Flynn and against Mr. Nonnebacher. This must have been on the theory that there was a present existing agreement between Mrs. Flynn and Mrs. Strater whereby Mrs. Strater was bound to convey this property to Mrs. Flynn on the payment of the purchase price, and the deed to be in full covenant, warranty deed; because on no other theory could the jury find such a verdict, and it must have found that Mr. Nonnebacher took with knowledge of Mrs. Flynn's rights in the premises.

(1) In this situation of affairs the complainant caused this bail bond (which was a cloud on the title) to be removed about March, 1912; and, having during all of these years permitted it to remain there, she thus was in no position, from the date of her contract down to March, 1913, to make a delivery of the deed in accordance with the terms of her agreement, for two reasons: First, this bail bond existed; and, second, on December 2, 1910, she conveyed this property to Mr. Nonnebacher by a deed recorded December 5, 1910, and Mr. Nonnebacher reconveyed to her the same property on March 21, 1913.

A further objection to any decree of specific performance would be that during this period of years she put it out of her power to perform the contract within a reasonable time; and, while in such contracts time is not usually of the essence of the contract, a period of upwards of two years after the contract was made, and the owner of the property conveys it to another, and thus dis enables herself to perform the contract, renders a decree for specific performance in her favor improper.

On the question of rescission of the contract, both parties agree that the contract can be treated as rescinded. The question then comes down to charging the defendant for meane profits for the reasonable value of the use of the premises, after deducting such sums as she may have expended for the betterment and improvement of the property.

[2] I am not so clear that, in the shape this case is, a court of equity has jurisdiction, on a bill for the rescission of a contract, to provide for an accounting, although my impression is that such account can be taken. Counsel will submit authorities on this point.

In so far as Mrs. Strater is concerned, she cannot be allowed for any profits or income of the property during the time that she was out of possession; that is, during the time the title was out of her name: I mean from December 20, 1910, until March 21, 1913. During that period the property was in Nonnebacher, and not Mrs. Strater, and she cannot, in this suit, claim for any meane profits or for the use and occupation.

The decree will be for the rescission of the contract, with an accounting, excluding the period that she was out of possession, if it should appear that this court has authority to make such accounting.

Mr. Smith (about the matter of possession at this stage): If your honor please, I assume that the decree or order which will be made by your honor will cover, under your opinion, only the question of rescission. I think some mention should be made as to the present right of possession; and, if necessary, the complainant be put in a position where a writ of assistance, or any writ that might necessarily issue, may issue.

THE VICE CHANCELLOR. If the contract is rescinded, of course that puts it at an end.

Mr. Smith: The trouble is that if the defendant does not move we are again in the same position that we have been in for three years.

THE VICE CHANCELLOR. No; no; it will not happen a second time.

Mr. Smith: The defendant will not move.

Mr. Grece: Oh, yes; didn't she—

THE VICE CHANCELLOR. Now, gentlemen, I will not listen to you on that. I have dictated my opinion on the matter, and when it comes to the decree all of those matters will be determined. The question now is whether the court will have, upon the rescission of this contract, power to order an accounting. I am inclined to think it has, but at present I won't decide that.

(36 N. J. L. 361)

NORDSTROM v. PAYNE et al. (No. 50.)  
(Court of Errors and Appeals of New Jersey.  
May 1, 1914.)

# 1. APPEAL AND ERROR (§ 1010\*)—REVIEW—FINDINGS OF FACT.

Findings of fact by the district court are not reviewable on appeal; there being testimony to support them.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3979-3982, 4024; Dec. Dig. § 1010.\*]

# 2. JUDGMENT (§ 530\*)—CONSTRUCTION.

Though the record in an action against a partnership and the members thereof and a corporation shows no formal disposition of the action as to the partnership and its members, the judgment against "the defendant" will be considered as against the corporation alone; it appearing that plaintiff was not entitled to any such judgment against the partners, and the case appearing to have been tried on an issue as to whether there was any liability, with an

admission that any liability of the partnership had been assumed and taken over by the corporation.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 974; Dec. Dig. § 530.\*]

Appeal from Supreme Court.

Action by Charles F. Nordstrom against Ralph W. Payne and others. From a judgment of the Supreme Court affirming a judgment for plaintiff, defendants appeal. Affirmed.

The following is the opinion of the Supreme Court:

**PER CURIAM.** An action was brought in the First district court of the city of Newark against Theodore P. and Ralph W. Payne, partners, and against Payne Bros., Incorporated, a corporation, to recover the sum of \$500, alleged to be due upon a certain contract in writing, a copy of which was annexed to the state of demand, and is as follows:

"Newark, February 12, 1910.

"C. F. Nordstrom, Esq., Cold Spring on Hudson, New York—Dear Sir: In accordance with terms as proposed by you we agree to enter into a contract with you for your services as shop superintendent for the term of one year, beginning March 15, 1910, at the rate of fifty (50) dollars per week, ten (10) dollars of which can be applied to stock when the firm of Payne Brothers are incorporated.

"Yours truly, Payne Brothers,  
"by T. P. Payne."

"The trial judge found, as follows: 'It is admitted in this case by the defendants that Charles F. Nordstrom, the plaintiff, entered the employ of partnership in March, 1910, following the writing of the letter February 12, 1910, marked P1. I find, as a fact, that the plaintiff entered the employ of such partnership under an agreement that he was to be paid a salary of \$50 a week. It is admitted that the incorporation took over all of the contract liabilities of the Payne Bros. partnership, and it is also proven in this case—I find it to be a fact—that the plaintiff worked for the corporation under the same contract. It is admitted that he received only \$40 a week; so for a period of one year I find that he is entitled to \$10 a week more. He never got any stock, and did not get the \$10 a week as promised. The plaintiff having waived any claim in excess of \$500, there will be a judgment for the plaintiff for \$500.'

[1] There is testimony to support these findings, and hence they are not reviewable. N. Y. & N. J. Telephone Co. v. Connelly, 69 N. J. Law, 182, 54 Atl. 219; Aschenberg v. Mundy, 76 N. J. Law, 352, 69 Atl. 954; Backes v. Morovich, 82 N. J. Law, 44, 81 Atl. 497.

[2] The appellants, in their brief, attack the validity of the judgment upon the ground that it was improperly awarded against all of the defendants. The argument, addressed to us, is that, if it be assumed that the judgment may be sustained as against the corporation, it is erroneous against the individuals and the co-partnership, and, being an entirety, must be reversed.

We are unable to find any support for the assertion that judgment was rendered against the individuals and the co-partnership or against either of them. It appears from the findings of the trial judge that he did not hold all the defendants liable for the plaintiff's claim. The judgment, as entered, reads: "The evidence being closed, the court rendered judgment in favor of the plaintiff and against the defendant for the sum of five hundred dollars (\$500.00) damages, with costs; whereupon the judgment was entered in favor of the plaintiff and against the defendant for the sum of five hundred dollars damages with costs."

The specification which seeks to raise the question refers to the findings of the court, and not to the judgment. It reads: "The determination of the court that the plaintiff was entitled to recover a judgment against all the defendants." The trial judge did not so find.

We do not think that, in view of all the circumstances, it can fairly be so read. An examination of the case shows that, at the trial, counsel for appellants admitted that the defendant corporation had assumed the liabilities of the partnership and of the individuals composing it, and announced that the defense was based upon the claim that the letter did not constitute a contract, and that, if it was a contract, it was without any consideration, and therefore was not a liability of the partnership, and therefore could not become such of the defendant corporation. The case was tried out by the parties upon the issue tendered by the appellants. Its practical effect was an abandonment by the plaintiff of any claim against the partnership and the individuals composing it. The trial judge apparently treated it as such. We think that he was justified in doing so. It is true that no formal motion was made by the plaintiff to discontinue as to the partnership and the individuals composing it. From the case before us, it sufficiently appears that the plaintiff was not entitled to any such judgment against them.

Although it appears that the action was brought against the partnership and the individuals composing it and the corporation, and there being nothing upon the face of the record showing any disposition made of the action against the partnership and individuals composing it, yet nevertheless it clearly appears, by the finding of the trial judge, that the corporation had assumed all the liabilities of the partnership and of the individuals composing it, and therefore it is apparent that the rendition of the judgment against the defendant was as against the defendant corporation solely. But, as the judgment in its present form is apt to give rise to uncertainty as to which defendant was meant, the record will be remitted to the First district court of the city of Newark to be amended in that respect.

The judgment will be affirmed.

Frank E. Bradner, of Newark, for appellants. Francis Child, Jr., of Newark, for respondent.

**PER CURIAM.** The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by the Supreme Court.

(83 N. J. Eq. 568)

**VAN DYKE v. ANDERSON et al.**

(Court of Chancery of New Jersey. July 18, 1914.)

1. LANDLORD AND TENANT (§§ 323, 330\*) — LEASE—CONSTRUCTION.

Complainant by a written instrument granted and farm let unto defendant his certain farm described, defendant agreeing to occupy, till, and cultivate the premises during the year beginning April 1, 1911, in a husbandlike manner and deliver to complainant one-half of the products. The instrument also required that complainant contribute to the cost of seed, fertilizer, fencing, etc., and that defendant do all the cultivation, repairing of fences, ditching, etc. Held, that defendant was a tenant, and not a mere cropper, and that complainant did not acquire title to any portion of the crop until division, so that an attachment levied there-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

on as the property of the tenant before division was prior in right.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 1350, 1351, 1355, 1356, 1394–1399; Dec. Dig. §§ 323, 330.\*]

**2. CONTRACTS (§ 170\*) — CONTEMPORANEOUS CONSTRUCTION.**

Whenever a dispute arises as to the meaning of a contract, that construction which the parties themselves have placed on it, as between themselves, is the one to be adopted by the courts.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. § 753; Dec. Dig. § 170.\*]

Action by Joseph S. Van Dyke against William H. Anderson and others. On exceptions to master's report. Overruled.

Linton Satterthwait, of Trenton, for expectant. Aaron V. Dawes, of Hightstown, for respondents.

**BACKES, V. C.** By an indenture, the complainant, Van Dyke, granted and farm let unto the defendant Anderson his farm, situate in Monmouth county, and the latter covenanted and agreed that he would "occupy, till and cultivate the premises during the year beginning April 1, 1911, until April 1, 1912, in a husbandlike manner according to the usual course of husbandry; \* \* \* that he will deliver to the party of the first part \* \* \* one-half of the products." In the document provision is made for the method of division. It also requires of the complainant that he contribute towards the cost of seed, fertilizer, fencing, etc., and of the defendant that he do all of the cultivation, repairing of fences, ditches, etc. Anderson entered into possession and farmed the land until the month of August, 1911, when he disappeared, and remained away until about September 9th. During his absence the complainant filed his bill for an accounting and a receiver. A receiver was appointed on September 12th, who harvested the crops and accounted, showing a balance in his hands of \$192.42. On September 2d the complainant issued an attachment out of the Monmouth circuit court against the defendant for the sum of \$195.64, under which the crops were seized. On September 11th William Kirby levied upon the crops, under an execution issued out of the Monmouth common pleas, to make \$175, and on December 2d Grover Bros. made a levy to recover \$89.12. The receiver's account was referred to a master, to examine and also to report the liens against the fund and the order of their priority. The master reported the foregoing facts, and also that the receiver, upon the assumption that the complainant was entitled to one-half of the crops, erroneously paid to him \$507.96. This sum was charged against the receiver, plus the amount reported by the receiver, \$192.42, making a total of \$700.38, which constitutes the fund to be disposed of. The master further reported that out of these moneys the com-

plainant should be first paid the amount of his debt sworn to in his attachment proceeding; that the Kirby judgment should be paid second, the Grover judgment third, and the balance to the complainant on account of his share of the crops. The exceptions go to the refusal of the master to allow to the complainant, as a prior claim, the value of one-half the crops, being the sum which the receiver had paid to him, and the argument in support is that Anderson was a cropper; that he and the complainant were owners in common, and that attachment and judgments were liens only upon the undivided interest of Anderson.

To arrive at his result, the master necessarily concluded that by the terms of the indenture the farm was rented to the defendant Anderson; that the crops belonged to him until a division was made; and that one-half of the yield would be payable as rent.

[1] A division was not made until after the liens attached, and then by the receiver, who, of course, had no authority to do so. The correctness of the master's report depends upon the construction to be given to the indenture. By it Van Dyke "doth grant and to farm let" unto Anderson the premises for a fixed term. Rent in kind is reserved, and exclusive possession is given. This language imports tenancy. Where the contract is manifestly for work and labor, and a share of the crops is given for such services, it should be construed not to create the relation of landlord and tenant, but where it is in form a lease, containing terms of demise, and reserving rent in kind, it should be given effect according to the expressed intention of the parties, and held to create that relationship. *N. J. Midland Railway Co. v. Van Syckle*, 37 N. J. Law (8 Vr.) 496; *Reeves v. Hannan*, 65 N. J. Law (36 Vr.) 249, 48 Atl. 1018. It will be found upon examination of the authorities cited by the complainant in support of his position that they involve agreements which were clearly for work and labor, for which a share of the crops formed the compensation. *Guest v. Opdyke*, 31 N. J. Law, (2 Vr.) 552; *Edgar v. Jewell*, 34 N. J. Law (5 Vr.) 259; *Gray v. Reynolds*, 67 N. J. Law (38 Vr.) 169, 50 Atl. 670. That the instrument was intended by the parties to create the relation of landlord and tenant is manifest from the construction the complainant himself has placed upon it by his allegations in the bill in this suit. He therein sets forth that:

"He let and rented the said farm \* \* \* to Anderson \* \* \* for one year \* \* \* upon condition that said Anderson should render to him as compensation for said occupancy during said term one-half part of all the products of said farm \* \* \* which should be sold and marketed by said Anderson; \* \* \* that in pursuance of said indenture of lease, said Anderson and his family moved into possession of said premises \* \* \* and are now in possession thereof; \* \* \* that he (complainant) is advised that he cannot safely take possession

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of said farm \* \* \* because there is no provision contained in the said indenture of lease which would permit your orator to take possession thereof."

[2] Clearly, at the time the bill was filed, Van Dyke regarded himself as landlord and Anderson as his tenant. Whenever a dispute arises as to the meaning of a contract that construction which the parties themselves place upon it and as to which they deal with each other is, as between them, the one to be adopted and to be given by the courts.

I agree with the determination of the master, and the exceptions will be overruled, with costs.

(86 N. J. L. 80)

TAYLOR v. VAN NIMWEGEN et al.

(Supreme Court of New Jersey. July 24, 1914.)

(Syllabus by the Court.)

1. MORTGAGES (§ 561\*) — FORECLOSURE — ACTION ON INDEMNITY BOND—LIMITATIONS.

An indemnity bond to secure to a mortgagee the payment of money to be found due on the foreclosure of a mortgage is within the purview of the act of 1880 (Act March 12, 1880 [P. L. p. 255]) relating to bonds and mortgages given for payment of the same indebtedness; and suit on such indemnity bond should be brought within six months after the foreclosure sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1609-1621; Dec. Dig. § 561.\*]

2. MORTGAGES (§ 556\*) — FORECLOSURE — ACTION ON INDEMNITY BOND—AMOUNT OF RECOVERY.

Plaintiff, a complainant in foreclosure, sued on a bond given to her pending the foreclosure, in case the mortgaged premises, if sold under the decree, should not realize the amount found to be due on the mortgage with interest, taxes, and taxed costs. The plaintiff paid certain tax liens pending the foreclosure, but the amount of such payment was not included in the decree. Other liens were still unpaid at the time of sale, which was made expressly subject to taxes and liens and incumbrances. Plaintiff (complainant) bid up to the face of the decree and interest and costs. Held, that she was not entitled to enforce the indemnity bond for the amount of the tax liens unpaid at the time of the foreclosure sale.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1592-1595, 1597; Dec. Dig. § 556.\*]

Appeal from Circuit Court, Passaic County.

Action by Rosa Taylor against Garret Van Nimwegen and others. From judgment for plaintiff, defendants appeal. Reversed.

Argued November term, 1913, before GUMMERE, C. J., and PARKER and KALISCH, JJ.

Leonard Van Lenten and Addison P. Rosenkrans, both of Paterson, for appellants. Barbour & Van Der Clock, of Paterson, for appellee.

PARKER, J. The suit is on an indemnity bond made in a foreclosure suit in which the present plaintiff was complainant and some, but not all, of the defendants were defendants. The plaintiff was the mortgagee, and

instituted proceedings in the foreclosure looking toward the appointment of a receiver of the rents of the mortgaged premises, on the ground that there were taxes and assessments in arrear which were paramount to the mortgage. Vice Chancellor Stevenson was about to appoint a receiver when, by an arrangement between the parties, the present defendants made the bond in question, dated October 7, 1909, in favor of the plaintiff in the penal sum of \$2,000, with this condition:

"That if the above-bonded Garret Van Nimwegen, Mary Sellner, John J. Sellner, and Elizabeth Van Dungen and Crine Van Dungen, their heirs, executors, administrators, shall well and truly pay or cause to be paid unto the above-named Rosa Taylor, her executors, administrators, or assigns, the amount found to be due this complainant by the defendants herein in case the property, if sold at sheriff's sale, shall not realize the amount found to be due upon the complainant's mortgage, with interest, taxes, and taxed costs, pursuant to a certain order advised by his honor, Eugene Stevenson, dated September 26, 1909, without any fraud or other delay, then the above obligation to be void; otherwise to remain in full force and virtue."

There is no question about the consideration of the bond, which, in fact, was the forbearance by the plaintiff to press for and obtain, as she undoubtedly would have obtained, the appointment of a receiver.

The foreclosure proceeded to a final decree and sale, on November 11, 1910, the complainant bidding it in, and thereafter the complainant and present plaintiff instituted this suit on the bond, which was tried before Judge Black without a jury, and resulted in a finding by him in favor of the plaintiff for \$934.50. This amount was made up as follows:

1. The decree, with interest, costs, and sheriff's fees, was.....	\$2,896 85
Complainant's bid was.....	2,843 37
Deficiency on sale.....	\$ 53 48
2. Prior to the foreclosure the property had been sold for taxes and assessments, and on July 28, 1909, before or just after filing her bill, the mortgagee redeemed it. The trial court disallowed assessments, but allowed redeemed taxes of.....	443 07
3. April 2, 1910, defendant Van Nimwegen bought in at a tax sale, and on November 28, 1910, after the foreclosure sale, the mortgagee took an assignment of the tax certificate and the court allowed on this..	210 00
4. There were also unpaid taxes of 1907, 1908, 1909, included in the judgment.....	219 95
5. Besides interest .....	23 00
	\$934 50

[1] So far as relates to the deficiency of \$38.48, we consider that the plaintiff was barred of a recovery by the provisions of the act of 1880 (P. L. p. 255; 3 Comp. St. 1910, p. 3420 et seq.), and especially section 2, which provides that, where a bond and mortgage have been given for the same debt, all proceedings to collect the debt shall be first to foreclose the mortgage, and, if there be a deficiency at the sale, then the mortgagee may proceed on the bond, but that such suit must be brought within six months after the sale. As more

than six months had elapsed from the date of the sale before the present action was begun, the recovery is barred, if the case be within the statute, as we think it is. It is true that the suit is not on the same bond that accompanied the mortgage in the first instance; but in *Van Aken v. Tice*, 60 N. J. Law, 377, 38 Atl. 20, and *Knigh v. Cape May Sand Co.*, 83 N. J. Law, 597, 83 Atl. 964, it is held that it is the identity of the debt, rather than that of the instrument representing it, that supplies the test whether the statute applies. In both of these cases suit was on a different bond. But that circumstance did not affect the result. So far, therefore, as relates to the \$38.48, there was error in the rendition of the judgment.

[2] There was also error in the inclusion of the third and fourth items, both of which were tax liens outstanding at the time of the foreclosure sale. That sale, as appears in the case, was made expressly "subject to taxes and liens and incumbrances." Consequently a purchaser took the property with its burdens, and all bids were for the property as it stood. If it had been sold to a stranger, he would have had these liens to pay off afterwards. If it had been sold to the defendants (and they bid \$2,800), they would have been in the same situation. Necessarily the successful bid of complainant stood on no different footing, and she said by her bid that she proposed to take the property for the amount she named, subject to its incumbrances, so that in reality her bid was the named figure plus the incumbrances for a property free and clear. She thus satisfied any claim that she might have for these items upon the bond.

This leaves only the second and fifth items. The fifth, being for interest, is, of course, controlled by the amount of principal, if any. The second item is for money paid by complainant before or pending foreclosure in redeeming the property from a prior tax sale. This, we think, was properly allowed by the trial court. It was fairly within the spirit of the bond, if not within its letter, and the parties evidently knew when the bond was made that this money had been paid by the complainant and ought to be secured to her. The case is silent on the question whether by the terms of the mortgage the mortgagee was authorized to pay taxes in arrear, add them to the principal sum, and include them in the decree. The making of the bond would seem to indicate that the mortgage contained no such provision. But, irrespective of this, it is plain that this tax lien had been wiped out, and that any purchaser at the foreclosure sale would take free from it. Consequently it formed no part of the calculation that an intending purchaser must make, and was not affected by the amount of the bid. If there had been a surplus, that surplus would have gone to the owners of the equity,

and would not have been applicable to this item.

We conclude, then, that while item 2 was properly allowed, the others were not, and to correct this error there must be a reversal and a new trial.

(85 N. J. L. 10)

**SAYRE et al. v. ROSEVILLE MOTOR CO.**

(Supreme Court of New Jersey. Dec. 4, 1913.)

**1. PRINCIPAL AND AGENT (§ 171\*)—AUTHORITY OF AGENT—WANT OF AUTHORITY—WAIVER.**

Where for some years after defendants' entry under a lease executed by plaintiffs' alleged agent, plaintiffs recognized defendants as tenants and accepted rent under the lease, whether the agent was authorized to execute the lease was immaterial.

[Ed. Note.—For other cases, see *Principal and Agent*, Cent. Dig. §§ 644-655; Dec. Dig. § 171.\*]

**2. FRAUDS, STATUTE OF (§ 123\*)—LANDLORD AND TENANT (§§ 118, 120\*)—LEASE—EXECUTION BY AGENT—WANT OF WRITTEN AUTHORITY—TENANCY AT WILL—NOTICE TO QUIT.**

Statute of Frauds (2 Comp. St. 1910, p. 2609) § 1 provides that leases for more than three years not in writing and signed by the parties making or creating the same or their agents thereto "lawfully authorized by writing," shall have the effect of leases at will only. *Held*, that where a lease for more than three years was executed by plaintiffs' alleged agent without written authority, plaintiffs' recognition of defendants' right to possession did not change the character of defendants' tenancy under such statute and they were therefore entitled to a three months' notice to quit as provided by District Court Act, § 109 (2 Comp. St. 1910, p. 1989).

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 272-274; Dec. Dig. § 123;\* *Landlord and Tenant*, Cent. Dig. §§ 402-415, 416-426, 432, 433; Dec. Dig. §§ 118, 120.\*]

**3. LANDLORD AND TENANT (§ 192\*)—INJURY TO PROPERTY—FIRE—OCCUPANCY—OBLIGATION TO PAY RENT—TERMINATION.**

Where buildings on the leased premises were damaged by fire without the tenant's fault, the tenant was entitled to remain in possession without liability for rent until the damage was repaired by the landlord as expressly provided by 3 Comp. St. 1910, p. 3078.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 777, 781, 784-786; Dec. Dig. § 192.\*]

**4. LANDLORD AND TENANT (§ 154\*)—LEASED PREMISES—BUILDINGS—DAMAGE BY FIRE—LANDLORD'S FAILURE TO REPAIR—LIABILITY TO TENANT.**

3 Comp. St. 1910, p. 3078, provides that whenever any building, erected on leased premises, shall be injured by fire without the lessee's fault, the landlord shall repair the same as speedily as possible, or, in default thereof, the rent shall cease until such time as the building or buildings shall be put in complete repair. *Held*, that where buildings on leased premises are partially destroyed by fire during the term, the extent of the landlord's liability to the tenant is the loss of rents during the time the building remains unrepaired, and the tenant cannot recover damages for loss of profits or business.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 558-566; Dec. Dig. § 154.\*]



Action by Wilhelmina C. Sayre and others against the Roseville Motor Company. A verdict was rendered in favor of defendant on a counterclaim, and plaintiffs obtained a rule to show cause why the verdict should not be set aside. Rule absolute.

Argued June term, 1913, before GUMMERE, C. J., and PARKER and KALISCH, JJ.

Vredenburg, Wall & Carey, of Jersey City, for the rule. Milton M. Unger, of Newark, opposed.

GUMMERE, C. J. The plaintiffs instituted this suit to eject the Roseville Motor Company and the other defendants, who are its subtenants, from certain premises in the city of Newark. The defendants set up that they are rightfully in possession under a lease held by the motor company upon the premises, made by Frederick E. Hodge, claiming to be the duly authorized agent of the plaintiffs for that purpose. The lease is in writing, dated February 1, 1906, and purports to demise the premises for a term of 10 years and 3 months from the date thereof. The motor company not only set up its right to continue in possession of the premises, but counterclaimed against the plaintiffs upon the ground that a fire occurred in the premises in 1911, whereby one of the buildings was partially destroyed; that the landlord thereupon became obligated to repair the premises in accordance with the statute (the Landlord and Tenant Act), but failed to do so; that by reason of such failure the motor company sustained damage to the amount of \$3,000, which, as the defendants alleged, the plaintiffs were bound to make good. The trial resulted in a verdict in favor of the defendants upon the question of possession, and also in favor of the defendant the motor company on its counterclaim, damages being assessed to it on that account for the sum of \$7,665.

[1, 2] The right of Hodge to execute the lease under which the defendants claimed the right of possession was disputed by the plaintiffs and asserted by the defendants. Whether or not he was authorized to act, however, seems to us to be unimportant, for the reason that for some years after the entry of the defendants under the lease the plaintiffs recognized their right as tenants thereunder by accepting from them from time to time the rent called for by this instrument. This being so, the first question to be determined is the rights of the respective parties under it. The first section of the statute of frauds provides that all leases for more than three years, not put in writing and signed by the parties making or creating the same, or their agents thereunto lawfully authorized *by writing*, shall have the force and effect of leases at will only. The authority of Hodge to execute the lease (if he had it) was not in writing, but was created by a conversation over the telephone. The lease,

therefore, created a tenancy at will by force of the statute, and the recognition by the plaintiffs of the right of the defendants to possession under it did not at all affect the character of the latter's tenancy. The plaintiffs, realizing that by force of the statute the defendants, if tenants at all, were tenants at will, served upon them, on the 21st of August, 1911, a notice to deliver up the possession of the premises on the 1st day of October then next. But this notice was insufficient to bring the tenancy to an end. By force of our statute (section 109 of the District Court Act; Comp. St. p. 1989) a three months' notice to quit is required in order to terminate such a tenancy. *Gubernator v. Kenin*, 66 N. J. Law, 114, 48 Atl. 1023. That given in the present case called upon the defendants to deliver up possession at the expiration of 1 month and 10 days from the date of service thereof. The tenancy not having been terminated by a sufficient notice, the defendants were entitled to a verdict on the question of the right of possession.

[3, 4] It is urged on behalf of the plaintiffs that they had a right to eject the defendants because the latter had failed to pay the rent called for by the lease from the time of the occurrence of the fire in 1911 up to the time of the filing of the complaint. But this contention is without merit. By force of the supplement of 1874 to the act concerning Landlords and Tenants (Comp. St. p. 3078) the defendants were under no obligation to pay rent for the demised premises, notwithstanding that they continued in the occupation thereof, so long as the injury done by the fire remained unrepaired by the landlord; and the finding of the jury that the fire did not occur through any fault of theirs is supported by the proofs. Turning to the counterclaim of the Motor Company, it is admitted on their behalf that the award of the jury was far in excess of the damages which they claimed a right to recover, and that the verdict should be reduced to the amount asked for by them in their answer. But the trouble with this part of the case lies deeper. The counterclaim is without any legal basis to support it. Prior to the enactment of the statutory provision referred to, the tenant in possession of demised premises under a lease was required to continue the payment of the rent called for by that instrument, notwithstanding that the rental value thereof might be greatly decreased by fire occurring therein. Moreover, any loss resulting from the falling off of his business by reason of the partial destruction of the leased premises was one which he had no right to call upon his landlord to make good. The statute made no change in the relations existing between the landlord and tenant so far as the responsibility of one to the other was concerned, except in one respect, viz., the exoneration of the tenant from the payment of rent so long as the landlord neglected the restoration of

the injured property. The statute requires the landlord to repair as speedily as possible; the only penalty which it imposes upon him for failure to comply with this requirement is that the rent shall cease so long as he neglects to comply with this provision of the statute. The verdict, therefore, so far as it awarded damages to the motor company, and against the plaintiffs, for the former's loss of profits due to the lack of repair of the building upon the demised premises, must be set aside.

The rule to show cause will be made absolute.

(83 N. J. Eq. 615)

### **In re CARNEY'S ESTATE.**

(Prerogative Court of New Jersey. July 14, 1914.)

#### **EXECUTORS AND ADMINISTRATORS (§ 17\*)—APPOINTMENT—RIGHT TO APPOINTMENT—NEXT OF KIN.**

Under Orphans' Court Act (P. L. 1898, p. 724) § 27, providing that administration on an intestate's estate must be granted to the next of kin, the court has no discretion but to grant the application of one who is next of kin to the intestate, unless personally disqualified, and the fact that the estate is insolvent, and that the applicant, a brother, lacks the necessary business qualifications to settle it in order to get the best financial results, and that many years before he had been intemperate, is insufficient to justify the appointment of another not of kin to the deceased.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 43-59; Dec. Dig. § 17.\*]

Appeal from Orphans' Court, Somerset County.

In the matter of the estate of David J. Carney, deceased. From an order appointing Jacob Shurtz, a creditor, administrator of the estate, deceased's brother appeals. Reversed.

Winfield S. Angleman, of Plainfield, for appellant. William A. Coddington, of Plainfield, for respondent.

**BACKES**, Vice Ordinary. David J. Carney died intestate, leaving a brother and a nephew and niece as his next of kin. The brother applied for letters of administration, which the probate court denied, and granted them to Jacob Shurtz, a creditor of the estate. The brother appealed. It was represented to the court below by counsel that the estate was insolvent; that the appellant lacked the necessary business qualifications to settle the estate in order to get the best financial results, and that years ago the appellant was of intemperate habits. These reasons cannot be successfully urged to override the statute, which directs that administration of an intestate must be granted to the next of kin. Orphans' Court Act, § 27; P. L. 1898, p. 724. The court must obey the statute, unless the applicant is personally disqualified. *Donahay v. Hall*, 45 N. J. Eq. (18 Stew.) 720, 18 Atl. 163; *Sayre v. Sayre*, 48 N. J. Eq. (3

*Dick*) 267, 22 Atl. 198; *Cramer v. Sharp*, 49 N. J. Eq. (4 *Dick*) 558, 24 Atl. 962; *Degnan's Case*, 75 N. J. Eq. (5 *Buch*) 197, 71 Atl. 668.

The order appealed from will be reversed, with costs.

An administrator pendente lite was appointed in this case, and an order was made directing him to sell at public or private sale, the personal effects of the intestate, which consist of a newspaper and a printing plant. That he may not be hampered, it is suggested that the signing of an order of reversal be deferred for a reasonable length of time.

(83 N. J. Eq. 474)

### **MYERS v. KELLY et al.**

(Court of Chancery of New Jersey. July 13, 1914.)

#### **1. INJUNCTION (§ 49\*)—RIGHT TO RELIEF—REAL PROPERTY—TORTIOUS TAKING OR HOLDING—IRREPARABLE INJURY.**

Mere tortious taking and holding of complainant's real property will not alone afford a ground for injunctive relief, in the absence of threatened irreparable injury.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 102; Dec. Dig. § 49.\*]

#### **2. INJUNCTION (§ 21\*)—RIGHT TO RELIEF—INTERFERENCE WITH REAL PROPERTY OF ANOTHER.**

Where, in a suit to restrain defendants from destroying or interfering with the plaster surface of a brick wall wholly on complainant's property, there was no denial of complainant's title, it was no defense that defendants' acts with reference to the wall would not be injurious, but would rather be beneficial, and that they were able to respond in damages for injury that might arise from their proposed acts.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. § 19; Dec. Dig. § 21.\*]

Suit by A. Lincoln Myers against John L. Kelly and others. Decree for complainant.

James H. Hayes, Jr., of Atlantic City, for complainant. Bourgeois & Coulomb, of Atlantic City, for defendant Kelly. U. G. Styron, of Atlantic City, for defendant Adler.

**LEAMING**, V. C. Complainant seeks a preliminary injunction to restrain defendants from destroying or interfering with the plaster surface of a brick wall, which wall is wholly on the property of complainant.

If the affidavits presented in behalf of defendants disclosed any substantial dispute touching the title of complainant to the wall in question or any substantial claim of right on the part of any of the defendants to remove the plaster surface of the wall or perform the other acts here complained of, this court might well hesitate to grant the relief sought in this suit until such controverted legal rights were determined by the proper courts of law. But the affidavits filed in behalf of defendants disclose no doubt touching complainant's title to the wall or any substantial claim of right upon the part of defendants to alter or in any way interfere with that wall. The utmost that is shown in behalf of defendants is that the changes

which are being made by them to complainant's wall are not sources of injury to it, and that defendants are able to respond in damages if any damages arise from their proposed acts.

[1, 2] It is a well-established rule that the mere tortious taking and holding of a complainant's real property will not alone afford a ground for equity jurisdiction or justify preventive relief by a court of equity in the absence of threatened irreparable injury. *Ballantine v. Harrison*, 37 N. J. Eq. (10 Stew.) 560, 45 Am. Rep. 667. But the present bill neither seeks the restoration of complainant's possession nor restraint against the possessory acts of defendants; it seeks to maintain the integrity of complainant's property through coercive restraint against its alteration or change by threatened wrongful acts of defendants. The relief so sought is peculiarly within the jurisdiction of this court, and commands the exercise of its beneficial preventive writ in all cases in which complainant's title is unchallenged or clear and defendant's threatened acts are unlawful. *Hart v. Leonard*, 42 N. J. Eq. (15 Stew.) 416, 7 Atl. 865.

It is obviously no defense to a claim for such relief to assert that the property of complainant which defendants are invading will not be damaged, or even will be improved, by the changes which they are wrongfully making; it is complainant's right to maintain his property in the condition which serves his lawful purposes. The attitude of defendants is that of strangers who assume to paint a building of another against the owner's wish and resist an appeal to a court of equity to preserve the building unchanged upon the mere claim that the paint will benefit the property.

I will advise a preliminary injunction restraining defendants from making changes to the surface of complainant's wall in any manner other than restoring such parts of the surface of the wall as they have removed to its former condition.

#### SMITH v. WAGNER et al.

(Court of Chancery of New Jersey. July 17, 1914.)

#### WILLS (§ 616\*)—CONSTRUCTION—POWERS—EXERCISE.

Testator bequeathed to his widow all his property to hold, possess, and own during her natural life, and provided that after her death it should be given over to testator's children if the widow should not decide otherwise. *Held*, that the widow acquired a life estate, with power of appointment as to the remainder, and that her will bequeathing a specific portion of the real estate to the children of one of testator's sons and a specific other portion to the surviving son constituted a proper exercise of the power.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1418-1430; Dec. Dig. § 616.\*]

Suit by Anna Wagner Smith against Minnie Wagner and another. Judgment for complainant for a part only of the relief demanded.

George S. Silzer, of New Brunswick, for complainant. Edward W. Hicks, of New Brunswick, for defendants.

BACKES, V. C. John Wagner died, leaving a last will and testament, the pertinent portion of which reads as follows:

"I, the undersigned, John Wagner, do herewith bequeath, will, give, and testate to my lawful wife, Kunigundi Wagner, née Lins, all my property, being real estate or personal property, notes, bank accounts, or ready money, to hold and to possess and own during her natural life, after my funeral expenses and all lawful debts are paid. After her death it shall go over to my children if she does not decide otherwise."

He left surviving him his widow, and two sons, Henry and William. He was seised of two houses in New Brunswick; one on Delafield street; the other on Gullden street. Henry and William died in the lifetime of their mother, Henry leaving children, and William one child, surviving. Kunigundi left a testament, by which she gave the Delafield street property to the children of her son Henry, and the Gullden street property to her son William. The will was executed after the death of Henry, and before that of William. The complainant, a daughter of Henry, seeks a partition of both of the properties between the children of Henry and William per stirpes, and she sets up the claim that the will of John Wagner, her grandfather, is void; that he died intestate; and that upon his death the lands descended to his two sons, and from them to their children. Upon what theory in law this claim is rested I am unable to perceive, for, taking a view most favorable to the complainant, and disregarding the powers therein conferred upon the widow, the will of John Wagner devised a life estate to his widow, with a vested remainder in his two sons, which descended to their children respectively. In his brief complainant's counsel adopts this view, and now argues that the will of Kunigundi, in parceling out the property, is inoperative. This involves the construction to be given the will of John Wagner. The document is not the handiwork of a skilled lawyer, but nevertheless it tells me in plain words what was in the testator's mind at the time he executed it. His intentions so disclosed must govern. "The intention of testators is the law of wills." His wife was the primary and all engrossing object of his solicitude. She was to enjoy and control his wordly possessions. She was to have an estate for life, with the right to convert and consume the principal if occasion required or she desired. If, in the light of future circumstances, it appeared to her that the testator's devise over was then inappropriate or

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

not to her liking, she was to be the master of the situation, with the power to alter it and dispose of the remainder as she saw fit to do. Possibly the latter provision was a precautionary measure on the part of the testator to protect his widow from unfilial conduct. Whatever the motive may have been, it is clear from this language of the will, viz., "After her death it shall go over to my children if she does not decide otherwise," obviously meaning that, if she concludes otherwise, then to such persons as she shall elect, that the testator conferred a power of appointment, which the widow lawfully exercised by devising one of the houses to the children of her deceased son, and the other, the more valuable one, to her living son. *Cueman v. Broadnax*, 37 N. J. Law (8 Vr.) 508; *Loosing v. Loosing*, 85 Neb. 66, 122 N. W. 707, 25 L. R. A. (N. S.) 920.

A decree will be advised directing a partition or sale of the Delafield house only. The bill will be dismissed as to the Guilden street house and the owners thereof.

As Kunigundi, the widow of John, had only a life estate, with power of appointment, neither property is liable for her debts.

(83 N. J. Eq. 476)

**SEARLE v. CARROLL**, City Recorder.

(Supreme Court of New Jersey. July 22, 1914.)

**BASTARDS (§ 78\*)—INDIGENT MOTHER—SUSTENANCE DURING "CONFINEMENT."**

The father of a bastard may, under the provision of P. L. 1898, p. 962, § 8, if the mother be indigent, be ordered by the magistrate to make payment for her sustenance during confinement; "confinement" meaning restraint by sickness in childbirth and covering the possible burden which may be cast on the municipality.

[Ed. Note.—For other cases, see *Bastards*, Cent. Dig. §§ 194-200; Dec. Dig. § 78.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1424, 1425.]

Certiorari by Alfred Searle against James F. Carroll, Recorder of the City of Paterson, removing an order of the recorder. Order affirmed, and certiorari dismissed.

Argued by consent before MINTURN, J.

Abram I. Bluestein, of Paterson, for prosecutor. Randal B. Lewis, of Paterson, for defendant.

**PER CURIAM.** The recorder of the city of Paterson found Alfred Searle to be the putative father of the unborn child of Agnes Holly. Miss Holly is now in her sixth month of pregnancy, and the recorder found that she was in indigent circumstances, and decided that Searle should pay for her sustenance \$3 a week during her confinement, and \$3 a week for the support of the child after it shall be born. The defendant secured a writ of certiorari, claiming that the recorder could not order payment to be made for the sustenance of the indigent mother during her

confinement. He bases that contention upon the case *In re Thomas Murphy*, 23 N. J. Law, 180, decided by this court in November term, 1851. While that case is authority for the contention of the prosecutor, it must be kept in mind that its reasoning is based upon the provision of the bastardy act as it existed in 1851. That statute was based upon the Statutes of 18 Elizabeth and 6 Geo. 2. The object of those enactments manifestly was limited to detaining the putative father in custody until the birth of the child, which ipso facto determined the township liability for the expense incurred by reason of the birth. *Rex v. Mills*, 10 Mod. 271.

Our statutes, however, passed since the pronouncement in the case in 23 N. J. Law have changed the legislative attitude upon this subject, and have practically superseded the effect which that decision would otherwise have accorded to it. Beginning with the revision of March 27, 1874 (Rev. St. 1874, p. 41, § 11), we find this legislative declaration:

"If the mother of such child be in indigent circumstances they (the court) shall determine the sum to be paid by such putative father for the sustenance of such mother during her confinement."

The revision of 1898 (P. L. 1898, p. 959) contains substantially a similar requirement. Webster defines confinement as "restraint within doors by sickness, especially by childbirth." I am disposed to give this term a liberal interpretation, so as to cover the possible burden which may be imposed upon the municipality by the prosecutor, and which he in law and morals should be obliged to sustain, and not unburden upon the public. This, too, in my judgment, is consonant with the legislative intent as manifested in the statutory language quoted.

The result is that the order in question must be affirmed, and the writ of certiorari dismissed, with costs.

(83 N. J. Eq. 476)

**OCEAN CITY LAND CO. v. WEBER.**

(Court of Chancery of New Jersey. July 17, 1914.)

**1. COVENANTS (§ 103\*)—USE OF PROPERTY—BUILDING RESTRICTIONS.**

A restrictive building covenant declaring that no building of any description shall at any time be erected within ten feet of the street line on which the property fronted was broken by the construction of elevated porches inclosed below in a manner to provide basements supplied with windows and doors, and also by the main bodies of approximately half the buildings on the street being extended over the porch roofs in a manner to afford bay windows of rooms within the restricted space.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 169; Dec. Dig. § 103.\*]

**2. COVENANTS (§ 104\*)—RESTRICTIVE BUILDING COVENANT—ENFORCEMENT—ESTOPPEL.**

A covenantee may not enforce in equity a restrictive building covenant prohibiting erections within 10 feet of a street, forming part of a general scheme for the development of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

a tract of urban property after he has failed to exercise the right for a considerable time, and many buildings have been erected contrary to the provisions of the covenant in the vicinity of the property; the covenantee's remedy then being limited to an action at law.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. § 170; Dec. Dig. § 104.\*]

Suit by the Ocean City Land Company, a corporation, against Sarah C. Weber. Final hearing on bill to enjoin violation of restrictive building covenants. Bill dismissed.

Charles C. Babcock, of Atlantic City, for complainant. Bourgeois & Coulomb, of Atlantic City, for defendant.

LEAMING, V. C. I am convinced that complainant's right to the form of relief here sought cannot be said to be established with that degree of certainty which is necessary in cases of this class. *Fortesque v. Carroll*, 76 N. J. Eq. (6 Buch.) 583, 75 Atl. 923, Ann. Cas. 1912A, 79; *Meaney v. Stork*, 80 N. J. Eq. (10 Buch.) 60, 83 Atl. 492; *Goater v. Ely*, 80 N. J. Eq. 40, 82 Atl. 611.

1. The language of the restrictive building covenant which complainant seeks to enforce, if not of doubtful meaning, is at least calculated to mislead. The reference in the covenant to "said avenue," following a description of lots at the corner of a block which specifically refers to "Corinthian avenue" and "Fourth street" as two of its boundaries, clearly suggests Corinthian avenue, and carries with it the idea that the four-foot restriction relates to Fourth street, whereas a careful examination of the exception which is contained within brackets and relates to the ownership of two or more contiguous lots may justify the conclusion that the "said avenue" first referred to is Fourth street. That construction of the covenant would apply the ten-foot restriction to Fourth street and the four-foot restriction to Corinthian avenue. If the popular construction be resorted to as evidenced by the locations of buildings which have been heretofore erected on corner lots, the ten-foot restriction would appear to relate to both highways.

[1] 2. The evidence discloses that on Fourth street covered porches of buildings heretofore erected uniformly disregard the ten-foot restriction. The language of the covenant is: "That no building, of any description whatever, shall at any time be erected within ten feet of the front line of said avenue." Whether the language above quoted includes covered porches as a part of a building may be said to be within the field of doubt (*Meaney v. Stork*, 80 N. J. Eq. 60, 66, 67, 83 Atl. 492; *Ogontz Land Co. v. Johnson*, 168 Pa. 173, 31 Atl. 1008; *Reardon v. Murphy*, 163 Mass. 501, 40 N. E. 854; *Supplee v. Cohen*, 80 N. J. Eq. [10 Buch.] 83, 83 Atl. 373, affirmed

81 N. J. Eq. [11 Buch.] 500, 86 Atl. 366), and any uncertainty of meaning of the covenant in that respect further contributes to render its enforcement impossible in this court (*Sutcliffe v. Elisele*, 62 N. J. Eq. [17 Dick.] 222, 224, 50 Atl. 69). But the evidence further discloses that some of these porches are elevated and inclosed underneath in a manner to provide basements supplied with windows and doors, and that these rooms are used as basements, and also that the main bodies of approximately one-half of the buildings on Fourth street are extended over the porch roofs in a manner to afford bay windows or rooms within the restricted ten-foot space. These latter features are clearly in violation of the provisions of a covenant that no building of any description whatever shall be erected within ten feet of the street line. *Bagnall v. Davies*, 140 Mass. 76, 2 N. E. 786; *Supplee v. Cohen*, supra.

[2] The right of the covenants to specifically enforce a restrictive building covenant of this nature which forms a part of a general scheme for the development of the tract cannot be exercised by such covenantee after his failure to exercise the right has resulted in the erection of so many buildings contrary to the provisions of the covenant in the vicinity of the property in question that the enforcement of the covenant in accordance with its terms may be appropriately said to have been abandoned in that locality. Covenants of this nature in the contemplation of the remedial jurisdiction of this court are to preserve the specific plan defined in the covenant, and not a plan which differs from that defined in the covenant, whether that difference has arisen by popular construction of the covenant or by common consent; and when the covenantee has permitted the specific plan to be materially violated by the erection of many buildings in the locality in question which are clearly erected contrary to the terms of the covenant, this court cannot equitably enforce the covenant at the instance of such covenantee against a subsequent violation. The covenantee's remedy in such cases must be sought in a court of law. *Ocean City Ass'n v. Schurch*, 57 N. J. Eq. (12 Dick.) 268, 271, 41 Atl. 914; *Ocean City Ass'n v. Headley*, 62 N. J. Eq. (17 Dick.) 322, 334, 50 Atl. 78; *Ocean City Ass'n v. Chalfant*, 65 N. J. Eq. (20 Dick.) 156, 157, 55 Atl. 801, 1 Ann. Cas. 601; *Woodbine Land & Imp. Co. v. Riener*, 72 N. J. Eq. (2 Buch.) 787, 788, 65 Atl. 1004. This view in no way conflicts with the principle that permissive violation through an erroneous construction of the covenant will not afford evidence of an abandonment.

I am obliged to advise an order denying the relief sought by complainant and dismissing the bill.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(112 Me. 160)

**RUSSELL v. CLARK et al.**

(Supreme Judicial Court of Maine. Aug. 12, 1914.)

**1. SALES (§ 81\*) — CONTRACT OF SALE — CONSTRUCTION.**

Where defendants purchased certain lumber in plaintiff's yards to be shipped within six months from date, the contract contemplated that the shipments were to be made at defendants' option; they being bound, however, to furnish orders, so that the lumber could be all shipped within the time specified, unless extended.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 217-223; Dec. Dig. § 81.\*]

**2. SALES (§ 176\*) — CONTRACT — BREACH — WAIVER.**

Where defendants contracted to purchase certain lumber from plaintiff, to be shipped at defendants' option within six months, any breach of such contract consisting of the latter's failure to order shipments within the time was waived by plaintiff's acceptance of a new agreement modifying and extending the old one.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 436-444; Dec. Dig. § 176.\*]

**3. SALES (§ 200\*) — CONTRACTS — PERFORMANCE — PASSING TITLE.**

Where defendants contracted to purchase certain lumber from plaintiff, who was to separate, grade, and load the same on cars, the contract as to lumber not delivered on board cars for shipment was executory, and title did not pass so as to entitle plaintiff to recover the contract price thereof as for goods sold and delivered.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 524-528; Dec. Dig. § 200.\*]

**4. SALES (§ 177\*) — CONTRACT — BREACH.**

Where defendants, who were wholesale lumber dealers, purchased a quantity of oak lumber of different dimensions from plaintiff, to be delivered within a specified time, defendants had an option as to the order of shipments in respect to the kinds and quality of the lumber, and hence they were not chargeable as for a breach of the contract because they refused to permit shipment of the heavier grades for which they had no orders while demanding shipments of a lighter grade, all of which they had sold to another.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 445-450; Dec. Dig. § 177.\*]

**5. SALES (§ 331\*) — CONTRACT — BREACH — BURDEN OF PROOF.**

In an action for breach of a contract of sale, the burden was on plaintiff to establish by a preponderance of the evidence that he had performed his part of the agreement, and that defendants had repudiated the contract on their part without justification.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1095; Dec. Dig. § 381.\*]

Report from Supreme Judicial Court, York County, at Law.

Action by David E. Russell against Frank B. Clark and others. On report from the Supreme Judicial Court of York County. Judgment for plaintiff for a part only of the relief demanded.

Argued before SAVAGE, C. J., and SPEAR, KING, HALEY, HANSON, and PHILBROOK, JJ.

George A. Goodwin, of Springvale, and Cleaves, Waterhouse & Emery, of Biddeford, for plaintiff. E. P. Spinney, of No. Berwick, for defendants.

**KING, J.** This case is before the law court on report. It is an action of assumpsit. There are four counts in the declaration. The first is on an account annexed, as follows:

Springvale, Me., Aug. 29th, 1912.

Messrs. Clark & Cleale, to David E. Russell, Dr.	
To 29806 ft. 2 in. oak plank and outs at \$20	
per M .....	\$ 596 12
To 4452 ft. white oak plank at \$30 per M....	132 56
" 12038 " 3 in. red, at \$25 per M.....	300 00

June 10, 1912. Car 35793 B. & M.

To 3507 ft. white oak.....	\$30	93 48
" 4890 " red .....	25	122 40
		\$1,249 51
Interest from Feb. 27, 1911, to Aug. 27, 1912,		
on \$1,249.51 .....		112 17
Taxes for 1911 and 1912.....		26 00
		\$1,387 68

There are some slight errors in computation in the above account, but they need not here be considered.

The second count alleges, in substance, that the plaintiff was the owner of 150,658 feet of oak plank and boards located at Newfield, Me.; that on the 27th day of August, 1910, he "sold and delivered" the same to the defendants, at prices specified, and that they "accepted and took into their possession" the same, and have paid him the purchase price for 94,262 feet thereof, leaving a balance of 46,396 feet unpaid for, amounting to \$1,249.51, which the plaintiff claims to recover, with interest, and also \$26 paid for taxes on said lumber.

The third count alleges, in substance, that the plaintiff was the owner of 150,658 feet of oak plank and boards, and that on the 27th day of August, 1910, the defendants agreed, "in consideration of the plaintiff keeping said oak plank and boards for the said defendants, and not disposing of them to any other party, to take, buy, and receive all of said oak plank and boards," at prices specified, f. o. b. cars at loading point, "the same to be all ordered and taken within six months from August 27, 1910, which said agreement was confirmed in writing at that date and later reaffirmed and extended, and said defendants again agreed to so take and to pay for all of said oak plank and boards as aforesaid"; that the plaintiff has fully performed said agreement on his part; but that the defendants have refused to accept and pay for a portion of said lumber (describing the portion unpaid for as specified in the account annexed), and the plaintiff claims to recover under this count the same amount, with interest and the taxes paid, as stated in the first and second counts.

The fourth is a general or omnibus count,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

with a specification that the plaintiff claims to recover thereunder for the same lumber specified in the account annexed.

The plaintiff's alleged cause of action arises out of two agreements between the parties, the first having been made on August 27, 1910, and the other on February 10, 1911. It will materially assist in the determination of the meaning and scope of those agreements and the rights and liabilities of the parties thereunder to point out briefly the circumstances and situation of the parties at the time the agreements were made, and also what has since been done by them acting under said agreements.

Prior to August 27, 1910, the plaintiff had, piled in his lumber yard at Newfield, Me., about 150,000 feet of sawed oak lumber of different dimensions and qualities, but consisting chiefly of two, three, and four inch plank. It was piled closely in large piles, and for that reason it was not readily examinable. The defendants comprised a co-partnership doing business in Boston as wholesale lumber dealers. On August 27, 1910, Mr. Cleale, representing the defendants, examined the lumber to some extent in company with the plaintiff. He overhauled three or four of the piles to show the plaintiff what would be accepted and what rejected under the proposition he then made to purchase some of it. Thereupon the parties entered into an agreement, whereby the defendants were to take certain of the lumber, to be selected as shown, and at prices specified f. o. b. cars at loading point. Confirming the agreement the following memorandum was signed by the parties in duplicate.

Waterboro, Me., Aug. 27, 1911.

One car load more or less short oak red and white, f. o. b. cars.....	\$30.00
C/L oak side bds. clear.....	30.00
Boston	
All white oak plank selected as shown, \$30.00 f. o. b. loading point.	
All red oak plank selected as shown, \$25.00 f. o. b. loading point.	

To be shipped within six months from date.  
About 125 M feet more or less.

[1] We think it clear that this agreement contemplated that the shipments were to be made at the option of the defendants, and such appears to have been the understanding of the parties. But it was the duty of the defendants to furnish orders so that the lumber embraced in the agreement could be all shipped within the time specified, unless that time was extended. The agreement covered all the oak plank, to be selected as shown, including the two-inch stock as well as the three and four inch. But it appears that the two-inch plank did not cull to advantage, a large percentage of it being rejected, and accordingly it was a cause of some controversy between the parties, and became the subject of further negotiations which resulted in the agreement of February 10, 1911.

At the time the first contract was made shipping orders were given for three car loads; one was to contain three and four inch white oak; another the short oak; and the other the side boards. The car load of the short oak, and that of the side boards were paid for without controversy, but it was otherwise with the other car load. As to that the defendants claimed that the plaintiff did not ship the three and four inch stock as ordered, but, instead, sent a full car load of the two-inch plank, for which they then had no order or use. Accordingly payment for that car load was held back, and much dispute resulted on that account. No more lumber was shipped till January 2, 1911. In the meantime the parties had much contention, but finally they came to an understanding whereby the defendants should send a check for the unpaid car load and the plaintiff would ship more of the lumber. December 9, 1910, the check was sent, but it was not satisfactory in amount, and more controversy followed, culminating almost in a conclusion of each party to have nothing further to do with the other in the premises. But on December 22, 1910, the plaintiff wrote the defendants that he had decided "to try two cars more, but if I run up against any more experiences of the past our deal will close forever." Accordingly on January 2, 1911, he shipped the fourth car load. This was received as satisfactory, and on January 13, 1911, the defendants sent a check for the same with an order for another car load of three and four inch stock. The plaintiff replied asking if he might make one-half of the car load two-inch stock, but this was not assented to. Then followed correspondence as to the two-inch plank, with the suggestion from the defendants that they might get an order at \$20 per thousand for all the two-inch "taking it right through, culls and all." On February 9, 1911, Mr. Cleale came to Newfield, and the parties made an additional agreement, which was confirmed in a letter of February 10, 1911, from the defendants to the plaintiff as follows:

"Confirming talk with you yesterday, we will take all the balance of the 2" oak which you have there, taking the good and the outs, at \$20 per thousand, f. o. b. the cars loading point. This takes the place of our previous arrangement and applies to the 2" only. The balance of the contract stands as agreed.

"Ship Clark & Cleale, Heywood Mass.

"Don't put many outs on first cars and mix them in pretty well."

It was understood between the parties at the time the agreement of February 10, 1911, was made that an order for a car load of two-inch selected stock was to be shipped at \$25 per thousand, and this was done. After that several car loads of the 2-inch stock were shipped to Heywood, but the plaintiff frequently requested that he might have an order to ship some of the thicker stock, as it was in his way, but the defendants did not

grant his request, insisting that he should keep on shipping the two-inch stock to Heywood, and on March 13, 1911, they wrote the plaintiff:

"Regarding the balance of the oak, kindly load up and ship immediately the balance of the 2" stock for Heywood, cleaning up everything in 2" that you have there with the exception perhaps of a half a car, which you could hold to fill out a car of thicker stock later on. \* \* \* but at the present time I want you to load up and ship at once all the 2", as I have an order now which I can apply your stock on, and which I will not have later on."

After that letter shipments of the 2" stock to Heywood continued. On April 11, 1911, an order for a car load of 3" and 4" stock was given, and it was shipped. This the defendants claimed was not properly selected, and another controversy arose, and no more lumber was shipped for more than a year. Once more, however, the parties got together, and on June 10, 1912, another car load of the 3" stock was ordered and shipped. August 6, 1912, a check for \$195.10 was sent in payment for that last car load. The amount of the check was less than the bill rendered, the defendants claiming that the plaintiff had charged in excess of the prices agreed for that car load. The check was not accepted, but returned. That is the car load of lumber sued for in the writ, and it appears by the pleadings that the defendants have brought into court the amount of that check for \$195.10. No more of the lumber was ordered or shipped. August 28, 1912, the plaintiff's attorney wrote the defendants saying:

"There is only one question: Will you give us directions to ship this lumber to you as per the original contract as shown and confirmed by your letters to Mr. Russell?"

It does not appear that that letter was answered, and this action soon followed.

[2] If there was a breach of the agreement of August 27, 1910, on the part of the defendants in not ordering the oak shipped within the six months, we think the plaintiff must be held to have waived it by accepting the agreement of February 10, 1911, which modified and extended the original agreement. Under the new arrangement the defendants were to take the balance of the 2" oak without culling it, taking the good and the out, at \$20 per thousand f. o. b. the cars at loading point, and they were also to take all the other oak remaining unshipped under the terms of the original agreement; that is, to be selected as shown on August 27, 1910, and at the original prices. There was some evidence in behalf of the plaintiff tending to show that Mr. Cleale said in the interview of February 9, 1911, that all of the lumber should be shipped "before mud times." No time, however, was stated in the memorandum of February 10, 1911, within which the lumber was to be taken, and we think that whatever may have been said in this regard was understood to be an expression of expectation rather than the assertion of a definite time limit which the parties understood to be of the

essence of the contract. Nevertheless, as the new arrangement contemplated that the two-inch stock, as well as the thicker stock that was to be selected as shown, was to be shipped as ordered by the defendants, it was their duty to furnish the plaintiff with orders so that the lumber could be shipped within a reasonable time after February 10, 1911.

[3] It is claimed in behalf of the plaintiff that by virtue of the contracts of August 27, 1910, and of February 10, 1911, and the shipments of a part of the lumber thereunder and payment therefor, the defendants became the owners of all of it, and that, upon their neglect and refusal to furnish the plaintiff with orders for its shipment, they became liable for what remained unshipped at the contract prices as for goods sold and delivered. We do not think that claim is sustainable.

The question whether a sale of personal property is completed or only executory, in cases between buyer and seller and where neither the statute of frauds nor the rights of third parties are involved, depends upon whether it was the intention of the parties at the time the contract was made that the title to the property should immediately pass to the buyer; and, when no such intention is expressed in the contract itself, then all the facts and circumstances under which the contract was made are to be examined to discover if such an intention is the meaning of the acts of the parties. Keeping in sight always the fact that it is the real intention of the parties that is to control, courts have adopted certain rules to aid them in discovering that intention. And it is too well settled to require the citation of authorities that, where anything remains to be done to identify the particular property to be sold, or to ascertain the price to be paid for it by selecting it as to quality, and weighing or measuring it as to quantity, or where the seller is to do certain things to the property to put it in that condition or situation in which it may or ought to be accepted by the buyer, the performance of those things are to be deemed presumptively a condition precedent to the passing of the title to the buyer.

Under the contract of August 27, 1910, it was the duty of the plaintiff, on receipt of shipping orders from the defendants, to select the lumber as to kind and quality "as shown," to haul it to the railroad and load it upon cars to be procured by him. The agreement of February 10, 1911, changed the original contract only in respect to the two-inch stock remaining, which thereafter was not to be selected, but as to that it was still the plaintiff's duty to separate it from the general mass, haul it to the railroad, procure cars, and load and ship it as ordered. In view of the fact that the plaintiff was to do those things at his expense before the defendants were bound to receive the lumber or make payment for it, it seems clear that it was not



the intention of the parties that the title to any of the lumber should vest in the defendants immediately and before those things were done. We are therefore of the opinion that neither of the agreements constituted an executed contract of bargain and sale of the lumber, but only an executory contract for the sale of it, and accordingly that the plaintiff cannot recover for the lumber unshipped under the first and second counts in his writ, as for goods sold and delivered.

Has the plaintiff shown that he is entitled to recover under his third count in the writ wherein he alleges a breach of the contracts on the part of the defendants in not taking or ordering the lumber shipped, as they had agreed to do? In determining that question we are concerned only with the acts of the parties after February 10, 1911, for, as before suggested, if there was any unreasonable neglect on the part of the defendants to furnish shipping orders prior to that date, we think it was waived by the plaintiff's acceptance of the new arrangement.

[4] Under the contract of February 10, 1911, as well as under the first contract, the defendants had the option as to the order of shipments in respect to the kinds and qualities of the lumber. They were wholesale lumber dealers. They did not contract for this lumber for their own use, but to fill orders to be procured by them from others, a fact well understood by the plaintiff, and it was their right to have the different kinds of lumber shipped out as they ordered it, provided they furnished orders under which it could all have been shipped reasonably within the terms of the contract. If it would have been more convenient for the plaintiff to have had shipping orders so that the different kinds of lumber could have been shipped out in some particular order, he should have so provided in the contract, and, in the absence of any such provision, it was not for the plaintiff to dictate the order in which it was to be shipped.

In the memorandum of February 10, 1911, the following shipping order was given:

"Ship Clark & Cleale, Heywood, Mass. Don't put many outs on first cars and mix them in pretty well."

That order applied to the two-inch stock only, and until it was withdrawn it was not only the plaintiff's right, but his duty, to make shipments thereunder as fast as they could reasonably be made. It is clear from the correspondence that the defendants then had an order for that two-inch stock, and from February 10, 1911, they were urging the plaintiff to ship it as fast as possible. On March 6, 1911, they wrote him, in answer to his request for an order for the thicker stock:

"I do not want any of this thick oak in here just at the present time, but I do want you to clean up the 2" for Gardner. Ship along all the 2" you have there before you start out to ship anything else, or talk about shipping anything else."

To that the plaintiff made the significant reply:

"In regard to loading all the 2 in. oak before I ship the thick 3 in. would be wrong as I want the 2 in. to help out the culls."

The defendants replied by letter of March 13, 1911, from which we have above quoted, urging the plaintiff to—

"ship *immediately* the balance of the 2 in. oak for Heywood. \* \* \* I have an order now which I can apply your stock on, and which I will not have later on."

It appears from the evidence that only four or five car loads of the two-inch stock were shipped after February 10, 1911, the last car load being shipped March 31, 1911, and on that day the plaintiff wrote the defendants to "give an order for the thick oak at once, as I have nothing to do with the teams." Mr. Cleale testified that up to that time the plaintiff never had any orders to stop shipping the two-inch stock to Heywood, and we do not find from the evidence that was not the fact; yet, according to the plaintiff's writ, there remained unshipped "29,806 ft. 2-in. oak plank and outs." The defendants contend that the plaintiff had ample opportunity to ship all the two-inch plank and outs to Heywood, and that it was his fault, and not theirs, that it was not all shipped, and that on account of his neglect to so ship they were obliged to have their order at Heywood filled from elsewhere. On the other hand, the plaintiff testified that after February 10, 1911, he shipped to the defendants some box boards at their request (those not being included in these contracts), and that he shipped out as much of the two-inch stock as he could with the teams he had, and that finally the defendants notified him not to ship any more. But, after a careful study and consideration of all the evidence, the court is constrained to the conclusion that the nonshipment of the balance of the two-inch plank and outs is not reasonably attributable to the defendants' neglect to order it shipped, but rather to the plaintiff's own fault in not shipping it more promptly to Heywood under the defendants' orders.

As already noted, on March 31, 1911, when the last car load of the two-inch stock was sent, the plaintiff asked for an order for the thick oak, and he repeated that request on the 3d of April, in response to which, on April 11th, the defendants sent an order for "a full car load of the 3" and 4" selected oak." The plaintiff admits that he did not ship that till May 18th, more than a month after the order was given. Answering the plaintiff's notice to them that this car had been shipped, the defendants wrote him that on account of his delay in filling the order they had been obliged to fill orders elsewhere, saying:

"I don't understand why you were so long in shipping this, and I can't tell now when I can send you more orders for this."

And on May 23d they wrote him that they had examined the car load and were extremely dissatisfied with it, saying:

"You have put considerable stock into this car which is not worth twenty-five (\$25.00) dollars, and which I had no intention of taking at that price, when I bought it. We do not care for any more of the lumber, so you had better try and dispose of it elsewhere. We mean what we say in regard to this. We absolutely do not want any more of this, as it is running too poor, the way you are sorting it."

Mention has already been made of the fact that no more lumber was ordered or shipped for more than a year, and that then the parties tried to do business with each other once more, and the last car load was shipped, for which the check that was returned was sent.

Taking into account the amount of the different kinds of lumber that was shipped after February 10, 1911, together with the amount of the different kinds that the plaintiff claims remains unshipped, it appears that very much the greater part of the unshipped lumber on February 10, 1911, was the two-inch stock, which we think both parties understood was the more difficult stock to dispose of. And we do not think it should be held that the defendants broke their contract in not giving orders for the shipment of any of the thicker stock while they were urging the plaintiff to ship the two-inch stock on the order they had for it at Heywood. The plaintiff sent out his last car load of the two-inch stock on March 31, 1911, and then requested an order for the thicker stock, which the defendants gave him on the 11th of April, 1911. Up to that time we do not think it could be fairly held that the defendants had broken their contract as to the thicker stock. The order of April 11th was not filled till May 18th, and after the car load arrived and was inspected by the defendants they notified the plaintiff that the order had not been filled according to the contract and that they would give him no more orders for any of the lumber, claiming a breach of the contract on his part. And that is the vital question on this branch of the case, whether the plaintiff had reasonably kept and performed his part of the agreement, and given no justification for the defendants' refusal to furnish shipping orders under the contract. In passing on this question the situation of the parties and their previous contentions should be kept in mind. The defendants claim that from the very beginning the plaintiff had not selected the lumber "as shown" in filling their orders, and that his delaying and misfilling their order of April 11th was not merely an isolated instance of neglect by him to live up to his contract, but another instance in a quite regular course of conduct on his part in disregard of the contract. On the other hand, the plaintiff with equal insistence contends that the defendants were from the beginning

carrying out a purpose to get the best quality of his lumber, and then on some pretense refuse to take the poorer grades, and that their complaints as to the kind and quality of the lumber shipped on their orders were spurious and without any foundation in fact.

[5] The question may not be free from doubt, but the burden was on the plaintiff to establish by a preponderance of the evidence that he had kept and performed his part of the agreement, and that the defendants had on their part repudiated it without justification. Upon a consideration of all the evidence, the court is led to the conclusion that the plaintiff has not sustained that burden, and that he is not entitled to recover damages for a breach of the contract by the defendants.

It may be added also that, if it could have been found that there was a breach of the contract on the part of the defendants in not accepting the lumber, there is not sufficient and definite evidence presented from which the damages could be reasonably ascertained and computed. There was no evidence introduced in behalf of the plaintiff as to the amount of the different kinds and qualities of the lumber remaining unshipped, except the testimony of Mr. Carleton who surveyed it. But he did not clearly show what part of the oak is white and what part red, and as to the dimensions of 19,391 feet of it he made no division, answering that it was "two and three inch oak." Nor is there any evidence of the market value of the remaining lumber at the time and place for its delivery under the contract.

It remains to consider if the plaintiff is entitled to recover for the car load of lumber sued for at the prices claimed by him. This car load was received and kept by the defendants, but they claim that there was an agreement whereby the price for it was to be \$25 per thousand. On the other hand, the plaintiff claims that there was no such an agreement, but that the car load was ordered and shipped as selected stock under the terms and prices of the original contract. From an examination of the correspondence between the parties just prior to the shipment of this car load we are of the opinion that the defendants' contention that there was a new contract as to the price of this car load is not sustained by the evidence. Accordingly we find that the plaintiff is entitled to recover for that car load of lumber as claimed in his writ, and it avails the defendants nothing that they have brought into court the amount of the check tendered in payment for it, since the check was less than the amount due therefor.

The conclusion of the court therefore is that the plaintiff is entitled to judgment for \$215.88, with interest thereon from August 6, 1912.

So ordered.

(245 Pa. 40)

**FAULKNER v. DELPH SPINNING CO., Inc.**  
(Supreme Court of Pennsylvania. April 13, 1914.)

**1. MASTER AND SERVANT (§ 286\*)—INJURY TO SERVANT—"UNGUARDED MACHINERY"—NEGLECT—QUESTION FOR JURY.**

Where, in an employe's action for injuries from her hand being caught in the unguarded cogwheels of a spinning machine about which she was working, plaintiff testified that the wheels were so close to the frame inclosing the machine that "if you just put your foot out you would catch your dress," and that in trying to grab waste which fell from her hands while the machine was in motion her hand was caught in the cogs, the question whether defendant was negligent in failing to provide guards pursuant to Act May 2, 1905 (P. L. 355), § 11, was for the jury, though defendant offered evidence, not contradicted or impeached, that by actual measure there was a space of 18 inches between the front of the frame of the machine and the nearest cogs, so that the cogs were entirely safe, and hence not unguarded, within the meaning of such statute.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

**2. MASTER AND SERVANT (§ 121\*)—INJURY TO SERVANT—UNGUARDED MACHINE—PRIMA FACIE CASE.**

In an employe's action for injuries from her hand being caught in the unguarded cogwheels of a spinning machine while she was attempting to catch waste, defendant's evidence, tending to show that the cogs were so far within the frame that the waste could not have fallen on them as alleged by plaintiff in her testimony, raised an issue of fact which, if determined in defendant's favor, would overcome plaintiff's prima facie case, even though it be conceded that defendant was negligent in not guarding the machine pursuant to Act May 2, 1905 (P. L. 355) § 11.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*]

**3. TRIAL (§ 253\*)—INJURY TO SERVANT—UNGUARDED MACHINERY—INSTRUCTIONS—IGNORING EVIDENCE.**

In an employe's action for injuries from her hand being caught in the unguarded cogs of a spinning machine, it was error to submit to the jury the question whether the cogs were guarded, merely on the photographs introduced in evidence, and ignore other pertinent evidence especially where the photographs were unsatisfactory, if not misleading.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

**4. MASTER AND SERVANT (§ 291\*)—INJURY TO SERVANT—UNGUARDED MACHINERY—INSTRUCTIONS.**

Where, in an employe's action for injuries from her hand being caught in the unguarded cogs of a spinning wheel at which she was working, the defense was that the accident could not have happened in the way described by plaintiff while she was not cleaning the machine, and a witness for defendant testified that immediately after the accident plaintiff admitted that she had been cleaning the machine, it was error to so instruct that the jury must have understood that plaintiff was entitled to recover, unless defendant's evidence satisfied them that she received her injury when cleaning the machine while in motion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1133, 1134, 1136-1146; Dec. Dig. § 291.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Mary A. Faulkner, by her next friend, Margaret J. Howard, against the Delph Spinning Company, Incorporated, for personal injuries. From judgment for plaintiff, defendant appeals. Reversed.

Argued before MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Henry Spalding and Edward W. Fell, both of Philadelphia, for appellant. John J. McDevitt, Jr., and John C. Bell, both of Philadelphia, for appellee.

STEWART, J. [1] The plaintiff, a girl of 17 years, was a cone winder in the employ of the defendant company. The work assigned her was to walk back and forth in front of a spinning machine, remove the waste material as it gathered, tie up the threads or ends where broken, and generally to see that the machine was kept busy in winding the yarns on the spools. Underneath an iron frame which extends along the length of the machine there is a series of wheels attached to a revolving shaft. Dividing these, in the center of the frame, are two cogwheels, one on the driving shaft, the other on an upright shaft. This part of the machine is exposed to view and is without physical guard of any kind, and, according to plaintiff's testimony, these cogwheels are close to the front of the frame of the machine where plaintiff stood at the time of the accident, so close, as she expressed it, that "if you just put your foot out you could catch your dress; it was so near the front." Her narrative is that at the time of the accident she had a piece of waste in her hand which she had gathered; that this waste suddenly dropped from her hand and, falling upon the roller underneath, got caught in the shaft; that she tried to grab it as the roller was revolving; and that it took her hand around as well and drew it into the cogwheel, with the result that she lost several of her fingers. It is impossible to derive any other meaning from the narrative than that the waste, as it left her hand, fell outside the frame of the machine. If, as she testified, the roller and cogs were close to the front of the frame, there would be nothing improbable in the statement that the waste had fallen upon the roller. The significance of this will appear later. We start, then, with a prima facie case made out by the plaintiff; the negligence charged being failure to properly guard the cogwheels which inflicted the injury. The defense was twofold. First, with a view to disprove negligence on the part of defendant, evidence was introduced to show, by actual measure, not impeached or contradicted in any way, that these cogwheels are on a shaft 21 inches back from the frame of the machine, and are but 6 inches in diameter, leaving a clear space of 18 inches between the front of the

frame and the nearest surface of the cogs. Upon this state of facts it was argued, following the doctrine of *McCoy v. Wolf*, 235 Pa. 571, 84 Atl. 581, that, having regard to the nature and character of the employee's duty, the particular machinery which inflicted plaintiff's injury—the cogwheel—was so distant from the place where plaintiff was employed as to render it entirely safe as to her, and was therefore not unguarded, within the meaning of the statute.

[2] Allowing the argument its full legitimate force, it could prevail no further than to carry this particular question to the jury, and to this extent it was allowed to prevail. The second line of defense was a deduction from the same evidence as to the actual location of the shaft and cogwheels with respect to the position occupied by the plaintiff when at work, and the argument is that, with the shaft and cogs from 18 to 21 inches within the frame of the machine, the accident could not have happened in the way described by the plaintiff; that the waste could not have fallen upon either shaft or cog; and that therefore plaintiff must have been otherwise engaged than in an endeavor to recover the fallen waste when her hand came in contact with the cogwheels. The purpose of the evidence was to overcome plaintiff's prima facie case. If it did overcome it in any material respect—and that would be a question for the jury to determine—the effect would be the same as though plaintiff had failed in the first instance. Plaintiff's prima facie rested wholly and exclusively upon her own testimony; she alone testified to the circumstances under which she received her injury. Conceding the negligence of the defendant, her prima facie was still incomplete except as it showed circumstances attending the accident which gave rise to no presumption of negligence on her part. She detailed circumstances which left her clear of contributory negligence. If the accident did not happen in the way she said it did (that is, if the evidence on part of the defendant overcame that of plaintiff in this respect) the circumstances attending the accident would at best be the subject of conjecture only, and the plaintiff's prima facie case would then be incomplete and recovery impossible. At most the evidence would then show a possible connection between defendant's alleged negligence and the injury, and a verdict founded on such a state of facts would be no more than a mere guess. *Ford v. Anderson*, 139 Pa. 261, 21 Atl. 18. We have said enough to indicate the true issues in the case. How far these were obscured in the charge in which the case was submitted to the jury we shall endeavor to make plain.

[3] First, as to the defendant's negligence: The only instruction as to this appears in the following excerpt from the charge:

"There is an act of assembly in this state which requires every manufacturer and factory

to have their cogwheels properly guarded. It is alleged by the plaintiff in this case that this cogwheel was not so guarded. You have seen a photograph of it, and you will determine whether it was or whether it was not."

The inadequacy of this instruction is too apparent to call for discussion. Two photographs of this spinning machine were admitted in evidence. Our own examination of them has shown how unsatisfactory, if not actually misleading, they may be except as they are viewed and studied in the light of the evidence offered explaining them. But aside from this, no matter how illuminating they might in themselves be, to submit the question of defendant's negligence on this one piece of evidence, ignoring all the other evidence in the case, and that without any instruction whatever as to what would constitute negligence on the part of the employer in such a case as this, was to leave the jury without guide or compass. It was the plain duty of the court to have instructed the jury clearly and distinctly as to the duty of the defendant in the premises, and failure to do so was error. *Hayes v. Penna. R. Co.*, 195 Pa. 184, 45 Atl. 925.

[4] On the second issue the charge is open to still more serious objection; it was an inaccurate statement of the issue. On the trial the defendant called a witness who testified that he was the first to run to plaintiff's relief; that he had found her lying down and bleeding, and said to her, "Mary, what have you been doing? Have you been cleaning?" and that to this she said, "Yes," and fainted and cried. Plaintiff denied that she had been cleaning the machine, and further that she at any time said that she had been so engaged. The evidence on the subject was for the consideration of the jury, in connection with any other evidence in the case that affected the credibility of the plaintiff in connection with her statement on the witness stand as to how the accident occurred. The defendant's exemption from liability did not depend on its ability to show how the accident occurred. Its whole effort was to show that it could not have occurred in the way the plaintiff described, and yet this is the way the issue was submitted:

"The defense in the case is that, as this injury happened, not on the part of the machine on which she was engaged, but in another compartment, she must have been engaged at the time that it happened, from the very nature of affairs, in cleaning the machine while the machine was in motion. That is the defense. There is no direct evidence that she was engaged in cleaning her machine, because no one seems to have seen this accident actually occur, but the defense claims, from all the facts and circumstances of the case, and from the nature of the machine on which she was working, that she must in order to quit her work earlier in the day, have disregarded what they say were the plain instructions they gave, particularly that she must not clean the machinery in motion. \* \* \* We will say to you that if you believe that to have been the state of affairs, if you believe that she was instructed not to clean the machinery in motion, and that notwithstanding such instructions she did un-

dertake to do so for any reason, and that while so engaged she received this injury, then your verdict should be for the defendant, because that would be contributory negligence upon her part, and she would not be entitled to recover under such circumstances. If you believe, however, that in the ordinary course of her employment, and without disregard of such instructions as I have described to you, she received this injury, the verdict would be for the plaintiff, because she is a young girl, and her employers were charged with the duty of furnishing her with a safe place to work, and with warning her of any dangers connected therewith. They were also charged with the statutory duty of properly guarding all machinery, all cogs and things of that kind, by which she might suffer injury."

As thus submitted the jury must have understood the instruction to mean that the plaintiff was entitled to recover unless the evidence adduced by the defendant satisfied them that she had received her injury when engaged in cleaning the machine while it was in motion. While this theory as to the happening of the accident was advanced by the defendant, it did not constitute the defense set up. The defense was, not that it had so happened, but that it did not happen, and could not have happened, in the way described by the plaintiff. It was not for the defendant to show that it happened in a way that would exempt it from liability, except as plaintiff's evidence had involved it in liability. The only question on this branch of the case was: Could the jury on a review of all the evidence, with reasonable certitude, conclude that the injury happened in the way and under the circumstances described by the plaintiff? If they could, then, provided they found as well that defendant was chargeable with negligence, plaintiff would be entitled to recover; if they could not, the accident remained unexplained, and no basis was furnished for a recovery.

The fourth assignment of error is that the charge of the court as a whole was erroneous, inadequate, and misleading. This assignment we sustain for the reasons above stated.

The judgment is reversed, and a *venire facias de novo* is awarded.

(245 Pa. 143)

SPINK v. PHILADELPHIA HYDRO-ELECTRIC CO. et al.

(Supreme Court of Pennsylvania. April 20, 1914.)

# 1. JUDGMENT (§ 744\*)—RES JUDICATA—WATER RIGHTS.

A judgment determining the respective rights of grantor and grantee under a grant to supply water for power purposes, and rendered in a proceeding to restrain the grantor from installing a device to limit the grantee's water supply to the amount provided in the grant, was conclusive in a subsequent proceeding to enjoin the grantor and his assignee from installing the same device, where it did not appear that the grantee was threatened with any diminution with the supply to which it was entitled under

the grant, and the new facts alleged could not enlarge his right as determined by the judgment.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1278-1281; Dec. Dig. § 744.\*]

## 2. JUDGMENT (§ 713\*)—CONCLUSIVENESS.

A final decree is conclusive as to plaintiff's claim, and as to every matter offered and received to sustain or defeat the claim and all admissible matters which might have been so offered.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1069, 1234-1237, 1239, 1241, 1247; Dec. Dig. § 713.\*]

## 3. WATERS AND WATER COURSES (§ 197\*)—WATER COMPANIES—PUBLIC RIGHTS—ENFORCEMENT BY PRIVATE PARTIES.

Where, in an injunction suit, it appears that defendant is a public water company owing no duty to plaintiff as an individual distinct from the general public, plaintiff is not entitled to relief, because the water company has failed to recognize and protect equities existing between those dependent on it for their water supply.

[Ed. Note.—For other cases, see Waters and Water Courses, Cent. Dig. § 271; Dec. Dig. § 197.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill for an injunction by William Spink against the Philadelphia Hydro-Electric Company, a corporation, and others. From a decree sustaining demurrer to the bill, plaintiff appeals. Affirmed.

The facts appear in the opinion of the Supreme Court, and in *Spink v. Schuylkill Navigation Co.*, 240 Pa. 619, 88 Atl. 10.

The plaintiff, inter alia, averred in his bill that the primary purpose for which the navigation company was incorporated was the maintenance of a waterway for transportation purposes, and that the right to sell water for power purposes was given by the state as an incident thereto, for the purpose of developing transportation business by encouraging and assisting the conduct of manufacturing enterprises along the line of the canal; that the company had been so managed that it had ceased to conduct any transportation business whatever over its waterways, and that the canal upon which plaintiff's property abuts had become impossible of use for the passage of boats and barges, inter alia, because of the rapidity of the current of water flowing through it; that the navigation company was, and for many years past had been, a water company, maintaining its works for the purpose of selling water and water power, and deriving its revenues from the sale of water to owners of manufacturing plants abutting on its canal, and that as such it was and became the duty of said defendant to treat alike and without discrimination all those who used and depended upon the water sold by said defendant for power purposes; that the defendant navigation company, in violation of its duty and the rights of plaintiff, had discriminated against him (a user and purchaser of water for a long period of years) in favor of the defendant, the Hydro-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Electric Company (a recent user of water), to whom it was attempting to sell all the surplus water power (of which there was a large quantity) produced by the works of the navigation company, and at a lower rate than plaintiff had been paying and was willing to pay; that the contract between the defendants was illegal and void as contrary to public policy, and in violation of the charter powers of the navigation company; and that the Hydro-Electric Company acquired no right under it to obstruct the flow of water through the forebay of the premises of plaintiff, or to take for its own use water he had theretofore used and desired to continue to use and pay for, and which was necessary to the operation of the machinery installed in his premises in 1889 and continuously operated thereafter.

The bill prayed for a decree declaring the navigation company to be a water company subject to the duties and obligations of a public service corporation, and directing the navigation company to furnish plaintiff with water necessary for the operation of his turbine wheel in the quantity heretofore taken by him, at a reasonable price, and at as low a price as defendant was furnishing water to other consumers; for an injunction requiring defendants to remove the obstruction limiting the amount of water supplied to plaintiff; a decree determining that the navigation company had no power to confer on the Hydro-Electric Company the right to install any device restricting the amount of water used by plaintiff; to determine a reasonable sum to be paid for the excess water; and for general relief.

Argued before FELL, C. J., and POTTER, ELKIN, STEWART, and MOSCHISKER, JJ.

W. W. Porter, of Philadelphia, for appellant. H. B. Gill, H. S. Drinker, Jr., William B. Linn, and A. M. Bettler, all of Philadelphia, for appellees.

STEWART, J. [1] The issue sought to be raised by this proceeding is identical in every material respect with that presented and adjudicated in *Spink v. Schuylkill Navigation Co.*, 240 Pa. 619,<sup>1</sup> and, notwithstanding in this proceeding the Philadelphia Hydro-Electric Company has been brought in as a codefendant, the real parties to the issue are the same. In that case we distinctly held that nothing that had occurred between the appellant and the navigation company subsequent to the date of the grant from the latter to the former had in any way enlarged the terms of that grant; that the grant itself defined the rights of the parties; and that the navigation company under the terms of its contract had a right to install in appellant's forebay the mechanical device it contemplated using for the purpose of limiting appellant's water supply to 200 square inches. The present bill, reciting the proceedings under

the former bill, charges that the navigation company has entered into a contract with the Hydro-Electric Company under which it has agreed to sell to the latter company all the water it controls in excess of the 200 square inches of water granted to the appellant and other similar grants to other mill properties adjoining the canal, and that the Hydro-Electric Company, in assertion of a right under this contract, has erected an obstruction in the canal at the opening of the forebay of appellant's property which has reduced the volume and head of water supplied to appellant's mill, and thereby prevented appellant from operating his water power machinery as he was accustomed. The bill nowhere, however, charges that the obstruction had so reduced the supply of water that in consequence less than the 200 square inches to which appellant is entitled under his grant passed into his forebay. What we decided in the former case—and it was the one point in issue—was that the navigation company had the right to do the thing that is here complained of. The fact that it has been done by another company that had acquired all the rights of the navigation company marks a distinction between the cases, but denotes no difference. A demurrer was filed to plaintiff's bill on the ground that:

"It appears in said bill that it has been judicially determined that complainant is not entitled to receive water in excess of amount to which he is entitled by grant as aforesaid; that complainant does not complain that he is not receiving the amount of water to which he is so entitled, and sets forth no after-discovered facts, and alleges no valid reason why the previous determination of his rights in the premises should not be final, or why the relief refused him in said previous suit should now be granted."

The demurrer was sustained, and the appeal is from the decree so entered. The present bill contains averments which did not appear in the first bill; but none, accepting all as true, however much they might qualify the right of the navigation company to grant to the Hydro-Electric Company all its excess water, could enlarge appellant's right with respect to the amount of water he is entitled to derive from the canal. He is receiving today all that he is entitled to receive under our former adjudication and controversy with respect to that amount is at an end.

[2] The decree in that case was a finality as to the claim there made by the plaintiff, and as to every matter which was offered and received to sustain or defeat the claim. The new averments relied upon to avoid estoppel relate wholly to the rights, privileges, and obligations of the navigation company, under its charter; and these are urged upon our attention because appellant would derive therefrom some obligation on part of the navigation company to afford him a larger supply of water than his grant calls for, because of an equitable right on his part to a share in the excess of water granted to the Hydro-Electric Company. These averments

<sup>1</sup> 88 Atl. 10.

might be disposed of with the single observation that all that is alleged therein was admissible matter which might have been offered in the former case, and not having been offered the decree in the former case is as conclusive as though these matters now set up had never existed.

[3] But, even though it be to prolong unnecessarily this opinion, we shall advert briefly to the merits of this contention as it is defined in the first proposition in the brief of argument. No more will be necessary since all the other propositions stand or fall with this. The proposition is:

"That the defendant navigation company, within the limitations of its supply of water rendered available for power purposes, is a public water company, and must recognize and protect the equities existing between those dependent upon it for their supply of water."

The latter part of this proposition would be entirely correct were its predicate established, that is, that the navigation company is a public water company; but this is an assumption manifestly open to very serious question if there be nothing in the charter of the company supporting it other than that which is quoted in the plaintiff's bill, and on which he relies. Assuming for the sake of argument, however, that the company is a public water company, the appellant is without standing to compel the company to discharge the duties it owes to the public. We have heretofore held that the company owed no duty to the appellant, as an individual distinct from the general public, that it has failed to perform; therefore the injury here complained of is one that plaintiff shared with the general public, and is not specific in any other sense than perhaps the disappointment is greater in his case than that of some others. This, however, would be one of degree simply, and, as said in *Saylor v. Canal Co.*, 183 Pa. 167, 38 Atl. 598, 63 Am. St. Rep. 749, this would not give standing to a private party to enforce public rights. In *Buck Mountain Coal Co. v. Lehigh Coal & Navigation Company*, 50 Pa. 91, 88 Am. Dec. 534, the bill was to compel the defendant company to reconstruct a portion of its canal which had been entirely swept away by a flood, and to compensate the complainants for the loss to them of the means of transporting their coal to market. It was there held that plaintiffs were without standing to enforce this duty on the part of the company to the public in the absence of special injury to themselves or property, and in the opinion in the case what is meant by special injury is thus defined:

"By this we mean any injury, special in its operation, resulting from a failure to perform some specified duty to them, or to make compensation for injury and deterioration to their property, as contradistinguished from injury to them in common with the whole public, in the loss of a convenient and valuable highway."

We repeat, it has already been adjudicated that the navigation company owed no special

duty to this appellant, and, as we have seen, the fact, if it be a fact, that appellant has suffered to a larger extent than some others in consequence of the failure of the navigation company to discharge its duty to the public, whether by discrimination or otherwise, the distinction would be simply one of degree; and, while appellant might have his common-law remedy in such case, it would give him no standing to enforce a performance by the navigation company of its duty to the public, and that is what this bill attempts through its additional averments. Again, the equities averred in the proposition are such as are supposed to arise from the fact that the navigation company has sold all its excess water to the Hydro-Electric Company, and in so doing has unjustly discriminated against the plaintiff to his serious injury. We refer to this feature only because of the argument submitted on behalf of appellant. We have been reminded that in the opinion in the former case this occurs:

"Whatever equities appellant may have, and we are inclined to think he has some under all the circumstances, must be treated as the subject of adjustment by the parties themselves. The courts are not at liberty to grant equitable relief in violation of the express covenants of contracting parties."

The use made of this excerpt in the argument at bar and in the briefs submitted gives it an undue and mistaken emphasis. The equities there referred to are those unenforceable equities which can and often do prevail as between the parties themselves to bring about an amicable compromise and adjustment. It is manifest that the reference could not have been to the particular equities which the appellant sets up by his added averments, since in the former case the conditions from which the appellant seeks to derive them did not then exist; they only arose with the sale to the Hydro-Electric Company by the navigation company of all its excess water, a sale which, so far as the record shows, was not even in contemplation when the former bill was filed. The case calls for no further discussion.

For the reasons stated, the assignments of error are overruled, and the decree is affirmed, at costs of appellant.

(245 Pa. 392)

### LEA v. SANSON.

(Supreme Court of Pennsylvania. May 18, 1914.)

#### 1. WILLS (§§ 607, 608\*)—CONSTRUCTION.

Under a will giving the residue of testator's estate to his wife for life and providing that at her death the property should be divided into shares, and that to "my son C. I devise a life estate in his share if he shall then be living. Upon his decease his share of said realty shall pass to his descendants who shall then be living, who shall take the same in remainder \* \* \* as they would have taken \* \* \* had he died actually seised and possessed thereof," C. took merely a life estate, and not an estate tail such as would be enlarged to a fee under the rule of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**Shelley's Case** and the act of April 27, 1855 (P. L. 368).

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1368-1378; Dec. Dig. §§ 607, 608.\*]

**2. WILLS (§ 608\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE.**

Where it appears, either by expression or by clear implication, that by the word "issue," as used in a will, testator meant issue living at a particular period, and not the whole line of succession which would be included under "heirs of the body," it must be construed to be a word of purchase, and the rule in *Shelley's Case* can have no application.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

**3. WILLS (§ 608\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE—APPLICATION—"DESCENDANTS"—"ISSUE"—"HEIRS."**

The principle that the rule in *Shelley's Case* applies whenever such technical words of limitation as "heirs" or "heirs of the body" appear without more, though there are superadded words of limitation, such as "may be then living," does not apply where the word "descendants," and not "heirs," is employed; the word "descendants" being, at most, the equivalent only of "issue," and not of "heirs."

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 2014-2017; vol. 8, p. 7635; vol. 4, pp. 3778-3782; vol. 8, p. 7693; vol. 4, pp. 3241-3265; vol. 8, pp. 7677, 7678.]

**4. WILLS (§ 608\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE—BURDEN OF PROOF.**

Whenever the word "descendants," which is not a technical word of limitation, appears in a will, the burden is on a party claiming that such word is equivalent to "heirs" or "heirs of his body" under the rule in *Shelley's Case* to show from the language of the will that it was so intended.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Charles M. Lea against Morris Sanson. From judgment for plaintiff, defendant appeals. Reversed and rendered.

In addition to the facts set forth in the opinion of the Supreme Court, it appeared from the case stated that Charles M. Lea and Charlotte Augusta, his wife, agreed to sell to Morris Sanson, the defendant, the property in dispute; that, when plaintiff tendered a deed, defendant refused to accept the same, alleging that the grantors had not a title in fee to the property.

It was stipulated in the case stated that, if the court was of the opinion that the plaintiffs could convey a good and marketable title in fee simple, judgment should be entered for the plaintiff; otherwise to be entered for the defendant. The court entered judgment on the case stated for the plaintiff.

Argued before FELL, O. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Horace Stern and Morris Wolf, both of Philadelphia, for appellant. Abraham M. Beitler, of Philadelphia, for appellee.

MOSCHZISKER, J. [1] The question for determination in this case is: Did the plaintiff, Charles M. Lea, take an estate tail enlarged to a fee, or but a life estate?

The testator gave the residue of his estate to his wife for life, and directed that at her death the property should be divided into shares. The devise to the plaintiff was as follows:

"To my son Charles I devise a life estate in his share, if he shall then be living. Upon his decease his share of said realty shall pass to his descendants who shall then be living, who shall take the same in remainder, in such proportions, with like force and effect as they would have taken said real estate had he then died actually seised and possessed thereof."

The issue arose in a case stated wherein it was agreed that, if it should be decided that Charles M. Lea took a fee, judgment should be entered for him; otherwise for the defendant. The plaintiff secured the judgment, and the defendant has appealed.

The court below sustained the plaintiff's contention that the terms of the devise gave him an estate tail which, under the rule in *Shelley's Case*, and the act of April 27, 1855 (P. L. 368), was enlarged to a fee. We cannot agree in this conclusion; for it is apparent that the testator did not intend to use the word "descendants" in the sense of "heirs of the body" of the first taker, but simply to designate a certain set of persons to take directly from him (the testator) at a given time.

The words of the will are not sufficient in themselves to create an estate in fee simple, for "descendants" does not comprehend "heirs" at law generally (*Bates v. Gillett*, 132 Ill. 287, 298, 24 N. E. 611); and the phrase "who shall be then living" restricts the word "descendants" to those alive at the time of the death of the first taker, thereby negating the idea of a devise to "heirs of the body" or descendants to the remotest degree, which is the essential attribute of an estate tail. It is quite true that the phrase "shall pass to his descendants" strongly suggests an intent to make the first taker the source of inheritable succession, and, had the devise ended at that point, it could well be held to create an estate tail; but it did not, and this is the pinch of the case.

[2] A clear statement of the principle which controls under circumstances such as presented here is to be found in the opinion of Mr. Justice Sharswood, in *Taylor v. Taylor*, 63 Pa. 481, 484 (3 Am. Rep. 565), where he said:

"It is a position not open to dispute \* \* \* that if it appears, either by expression or clear implication, that by the word 'issue' [in this case 'descendants'] the testator meant \* \* \* issue living at a particular period, as at the death of the first taker, and not the whole line of succession, which would be included under \* \* \* 'heirs of the body,' it must necessarily be construed to be a word of purchase; and the rule in *Shelley's Case* can have no application."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



And, again, in *Robins v. Quinliven*, 79 Pa. 333, 335, where it is stated:

"If there be on the face of the will sufficient to show that the word was intended \* \* \* to be applied only to \* \* \* descendants of a particular class or at a particular time, it is to be construed as a word of purchase, and not of limitation."

And in *Jones v. Jones*, 201 Pa. 548, 550, 51 Atl. 362, 363, where Mr. Justice Brown said:

"When the testator annexes words of explanation to 'heirs' or 'heirs of the body,' as to heirs now living, etc., using the terms as mere descriptio personarum, or for the specific designation of individuals, a new inheritance is thereby ingrafted upon the heirs to whom the estate is given (4 Kent Com. 221), and they will be assumed to take as purchasers (*Kuntzleman's Est.*, 136 Pa. 142 [20 Atl. 645, 20 Am. St. Rep. 909])."

Also see *McCann v. McCann*, 197 Pa. 452, 459, 47 Atl. 743, 80 Am. St. Rep. 846; *Hill v. Giles*, 201 Pa. 215, 217, 50 Atl. 758; *Pindlay v. Riddle*, 3 Bin. 139, 166, 5 Am. Dec. 355.

[3] The principle is different, however, and the rule in *Shelley's Case* applies whenever technical words of limitation, like "heirs" or "heirs of the body," appear without more; and this is so even when superadded words of limitation are present, if they do not actually demonstrate that the technical words which precede them are intended merely to designate specific individuals, and, generally speaking, a phrase such as "may be then living" is not sufficient in itself to reduce these technical terms to words of purchase. *Harrison v. Harris*, 91 Atl. 617; *Criswell's Appeal*, 41 Pa. 288; *Cockins' Appeal*, 111 Pa. 26, 2 Atl. 363; and *Hiester v. Yerger*, 166 Pa. 445, 31 Atl. 122. But this last principle has no application in the present case; for here "heirs" is not used, and the word which is employed, "descendants," is not of like force; "at most, it is only the equivalent of issue" (*Walns' Estate*, 189 Pa. 631, 632, 633, 42 Atl. 299), which is a word that "yields readily to a context indicating its use as a word of purchase" (*Stout v. Good*, 91 Atl. 613), and which prima facie "has not the same significance as 'heirs of the body' \* \* \*" (*Anderson Law Dictionary*).

[4] "Descendants" is not a technical word of limitation; and whenever in a devise a word appears which is not strictly one of limitation, if the rule in *Shelley's Case* is sought to be applied by analogy, the burden rests upon him who claims such word to be the equivalent of "heirs" or "heirs of his body" to demonstrate from the language of the will that it was so intended. *Stout v. Good*, supra.

The testator uses the word "descendants" several times; he first provides that, at the death of his widow, his property shall be divided "into as many parts and shares as at that time there shall be children of mine then living and children of mine then dead represented by 'descendants' then living";

next, he states, "To each of my children, Arthur and Nina, who shall then be living, and to the 'descendants' who shall then be entitled of any of my children then deceased, I devise its share, in fee-simple"; then follows the particular provision with which we are dealing. It seems clear that the testator first employed "descendants" as a mere descriptio personarum; hence, it is but reasonable to assume that he meant the word in that sense in the devise in question; and there is nothing called to our attention from the other parts of the will sufficient to overcome this assumption, or to show that he intended it as a synonym for the technical phrase "heirs of the body." The last words of the devise, which states that the descendants of Charles, living at the time of his death, shall take "in remainder in such proportions with like force and effect as they would have taken said real estate had he then died actually seised and possessed thereof," as a distributive direction, accord with the inheritance laws, and, since estates tail, after they have been determined to be such, now descend as fee-simple estates (*Stout v. Good*, supra), if it were not for the presence of the superadded words of limitation which this direction contains within itself, and those that follow the word "descendants"—i. e., "then living"—these words of distribution would not in themselves be sufficient to overcome what might appear to be an intent to create an estate tail. As it is, however, we have an instance of superadded words of limitation joined with a special direction for distribution; which combination, in a case like this, is usually held to be conclusive evidence of an intent that the remaindermen shall take as purchasers. *Grimes v. Shirk*, 169 Pa. 74, 77, 32 Atl. 113; *Stout v. Good*, supra.

After considering all the relevant parts of the will (*Kemp v. Reinhard*, 223 Pa. 143, 77 Atl. 436, 29 L. R. A. [N. S.] 958), we are convinced that the learned court below erred in entering judgment for the plaintiff. The assignments of error are sustained.

The judgment is reversed, and is here entered for the defendant.

(245 Pa. 323)

#### STOUT et ux. v. GOOD.

(Supreme Court of Pennsylvania. May 18, 1914.)

#### 1. WILLS (§§ 607, 608\*) — CONSTRUCTION — RULE IN SHELLEY'S CASE.

Under a will giving to deceased's daughter C. his house and lot for life, and upon her death then "to the children of my said daughter \* \* \* and the issue of said children who may then be deceased, \* \* \* provided, however, that in the event of \* \* \* C. leaving no issue \* \* \* she shall have the right to will said house," the daughter C. took only a life estate in the property, and not an estate tail

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

enlarged to a fee under the rule in Shelley's Case and the act of April 27, 1855 (P. L. 368).

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1368-1371, 1372-1378; Dec. Dig. §§ 607, 608.\*]

## 2. WILLS (§ 608\*)—CONSTRUCTION—"RULE IN SHELLEY'S CASE."

The "rule in Shelley's Case" ordains that when a life estate is devised to a person, and in the same will an estate is limited mediately or immediately to his heirs in fee or in tail, the word "heirs" is a word of limitation, not of purchase, and the devise to the first taker is enlarged to a fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6272, 6273.]

## 3. WILLS (§ 608\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE.

Where the technical words suggested in the rule in Shelley's Case, "heirs," for a fee simple, and "heirs of his body," for a fee tail, appear without more, the rule applies, but where other words such as "children," are used, the burden rests on him who claims them to be the equivalent of "heirs" or "heirs of his body" to show from the context or other relevant language in the will that they were so intended.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

## 4. WILLS (§ 608\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE—APPLICATION.

In the absence of the technical words of limitation, "heirs" or "heirs of his body," the rule in Shelley's Case should never be applied unless a paramount intent to make the first devisee a source of inheritable succession plainly appears, but, where the language of the will brings the case within such rule, the fact that testator desired that it should not operate is immaterial.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

## 5. WILLS (§ 457\*)—CONSTRUCTION—INTENT OF TESTATOR.

In determining testator's intent, his words should be taken in their proper technical sense, unless their context or other parts of the will plainly show that they were used in a different sense.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 975; Dec. Dig. § 457.\*]

## 6. WILLS (§ 495\*)—CONSTRUCTION—"CHILDREN"—"ISSUE."

"Children" is prima facie a word of purchase, while "issue" is ordinarily used as a word of limitation, though it is not technically so to the same degree as "heirs" or "heirs of his body" and yields readily to a context indicating its use as a word of purchase.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1061-1064; Dec. Dig. § 495.\*]

For other definitions, see Words and Phrases, vol. 2, pp. 1115-1141; vol. 8, p. 7601; vol. 4, pp. 3782-3792; vol. 8, p. 7693.]

## 7. WILLS (§ 545\*)—CONSTRUCTION—"WITHOUT ISSUE"—"LEAVING NO ISSUE."

Where a devise is to one for life, with remainder to his children, a subsequent reference to the death of the life tenant "without issue" or "leaving no issue" ordinarily means such issue as those previously mentioned, and not an indefinite failure of issue.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1171-1176, 1310-1318; Dec. Dig. § 545.\*]

For other definitions, see Words and Phrases, vol. 3, pp. 2059-2061.]

## 8. WILLS (§ 608\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE—APPLICATION.

The rule in Shelley's Case is not a rule of construction, but of law, and is never applied until the testator's meaning is first ascertained

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

## 9. WILLS (§ 608\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE—APPLICATION.

The rule in Shelley's Case does not apply where the words of a will show that testator intended the remaindermen to take directly from him, and not by inheritance from the devisee of the life estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

## 10. WILLS (§ 608\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE.

While neither superadded words of limitation nor of distributive modification, standing alone, are ordinarily enough to overcome precedent words sufficient to give a fee under the rule in Shelley's Case, the combination of the two will usually be taken as sufficient proof of an intent to create a new line of descent in the remaindermen and to make them purchasers from testator.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

## Appeal from Court of Common Pleas, Philadelphia County.

Case stated to determine title to real property, by Joshua C. Stout and wife against Daniel Good. From a judgment for plaintiffs, defendant appeals. Reversed and rendered.

In addition to the facts set forth in the opinion of the Supreme Court, it appeared from the case stated that on October 13, 1913, Clara Virginia Stout and Joshua C. Stout, her husband, made an agreement in writing to sell the property in question to Daniel Good, the defendant, and to convey a good and marketable title in fee simple; that upon the tender of a deed the defendant refused to accept same. Under the case stated, if the court was of the opinion that the plaintiffs could convey a good and marketable title in fee simple, judgment was to be entered for the plaintiffs; otherwise judgment was to be entered for the defendant.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

John V. McCann, of Philadelphia, for appellant. Wm. B. S. Ferguson, of Philadelphia, for appellees.

MOSCHZISKER, J. [1] The question for determination in this case is: Did the plaintiff Clara Virginia Stout take an estate tail, enlarged to a fee, or has she but a life estate?

The testator provided:

"I give, devise, and bequeath to my daughter Clara Virginia Stout \* \* \* my house and lot known as No. 860 North 19th street, \* \* \* for and during the term of her natural life, and upon the death of my said daughter, then I give devise and bequeath my said house to the children of my said daughter share and share alike and the issue of said children who may then be deceased, such issue to take the share only that their deceased parent would have tak-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

en if living at that time, provided, however, that in the event of my said daughter, Clara Virginia Stout, leaving no issue at the time of her death, she shall have the right to will said house to whomsoever and in what manner soever she pleases."

The issue arose in a case stated wherein it was agreed that, if the court below decided the testator's daughter took a fee, judgment should go for the plaintiffs; otherwise for the defendant. It was determined that, under the rule in Shelley's Case and the act of April 27, 1855 (P. L. 368), Mrs. Stout possessed a fee-simple estate. Judgment was entered accordingly, and the defendant has appealed.

[2] The rule in Shelley's Case ordains that when a life estate is devised to a person and in the same will an estate is limited "immediately or immediately to his heirs in fee or in tail \* \* \* 'the heirs' are words of limitation, \* \* \* not of purchase," and the devise to the first taker is enlarged to a fee.

[3] When the technical words suggested in the rule, "heirs," for a fee simple, and "heirs of his body," for a fee tail, appear without more, then no further inquiry is permitted, and the rule applies; but where other words are used, such as children, or the like, and the rule is sought to be applied by analogy, then the burden rests upon him who claims them to be the equivalent of "heirs" or "heirs of his body" to show they were so intended; and this must be demonstrated from their context or other relevant language in the will, judged according to proper and appropriate rules of construction. See Guthrie's Appeal, 37 Pa. 9, 14, 15; Criswell's Appeal, 41 Pa. 288, 291.

[4] The rule governs whenever the will shows a clear intent to vest a fee simple or a fee tail in the heirs of the first taker, qua such heirs; even though the interest of such first taker is expressly stated to be but a life estate, and even though the technical word "heirs" or the phrase "heirs of his body" is not used. Lauer v. Hoffman, 241 Pa. 315, 88 Atl. 496, 47 L. R. A. (N. S.) 676. But when neither the word nor the phrase in question is present, then, before the life estate can be enlarged to a fee, it must clearly appear from the language employed that the remaindermen are to inherit from the original devisee, and not to take as devisees directly from the testator; particularly when, as is so often the case, the application of the rule will have the effect of defeating the testator's express declaration that the first taker shall have but a life estate. Kemp v. Reinhard, 228 Pa. 143, 77 Atl. 436, 29 L. R. A. (N. S.) 958. Therefore, in the absence of technical words of limitation, the rule should never be applied, unless a paramount intent to make the first devisee a source of inheritable succession plainly appears; but, where the language used brings the case within the rule, the fact that the testator desired that it should not operate is of no

importance. Grimes v. Shirk, 169 Pa. 74, 76, 32 Atl. 113; Lauer v. Hoffman, supra; Shapley v. Diehl, 203 Pa. 566, 569, 53 Atl. 374.

[5] In order to determine the testator's intent, we must apply the recognized canons of construction, and his words ought to be taken in their "proper technical sense," unless their context or other parts of the will plainly show that they were used in a different sense. Doeblers Estate, 64 Pa. 9, 15.

[6] All authorities agree that "children" is prima facie a word of purchase, and that it cannot be construed otherwise, unless the context plainly shows that the testator did not employ the word in its ordinary sense. Affolter v. May, 115 Pa. 54, 8 Atl. 20; Guthrie's Appeal, 37 Pa. 9, 14. While "issue" is most often used as a word of limitation, yet it is not technically so to the same degree as "heirs" or "heirs of his body," and it yields readily to a context that indicates its use as a word of purchase. Taylor v. Taylor, 63 Pa. 481, 483, 3 Am. Rep. 565; Beckley v. Reigert, 212 Pa. 91, 93, 61 Atl. 641; O'Rourke v. Sherwin, 156 Pa. 285, 291, 27 Atl. 43; Robins v. Quinliven, 79 Pa. 333; Powell v. Board of Domestic Missions, 49 Pa. 46, 53.

[7] Where the devise is to one for life with remainder to his children, then a subsequent reference to the death of the life tenant "without issue" or "leaving no issue" ordinarily will be construed to mean such issue as those previously mentioned, and not an indefinite failure of issue. Curtis v. Longstreth, 44 Pa. 297, 302, 303; Sheets' Estate, 52 Pa. 257, 268; Carlisle v. Carlisle, 243 Pa. 116, 89 Atl. 873.

[8] The rule in Shelley's Case is not a rule of construction, but of law, and it is never applied until the meaning of the testator is first ascertained. Yarnall's Appeal, 70 Pa. 335, 340.

[9] If the words of the will show that the testator intended the remaindermen to take directly from him, and not by inheritance from the devisee of the life estate, then the rule has no application. Kemp v. Reinhard, 228 Pa. 143, 77 Atl. 436, 29 L. R. A. (N. S.) 958. On the other hand, if they show a contrary intention, the rule applies. Lauer v. Hoffman, 241 Pa. 315, 88 Atl. 496, 47 L. R. A. (N. S.) 676.

[10] When superadded words of limitation are combined with words of distributive modification which, in a situation possible to arise, would vary the distribution ordained by the existing inheritance laws, that is proof that the testator did not intend those to whom the words of distributive modification apply to take by succession of law as the heirs of the devisee of the life estate, and indicates that he intended them to take directly from him; for, had he wished them to inherit as heirs of the life tenant, he would not have expressly directed a distribution that might vary that fixed by the inheritance laws. Walker v. Milligan, 45 Pa. 178;

*O'Rourke v. Sherwin*, 156 Pa. 285, 292, 27 Atl. 43; *Grimes v. Shirk*, 169 Pa. 74, 77, 32 Atl. 113; *Robins v. Quinliven*, 79 Pa. 333; *Powell v. Board of D. M.*, 49 Pa. 46, 55; *Hill v. Giles*, 201 Pa. 215, 50 Atl. 758; *Jones v. Jones*, 201 Pa. 548, 550, 51 Atl. 362. The general rule is that neither superadded words of limitation nor of distributive modification, standing alone, will be accepted as enough to overcome precedent words sufficient to give a fee; but the combination of the two will usually be taken as sufficient proof of an intent to create a new line of descent in the remaindermen and to make them purchasers from the testator. This is not always so, however, for sometimes even the combination of the two will not be given that effect, where the words used are general in form, and do not show an intent to change the course of descent or the general scheme of distribution fixed by the inheritance laws (*Grimes v. Shirk*, 169 Pa. 74, 32 Atl. 113); but where the distributive modification is an express direction (as here) that those who get the remainder "shall only" take in certain propositions, which direction, when applied, might have the effect of changing the general scheme of distribution fixed by the inheritance laws, then this is evidence of an intent that the remaindermen are to take as purchasers with the line of descent starting from them. Under the act of April 27, 1855 (P. L. 368) words that would have created an estate in fee tail now make a fee simple, and the statute expressly provides that estates thus created "shall be inheritable" as such; i. e., as fee-simple estates.

When the foregoing relevant rules are applied to the will before us, it is plain that the testator did not intend those to whom he devised the property upon the death of his daughter to inherit it from her; on the contrary, it is manifest that he meant them to take directly from him. The testator leaves the remainder to the "children" of his daughter, and there is nothing in the context sufficient to show that the term "children" was used in any other than its ordinary sense, as a word of purchase. True, the testator makes provision for the issue of these children, "such issue to take the share only that their deceased parent would have taken if living at that time." But this latter direction, instead of indicating that "issue" was intended to modify "children" so that the two words should be taken interchangeably, and both together understood as meaning "heirs of her body," thus creating an estate tail in the first taker with an inheritable line of succession to flow from her to her issue to the most remote degree, rather suggests the contrary; i. e., that he intended to provide directly and only for the children of his daughter and such of their issue as might be alive at the time of her death. In other words, instead of simply pointing out a class of heirs to succeed by inheritance, the testator, in effect, specified persons to be ascertained at a given

time from a general description stated by him.

Since there is nothing here approaching a limitation to "heirs" general, Mrs. Stout's only claim to a fee is through an estate tail; and to accomplish this, she must depend upon the fact that the word "issue" follows the word "children." But if, in order to work an entail, with the first taker as the root of an inheritable succession, we accept "issue" as a superadded word of limitation, governing "children," then we come squarely against the rule that, when in a devise to issue superadded words of limitation and distributive modification are both present, it is sufficient to show an intent that such issue shall take as purchasers. On the other hand, if we do not accept "issue" as a word of limitation, then it must be taken as on a par with "children," and in that case, technically, the express terms of the devise would be inconsistent with an estate tail; for in such an estate lineal heirs in two different generations cannot come into their inheritance at one and the same time, as directed by the present will. *Nice's Appeal*, 50 Pa. 143, 148, 149. Then, again, there is nothing in the will to suggest that the testator had in mind that essential attribute of an estate tail, an indefinite failure of issue. This is not the case of a simple devise to one and his issue, nor is it an instance where an estate tail can be implied from a devise over in default of issue; for the provision that "in the event of my said daughter \* \* \* leaving no issue at the time of her death, she shall have the right to will," etc., indicates that the testator contemplated a definite failure of issue, the words "leaving no issue" simply meaning no such issue as above named; i. e., the children of the devisee for life living at the time of her decease and the living issue of those who might then be dead. Finally, the provision that the issue living at the death of the first taker shall "only" take the share which their deceased parent would have taken if living "at that time" is a distributive modification which may lead to this result: Should all the children of the first taker be deceased at the time of her demise, leaving descendants standing in the same degree of consanguinity to her, they would not take per capita, as directed by the inheritance laws (section 14, Act April 8, 1833 [P. L. 819]; section 1, Act June 30, 1885, P. L. 251), but would have to take per stirpes, as directed by the will. For example, should the daughter leave no children, but issue consisting of five grandchildren, two born of one deceased child and three of another, under the law the first set of grandchildren would inherit between them a two-fifths interest in the property, whereas under the scheme of distribution expressly ordered by the testator they would take a one-half interest. All of these incongruities taken together tend to prove that the testator never designed an estate of inheritance for his daughter, but intended the remainder-

men to take by purchase directly from him; and, this being so, the rule in Shelley's Case can have no application.

Of course, strictly speaking, when inquiring as to an estate tail, any limitation or direction for distribution which tends to interfere with the succession of one heir after another in accordance with the scheme of an entail in theory would show an intent not to create such an estate; but in some of the cases cited by us general words that might have been given that effect, such as "share and share alike," or "tenants in common," were held insufficient for the purpose, as showing no paramount intent to vary the entail. These decisions were prior to the year 1855, and, no doubt, in many instances they may be attributed to a then prevalent judicial desire to get away from the technical rules relating to estates tail; but they are somewhat confusing at the present time, unless it is constantly kept in mind that prior to the act of 1855, supra, such estates were subject to their own peculiar common-law rules of inheritance (Guthrie's Appeal, 37 Pa. 9; Findlay v. Riddle, 3 Bin. 139, 164, 5 Am. Dec. 355), whereas, all entails created since the act of 1855, after they are ascertained to be such, come under the general laws of inheritance, as though fee-simple estates. See the words of the act and Simpson v. Reed, 205 Pa. 53, 55, 54 Atl. 499; Pifer v. Locke, 205 Pa. 616, 55 Atl. 790. While it is still the rule that a distributive direction not at variance with the law of inheritance, when standing alone, is of no importance (Lea v. Sanson, 91 Atl. 611), yet we have found no case where an actual modification of the scheme of inheritance appropriate to a fee-simple estate, as in the present will, has not been treated as significant.

In the multitude of authorities upon the rule in Shelley's Case it is hard, and often impossible, to find any one which precisely fits the particular case under review, and the citation of long lists of decisions upon the general subject only leads to confusion. Therefore in this opinion we have simply cited authorities in support of the general principles or canons of construction which seem helpful to a proper determination of the actual questions involved. We conclude that Mrs. Stout took but a life estate; that the rule in question does not apply; and that the learned court below erred in entering judgment in favor of the plaintiffs.

The assignments of error are sustained.

The judgment is reversed, and is here entered for the defendant.

(245 Pa. 397)

HARRISON et al. v. HARRIS.

(Supreme Court of Pennsylvania. May 18, 1914.)

**1. WILLS (§ 608\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE.**

Under a will devising to testator's wife all his property, including certain realty, for life,

and providing that after her death the use and income thereof should go to J. and M. for and during their natural lives, and that after their death an undivided one-half part of the estate should go to the heirs of J. and a like part to the heirs of M., their heirs and assigns forever, M. took, under the rule in Shelley's Case, a fee-simple title in the undivided one-half interest in the real estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

**2. WILLS (§ 608\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE—APPLICATION.**

When "heirs" is employed in connection with remaindermen, the rule in Shelley's Case applies, unless other language in the will clearly demonstrates that the word was not intended in its technical sense as a term of limitation.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

**3. WILLS (§ 608\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE—APPLICATION—PRESUMPTION.**

The presumption arising from the use of technical words of limitation that the rule in Shelley's Case applies can be rebutted by nothing short of affirmative proof beyond a reasonable doubt of a contrary intent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1372-1378; Dec. Dig. § 608.\*]

**4. WILLS (§ 495\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE.**

Since the word "heirs" retains its significance though the effect be to make unmeaning other words in the will, words of inheritance ingrafted on such word will not convert it into a word of purchase, unless entirely inconsistent with the nature of the descent pointed out by such word.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1061-1064; Dec. Dig. § 495.\*]

Appeal from Court of Common Pleas, Luzerne County.

Case stated to determine title to real estate by John Harrison and others, being all the heirs of Mathew Harrison, deceased, against A. H. Harris. From a judgment for defendant, plaintiffs appeal. Affirmed.

Argued before FELL, C. J., and MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

W. Alfred Valentine and Charles E. Keck, both of Wilkes-Barre, for appellants. W. L. Pace, for appellee.

MOSCHZISKER, J. [1] The question for determination in this case is: Did Mathew Harrison take an estate in fee simple or but a life estate?

The testator devised to his wife, who is now dead, all his property for life, including the real estate here in controversy. He then provided:

"After the death of my said wife, I give, bequeath and devise to my son, John Green, and to the son of my wife, Mathew Harrison, the use and income of all my estate, real and personal, share and share alike, for and during the term of their natural lives. In case of the decease of one of said sons, the other shall have a life interest in one-half of my estate, and the remainder shall be appropriated as hereinafter provided. After the death of John Green and Mathew Harrison, I give, bequeath, and devise the undivided one-half part of all my estate, real and personal, to the heirs of said John

Green and the other one-half part of my estate unto the heirs of Mathew Harrison, to have and to hold the same to themselves, their heirs and assigns forever."

John Green also is now deceased.

The issue arose in a case stated wherein it was agreed: Should the court below decide that Mathew Harrison took "a fee-simple title to the undivided one-half interest of the real estate, \* \* \* then judgment to be entered for the defendant"; otherwise for the plaintiffs. It was determined that, under the rule in *Shelley's Case*, the will gave to Mathew Harrison a fee-simple estate. Judgment was entered accordingly, and the plaintiffs have appealed.

In an effort to determine the testator's intent, "we are bound to take as our guides those general rules or canons of interpretation which have been adopted and followed by those who have gone before us. \* \* \* There are two such canons of construction, which have been so universally recognized as sound and just that it would be a mere affectation of learning to cite books in their support. The first is that technical words shall be taken to have been used according to their proper technical sense, unless the other parts of the will imperatively require a different one. \* \* \* The second is that a particular intent shall always give way to a general one if the two cannot consist together." *Doebler's Appeal*, 64 Pa. 9, 15.

[2] When "heirs" is employed in connection with remainderman, the rule in *Shelley's Case* applies, unless other language in the will clearly demonstrates that the word was not intended in its technical sense, as a term of limitation. See *Stout v. Good*, 91 Atl. 613, and other authorities there cited.

[3] "The strong presumption arising from the use of technical words of limitation is not easily overcome. It may be rebutted, but it can be by nothing short of affirmative evidence of a contrary intent so clear as to leave no reasonable doubt." *Little's Appeal*, 117 Pa. 14, 29, 11 Atl. 520, 528.

[4] If in a devise the word "heirs" has other words of inheritance ingrafted upon it, unless the latter are entirely inconsistent with the nature of the descent pointed out by the former, they will not convert it into a word of purchase (*George v. Morgan*, 16 Pa. 95, 108); for the word "heirs" retains its significance, even though the effect be to make unmeaning other words in the will, thus "words of superadded limitation alone are insufficient, as in the case of a gift to A. for life, remainder to the heirs of his body, and to their heirs forever." *Criswell's Appeal*, 41 Pa. 288, 291. Also see cases cited in *Grimes v. Shirk*, 169 Pa. 74, 88, 32 Atl. 113. Here, the devise is to Mathew Harrison, with remainder to his heirs, and "the round about way which the testator takes to say 'heirs' does not affect the substance." *McKee v. McKinley*, 33 Pa. 92, 93.

It may be that the testator's particular intent was to give the first devisee not more than a life estate; but it is equally clear that his general intent was to constitute such devisee a source of inheritable succession. The latter, therefore, "took a fee under the unbending rule in *Shelley's Case* as applied in this state." *Lauer v. Hoffman*, 241 Pa. 315, 317, 88 Atl. 496 (47 L. R. A. [N. S.] 676); *Shapley v. Diehl*, 203 Pa. 566, 569, 53 Atl. 374. We say that the intent to make the life tenant a source of inheritable succession is clear, because the technical words used demonstrate that design, and there is nothing within the four corners of the will sufficient to rebut it. There are no words of distributive modification; and, under these circumstances, "superadded words of limitation which import the same course of descent are inoperative." *Hileman v. Bouslaugh*, 13 Pa. 344, 353, 53 Am. Dec. 474. Finally, the fact that the testator uses the words "I give, bequeath, and devise \* \* \* to the heirs \* \* \* of Mathew Harrison," instead of using an expression such as "to pass to" or "to descend to" the heirs, etc., has no controlling effect. This is illustrated by *Grimes v. Shirk*, 169 Pa. 74, 32 Atl. 113, and many other cases which might be cited.

*Kemp v. Reinhard*, 228 Pa. 143, 77 Atl. 436, 29 L. R. A. (N. S.) 958, largely relied upon by the appellants, does not rule this case. There the technical word "heirs" was not used, and we found, from the four corners of the will, satisfactory proof of an unmistakable intent that the remaindermen were not to take qua heirs of the first devisee, but directly from the testatrix. The case which, on its facts, most nearly approaches this one is *Grimes v. Shirk*, supra, where the language employed in respect to the superadded words of limitation is strikingly similar to that used in the present devise; and it was there held that the first devisee took an estate in fee.

The assignments of error are overruled, and the judgment is affirmed.

(245 Pa. 333)

JOHNSTON v. DELAWARE, L. & W. R. CO.

(Supreme Court of Pennsylvania. May 18, 1914.)

1. EMINENT DOMAIN (§§ 69, 186\*)—CONDEMNATION OF RAILROAD RIGHT OF WAY—NECESSARY STEPS.

It is essential to the condemnation of land for a railroad right of way that there shall be a preliminary survey made and reported with necessary maps and profiles, and the selection and adoption of a surveyed line by the directors for the location of the proposed railroad, and that the owner shall be compensated for damages sustained.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 171-179, 500-504; Dec. Dig. §§ 69, 186.\*]

2. EMINENT DOMAIN (§ 186\*) — RAILROAD RIGHT OF WAY—APPROPRIATION—VALIDITY. In 1910 a railroad company declared an intention to straighten and relocate its road be-

tween C. and H. according to the routes shown on a location plan. In 1911 the line was rerun, the old stakes destroyed, and the final stakes reset in the same location. In 1912 the company's directors by a resolution declared an intention to appropriate land for the right of way, as shown on the map referred to in the resolution of the directors in 1910 between C. and N.; N. being between C. and H. The company petitioned for the appointment of viewers to assess damages to be caused by the taking of land between C. and H. Held that, by the resolution of 1912, the company receded from its previous intention to improve the road between C. and H. and adopted N. as the new terminus of the improvement, and that the map referred to in the second resolution, though showing H. as the terminus, was ineffective to make it such, and that hence the land sought to be condemned was not legally appropriated.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 500-504; Dec. Dig. § 186.\*]

### 3. EMINENT DOMAIN (§ 167\*)—CONDEMNATION OF RAILROAD RIGHT OF WAY—PROCEDURE.

Since a proceeding for the condemnation of private property for a railroad right of way is contrary to the course of the common law, the steps directed by statute must be strictly pursued.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 451-456; Dec. Dig. § 167.\*]

### 4. EMINENT DOMAIN (§ 274\*) — RAILROAD RIGHT OF WAY—APPROPRIATION—INJUNCTION.

A railroad company will be enjoined from entering on and taking private property to straighten and improve its road, where it had made no legal appropriation thereof, regardless of its right to make an appropriation by proper action.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 763, 765-768; Dec. Dig. § 274.\*]

Appeal from Court of Common Pleas, Susquehanna County.

Bill for injunction by Kenneth D. Johnston against the Delaware, Lackawanna & Western Railroad Company. From a decree awarding injunction, defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and STEWART, JJ.

J. H. Oliver, of Scranton, W. D. B. Ainey, of Montrose, and D. R. Reese, of Scranton, for appellant. H. C. Reynolds, of Scranton, and John Ferguson, of Susquehanna, for appellee.

**MESTREZAT, J.** This is a bill in equity filed by the plaintiff to restrain the defendant railroad company from entering upon and taking his land in Susquehanna county to straighten and improve its road. The bill, as amended, avers inter alia that the plaintiff is the owner in fee of two farms in Great Bend township, Susquehanna county; that defendant has notified him of its determination to appropriate two parcels of said farms for its corporate uses and purposes; that defendant has not by any legal action acquired the right to take any part of his land; that the two resolutions adopted by the directors of the defendant company, which it claims authorizes it to take the plaintiff's

land, do not constitute such legal action as entitles the defendant to appropriate the land; and that the second of said resolutions purports only to widen and straighten the railroad between Clarks Summit and New Milford, whereas plaintiff's property is beyond New Milford. The bill prays inter alia that the defendant be enjoined from taking any portion of his land. The answer avers that the defendant has taken proper corporate action to appropriate plaintiff's land. The learned court below entered a decree enjoining the defendant company from taking the land of the plaintiff described in the petition, filed in the common pleas for the approval of the bond, in pursuance of the resolutions of the board of managers of the defendant company recited in and attached to the petition, for the purposes therein set forth. The decree, however, was without prejudice to the right of the defendant to proceed anew to condemn the land after it had taken the requisite definite action therefor. There was also a condition in the decree attached to the future taking of the plaintiff's land providing that a suitable passageway should be constructed between the two pieces of land divided by the defendant's road. The defendant company has taken this appeal.

The controlling question, and the only one which need be considered here, is whether the defendant company by proper corporate action appropriated the plaintiff's land for straightening and improving its railroad. The other questions raised on the record become immaterial to the disposition of the cause on this appeal, as it is clear that, if the defendant has made no legal appropriation of the land, it cannot condemn under the exercise of its power of eminent domain.

[1] The successive steps necessary to vest title to the roadway in a railroad company have been pointed out in many of our decisions. They are: (a) A preliminary survey of the lands for the purpose of exploration made by engineers and surveyors who, after running and marking one or more experimental lines, report their work with necessary maps and profiles to the company; (b) the selection and adoption of a line or one of the lines so run, as and for the location of the proposed railroad by appropriate action by the board of directors; and (c) compensation made or secured by the corporation to the owner for the damages he has sustained by reason of the appropriation of his land.

These are the several steps held necessary to vest in the corporation the title to the owner's property under eminent domain proceedings. Each and every step is a prerequisite to the right of the corporation to deprive the owner of his property. When the route has been surveyed, marked on the ground, and adopted by the appropriate action of the board of directors of the corpo-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ration, the experimental stage has passed, and there is a fixed and definite location of the road. The route, including the termini, must be definitely determined by the board of directors. The land is then taken from the owner and appropriated to the use of the corporation. It has acquired a conditional title, good against rival corporations, but not as against the owner until compensation is made or secured to him. Until there is an experimental survey or surveys made on the ground and an adoption of the route, including the termini, by the board of directors, there can be no appropriation of the owner's land. As said in our cases, the act of location is at the same time the act of appropriation, and, it may be added, the latter cannot take place without or in the absence of the act of location. A legal appropriation fastens a servitude in favor of the corporation upon the property taken. The exercise of the right of eminent domain does not permit a corporation to locate and adopt two or more routes at the same time for its road through private property. It may make only one final location at the time, and that must be definitely fixed by proper corporate action. After the act of location by the company, the owner or the company may proceed at once to secure an ascertainment of damages, but until such act neither can do so, for no right to damages vests in or accrues to the owner until there has been an appropriation of his property by the corporation. *Davis v. Railway Co.*, 114 Pa. 308, 6 Atl. 736; *Williamsport, etc., R. R. Co. v. Railroad Co.*, 141 Pa. 407, 21 Atl. 645, 12 L. R. A. 220.

The action of the defendant company in the present case, under which it claims the right to appropriate the plaintiff's land for straightening and improving its line, is, as recited in the petition to the common pleas for the appointment of viewers to assess damages, the resolutions of its board of managers adopted on April 28, 1910, and January 25, 1912, respectively. By the resolution of 1910 the company declared its intention to straighten and relocate its road "according to the location and route shown upon the location plan entitled, 'D., L. & W. R. R. Co., proposed change of alignment, Clarks Summit to Hallstead—scale 1 inch 3,000 feet, Oct. 25, 1909,' and in accordance with the description of said route and changes as hereinafter set forth, the said map and description being hereby adopted and ordered filed as a part of the resolution"—and appropriated the necessary land and interests therein along the route. The map shows a projected, straightened, and improved line between Clarks Summit and Hallstead, in connection with the line in use by the defendant company. New Milford and Hallstead are both shown on the map.

The resolution of 1912 declares that, for the purpose of better securing the safety of persons and property and to accommodate

the increasing trade and traffic on the main line of the defendant's railroad, it is necessary to straighten and otherwise improve "that part of the main line of the railroad of this company between Clarks Summit and New Milford, by the construction of an additional roadbed, partly adjacent to and partly divergent from the present roadbed, \* \* \* according to the location, route or line shown upon the blueprint map hereto annexed and hereby made a part hereof for a particular description of said location, route or line, as the same has been surveyed, located or laid out upon the ground," which location is approved and adopted; and the lands and the interests therein along the said route are appropriated by the company. The map referred to in this resolution is a blueprint of the one attached to the first resolution.

Hallstead is on the defendant's road and about 40 miles north of Clarks Summit, and New Milford lies between the two places and about 7 miles south of Hallstead. The land of the plaintiff is between New Milford and Hallstead. The preliminary surveys for the improvement were begun prior to 1910, and the maps showing the location of the improved line were made from the same data. The line was re-run in the winter of 1911, the old stakes were destroyed, and the final stakes were reset in practically the same location. The defendant's engineer testified that the location of the improved line was determined in the winter of 1911. He made an estimate of the cost of the improvement between Clarks Summit and Hallstead and also between Clarks Summit and New Milford, and furnished both estimates to the board of directors in December of that year. The improvement in the line is principally between Clarks Summit and New Milford.

It will be observed that the plaintiff's land lies north of and between New Milford and Hallstead, and that therefore the appropriation made by the resolution of 1912 did not cover it. The learned court below held that "the defendant has not definitely located its improved line across, nor with certainty appropriated, the plaintiff's land," and for that reason sustained the bill and granted the injunction. With this conclusion we agree. The route adopted by the resolution of April, 1910, extended from Clarks Summit to Hallstead and unquestionably included the plaintiff's land. If the necessary preliminaries for a legal appropriation had been taken, the resolution of 1910 would have authorized the defendant company to appropriate the plaintiff's land for the improvement of its road. There is grave doubt, however, as to whether a definite and fixed line had been finally marked on the ground and adopted by the corporation prior to 1912. The testimony of the defendant's own engineer leaves this question in doubt. We need not, however, determine whether the corporation had taken appropriate action to condemn the route from



Clarks Summit to Hallstead by the action of its directors in April, 1910, as we are clearly of the opinion that by the resolution of 1912 the corporation intended to confine and limit its appropriation for the improvement to that part of the road between Clarks Summit and New Milford. In the proceedings for condemnation instituted by the corporation in the common pleas, both resolutions are relied upon as authority for the appropriation of the plaintiff's land. As already pointed out, if the action taken by the company in April, 1910, was otherwise legal, it would be sufficient authority for the adoption and appropriation of the route by the defendant. That resolution declared it to be the intention of the corporation to improve its road between Clarks Summit and Hallstead and would justify the condemnation of the plaintiff's land. Subsequently to the adoption of this resolution the corporation manifestly changed its intention regarding the part of its road to be straightened, otherwise it would not have adopted the resolution of January, 1912. There can be no other explanation of the passage of the later resolution, which was wholly unnecessary as well as insufficient to authorize the condemnation of any land between New Milford and Hallstead. The two resolutions adopted precisely the same route between Clarks Summit and New Milford. The later added nothing to the validity of the adoption and appropriation by the former resolution between those termini. There is no essential difference between the two resolutions except the very important change made in the northern terminus of the route, which in the resolution of 1910 was Hallstead, and in the other resolution was New Milford, seven miles south. It is not claimed that there was any mistake in fixing the northern terminus at New Milford in the second resolution. When it was adopted, the board of directors had before them a blueprint of the map of the route adopted by the first resolution. The board knew, or must be presumed to have known because the map disclosed the fact, that the termini of the route in the first resolution were Clarks Summit and Hallstead, and in the second resolution were Clarks Summit and New Milford, and that between the latter two points the routes named in the two resolutions were the same. What, then, was the purpose of the board of directors in passing the resolution of January 25, 1912, adopting and appropriating the route with its northern terminus at New Milford instead of Hallstead? That resolution declares that it was the intention of the corporation to straighten and improve its road between those termini. We think it is manifest that by this resolution the intention was to change the northern terminus of the proposed improvement of the road and to recede from its intention and purpose to change the route between New Milford and Hallstead; otherwise there was no necessity,

whatever for the passage of the resolution and the fixing of a different northern terminus. Under the earlier resolution the company, as suggested, could have straightened its road over the longer route without any additional corporate action. The second resolution was not passed for the purpose of changing the improved route between Clarks Summit and New Milford, as adopted in the resolution of 1910, as the two routes between those termini were the same. If, however, the corporation desired to shorten its line of improvement by fixing another northern terminus, and only for that purpose, then the resolution of 1912 did become necessary. The necessity for the second resolution, therefore, was for the purpose either of changing the route between Clarks Summit and New Milford or the northern terminus of the former adopted route, and, as there was no change made in the route, the only possible object of the resolution was to make a change in the northern terminus of the proposed improvement.

[2] There is no merit in the defendant's contention that because the second resolution refers to the attached map, which was a blueprint of the map attached to the first resolution, as showing the location adopted, the proposed line was extended to Hallstead. That contention is in the very teeth of the resolution itself which declares the northern terminus of the road to be New Milford and not Hallstead. The map, it is true, shows a route between Clarks Summit and Hallstead, but the resolution fixes New Milford as the northern point to which the improvement was required "for the purpose of better securing the safety of persons and property and to accommodate the increasing trade and traffic on the main line of the railroad of this company." The company manifestly did not consider it necessary at that time to improve the road beyond New Milford, or otherwise the board of directors would not have passed a resolution declaring inferentially the contrary. The board would have permitted its first resolution declaring such necessity to remain upon its minutes unimpeached by any subsequent corporate action. We agree entirely with the learned court below that the second resolution appears to be a reconsideration by the managers of the company of their prior determination to extend the improved line beyond New Milford. The defendant is relying upon both resolutions, as appears by its petition for condemnation of the land, and they are clearly conflicting in that there is a difference in the northern terminus of the two routes and, necessarily, in the extent of the improved line. It was the duty of the defendant company by appropriate corporate action to locate and fix a line for the improvement of its road which would include a route through the plaintiff's land.

[3] This is a proceeding contrary to the course of the common law and must be strictly pursued. Private property is not to be

taken by the exercise of the power of eminent domain unless the legal prerequisites are clearly and definitely established. We are of the opinion that the second resolution was a declaration by the company of its intention to limit the improvement of its road between Clarks Summit and New Milford, and was an adoption of the improved line between those termini. There is therefore no location of the improved line between New Milford and Hallstead and no legal appropriation by the defendant company of the plaintiff's land, and for this reason the learned court below was right in restraining the defendant from entering upon and taking the plaintiff's land.

[4] The other questions raised by the record need not be considered. The defendant company having made no legal appropriation of the plaintiff's land, it was properly enjoined from taking the land under the condemnation proceedings brought by it in the common pleas, regardless of its right, under proper corporate action, to appropriate the farm crossings of the plaintiff. If the defendant hereafter takes such action to condemn the plaintiff's land, and his rights under his agreements and to the farm crossings are affected, those questions will then arise, and it will become necessary to decide them.

The decree of the court below awarding the injunction without prejudice to the right of the defendant to proceed anew after having taken proper corporate action to appropriate the plaintiff's land is affirmed.

(245 Pa. 287)

**MCGUIRE v. CITY OF PHILADELPHIA**  
et al. (No. 1.)

(Supreme Court of Pennsylvania. May 12, 1914.)

**1. MUNICIPAL CORPORATIONS (§ 865\*) — INCREASE OF INDEBTEDNESS—COMPUTATION OF "DEBT."**

The word "debt," as used in Const. art. 9, § 8, providing that "the debt of any \* \* \* municipality, \* \* \* except as herein provided, shall never exceed 7 per centum upon the assessed value of the taxable property therein," means what the city owes and can be called on to pay, without regard to the amount of its assets.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1836-1838; Dec. Dig. § 865.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1864-1886; vol. 8, p. 7628.]

**2. MUNICIPAL CORPORATIONS (§ 865\*) — INCREASE OF INDEBTEDNESS—COMPUTATION OF EXISTING DEBT—"SOLVENT DEBTS."**

The "solvent debts" which a city may deduct from its gross indebtedness pursuant to Act April 20, 1874 (P. L. 65), in ascertaining its borrowing capacity, are debts due it directly, payment of which it can enforce as one of its quick assets for the liquidation of any of its obligations.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1836-1838; Dec. Dig. § 865.\*]

**3. MUNICIPAL CORPORATIONS (§ 865\*) — INCREASE OF INDEBTEDNESS—COMPUTATION OF EXISTING DEBT — DEBT OF SCHOOL DISTRICT.**

The amount of a city debt which has been assumed, pursuant to School Code (Act May 18, 1911 [P. L. 309]) § 120, by a school district coincident with such city, cannot be deducted from the city's gross indebtedness to determine its borrowing capacity.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1836-1838; Dec. Dig. § 865.\*]

**4. MUNICIPAL CORPORATIONS (§ 865\*) — INCREASE OF INDEBTEDNESS—COMPUTATION OF EXISTING DEBT—DEDUCTION FOR UNISSUED LOANS.**

In determining the net amount of a city's indebtedness to ascertain its borrowing capacity, the city cannot, in view of the express provisions of Act April 20, 1874 (P. L. 66) § 3, deduct authorized but unissued loans.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1836-1838; Dec. Dig. § 865.\*]

Elkin and Stewart, JJ., dissenting.

Original bill by Frederick T. McGuire, a citizen and taxpayer, etc., against the City of Philadelphia, a municipal corporation, etc., and others, to restrain the issuance of a loan. Injunction granted.

On March 30, 1914, the following decree was entered, and subsequently the opinion of the court was filed, in which the facts appear:

March 23, 1914, this cause came on to be heard on bill and answer and was argued by counsel, and now, March 30, 1914, on due consideration thereof, it is ordered, adjudged, and decreed as follows: (1) That the election held November 4, 1914, by the qualified electors of the city of Philadelphia to obtain the assent of said electors to an increase of \$8,600,000 in the indebtedness of said city is hereby declared void. (2) That the ordinance introduced in the common councils of said city on February 5, 1914, authorizing the creation of a loan in the sum of \$8,600,000, for the development of city transit, etc., is hereby declared invalid. (3) That a writ of injunction be issued perpetually restraining the city of Philadelphia, Rudolph Blankenburg, mayor of the said city, John M. Walton, controller of the said city, and William McCoach, treasurer of the said city, the said defendants, and each of them, from carrying out the direction of the said proposed ordinance and from borrowing, on the faith and credit of the city of Philadelphia, the said sum of \$8,600,000, or any part thereof, and from issuing the bonds of the said city for the said sum or any part thereof, and from signing, counter-signing, or paying any warrant for the cost of advertising the said ordinance. It is further ordered that the city of Philadelphia pay the costs of this proceeding.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Theodore F. Jenkins, of Philadelphia, for plaintiff. Michael J. Ryan, City Sol., and Ernest Lowengrund, Asst. City Sol., both of Philadelphia, for defendants.

BROWN, J. By an ordinance of the select and common councils of the city of Philadelphia, approved October 3, 1913, the corpo-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

rate authorities of the said city signified their desire to increase its indebtedness in the sum of \$8,600,000, and at an election held on the 4th of the following November the electors of the city voted in favor of the proposed increase. On February 5, 1914, an ordinance was introduced in the common council of the city, authorizing the mayor to borrow the \$8,600,000 voted for at the November election. On March 12, 1914, the complainant, a taxpayer of the city of Philadelphia, filed this bill, of which we assumed original jurisdiction, in view of the large public interest involved and of the importance of an early determination of the question whether the borrowing capacity of the city had been exceeded in authorizing the creation of a new indebtedness of \$8,600,000. The averment of the bill is that the said borrowing capacity was exceeded, and its prayers are:

"First. That the said election held upon November 4, 1913, be declared void. Second. That the city of Philadelphia, Rudolph Blankenburg, mayor of the said city, John M. Walton, controller of the said city, and William McCoach, treasurer of the said city, the said defendants, and each of them, be restrained by injunction preliminary until hearing and perpetual thereafter from carrying out the direction of the said proposed ordinance annexed hereto marked Exhibit A, and from borrowing, on the faith and credit of the city of Philadelphia, the said sum of \$8,600,000, or any part thereof, and from issuing the bonds of the said city for the said sum or any part thereof, and from signing, countersigning, or paying any warrant for the cost of advertising the said ordinance. Third. That the said proposed ordinances be declared invalid."

The last assessed valuation of taxable property in the city preceding the election of November 4, 1913, was \$1,556,323,614, 7 per centum of which is the sum of \$108,942,652.98. This was the limit of the borrowing capacity of the city when the ordinance of October 3, 1913, was approved and the election on November 4th was held. From the gross indebtedness of the city existing at those dates, the defendants insist there ought to have been two deductions, one for \$6,524,216.57, the amount of the city's indebtedness incurred by it for school purposes and subsequently assumed by the school district under the provisions of the act of May 18, 1911 (P. L. 309), and the other for \$6,750,000, the amount of authorized but unissued loans. If neither of these two items could have been lawfully deducted from the gross indebtedness of the city, it is conceded that its borrowing capacity was exceeded in authorizing the loan of \$8,600,000. If that capacity was exceeded, the said proposed loan must be declared invalid.

[1] The constitutional provision which concisely, clearly, and definitely fixes the borrowing capacity of a city is that its indebtedness "shall never exceed seven per centum upon the assessed value of the taxable property therein." The indebtedness of a municipality, like that of an individual, is what it owes and can be called upon to pay, and

the constitutional limitation upon its power to contract indebtedness is fixed without regard to what assets, real or personal, it may own. It may own absolutely real estate worth 7 per cent. of all the taxable property within its limits, but property which it may so own is not to be weighed in the balance in determining how much it may borrow. Under the plain words of the Constitution, it is never a question of how much a municipality owns in determining how much it may borrow. County, city, borough, township, and school district, corporately rich or poor, all have the same basis for their borrowing capacity. It is the assessed value of the taxable property within their confines, 7 per centum of which is the limit to which any of them may borrow. The Constitution says nothing about their assets. If the same were permitted to be taken into account in ascertaining the borrowing capacity of the subdivisions of the state, it would not only not be uniform, but there would be endless controversies and litigation in determining the value of county, city, borough, township, and school district assets. The constitutional provision in this respect is alike for rich and poor. In the same year that it went into effect, the Legislature undertook to increase the borrowing capacity of municipalities by providing that, from their gross indebtedness, for the purpose of ascertaining their borrowing capacity, there shall be deducted "all outstanding solvent debts." By necessary implication this legislation was forbidden, for the sole constitutional provision, which says nothing of the assets of a municipality, is that its indebtedness shall never exceed 7 per centum upon the assessed value of the taxable property therein.

If the question of the constitutionality of the act of April 20, 1874 (P. L. 65), had been raised promptly after its passage, we have no doubt that it would have been held to be legislation forbidden by the Constitution by clearest implication. But for more than a score of years it remained unchallenged, and, in the interval, municipalities acted upon its authority, and millions of dollars have been borrowed and disbursed in reliance upon it. It is for this reason that we do not now feel any imperative necessity which would justify us in striking it down. *Commonwealth v. Gilligan*, 195 Pa. 504, 46 Atl. 124; *Elliot v. Philadelphia*, 229 Pa. 215, 78 Atl. 107. In the latter case the solvent debts which the city claimed to deduct from its gross indebtedness were, as appears from the paper books now before the writer, for delinquent taxes and other items which were absolutely due and payable to the city, the proceeds of which it could use to discharge any outstanding obligations.

[2] Outstanding solvent debts, within the meaning of the act of 1874, which a municipality may deduct from its gross indebtedness in ascertaining its borrowing capacity, are debts due to it directly, payment of

which it can enforce as one of its quick assets for the liquidation of any of its obligations. *Elliot v. City of Philadelphia* is authority for this, and nothing more, in construing the meaning of the words "solvent debts," as used in the act of 1874, and neither now nor at any time in the future will they be given any other than their strict, literal meaning.

[3] At the beginning of the first school year after the passage of the act of May 18, 1911 (P. L. 309), commonly known as the "School Code," the title to all property, real and personal, which had belonged to the city of Philadelphia for public school purposes passed to the school district of the said city. By section 120 of the said Code, the school district succeeded to and was required to assume the payment of all indebtedness which had been incurred by the city for school purposes. When the title of the city to the property owned by it for school purposes thus passed to the school district, the net outstanding debt of the city which had been incurred for school purposes was \$6,978,080.89. At the time of the election of November 4, 1913, this had been reduced to \$6,524,216.57, and one of the two questions for our determination is whether that sum ought to have been included in the indebtedness of the city in ascertaining its borrowing capacity when the loan of \$8,600,000 was authorized.

The indebtedness of the city to the amount of \$6,524,216.57, incurred by it for school purposes, is still outstanding in the shape of its valid obligations to pay, and the holder of each of these obligations can look to it for payment. The act of 1911, imposing upon the school district the obligation to pay this indebtedness, in no manner affects the absolute liability of the city to pay it. The Legislature could not have impaired in the least degree these obligations of the city, for both federal and state Constitutions forbid the passage of any statute impairing the obligation of contracts. The liability of the city to pay remains, in respect to this indebtedness, just the same as if the act of 1911 had not been passed. What its general indebtedness was before the passage of that act still exists, except so far as it had been paid or reduced.

But it is earnestly contended that, under the act of April 20, 1874, the amount of the city's indebtedness assumed by and imposed upon the school district ought to be deducted from the gross indebtedness of the city in determining how much it actually owes. We have already stated what is to be understood as "solvent debts," within the meaning of the act of 1874, the constitutionality of which we have been constrained to sustain on doubtful ground; and it is easy of demonstration that the deductions claimed by the city for its indebtedness for school purposes are not within the provisions of that act, which are not to be further extended for the purpose of practically increasing the borrowing capacity

of a municipality beyond the limit fixed by the Constitution. There is nothing in the act of 1911 providing how or when the indebtedness incurred by the city of Philadelphia for school purposes shall be paid by the school district. Answer may be made to this that the school district can be compelled to pay whenever the city pays its obligations to those who will look to it for payment. When that will be does not appear from the pleadings. It may be in the remote future, but, whether the time of payment is near or far away, the same power that passed the School Code may repeal it, and in that event, with all property held for school purposes returned to it, the city might find itself, in the matter of its indebtedness for school purposes, just where it was before the Code was passed. By its resolution of October 8, 1912, the board of public education formally recognized the indebtedness of the city for school purposes as a debt of the school district, imposed upon it by the act of 1911, but the proviso is that the school district shall not pay until some time in the future. Under the authority conferred upon it by section 506 of the Code, the school district might have issued bonds for the purpose of paying the indebtedness of the city for school purposes and handed those bonds over to it; but it did not do so. Suppose, however, it had so acted; the city, with those bonds in its actual possession, could certainly now contend with more reason that the school indebtedness should no longer be charged against its general indebtedness; but we should have to say, even under such circumstances, that the amount of its gross indebtedness remained unaffected, though means for the payment of a portion of the same had been placed in its hands by the school board. This is what was distinctly ruled by a full court in the well-considered case of *Brooke v. City of Philadelphia*, 162 Pa. 123, 29 Atl. 387, 24 L. R. A. 781. It is conclusive that the city's present contention cannot prevail. It was there held that only the city's own obligations in the sinking fund could operate as a reduction of its indebtedness, and the reason for this was that so much of its indebtedness as was represented by its own bonds in the sinking fund, purchased by it, had been practically paid. As to all the other securities in that fund, it was ruled that the city's indebtedness was not reduced by them, even though the fund was inviolably pledged, both under the Constitution and an act of assembly, to the payment of the municipal indebtedness. In so holding Mr. Justice Dean said:

"As set out in appendix to plaintiffs' paper book, there are now in the sinking fund 6 per cents., city loan, \$14,233,350; 4 per cents., \$1,949,750; 3 per cents., \$6,947,000—altogether, \$23,130,100 of city certificates purchased by the commissionera. There are, besides these, other securities, not those of the city, in the fund. As to these last, obviously, they remain in the fund, bound by the inviolable pledge which attached to them when they first became part of it. So far as concerns them, they have not yet

been applied in payment or redemption of any part of the funded debt. An asset of the city, easily convertible into cash, they undoubtedly are, but as yet they have not operated to the reduction of the funded debt, to which purpose they were pledged. In effect they only represent the savings of the city, set aside in anticipation of payment of the debt; as to any actual reduction of the debt by them, there has been none; the debt is still an outstanding liability unaffected by the savings, with only an increased ability on part of the city to pay; an increase in ability measured by the cash value of the savings. When used in purchase of the debt, there is a release of the pledge, and a discharge of the obligation, to the amount of the purchase."

This followed the plain words of the Constitution that, without regard to its own assets for the payment of its debts, the indebtedness of a municipality shall never be increased beyond the limit of 7 per centum upon the assessed value of taxable property therein. *Brooke v. Philadelphia* was subsequently followed by *Bruce v. Pittsburg*, 168 Pa. 152, 30 Atl. 831, and *Schuldice v. Pittsburg*, 234 Pa. 90, 82 Atl. 1125.

The city does not even hold a debt against the school district, due and payable to it, the proceeds of which it may use for the payment of any of its outstanding obligations. There is a mere promise or obligation by the school district, admittedly solvent, to pay a part of the city's indebtedness. There is, however, no promise to pay anything to the city, and no obligation is imposed upon the school district to do so. To contend that a mere promise, or even an obligation, to pay a debt which the city itself owes is a solvent debt due to it is to assume that the Legislature did not know the difference between a debt due from one person to another and a promise by a third party to pay the same. Solvent debts which the Legislature had in mind are debts absolutely due and payable directly to the municipality, without regard to what it may do with the money when received. The indebtedness of the city, incurred by it for school purposes, is still its debt, to be included in determining the amount of its liabilities.

[4] The second question for our consideration is the right of the city to deduct from its gross indebtedness authorized but unissued loans amounting to \$6,750,000. If the city's contention as to this should prevail, it would mean that a municipality's indebtedness may be authorized by the corporate authorities and electors to an unlimited amount, and that the Constitution permits the authorization of that which it at the same time declares shall not be consummated. This is trifling with the spirit and intent of that instrument, conflicts with common sense in construing it, and is in the teeth of the third section of the act of 1874, which provides that:

"The indebtedness of any county, city, borough, township, school district, or other municipality or incorporated district, in this commonwealth, may be authorized to be increased to an amount exceeding two per centum, and not ex-

ceeding seven per centum, upon the last preceding assessed valuation of the taxable property therein."

The authorization of indebtedness by a municipality is thus clearly limited by the statute to 7 per centum of the assessed valuation of taxable property. In the second section of the same act the municipal authorities are permitted "to authorize" an increase of debt to the constitutional limit. Every authorization of a municipal loan is therefore to be regarded as exhausting pro tanto the municipality's borrowing capacity. It is not conceivable that the framers of the Constitution, or the people who adopted it, ever intended that an election should be held to authorize that which it may be impossible to carry out; yet this is the anomalous situation contended for by the defendants. If an increase of \$1,000,000 beyond the 7 per cent. limit may be authorized because former authorized loans had not been issued when said increase was authorized, loans to the amount of a hundred million dollars beyond the limit may be authorized. In such a situation, who could declare which loans should be issued?

Counsel for defendants seek to justify their contention as to authorized but unissued loans by what was said by the lower court in *Redding v. Esplen Borough*, 207 Pa. 248, 56 Atl. 431. The bill in that case was to enjoin payment by the borough authorities of moneys claimed on a contract for the construction of a sewer alleged to have been illegally entered into by the borough authorities, in view of its indebtedness existing at the time, including authorized but unissued loans. The borough indebtedness, at the time it contracted for the construction of the sewer, including those loans, was \$209 less than 2 per cent. of the assessed valuation of the taxable property within its limits. There was subsequently assessed against it as its portion of the cost of the construction of the sewer the sum of \$1,066.89, which it paid; but there was no evidence that this sum had not been actually paid out of the borough's current funds. While it is true that the court below expressed the opinion that authorized but unissued loans of the borough were not to be regarded as its indebtedness, we are not to be understood as approving this. We affirmed the decree because, with the unissued loans counted as part of the municipal indebtedness at the time the contract was entered into, that indebtedness was not in excess of the constitutional limit, and it further did not appear, as the court found, that the contract imposed any liability upon the borough. Another case relied upon by counsel for defendants is *Thomson-Houston Electric Co. v. City of Newton* (O. C.) 42 Fed. 723, in which there is an expression by the Circuit Court of the United States for the Southern District of Iowa that municipal indebtedness is not incurred for municipal improvements until the bonds authorized for

the same have been sold and issued. It appeared, however, that, at the time the city of Newton was about to issue the bonds involved in the controversy before the court, the indebtedness of the city was not beyond the constitutional limit, and therefore the restraining order was refused. That case is not to be regarded as an authority in support of the defendants' contention in the present proceeding.

Nothing more need be said in support of our decree of March 30, 1914.

ELKIN, J. (dissenting). I must be in error, as the court has so decided, but not being convinced of the error, and since the debt-creating power of bodies corporate under the Constitution throughout the entire state may be indirectly involved, I deem it proper to state a few reasons to sustain the faith that is in me. The subject-matter involved is the borrowing capacity of the City of Philadelphia under the Constitution, and the decision depends upon the proper ascertainment of the net indebtedness under the act of 1874. Whether the city is attempting to borrow too much money to provide for permanent improvements, or not enough for the proper development of a progressive municipality, are questions for the people to determine and not for the courts to decide. When courts are asked to determine what the borrowing capacity of a city is, they must look to the Constitution and statutes as their guide in arriving at a just decision. Hence our first inquiry must necessarily be: What limitation has been placed upon the power of cities or other bodies corporate to create indebtedness by our Constitution? The answer will be found in article 9, § 8, which provides *inter alia* as follows:

"The debt of any county, city, borough, township, school district or other municipality or incorporated district, except as herein provided, shall never exceed seven per centum upon the assessed value of the taxable property therein."

It will be noticed that the limitation on the power to create indebtedness is made to apply in the express language of the Constitution to each separate political subdivision or body corporate, and not to all of the subdivisions or bodies corporate, collectively. This means that a county can create for county purposes an indebtedness not to exceed 7 per centum of the assessed value of its taxable property; that a city can create an indebtedness for municipal purposes not to exceed 7 per centum of the assessed value of the taxable property within the city; and that a school district can likewise create an indebtedness for school purposes not to exceed the constitutional limitation. It is now 40 years since the adoption of the Constitution, and, so far as I am advised, no one has ever seriously questioned the power of each separate district enumerated in the organic law to create an indebtedness not to exceed the 7 per centum limitation, unless the

Legislature still further limited a particular class of districts to a less borrowing capacity than the Constitution permits, which the lawmaking body has the power to do. This is true of the School Code, which limits the debt-creating power of a school district of the first class to 2 per centum of the assessed value of the taxable property therein. The limitations of the Constitution apply to the city and to the school district of Philadelphia, just as they do to all other cities and school districts of the commonwealth. The Constitution is in force throughout the entire state, and applies to all districts of the same class precisely in the same manner, no matter where located. Each separate body corporate, enumerated in the Constitution, has the power to create an indebtedness not to exceed 7 per centum of the assessed value of the taxable property therein. As an illustration, the city of Pittsburgh has a borrowing capacity for municipal purposes of 7 per centum of the assessed value of the taxable property in the city, and the county of Allegheny has likewise a separate borrowing capacity for county purposes of 7 per centum upon the assessed value of the taxable property in the county. It is also true that, in determining the borrowing capacity of the city of Pittsburgh for municipal purposes, the indebtedness of Allegheny county is not taken into consideration; and, in determining the net indebtedness of the county, the municipal indebtedness of the city is not included. The county and the city are separate bodies corporate, each of which has the power to create an indebtedness within the constitutional limitation without reference to the other. This is no new doctrine, but one which has had the sanction of the legal profession in our own state since the adoption of the Constitution, and the approval of almost every jurisdiction in which the question has been raised. Mr. Dillon, in his valuable work on Municipal Corporations, states the rule as follows:

"The limitations of the Constitution, as generally expressed on indebtedness, are to be taken and understood distributively and not collectively. The prohibition, unless otherwise expressed or provided, is aimed at each of the organizations, or political subdivisions, or bodies corporate, separately; the indebtedness of a county plays no part in determining the existing indebtedness of a city, town, or village which forms a part thereof, and vice versa."

Of the numerous authorities which sustain this doctrine the following may be cited: *Ex parte Newport*, 141 Ky. 329, 132 S. W. 580, 37 L. R. A. (N. S.) 1034, Ann. Cas. 1912C, 447; *State v. Common Council of Tomahawk*, 96 Wis. 73, 71 N. W. 86; *Todd v. Laurens*, 48 S. C. 395, 26 S. E. 682; *Campbell v. Indianapolis*, 155 Ind. 186, 57 N. E. 920; *Wilson v. Board*, 133 Ill. 443, 27 N. E. 203; *Board of Education of Huron v. Life Ins. Co.*, 94 Fed. 324, 36 C. C. A. 278; *Kennebec Water Dist. v. Waterville*, 96 Me. 234, 52 Atl. 774; *Tuttle v. Polk*, 92 Iowa, 433, 60 N. W. 733.

As applied to the present case, this means that the city of Philadelphia at the present time has a borrowing capacity of 7 per centum of the assessed value of the taxable property therein for municipal purposes; and that the school district of Philadelphia has a borrowing capacity of 2 per centum of the assessed value of the taxable property within the district for school purposes, and this is so because the School Code thus limited its borrowing capacity. It is not open to doubt that the city of Philadelphia can act independently of the school district in creating indebtedness for municipal purposes, and that the school district can act independently of the city in creating an indebtedness for school purposes. With this understanding of the law, let us see how the present case stands. The School Code created a school district of the first class within the territorial limits of the county of Philadelphia. It conferred upon the school district thus created the powers and privileges of a corporate entity. The Legislature clothed the school district with power to make contracts, to incur obligations, to create indebtedness for school purposes, and to provide a sinking fund for the payment of indebtedness and the liquidation of bonds, the payment of which was assumed when the school property of the city was taken over by it for school purposes. For the maintenance of the public schools and for the payment of debts created or assumed, the school district was given the power to levy and collect taxes just the same as a county or a city is given the power to levy and collect taxes for county or municipal purposes. The board of education, acting for the school district under the power conferred by the Legislature, took over the school property of the city and agreed to assume, and in fact did assume, the payment of \$6,524,216.57 of the bonded indebtedness of the city, which sum represented what was considered an equitable share of the public burdens to be borne by the school district in consideration for the valuable assets and property transferred to it. The school district, therefore, had transferred to it, as a separate body corporate, all of the school property, formerly owned by the city, and, as a consideration for the transfer, assumed the payment of the amount above stated. Why is not this a valid contract binding upon both parties? Neither the city nor the school district denies the validity of the contract nor the binding obligations thus imposed by law and covenant. The school district is not attempting to evade its liability for the payment of the bonded indebtedness assumed by it, and the city is content with the situation. As between these two separate bodies corporate, the obligation of the school district is considered binding, and no one doubts either the willingness or the ability of the school district to meet its obligations at maturity. There is not the

slightest doubt but that the school district will pay out of the school revenues the \$6,524,216.57, the payment of which it assumed when the school property was taken over. It seems to me that every fair-minded person must concede the correctness of these statements. This, then, brings us to the consideration of the practical question in the case. Is the school district of Philadelphia a solvent debtor within the meaning of the act of 1874? This act provides that the net amount of the indebtedness of a municipality or other incorporated district "shall be ascertained by deducting, from the gross amount thereof, all moneys in the treasury, and all outstanding solvent debts, and all revenues applicable within one year to the payment of the same." Is the school district of Philadelphia a solvent debtor, and is its obligation to pay \$6,524,216.57 a solvent debt? If so, this amount should be deducted from the gross indebtedness of the city in ascertaining its net indebtedness under the act of 1874. Who says that the school district of Philadelphia is not a solvent debtor, or that debts created or assumed by it are not solvent debts? No one in interest. It would be a distinct shock to the board of education, and to the patrons of the public schools, to be told that the school district was insolvent and could not pay its legal obligations. Why cast a doubt upon the obligations of the school district by a labored attempt to show that it is not a solvent debtor and cannot pay what it is legally bound to pay? Of course the school district is solvent, and of course it can and will pay what it agreed to pay, and this, as between the city and the school district, makes the latter a solvent debtor, and the indebtedness assumed by it a solvent debt, within the meaning of the act of 1874. I entirely agree with the contention of learned counsel on both sides of this case that the gross indebtedness of the city should include the item of \$6,524,216.57, because the bonds were issued by the city, and the city is therefore primarily liable for their payment, but in ascertaining the net indebtedness of the city I would deduct this item from the gross indebtedness because the city has a solvent debtor upon which it relies, and can rely, to pay this amount of indebtedness as the bonds mature.

There is a further and practical reason why this view should prevail. No matter how our views differ in other respects, we all agree that the item of \$6,524,216.57 must be charged against the school district in ascertaining its borrowing capacity. If the item be charged against the city in the present instance, and no deduction be made because of the obligation of the school district to pay it, and the same amount of indebtedness be charged against the school district in determining its borrowing capacity, both districts will be charged with the same indebtedness, and the borrowing capacity of each will be



reduced by this amount, although there is but a single indebtedness covered by the item in question. In the absence of any constitutional or statutory requirement making such a construction necessary, no such rule should be adopted. The item involved represents a single indebtedness, which, as regards the bondholders, the city is primarily liable to pay, but, as between the city and the school district, the latter is bound to pay, and will pay, and therefore the school district is a solvent debtor upon which the city can call to meet its obligations.

It is too late to even question the validity of the act of 1874 on constitutional grounds. For 40 years the profession throughout the state have accepted it as a valid binding act, and municipal indebtedness to the extent of millions of dollars has been created upon the strength of its provisions. This court has also settled the question beyond the peradventure of doubt. *Bruce v. Pittsburg*, 166 Pa. 152, 30 Atl. 831; *Elliot v. Philadelphia*, 229 Pa. 215, 78 Atl. 107. Nothing can be gained now by attempting to disturb what must be considered a settled question of law. It is true that the courts have not been called upon to precisely define what is meant by the words "solvent debts," within the meaning of the act of 1874. To my mind a debt is an obligation to pay, and, if the debtor is solvent and able to pay his obligation, he is a solvent debtor, and his obligation to pay is a solvent debt, within any reasonable meaning of the term. The school district of Philadelphia is able to pay its obligations and is therefore a solvent debtor, and its obligation to pay \$6,524,216.57 is a solvent debt, within the meaning of any fair interpretation of the act of 1874. This indebtedness will be paid by creating a sinking fund for the purpose, in the same manner as the city creates a sinking fund to pay its indebtedness. Already the school district has paid into the sinking fund about \$600,000 under its contract with the city, and will continue to meet its obligations in this respect until its indebtedness is fully paid. Under such circumstances, it seems trifling with the meaning of words to say that the school district is not a solvent debtor and that its obligation to pay is not a solvent debt. If the obligation of the school district is a solvent debt, the express provisions of the act of 1874 require it to be deducted in ascertaining the net indebtedness of the city.

It is suggested that the Legislature might repeal the School Code without making any provision for the payment of indebtedness created or assumed by the school district, and, in such event, the city of Philadelphia would have no recourse against the school district. It could just as well be said that the Legislature might repeal what is known as the Bullitt Act, and all other acts relating to the city, and by so doing strike down

the entire municipal government and take away from it its power to levy and collect taxes and to incur and pay municipal indebtedness. But such suggestions are not in keeping with the spirit of our people, and such a method of repudiating indebtedness and destroying public credit is foreign to Pennsylvania. Of course the Legislature would do no such thing without making ample provision for the payment of all honorable obligations. I would sustain the position taken by the learned city solicitor and allow a deduction of the amount assumed by the school district from the gross indebtedness of the city.

With the greatest respect for the views of my Associates who do not agree with me, I would sustain the authorized loan of \$8,600,000 and dismiss the bill.

STEWART, J., joins in this dissent.

(245 Pa. 307)

McGUIRE v. CITY OF PHILADELPHIA  
et al. (No. 2.)

(Supreme Court of Pennsylvania. May 12, 1914.)

1. STATUTES (§ 121\*) — TITLE AND SUBJECT-MATTER—TAXATION.

The act of June 17, 1913 (P. L. 507), imposing taxes on certain classes of personal property for city and county purposes in cities coextensive with counties and setting forth the means of carrying out such purpose, is not violative of Const. art. 3, § 3, providing that no bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 146, 173, 174; Dec. Dig. § 121.\*]

2. MUNICIPAL CORPORATIONS (§ 867\*) — INCREASE OF INDEBTEDNESS—ELECTION NOTICE—MANDATORY REQUIREMENTS.

The statutory requirement that the public notice to be given by advertisement of an election to submit the question of a proposed increase of municipal indebtedness shall contain "the amount of the existing debt" of the municipality is mandatory.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1841; Dec. Dig. § 867.\*]

3. MUNICIPAL CORPORATIONS (§ 867\*) — INCREASE OF INDEBTEDNESS—ELECTION NOTICE—AMOUNT OF EXISTING DEBT—DETERMINATION.

Where a notice of an election to submit the question of a proposed increase of municipal indebtedness stated "the amount of the existing debt" of the municipality to be a certain amount, which was ascertained by deducting from the city's gross indebtedness a sum assumed by a school district coincident with the city, its publication was ineffective to authorize the holding of a valid election.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1841; Dec. Dig. § 867.\*]

Elkin, J., dissenting.

Bill by Frederick T. McGuire, a citizen and a taxpayer, etc., to enjoin the City of Philadelphia and others from holding an election. Injunction granted.



On March 30, 1914, the following decree was entered and subsequently the opinion of the court was filed:

March 23, 1914, this cause came on to be heard on bill and answer, and was argued by counsel, and now March 30, 1914, on due consideration thereof, it is ordered, adjudged, and decreed as follows:

1. That the ordinance of the city of Philadelphia approved February 21, 1914, entitled "An ordinance to amend an ordinance approved February 13, 1914, signifying the desire of the corporate authorities of the city of Philadelphia to increase the indebtedness of the said city in the sum of twelve millions nine hundred thousand dollars," and the said ordinance of February 13, 1914, are hereby declared invalid.

2. That a writ of injunction be issued perpetually restraining the city of Philadelphia, Rudolph Blankenburg, mayor of the said city, John M. Walton, controller of the said city, and William McCoach, treasurer of the said city, the said defendants, and each of them, from holding an election for authorizing an increase of the indebtedness of said city in the said sum of \$12,900,000, from signing, countersigning, or paying any warrant for the expense of advertising the ordinance authorizing the holding of said election, or for holding said election, and from borrowing on the faith and credit of the city of Philadelphia the said sum of \$12,900,000, or any part thereof, and from issuing the bonds of the said city for the said sum, or any part thereof. It is further ordered that the city of Philadelphia pay the costs of this proceeding.

Argued before FELL, O. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Theodore F. Jenkins, of Philadelphia, for plaintiff. Michael J. Ryan, City Sol., and Ernest Lowengrund, Assist. City Sol., both of Philadelphia, for defendants.

BROWN, J. By an ordinance of the select and common councils of the city of Philadelphia, approved by the mayor February 21, 1914, the corporate authorities of the municipality signified their desire to increase the indebtedness of the city in the sum of \$12,900,000, and it was directed that an election be held on March 31, 1914, for the purpose of obtaining the assent of the electors of the city to the said proposed increase of its indebtedness. This bill, of which we took original jurisdiction, in connection with another filed by the same complainant, No. 690, Miscellaneous Docket No. 2, was filed to have the said ordinance declared invalid; to enjoin the holding of the said election; to restrain the defendants from signing, countersigning, or paying any warrant for the expense of advertising the ordinance relating to the said proposed increase of indebtedness, and from borrowing, on the faith and the credit of the city, any part of the proposed loan. Plaintiff's complaint is that the proposed increase of the city's indebtedness will exceed its borrowing capacity as limited by the Constitution.

The last assessed valuation of taxable real property in the city of Philadelphia preceding the ordinance of February 21, 1914, was

\$1,641,316,027, and it is conceded by learned counsel for complainant that if the loan of \$8,600,000—the subject of the other bill—was not validly authorized, the city's borrowing capacity was not exceeded in authorizing the loan of \$12,900,000. As the said proposed loan of \$8,600,000 has been declared invalid, the city's right to make the proposed loan of \$12,900,000 is not to be questioned; but, as the defendants aver in their answer that the city had a largely increased borrowing capacity based upon the last assessed valuation of personal property, we deem it proper to pass upon that question, though the determination of it is not essential in view of the undoubted borrowing capacity of the city, based upon the valuation of real property alone. Our reason for now passing upon the question is, as was said by the Chief Justice at the argument, that it is "sure to arise in the near future, and until it is finally settled, neither the city authorities nor the voters at an election for the increase of loans, nor the purchasers of city bonds can act with certainty."

[1] The last assessed valuation of personal property preceding February 21, 1914, was \$571,539,535.75, and the authority of the city to make it part of the basis of its borrowing capacity is found in the act of June 17, 1913 (P. L. 507). But it is said, though not argued with much seriousness, that the act of 1913 is unconstitutional because the title to it contains more than one subject, and is therefore violative of article 3, § 3, of the Constitution, which provides that:

"No bill, except general appropriation bills, shall be passed containing more than one subject, which shall be clearly expressed in its title."

There is to be found in the title to the act of 1913 but one subject, and that is the imposition of taxes upon certain classes of personal property for the purpose of providing revenues for the state, counties, and for cities and counties when coextensive. The one main subject of the act is taxation upon certain classes of personal property. This is so clearly expressed in the title as to give notice to every owner of any kind of personal property that the provisions of the act may affect him. The title, therefore, led to an inquiry into what was contained in the body of the bill. Everything appearing in the title is germane to the one main subject, and the same is true of the several provisions in the bill itself. They relate to and are the means of carrying out the one general purpose of the act. It is not necessary to show this by discussing those provisions in detail. Among the authorities sustaining the constitutionality of the act are Reber's Petition, 235 Pa. 622, 84 Atl. 587, and Booth & Flinn, Ltd., v. Miller, 237 Pa. 297, 85 Atl. 457. We now declare it to be valid legislation.

[2] As the city was clearly within its bor-

rowing capacity in passing the ordinance approved February 21, 1914, so much of our decree of March 30, 1914, as declared the same invalid is now vacated. But, for a reason to be briefly stated, the injunction staying the election advertised for March 31, 1914, properly went out, and so much of the decree as enjoined it is not to be disturbed. The statutory requirement relating to the public notice to be given by advertisement of an election to be held for the purpose of submitting to electors the question of a proposed increase in municipal indebtedness is that it shall contain, *inter alia*, "the amount of the existing debt" of the municipality. This wise provision is to enable the elector to act not only intelligently, but prudently, in casting his ballot for or against a proposed increase of the indebtedness of his municipality, and it is mandatory upon the public authorities.

[3] In the public notice given by the corporate authorities of the city of Philadelphia of an election to be held on March 31, 1914, there was deducted from the gross indebtedness of the city \$6,382,842.88, the balance of the debt of the city assumed by the school district under the provisions of the School Code. This, as appears in the opinion this day handed down in the other proceeding instituted by the complainant (91 Atl. 622) could not be done, and the electors, if they had been permitted to vote, would have done so under the impression that the debt of the city was \$6,382,842.88 less than it really was. This was a substantial, though unintentional, error on the part of the city authorities in giving the public notice of the election required by the statute, and, for the reason stated, if it had been held, it would have been invalid.

ELKIN, J. (dissenting). Counsel on both sides agree that if the authorized loan of \$8,600,000 be declared invalid, the loan of \$12,900,000 to be voted on at the special election called for the purpose is within the borrowing capacity of the city. The loan voted on in November, 1913, was based upon the assessment for that year, but subsequently the assessment for 1914 was completed, and this assessment very largely increased the borrowing capacity of the city. We must accept these as established facts under the pleadings, and therefore the question of the borrowing capacity of the city is not in this case. It is objected, however, that the public notice given by advertisement as the law requires did not correctly state the indebtedness of the city, and that an election held under a defective notice would be invalid. The notice is said to be defective because it contained, as an item of municipal indebtedness, the authorized loan of \$8,600,000, and deducted from this municipal indebtedness \$6,382,842, the balance of the debt of the city assumed by the school district. This simply stated the facts as they were at the

time the notice was published, and the city authorities were bound to give the facts as they existed. The voters could not have been misled as to the borrowing capacity of the city by anything contained in the notice, because if for any reason loans authorized should subsequently be declared invalid, or if they should never be negotiated, the city would have a larger borrowing capacity, and as the borrowing capacity increased, the danger of exceeding the constitutional limit would grow less.

The published notice charged the city with the loan of \$8,600,000, authorized by vote of the electors last November, and claimed a deduction of \$6,382,842.88, the balance of the debt assumed by the school district; but, even when these items are adjusted in accordance with the present decision of this court, the figures on their face show an increase in the borrowing capacity of the city of \$2,217,157.12 more than was claimed in the notice, which is now condemned on the ground that it does not meet the legal requirements. When the loan of \$8,600,000 was stricken down, and the city was charged with the item of \$6,382,842.88 without any deduction, its borrowing capacity was ample to sustain the loan of \$12,900,000 to be voted on at the special election. The primary purpose of publishing the notice is to give the voters the facts as they are, so that they may know what the indebtedness is and what borrowing capacity the city has within the constitutional limit. The notice as published met these requirements by giving the facts as they existed at the time, and nothing more could be required reasonably. To my mind the objection to the published notice is too technical to be convincing.

In addition it may be suggested that the question of the borrowing capacity of the city, involving the deduction of the indebtedness assumed by the school district, was passed upon by court of common pleas No. 4, in *Philadelphia v. Walton*, 22 Pa. Dist. R. 301, wherein it was held by the learned president judge of that court, prior to the election in November, 1913, that the indebtedness assumed by the school district should be deducted from the municipal indebtedness, and, if so, even under the old assessment the city had a borrowing capacity sufficient to authorize the loan. No appeal was taken from that judgment, and the city authorities were bound to respect that decision in all subsequent proceedings, or at least until the law was otherwise declared by an appellate court. The election notice followed in every particular the law as declared at the time it was published, and since the notice gave the facts just as they were, and nothing contained therein could possibly have misled the voters as to the power of the city to authorize the loan within the constitutional limit, I cannot agree that the election should be enjoined on the sole ground of a defective published notice.

In this case I would also sustain the position of the learned city solicitor and dismiss the bill.

(245 Pa. 189)

**TAYLOR v. PHILADELPHIA RAPID TRANSIT CO.**

(Supreme Court of Pennsylvania. April 27, 1914.)

**1. RAILROADS (§ 355\*)—COLLISION WITH AUTOMOBILE—EVIDENCE.**

Where a street railway company operates a double line of tracks along its private right of way in the center of a public highway, above the level of the road and protected by a stone curb, it is not liable for injury to an automobile struck by a car while on the tracks at a point where there was no public crossing.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1220–1227, 1235; Dec. Dig. § 355.\*]

**2. APPEAL AND ERROR (§ 42\*)—DECISIONS REVIEWABLE—IMPORTANT QUESTIONS.**

Where only the application of well-recognized principles of law to a particular state of facts is involved, the judgment of the superior court is final, and jurisdiction of the Supreme Court to review it will be exercised only in cases of general importance.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 159, 160; Dec. Dig. § 42.\*]

**Appeal from Superior Court.**

Action by Deacon R. Taylor against the Philadelphia Rapid Transit Company. From a judgment of the Superior Court reversing a judgment of the common pleas on verdict for plaintiff, plaintiff appeals. Affirmed.

See *Taylor v. Philadelphia Rapid Transit Co.*, 55 Pa. Super. Ct. 607.

The following opinion was filed by Or-lady, J., in the court below:

The plaintiff was driving his automobile on First avenue, a public highway in the suburbs of Philadelphia. This avenue connects with Tyson avenue at right angles and there ends. On the east side of Tyson avenue there is located, and in public use, an open roadway with a width of 16 feet. In the center of Tyson avenue, the defendant owns a private right of way on which it operates a double line of trolley tracks. This construction is similar to that of steam railroads. Heavy rails are fastened to wooden ties which are imbedded in stone ballast, and the whole right of way is inclosed by a heavy curb, for protecting the ballasted track, and is from 4 to 12 inches higher than the roadway on its eastern side.

The plaintiff approached Tyson avenue with the intention of turning north, but when he arrived at the intersection of the avenues, as he states: "When we got within one block of where we turned, we discovered that the tracks were a little elevated, and, rather than risk an upset, I turned across the track and there I stalled the engine." When asked, "Why, if this was a bright moonlight night, as you say, you were driving west on First avenue, and desired to turn north on Tyson avenue—why did you run your car on the road track when there was plenty of room to the right?" he answered: "For fear in making the turn when I discovered it—for fear of turning the machine over. If running at a moderate speed—which I was—I could turn my car in twelve feet." The speed at which he entered upon Tyson avenue is fairly shown by the fact that the loaded five-passenger car mounted the curb and stopped when the front wheels had crossed both

rails of the north-bound track. He was traveling on an unfamiliar road in uncertain moonlight, on a downgrade, and about to make a right-angled turn. He had before him an abrupt barrier of from 4 to 12 inches in height, and between it and him there was the 16-foot roadway. His surroundings required that special care should be exercised. After the car stalled, the passengers got out, and one went back along the track of the defendant company to signal an approaching car, but failed to attract the attention of the motorman, and it crashed into the automobile and wrecked it. This action was brought to recover for the damages, and the trial resulted in a verdict for the plaintiff. A motion for a nonsuit was overruled, binding instructions for the defendant were refused, and the court declined on motion to enter a judgment for the defendant non obstante veredicto.

The trial judge aptly described the situation in his charge: "Was it the carelessness of Mr. Taylor or the carelessness of the motorman, or the carelessness of both? If it was the carelessness of both, the verdict must be for the defendant, because a man who is partly careless cannot get a verdict. If it was the carelessness of Mr. Taylor, of course he cannot get a verdict. If it was the carelessness of the transit company alone, by the motorman, then the plaintiff is entitled to a verdict. The common sense of this case is the law of it."

It must be conceded that the plaintiff had no right to cross these inclosed trolley tracks, which were for the exclusive use of the defendant company, and that he was a trespasser through his own lack of care in approaching Tyson avenue at such speed that he could not make the turn into the 16-foot roadway at the side of the tracks.

He took no proper precautions as he approached Tyson avenue, until, according to his own testimony, it was too late for him to make the turn, and he did not even then stop his car, but took his chances in going over a double-track trolley line to get to the roadway on the other side, at a place where there was no crossing. *Houston v. Traction Co.*, 28 Pa. Super. Ct. 374.

Had it been a grade crossing, it would have been his duty to approach it at such speed that the car would be under control as to stop it short of the track if the occasion demanded. *Griffith v. Street Ry. Co.*, 214 Pa. 293, 63 Atl. 740.

In *March v. Traction Co.*, 209 Pa. 46, 57 Atl. 1131, it was held: "What is having horses (or an automobile) under control is a matter that varies with the circumstances. \* \* \* To come to a right-angled street crossing in the dark at a trot is in itself strong evidence of negligence. \* \* \* The plaintiff was bound to know \* \* \* that it was a point of danger, and not only to keep such a lookout as would inform him of the approaching car, but also such control of his team as would enable him to stop on short notice of a threatened collision."

As we said in *Van Winckler v. Morris*, 46 Pa. Super. Ct. 142, "an inanimate body of the weight of a heavy automobile will not take a flying jump over a curb onto a pavement unless propelled by exceptional force," and from the plaintiff's own showing he could have turned into the roadway if he had approached it at a less rate of speed. He was at the wheel and in full control of the machinery that regulated the speed. Every reasonable deduction from the plaintiff's testimony leads to but one conclusion—that the accident was due to the speed of the car when it entered upon Tyson avenue.

[1] The car tracks were on the property of the defendant company, and the plaintiff had no right thereon. Electric cars on their own property have a lawful right to go fast. Rapidity of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

transit is no longer a mere convenience to the traveler; it has become a matter of vital interest to the general business of the community. *Thane v. Traction Co.*, 191 Pa. 249, 43 Atl. 136, 71 Am. St. Rep. 767; *Gallagher v. B. & O. R. Co.*, 52 Pa. Super. Ct. 568. It is the settled law of this state that a railroad company has the right to the exclusive possession of its tracks except at crossings, and that the person who enters upon the tracks at any other point than at such crossings is guilty of negligence per se. *Bailey v. Lehigh Valley R. Co.*, 220 Pa. 516, 69 Atl. 998.

The motorman on this express trolley car had no reason to anticipate the plaintiff's presence on these exclusive tracks of the company, which were constructed to expedite the travel between a large city and a popular resort.

There was no grade crossing over Tyson avenue where First avenue joined it. The plaintiff's negligent management of his car placed it in the hazardous place, and without his carelessness the accident would not have happened. As said by Judge Strong in *Philadelphia & Reading R. Co. v. Hummell*, 44 Pa. 375, 84 Am. Dec. 457: "If the use of a railroad is exclusively for its owners, or those acting under them; if others have no right to be upon it; if they are wrongdoers whenever they intrude—the parties lawfully using it are under no obligations to take precautions against possible injuries to intruders upon it. Ordinary care they must be held to, but they have a right to presume and act on the presumption that those in the vicinity will not violate the laws; will not trespass upon the right of a clear track. \* \* \* Precaution is a duty only so far as there is reason for apprehension. No one can complain of want of care in another where care is only rendered necessary by his own wrongful act. \* \* \* If the law declares, as it does, that there is no duty resting upon any person to anticipate wrongful acts in others, and to take precaution against such acts, then the jury cannot say that a failure to take such precautions is a failure in duty and negligence. The law does not require any one to presume that another may be negligent, much less to presume that another may be an active wrongdoer. \* \* \* There is as perfect a duty to guard against accidental injury to a night intruder into one's bedchamber as there is to look out for trespassers upon a railroad where the public has no right to be." This declaration has been frequently restated and approved. In *Bailey v. L. V. R. Co.*, 220 Pa. 516, 69 Atl. 998, it is held: "Where the public have the right to cross a railroad, the company in the operation of its trains must exercise ordinary care to prevent accidents. This necessarily follows from the right of the public to cross the tracks. But at all other points upon a railroad, where the company has the exclusive right to the use of its tracks, the person who enters upon the tracks becomes a trespasser, and the only duty imposed upon the company \* \* \* is to refrain from wantonly injuring the trespasser. In operating trains on its road at all places other than at crossings, the company's employes in charge of the train have the right to assume that no person will enter upon the tracks, or if upon the tracks will immediately leave them upon the approach of the train. The trainmen may act on this presumption, and, if a person trespassing on the tracks is killed, the company is not liable unless his death is caused by the wanton or willful conduct of those in charge of the train."

The same rule is declared in *Eastburn v. Express Co.*, 225 Pa. 33, 73 Atl. 977; *Gillespie v.*

*Railroad Co.*, 226 Pa. 31, 74 Atl. 738. This court followed it in *Gallagher v. B. & O. R. Co.*, 52 Pa. Super. Ct. 568, which is fairly summarized in the syllabus: "A railroad company has the right to the exclusive possession of tracks, except at crossings; and a person who enters upon the tracks at any other point than such crossings is guilty of negligence per se." And we reversed the judgment recovered in the court below for damage to a wagon standing on the tracks of a railroad without authority or right, because "it was not alleged in the plaintiff's statement of claim, and there is no evidence that would sustain a finding, that the defendant's employes, knowing that the plaintiff's wagon was on the track, recklessly or wantonly backed the train upon it." It was wholly insufficient to warrant an inference of the element of willfulness or wantonness, or that reckless disregard of a manifest duty and of the consequences thereof as affecting the property of the defendant, which is implied in the term gross negligence (*Trexler v. B. & O. R. Co.*, 28 Pa. Super. Ct. 198), especially so when it is not suggested in the plaintiff's statement or sustained in the evidence offered.

The character of this defendant's tracks and equipment make the same rule applicable here, and the plaintiff being on the tracks as a trespasser by his own negligent act, it not being alleged that there was wanton or reckless operation of the car, nor any evidence of such conduct, he cannot recover when his negligence not only contributed to the result, but was the sole cause of it.

The judgment is reversed.

Argued before FELL, C. J., and POTTER, ELKIN, STEWART, and MOSCHZIS-KER, JJ.

J. S. Freeman, of Philadelphia, for appellant. Sydney Young, of Philadelphia, for appellee.

PER CURIAM. [1, 2] The facts on which the judgment of the Superior Court is based are fully stated in the opinion of Judge Orlady, and there is no dispute in relation to the law applicable to them. In its final analysis the case turned on the answer to the inquiry whether the testimony would sustain a finding by the jury that the defendant's motorman had knowledge, or by the exercise of proper care would have known that the plaintiff's automobile was on the track in time to avoid injury to it. The case is a close one, but it involves only the application of well-recognized principles of law to a particular state of facts, and it belongs to a class of cases in which the judgments of the Superior Court should be considered as final. It was announced by this court soon after the act creating the Superior Court went into operation that our jurisdiction to review its judgments would be exercised only in cases of general importance or to secure uniformity of decision. *Kraemer v. Guarantee Trust & Safe Deposit Co.*, 173 Pa. 416, 33 Atl. 1047.

The judgment is affirmed.

(345 Pa. 154)

DAY et al. v. RYAN, City Solicitor.

(Supreme Court of Pennsylvania. April 27, 1914.)

**1. MUNICIPAL CORPORATIONS (§ 170\*)—CITY SOLICITOR—DUTIES.**

It is the duty of the city solicitor of Philadelphia, elected under Act June 1, 1885 (P. L. 37), to be the legal adviser and act as counsel for the city and all its departments and officers, and to prepare contracts with the city and indorse on them his approval of the form thereof preliminary to their taking effect; such latter duty being coexistent and not inconsistent with his duty of being the city's legal adviser.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 380-395; Dec. Dig. § 170.\*]

**2. MANDAMUS (§ 84\*)—RIGHT OF ACTION—PERFORMANCE OF OFFICIAL DUTY.**

That the city solicitor of Philadelphia refused to prepare and approve a contract awarded to architects by the executive officers of the city did not authorize proceedings in mandamus against him, though his refusal was due to an error of law.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 180-183; Dec. Dig. § 84.\*]

**3. MANDAMUS (§ 84\*)—RIGHT OF ACTION—MUNICIPAL CONTRACT—PARTIES.**

Contractors to whom a contract to perform city work has been awarded, but with whom no written contract has been made, cannot, by mandamus, require the city solicitor to prepare a contract for execution by the mayor; it being essential to the creation of an obligation that a contract binding on a city shall have been duly executed in writing, and such proceeding being merely an endeavor to obligate the city by a contract which the contractors have been unable to obtain.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 180-183; Dec. Dig. § 84.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Mandamus by Frank Miles Day and another, copartners, trading as Day & Klauder, against Michael J. Ryan, city solicitor of the city of Philadelphia. From a judgment quashing the petition, plaintiffs appeal. Affirmed.

Sulzberger, P. J., in the court below, filed the following opinion sur motion to supersede or quash the alternative writ of mandamus:

The plaintiffs Day & Klauder, ask that a peremptory mandamus issue commanding the defendant, Michael J. Ryan, who is the city solicitor of the city of Philadelphia, to prepare and approve a written contract by said city with said plaintiffs.

In order that the city shall be bound by a contract to pay money, the charter demands as prerequisites that the councils, which are the legislative branch of the city government, shall first appropriate the money to be expended and that the executive branch, composed of the mayor and several heads of departments, shall perform certain duties imposed on them by law, designed to call forth care and deliberation in the use of the money so appropriated.

In the case before us the departments concerned are at most health and charities, public works, public safety, and law. The department most immediately concerned is that of health and charities, because a building is to be erected

which is to form one of a series which together will constitute a municipal hospital. Without at this time defining with exactness the nice subdivision of powers among the several departments, we may say that the city is ready to enter into a contract when the four departments named have pursued the course prescribed by law, have mutually agreed that the contract should be made, and the mayor has approved.

The complaint of the plaintiffs, in substance, is that the heads of three of these departments, health and charities, public works, and public safety, have agreed that a contract should be entered into with them; that the mayor has signified his approval, but that the head of the law department refuses to approve; that without his approval the plaintiffs will lose their contract; that his approval is an act merely ministerial; and that their only remedy is by mandamus.

The question raised is therefore whether the function of the city solicitor in the matter before us is merely ministerial. Under our scheme of city government, it is the duty of the various heads of departments (constituting, with the mayor, the executive branch of the city government) to consider every proposition from their respective points of view, their several conclusions being designed to be communicated to each other, by way of consultation, for reaching the best results. The law assumes that by this course executive unanimity for working purposes will be reached. This is our scheme of municipal government which has hitherto shown itself to be workable. Its efficiency would be seriously hampered if the executive, or any subdivision thereof, were liable to be restrained in action at the instance of an outsider who disagreed with the views of this or that department. Interference by the courts, in this consultative stage, would be an unwarranted assumption of powers which the law has confided to others.

[1] The plaintiffs, however, contend that in the case before us the city solicitor is not acting in a consultative capacity, that the substantial questions concern only the other named departments, and that he is merely to act as clerk or scrivener, whose duty it is to write in proper legal form what has been agreed upon by his colleagues.

By the terms of the Bullitt charter, the city solicitor is elected by the people to be the legal adviser and to act as attorney and counsel for the city of Philadelphia and all its departments and officers. As regards contracts with the city, it is his duty to prepare them in his office and indorse on each his approval of the form thereof before the same shall take effect.

The duty to prepare and approve contracts and the duty of being the city's legal adviser are not inconsistent, but coexistent, and the city solicitor must perform both. If, in his opinion, there is good legal reason for not approving a contract, he must so advise the city, and his failure to do so would be negligence, or worse.

It appears that in the case before us there were complications. On March 21, 1903, councils authorized the then mayor to enter into a contract with an architect to draw the plans and supervise the construction of a series of buildings which were to constitute a great municipal hospital plant. Ten days later the mayor, in pursuance of the ordinance, executed a contract with Philip H. Johnson, an architect. The latter prepared the necessary plans and specifications, and bids were received for the work on May 1, 1905. The bids were alternative, one for the whole plant for the sum of \$2,030,158, and the other for the 20 or more separate buildings contemplated by the plan. The sum of the separate bids equalled the amount asked for the whole plant. From the testimony of the director of public health and charities it appeared that up to the present time

from 60 to 65 per cent. of the whole contemplated work had been finished under the supervision of Johnson, and that his service has been satisfactory. The only qualification of this statement is that for one of the buildings a contract had been entered into with another architect, and that the question of Johnson's right in the matter was amicably adjusted by a division of the fees between the rival architects.

On July 31, 1913, the director of the department of health and charities wrote a letter to the city solicitor, in which he said:

"I inclose draft of contract with Day & Klauder prepared by the city architect, Mr. Edward A. Crane, and forwarded by him to me under date of July 23, with the approval of the director of the department of public works which I respectfully submit for your approval as to form. You will notice the signature of Day & Klauder, a somewhat unusual procedure, explained by the fact that Mr. Day sails for Europe to-morrow morning."

The city solicitor, on the same day, replied in writing, refusing to approve the contract.

As there is no statute creating or recognizing a city architect, there can be no power in a person claiming that title to take any step to bind the city by a contract. The utmost effect attributable to the paper was to treat it as a memorandum of the terms of a contract which the city architect deemed it advisable for the city to make and which the directors of public works and of public health and charities approved.

The subject-matter of the contract was the performance by the plaintiffs of certain services which constituted a part of the labor of building a section of the municipal hospital. The authority to build could be given by councils only.

On May 2, 1918, an ordinance of councils became effective, which appropriated to the department of health and charities the sum of \$250,000 for the acquisition of such land and the construction of buildings for the Philadelphia hospital for contagious diseases and the home for the indigent, as councils should thereafter authorize.

On June 11, 1913, an ordinance of councils was approved by the mayor, which ordained that the director of the department of public health and charities be authorized to construct additional buildings for contagious diseases upon ground now owned by the city of Philadelphia and charge the same to the aforesaid appropriation of \$250,000.

When the city solicitor received the letter of July 31, 1913, with its inclosed paper, the question presented to him was whether the ordinance of June 11, 1913, authorized the expenditure of the considerable sum of money involved in the proposed contract. He had before him the ordinance of March 21, 1903, and the contract with Johnson of March 31, 1903. If the latter was still operative, the new contract submitted for his preparation and approval involved a double expense for one service, and would, to that extent, reduce the amount of the appropriation applicable to the cost of the building itself.

This question had evidently not presented itself to the directors. They doubtless assumed that Johnson's contract had ceased to be valid, or had no reference to the proposed building. This circumstance, however, could not operate to relieve the city solicitor of his duty to act as legal adviser for the city. He declined to approve the contract because he feared that the city would be compelled to pay twice for one service. Believing that this could not lawfully be done without the express authority of the councils, he suggested a reference of the matter to those bodies.

The plaintiffs think that this opinion was erroneous in at least two respects: (1) In assum-

ing a power not conferred by law on the city solicitor; and (2) in not holding that the Johnson contract had no bearing upon the matter because either of its original invalidity or its subsequent expiry.

As regards the first reason, we are clearly of opinion that the city solicitor was acting within the line of his duty.

[2] As regards the second, we are not called upon to announce a definite conclusion at this time, because even if the city solicitor's opinion were erroneous in law, we have no power to sit as a court of appeal to correct his errors of judgment by mandamus. If any one is legally injured by such error, redress must be obtained in another kind of proceeding, in a manner which will avoid the direct interference of courts in the ordinary functions of municipal government.

[3] There is, however, another aspect of this case which may not be overlooked. The plaintiffs have no status to complain. Their proceeding, in the last analysis, amounts to an endeavor to obligate the city by a contract which they have not been able to obtain. A contract to bind the city must have been duly executed in writing. All previous acts are mere preliminaries which give a party no standing. On this point there can be no doubt since the doctrine was definitely settled on irrefutable grounds in *Smart v. Philadelphia*, 205 Pa. 329, 331, 54 Atl. 1025.

The peremptory mandamus must be refused.

The court quashed the writ.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Thos. Raeburn White, of Philadelphia, for appellants. James Gay Gordon, of Philadelphia, for appellee

PER CURIAM. The order refusing a peremptory mandamus is affirmed on the opinion of the learned president judge of the common pleas.

(245 Pa. 240)

WINDOLPH v. GIRARD TRUST CO. et al.  
(Supreme Court of Pennsylvania. May 18, 1914.)

1. HUSBAND AND WIFE (§ 184\*) — SEPARATE PROPERTY OF WIFE—CREATION OF TRUST—RIGHT.

Under Act June 8, 1893 (P. L. 344), relative to a married woman's right to control her separate property, a wife can create a valid trust of her separate personal estate by a deed of trust without the joinder or consent of her husband.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 716-718; Dec. Dig. § 184.\*]

2. HUSBAND AND WIFE (§ 182\*)—GIFTS—VALIDITY.

Under Act June 8, 1893 (P. L. 344), relative to a married woman's right of control of her separate property, an absolute gift by a wife of her personal property is valid when accompanied by a transfer of possession with intent to divest her of ownership, though the obvious effect is to defeat the husband's succession to the property and though he did not know of the gift until after her death.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 714, 715, 719; Dec. Dig. § 182.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

### 3. WILLS (§ 90\*) — CREATION OF VOLUNTARY TRUST—VALIDITY—GIFTS TESTAMENTARY IN CHARACTER.

That a married woman, in the execution of a voluntary deed of trust of her property, reserved to herself the entire income from the property during her life, and that the estates of the remaining cestui que trust were not to take effect in possession or enjoyment until after her death, and that there was a power of revocation reserved, were not sufficient to avoid the deed as an attempted disposition of property to take effect after death.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 219; Dec. Dig. § 90.\*]

### 4. TRUSTS (§ 44\*) — VOLUNTARY DEED OF TRUST—SUIT TO ANNUL—SUFFICIENCY OF EVIDENCE.

Evidence in a surviving husband's suit to have declared void as to him a voluntary deed of trust of personal property made by his wife held to sustain a finding that the deed was delivered to the trustee at the time of its execution, together with the possession of the property, that the settlor then intended to and did part with the legal title to the property, and that the deed was not executed as a mere subterfuge to enable her to control her property, and at the same time defeat her husband's marital rights in her estate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 66-68; Dec. Dig. § 44.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by William H. Windolph against the Girard Trust Company, succeeding trustee under instrument of Annie Windolph and another executor of the will of Annie Windolph, deceased, and others. From decree for defendants, plaintiff appeals. Affirmed.

The referee, M. Hampton Todd, Esq., made inter alia the following findings of fact:

The plaintiff, William H. Windolph, and Annie Windolph, the settlor in the deed of trust of July 16, 1909, were married on March 21, 1903, and resided together continuously as husband and wife until her death on September 28, 1911. Annie Windolph was survived by her husband and her two brothers, George W. Shafer and Zachary Taylor Shafer. Elizabeth Gravell, the trustee named in the deed of July 16, 1909, and the mother Annie Windolph, died September 3, 1911, and letters of administration on her estate were duly granted to her son, George W. Shafer, who is one of the respondents. On the 16th day of July, 1909, Annie Windolph duly signed, acknowledged, and delivered a deed assigning and conveying her interest in the estate of George Crock, deceased, together with certain cash and securities therein specified and enumerated, of the value of \$103,550, to her mother, Elizabeth Gravell, in trust, for the purposes therein set forth. Subsequently under the provisions of the trust Annie Windolph added securities to the value of \$5,000 to the corpus of the trust fund. Elizabeth Gravell, the trustee named in said deed of trust, by instrument of writing duly executed by her on July 16, 1909, duly accepted the trust therein and thereby created, and agreed to comply with the terms and provisions thereof. At this time Elizabeth Gravell was in her seventy-eighth year and Annie Windolph in the fifty-first year of her age. On September 19, 1911, the said Annie Windolph, by instrument in writing under her hand and seal, refused to exercise the right reserved to her in the original deed of trust to appoint a successor to Elizabeth Gravell, deceased, as trustee, and consented and agreed that

the trust should devolve upon and vest in the Girard Trust Company in accordance with the terms of said deed of trust. On September 19, 1911, the said Annie Windolph, by instrument in writing under her hand and seal, by virtue of the power reserved to her in the original deed of trust, amended the same by increasing the annuity therein given to her husband, William H. Windolph, from \$500 to \$900. On September 20, 1911, the Girard Trust Company accepted the said trust as provided in the original deed and the amendment thereof, and agreed to abide by the terms thereof. The assets of the trust estate were delivered to the Girard Trust Company as succeeding trustee by George W. Shafer, administrator of Elizabeth Gravell, the deceased trustee, in November, 1911. On October 3, 1911, the will of Annie Windolph, dated September 19, 1911, was duly admitted to probate by the register of wills for the county of Philadelphia and letters testamentary thereon granted to the respondent Charles J. Hepburn. By instrument in writing dated and acknowledged the 31st of May, 1912, William H. Windolph duly made and caused to be recorded his election to take against his wife's will and claiming his right to take as her surviving husband under the laws of this state. In December, 1904, Annie Windolph consulted J. Frank E. Hause, Esq., of the Chester county bar, in reference to the preparation of a will. Mr. Hause at this time explained to Mrs. Windolph that her husband could take against any will she could make, and Mrs. Windolph then expressed the opinion that her husband would be satisfied with whatever disposition she would make of her property.

Early in the year 1908 Charles J. Hepburn, Esq., a member of the Philadelphia bar, drew a will for Annie Windolph by which a large part of her estate was given to charities. Mr. Hepburn informed Mrs. Windolph that her will could operate only on one-half of her estate unless her husband acquiesced therein. Mrs. Windolph asked Mr. Hepburn's advice whether she could not dispose of her property as she desired. She was advised that she could by deed of trust, but to do so she would have to part with the possession and control of her property. This she did not want to do. The subject was discussed several times between Mr. Hepburn and Mrs. Windolph, but she was unwilling to part with the possession of her property, and consequently no deed of trust was then prepared. In the fall of 1908, Mrs. Windolph being about to go to a hospital to be operated on for appendicitis, sent for Mr. Hepburn and asked him to draw a deed of trust for her along the lines he had theretofore advised. She said she was going under an operation and might die. She was told that a deed of trust drawn under such conditions would not affect her purpose; that she should make a will and take the chance of her husband approving or disapproving it. She replied that she then had a will under which her property would pass to her mother, who knew what she wanted to do with it. She insisted that the deed should be prepared at that time. The deed was prepared and signed at the hospital and also the accompanying schedule. Mrs. Windolph recovered from the operation for appendicitis and returned to her home. This transaction was never fully and finally consummated. Certain moneys in bank accounts to the credit of Annie Windolph were transferred to Elizabeth Gravell, the trustee named in the deed of trust, and the mortgages mentioned in the schedule were assigned and the assignments placed in the hands of Mr. C. J. Hepburn, but they were never recorded, nor did Mr. Hepburn ever receive permission to deliver the same. The terms of this deed were not satisfactory to Annie Windolph. In March, 1909, in the presence of Elizabeth Gravell and Annie Windolph

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and at their instance and request, this deed was canceled by Mr. Hepburn by drawing a line in ink through the signatures. Annie Windolph at this time decided she would make a new deed of trust. In April, 1909, Annie Windolph gave Mr. Hepburn instructions to prepare a new deed of trust, which he did, and the same was duly executed on July 16, 1909, and the securities and other property delivered to Elizabeth Gravell, as is hereinbefore set forth. The cash and securities enumerated in the schedule attached to the deed of trust were delivered to the trustee in the following manner:

The cash on deposit in the Girard Trust Company, \$17,058.16, in the Western Savings Fund, \$6,005.16, in the Beneficial Savings Fund \$17,744.43, and in the Northern Trust Company \$16,867.95, stood in the name of Elizabeth Gravell as trustee, having been transferred to her credit under the canceled deed of trust of 1903, were treated as moneys of Annie Windolph turned over by her to Elizabeth Gravell, trustee. No change was made in the deposits, as the accounts were in the proper name under the new deed of trust. The deposit account in the Philadelphia Savings Fund Society \$8,162.62 was duly transferred on August 2, 1909, and opened in the name of Elizabeth Gravell in trust for Annie Windolph. Cash to the amount of \$11.68 was paid to Elizabeth Gravell, trustee. Three mortgages, namely, \$3,500 on 2202 West Lehigh avenue, \$2,000 on 2034 West Atlantic street, and \$2,500 on 5230 Fitzwater street, were carried as cash in the schedule. The mortgages on 2034 West Atlantic street and 5230 Fitzwater street, aggregating \$4,500, had been called and upon the receipt of the money from the same it was paid to Elizabeth Gravell, trustee. The mortgage for \$3,500 on 2202 West Lehigh avenue had been accepted by Mrs. Windolph prior to the preparation of the schedule, and the money for the loan was furnished by Mrs. Windolph and the mortgage taken in the name of Elizabeth Gravell, trustee. The remaining mortgages described in the schedule and aggregating \$31,300 were duly assigned to Elizabeth Gravell, trustee, and the assignments recorded. The eight shares of stock in the National Bank of Chester Valley at Coatesville, valued at \$400, were duly transferred to Elizabeth Gravell as trustee. The interest and estate of Annie Windolph in the estate of her grandfather, George Crock, mentioned in the schedule, were transferred to Elizabeth Gravell, trustee, by the assignment and conveyance thereof in the deed of trust. After the delivery of the trust assets to Mrs. Gravell, she invested trust funds in six mortgages, three through Mr. Hepburn, two through Mr. Bishop, of the Girard Trust Company, and one through Mr. McCollum. These mortgages were all submitted to Annie Windolph for her approval before they were accepted by the trustee as investments.

For more than 10 years prior to the creation of the trust in question, in the making of mortgage investments, not only Mrs. Gravell but also the brothers of Mrs. Windolph were in the habit of submitting the same to her for her judgment thereon before accepting or rejecting them. There was nothing unusual in Mrs. Gravell as trustee submitting to Mrs. Windolph before accepting them, the mortgages taken by the trustee for the investment of trust funds, and it was good judgment on her part so to do. Mrs. Windolph did not assume to dictate to the trustee what mortgages she should accept for the trust. The final determination was made by the trustee, but always after consultation with Mrs. Windolph.

The collection and distribution of the income arising from the trust estate was made by Elizabeth Gravell as trustee, with the exception of three interest payments on the James G. Downward mortgage of \$1,000, which were paid directly to Annie Windolph and not turned over by her to the trustee. This arose by rea-

son of Mr. H. B. McCollum, who acted as agent for the trustee in this matter, not notifying the mortgagor of the assignment of the mortgage to the trustee, and the mortgagor continued to mail the checks for interest to Mrs. Windolph as he had done before the assignment. Mrs. Windolph called this to the attention of both Mr. Hepburn and Mr. McCollum, and thereafter Mr. Downward was notified to send all future payments of interest to Mr. McCollum for the account of the trustee; thereafter the interest was paid to the trustee. The remaining income of the trust estate was collected by Mr. Hepburn. Mr. McCollum and Fox & Sons for account of the trustee, and the checks by which the interest on investments was paid would generally, although not in every instance, be indorsed by the trustee and delivered to Annie Windolph. No account was rendered by the trustee in her lifetime nor was the income paid to Annie Windolph quarterly as provided in the trust deed, nor was any compensation paid the trustee for her services. The income was usually paid to Mrs. Windolph as it was from time to time received, although there was a balance of income in the possession of the trustee at the time of her death which was subsequently accounted for by her estate. At the time of the creation of the trust Mrs. Gravell was consulted about accepting the trust, and was reluctant to assume the duties incident thereto. She did accept the trust, however, upon the agreement that she should be relieved from the burden of collecting the income by Mr. Hepburn and Mr. McCollum, and this arrangement was carried out in the manner hereinbefore set forth.

In connection with the acceptance for the trust of the Da Costa, Shields and Eveland mortgages, bonuses to the amount of \$940 were paid by the borrowers to Annie Windolph. These mortgages were either second mortgages or were upon an undivided interest in the mortgaged premises; for this reason they were not legal investments, and consequently under the terms of the trust required the approval of Annie Windolph before they could be accepted. These bonuses were not paid to the trustee under advice of counsel, because if they had been they could be set off against the mortgage debts as usurious interest. These sums were paid to Annie Windolph as a commission for her approval of the investments.

In reference to the administration of the trust estate by Elizabeth Gravell, the referee finds that there was no undue or dominating influence exercised by Annie Windolph, or any one else, upon the trustee. Mrs. Gravell was an old lady and only consented to serve as trustee upon the condition that she should be as far as possible relieved from attending to the business details of administering the trust. She consulted with Mrs. Windolph in reference to investments, and she also consulted her counsel, Mr. Hepburn, and her agent, Mr. McCollum, on the same subject. There was no evidence before the referee that would justify a finding that the deed of trust in this case was gotten up as a mere subterfuge to permit Annie Windolph in her lifetime to possess and control her estate and at the same time to be free of the post mortem claims of her husband. She fully intended to and actually did assign and deliver to the trustee the property in question for the purposes set forth in the deed, and under the advice of counsel she endeavored to effectuate her intention by fully complying with the requirements of law.

The referee recommended that the bill be dismissed and upon exceptions filed to the report the court, Patterson, J., confirmed the report of the referee and dismissed the bill.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.



John G. Johnson, James P. Fogarty, and Daniel C. Donoghue, all of Philadelphia, for appellant. C. J. Hepburn, of Philadelphia, and J. Frank E. Hause, of West Chester, for appellees.

**MESTREZAT, J.** This is a bill in equity filed by a surviving husband to have declared null and void as to him a voluntary deed of trust of personal property made by his wife, and for a decree that the property embraced in the deed continued to be her property, and at her death formed part of the assets of her estate. The defendants in the bill are a substituted trustee under the deed, the administrator of the original trustee, and the persons named as beneficiaries in the deed. The case was heard on bill, answers, replication, and proof by a referee, who recommended the dismissal of the bill. Exceptions were filed by the plaintiff to the referee's report which were overruled by the court, and a final decree entered dismissing the bill. The plaintiff has taken this appeal.

The deed of trust is dated July 16, 1909, and names as trustee the mother of the settlor, with a provision for the substitution of the Girard Trust Company in case of her death, unless the settlor should appoint another successor. It conveys a part of the settlor's separate personal estate to the trustee in trust to collect the income and pay it to the settlor for life, and after her death to pay an annuity to her husband so long as he remains unmarried, an annuity to a niece, the balance of the income to the trustee herself, and after her death the balance of the income equally to two brothers of the settlor, on their death to their issue, and a part to charity, and if no minor issue of the brothers shall survive them, then the entire estate to charity.

The deed gives the trustee power to change investments, but not to invest in other than legal securities except during the life of the settlor without her consent in writing, and relieves the trustee of liability from loss on investments thus made. The trustee's compensation is fixed at 3 per cent. The settlor reserved the right at any time during her life, in her discretion, to rescind, revoke, or annul the instrument and the trust in whole or in part, and to change or amend its terms and provisions, which action should be evidenced by an instrument in writing.

The bill avers that the deed was executed and delivered, not in good faith, but with the intent, purpose, and object of defrauding the husband, in case he should survive his wife, of his marital rights in the personal property conveyed; that it was testamentary in character and did not constitute a valid gift; that, therefore, the personal property included in the deed formed part of the estate of the wife at the time of her death and should be turned over to her personal representative; that after the execution and delivery of the deed the wife acted as the sole

and absolute owner of the property, and exercised complete dominion over it; and the trustee, who was the wife's mother, and the brothers and niece of the wife all participated with the wife in a scheme whereby the husband would be defrauded of his marital rights, and the deed was executed by the wife without his knowledge, consent, or approval; his first knowledge thereof being obtained after her death.

The two brothers and the niece deny, in their answers and their testimony, the averments as to the alleged collusion in a fraudulent scheme. No evidence of it was produced at the trial, and hence it is eliminated from the case. All the defendants deny the averment that after delivery of the deed the settlor exercised absolute dominion over the property, and aver on the contrary that, immediately upon the execution and delivery of the deed, she parted with the legal title and the physical possession of the entire corpus of the trust fund and thereafter exercised no dominion or control whatever over the trust estate other than as specifically provided in the deed itself.

From the report of the learned referee it appears that the plaintiff and Annie Windolph, the settlor in the trust deed, were married in 1903, and resided together continuously and amicably until her death on September 28, 1911. Elizabeth Gravell, the mother of the wife, and the trustee named in the deed, was 78 years old at the date of the deed, and died September 3, 1911. She is described by one of the witnesses as "a very shrewd, able, and capable business woman." She duly accepted the trust. The referee found that the securities and other personal property enumerated in the schedule were part of the separate estate of Annie Windolph, and at the time of the execution of the deed and as part and parcel of the transaction were absolutely and in good faith transferred and delivered by her to the trustee for the uses and purposes declared in the trust deed; that the deed and the transfer and delivery of the securities under it to the trustee were not made by the settlor in contemplation of death, nor was it intended by her to take effect after her death, and that it was intended by her to take effect and become absolute on the instant of delivery. He further found:

"There was no evidence before the referee that would justify a finding that the deed of trust in this case was gotten up as a mere subterfuge to permit Annie Windolph in her lifetime to possess and control her estate and at the same time to be free of the post mortem claims of her husband. She fully intended to and actually did assign and deliver to the trustee the property in question for the purposes set forth in the deed and under the advice of counsel she endeavored to effectuate her intention by fully complying with the requirements of law."

In conclusion the referee held that the deed of trust is valid, and that the trustee holds title to the securities and other property embraced within the trust for the purpose

of the trust, and not subject to any claim of the plaintiff as the surviving husband of Annie Windolph. The findings of the referee were approved by the learned court below.

The plaintiff, who is the appellant, contends: (a) That the deed of trust is void as to him because it was in fraud of his marital rights; (b) that it is testamentary; and (c) that the evidence established that the instrument operated as a mere nominal transfer of the personal property embraced therein, and did not constitute a perfected gift *inter vivos* valid and binding upon him.

We have examined with care the testimony in the case, and are not convinced that the learned referee is in error as to his findings of facts. The principal testimony as to the purpose of the settlor in declaring the trust is that of the two attorneys whom she consulted in regard to the matter. They both testify at length as to what occurred at the several interviews between them and their client, and, if believed, there can be no reasonable doubt that the deed was executed by her, not in contemplation of death, nor intended to take effect after her death, but to take effect immediately on its execution and for the uses and purposes named in it. The deed was delivered and transfer of the possession of the entire trust estate was made to the trustee. She, or her agents, made the investments and collected the income with the exception of three interest payments on a mortgage made by check to Mrs. Windolph. The referee distinctly finds that there was no undue or dominating influence exercised by Mrs. Windolph or any one else over the trustee, who consulted her counsel and agents as well as her daughter in relation to the investments.

[1] We do not agree with the appellant that the deed was a fraud upon his marital rights. It is the settled law in this state, as was the common law, that during his life a man may dispose of his personal estate, by voluntary gift or otherwise, as he pleases, and it is not a fraud upon the rights of his widow or children. *Ellmaker v. Ellmaker*, 4 Watts, 89; *Pringle v. Pringle*, 59 Pa. 281; *Dickerson's App.*, 115 Pa. 198, 8 Atl. 64, 2 Am. St. Rep. 547. This power arises from the fact that he is the absolute owner, and hence may make a gift, declare a trust, or otherwise dispose of his personal property at his pleasure. During his life his wife and children have no vested interest in his personal estate, and hence they cannot complain of any disposition he sees fit to make of it. Their right to his property attaches only at his death.

"It is scarcely necessary to add," says Sterrett, J., in *Dickerson's Appeal*, supra, "that such gifts, made in good faith as these were, cannot be impeached on the ground that they are a fraud upon the rights of the widow. Nothing is better settled than the power of a husband to dispose of his personal property in good faith, by gift or otherwise, during coverture, free from all post mortem claims thereon by his widow."

The indispensable foundation for any limitation on his control is a fraudulent intent to defeat his wife's statutory rights as widow. *Young's Est.*, 202 Pa. 431, 51 Atl. 1036. If the gift is absolute and accompanied by a transfer of possession with intent to divest the donor of his ownership, although the obvious effect is to defeat the wife's or children's succession to the property at the donor's death, it is not fraudulent, and therefore invalid.

"In our law," says Sharswood, J., in *Pringle v. Pringle*, supra, "no such gift otherwise valid can be impeached as a fraud on a man's wife or children. They have no legal right to any part of his goods, and therefore no fraud can be predicated of any act of the husband or parent to deprive them of the succession."

In *Lines v. Lines*, 142 Pa. 149, 21 Atl. 809, 24 Am. St. Rep. 487, we held that the "good faith" required of the donor or settlor in making a valid disposition of his property during life does not refer to the purpose to affect his wife, but to the intent to divest himself of the ownership of the property. It is therefore apparent that the fraudulent intent which will defeat a gift *inter vivos* cannot be predicated of the husband's intent to deprive the wife of her distributive share in his estate as widow.

[2] We think there can be no doubt that, under the present legislation in this state, a wife has the same power of disposal of her personal estate during coverture that her husband has of his personal property, and that she can create a valid trust of her separate personal estate without the joinder or consent of her husband. Of course at common law this could not be done, as her estate, on the marriage, went to her husband. Our legislation, however, has changed her status as to her separate property, and she now has the same right and power as an unmarried person to acquire, own, control, sell, or otherwise dispose of her property, and may exercise the right and power in the same manner and to the same extent as an unmarried person. The only exceptions are that she may not become an accommodation indorser, maker, guarantor, or surety for another, or mortgage or convey her real estate without the joinder of her husband. With these exceptions, a married woman occupies the same relation to her property as an unmarried person, or, as her husband to his property. In other words, saving the disabilities specified in the statute, her control over, and power of disposal of, her separate estate are the same as if she were a *feme sola*. She may therefore dispose of her personal estate during coverture as she pleases. Her husband has no vested interest in her personal property during her lifetime. If done in good faith and with the intention to divest herself of the ownership, she may sell her personal property, give it away, or make any other disposition of it she desires during her life, and he cannot complain, for the all-sufficient

reason that he has no interest in the property. She is the owner and has absolute control over it, and hence in disposing of it during life she infringes no property or other right of her husband. He does not sustain the relation of creditor to his wife. If she does not die vested of it, he can never acquire any interest in the property. It is manifest, therefore, that having no right or interest in or to the property as husband, there are no marital rights of which he can be defrauded by his wife's disposal of the property during life by gift or otherwise. To hold that a wife cannot declare a trust or make a valid gift inter vivos of her personal property would, in effect, be repealing the statute which frees her from the common-law restrictions and limitations imposed upon her and declares her ownership to be that of a feme sole. In *Saake v. Dörner*, 167 Pa. 301, 31 Atl. 574, we held that the Married Person's Property Act of June 3, 1887 (P. L. 332), was ample to enable a married woman to create a trust of her separate estate. That act was repealed by the act of June 8, 1893 (P. L. 344), the present law on the subject, which extends and enlarges a married woman's control over her separate estate, and confers upon her the same right and power as an unmarried person to acquire, control, and dispose of her property and to make any contract in the exercise or enjoyment of such right and power, requiring, however, the joinder of the husband in mortgaging or conveying her real estate, and prohibiting her from becoming an accommodation indorser, maker, guarantor, or surety for another.

The wife's motive for declaring the trust in the present case was not to defraud her husband, nor did she resort to the deed for the purpose of defeating his marital rights. She did desire to make a legal disposition of the part of her separate personal estate embraced in the deed, and hence she consulted her counsel with that purpose in view. She was advised that she could dispose of it by a proper declaration of trust, and the deed in question was made in pursuance of that advice. It was duly executed and delivered by her to the trustee, and the property embraced in it was transferred to and taken possession of by the trustee. This, as found by the learned referee, was done in good faith and for the purposes set forth in the conveyance.

We do not regard as material whether the plaintiff acquired his knowledge of the declaration of the trust before or after the death of his wife. She was the owner of the property, had the absolute control and power of disposal over it, and hence she was not required to consult or notify her husband of her intention to dispose of it. If she had the power of disposal by deed of trust, notice to her husband of her intention to exercise it would have served no purpose so far as he was concerned. It was equally unimportant that he should have notice if she could not

dispose of the property without his consent. In either case his rights were not affected by his ignorance of the trust during her lifetime.

The present case is not a secret voluntary conveyance of her property by a party in contemplation of marriage without the consent of her intended husband, and hence the numerous authorities cited by counsel holding that such disposition of her property is void have no application here. That was declared to be a fraud upon the marital rights of the other party and, of course, avoided the transfer of the property as to him. The reason of the rule forbidding such antenuptial transfers is well stated by Lowrie, C. J., in *Duncan's Appeal*, 43 Pa. 67, 69, where it is said:

"Common candor forbids that so important a change in his intended wife's circumstances, and in her power over her estate, should be made without his consent, and equity sternly condemns it as a fraud upon his just expectations. This principle of equity has stood the test of experience too long to be open to dispute now. \* \* \* The plaintiff had \* \* \* a right to suppose that he was marrying her with all her legal power over her estate, whereas by this arrangement it was secretly slipped into the hands of trustees, and out of her control, just before the marriage was consummated. This is not just or equitable treatment of the husband. A fraud no greater than this would avoid any other contract than that of marriage; but as this cannot be avoided, equity avoids the contracts that are in fraud of it."

The distinction between a voluntary disposition of property in contemplation of marriage and a gift or declaration of trust of personal estate by a husband or wife during coverture is recognized in the decisions. In the recent case of *Hall v. Hall*, 109 Va. 117, 63 S. E. 420, 21 L. R. A. (N. S.) 533, where it is held that a voluntary deed by a man of his personal estate cannot be set aside by his wife as a fraud upon her rights, the distinction is adverted to, Mr. Justice Whittle saying:

"The fact that the precise question involved in this case has been twice decided by this court renders unnecessary a discussion of the power of the husband to disappoint his widow by divesting himself of title to his personal estate in his lifetime. (Of course, the doctrine is not to be confounded with the principles applicable to the dispositions of property made in contemplation of marriage.)"

[3, 4] The plaintiff further contends that the instrument of July 16, 1909, is not a deed of trust, but is testamentary in its nature. If this be true, it would not, of course, deprive the husband of his interest in the property embraced in the deed, as the wife would die possessed of the property, and hence his statutory interest therein would be unquestionable. It is contended that the instrument bears upon its face evidence that it was not intended to take effect in the lifetime of Annie Windolph. These evidences of its testamentary character, it is claimed, are that the settlor reserved to herself the entire income from the trust property during her life, that the estates of the remaining cestui que trust were not to take effect in possession

or enjoyment until after her death, and that there was a power of revocation reserved in the instrument. We think, however, these reasons are not sufficient to avoid the deed as a valid declaration of trust, and to show that it was intended as a disposition of property to take effect after death. The referee found, on sufficient evidence, that the deed was delivered to the trustee at the time of its execution, together with a transfer of the possession of the property, that the settlor parted with her title to the property at that time and vested it in the trustee for the purposes specified in the deed, and that she at no time intended that the deed of trust should be construed as a will, or that it was executed as a subterfuge to enable her to obtain the control of her property, and at the same time make it effective to defeat her husband's marital rights in her estate. The intention of the settlor at the delivery of the deed was to part with the legal title and the reservation to herself of a life interest, and the enjoyment of the estate until her death did not invalidate the trust as to the beneficiaries named in the deed. *Lines v. Lines*, 142 Pa. 149, 21 Atl. 809, 24 Am. St. Rep. 487; *Nolan v. Nolan*, 218 Pa. 135, 67 Atl. 52, 12 L. R. A. (N. S.) 369; *Wilson v. Anderson*, 186 Pa. 531, 40 Atl. 1096, 44 L. R. A. 542; *Robertson v. Robertson*, 147 Ala. 311, 40 South. 104, 3 L. R. A. (N. S.) 774, 10 Ann. Cas. 1051. In the *Wilson Case* we said, *inter alia* (186 Pa. page 539, 40 Atl. 1099, 44 L. R. A. 542):

"The general rule is that if the intention of the grantor at the time he delivered the deed was to part with the legal title, the trust will be enforced in favor of the beneficiaries, even though their enjoyment of the estate is postponed until the death of their benefactor."

It is equally well settled that a reserved right of revocation is not inconsistent with the creation of a valid trust. *Dickerson's App.*, 115 Pa. 198, 8 Atl. 64, 2 Am. St. Rep. 547; *Smith's Est.*, 144 Pa. 428, 22 Atl. 916, 27 Am. St. Rep. 641; *Stone v. Hackett*, 78 Mass. (12 Gray) 227. In the latter case it is said:

"A power of revocation is perfectly consistent with the creation of a valid trust. \* \* \* If

this right is never exercised according to the terms in which it is reserved, as in the case at bar, until after the death of the donor, it can have no effect on the validity of the trusts or the right of the trustee to hold the property."

Nor do we think the evidence, as claimed by plaintiff, discloses that the instrument was executed with testamentary intent. The settlor was distinctly told by her counsel prior to the execution of the deed that in order to make it effective as a deed of trust, she would have to give up her property and lose all control over it. She clearly understood that to make the deed effective she must deliver it and the property to the trustee. There is nothing subsequent to the execution and delivery of the deed that indicates that this was not done. The evidence which it is claimed shows that the settlor continued to exercise her right as owner over the property was carefully examined by the learned referee, and he found that it did not sustain the plaintiff's contention. Our examination of the evidence has not convinced us that he was wrong. We think that the essential requisites of a valid trust are disclosed in this case, and that the instrument of July 16, 1909, was not a will.

What has been said disposes of the plaintiff's contention that the evidence established that the deed operated as a mere nominal transfer of the property, and did not constitute a valid and perfected gift *inter vivos*. In determining this question the learned referee considered, not only the deed, but all the other evidence bearing upon the subject, and his conclusion was adverse to the plaintiff's contention. The findings of the referee were approved by the court below, which said:

"We have carefully gone over the testimony and have noted the exceptions of plaintiff to the same. There appears to be no substantial error in the referee's findings of fact."

These findings are conclusive upon us in the absence of manifest error, of which we are not convinced.

The decree is affirmed.

(83 N. J. Eq. 510)

**RUBBER & CELLULOID HARNESS TRIMMING CO. v. RUBBER-BOUND BRUSH CO. et al.**

(Court of Chancery of New Jersey. July 18, 1914.)

**1. CORPORATIONS (§ 37\*)—EXISTENCE—TERM—REINCORPORATION.**

Complainant was incorporated, under the general corporation act (P. L. 1849, p. 300), January 23, 1873; its franchise to terminate January 1, 1900. In 1874 the Legislature passed a special act (P. L. 1874, p. 1071) to extend and amend its corporate powers and privileges, section 11 of which provided that the corporation should not, from the date of the act, be bound or affected by the act of 1849, under which it was incorporated, or its supplements, except as prescribed by the act of 1874. *Held*, that complainant's corporate existence under the act of 1874 continued indefinitely, and did not therefore terminate in accordance with its original articles.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 105; Dec. Dig. § 37.\*]

**2. STATUTES (§ 113\*)—PLURALITY OF OBJECTS—SPECIAL LAWS.**

Act March 17, 1874 (P. L. 1874, p. 1071), is entitled "An act to extend, amend, and increase the corporate powers and privileges of the Celluloid Harness Trimming Company," and section 11 of the act provides that the company shall not, from the date of the approval of the act, be bound, controlled, or in any wise affected by the general corporation act of 1849 (P. L. p. 300), under which it was organized, or any provisions thereof not incorporated in the act of 1874. *Held*, that such act is not invalid as containing an object not expressed in its title.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 141-144; Dec. Dig. § 113.\*]

**3. EQUITY (§ 447\*) — BILL OF REVIEW — GROUNDS—NEWLY DISCOVERED EVIDENCE.**

Where the date of the alleged expiration of a corporation's charter appeared from the public records, the fact that its corporate life had expired at the time it brought suit against defendant for unlawful competition could not be said to constitute newly discovered evidence sufficient to sustain a bill to review a judgment against defendant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 1091-1094; Dec. Dig. § 447.\*]

Suit by the Rubber & Celluloid Harness Trimming Company against the Rubber-Bound Brush Company and others. On defendants' motion for leave to file a bill of review. Denied.

See, also, 81 N. J. Eq. 519, 88 Atl. 210.

Carl V. Vogt, of Morristown, for the motion. Thomas M. Kays, of Newton, and Alfred F. Skinner, of Newark, opposed.

**HOWELL, V. C.** In 1911 the Rubber & Celluloid Harness Trimming Company filed its bill in this court against the Rubber-Bound Brush Company and others, to restrain the defendants from the commission of certain acts which it was alleged amounted to unfair trade and unfair competition on the part of the defendants, and such proceedings were had therein that on December 6, 1912, a final decree was entered therein

against the defendants in accordance with the prayer of the bill. 81 N. J. Eq. 419, 88 Atl. 210. The decree was affirmed on appeal. 81 N. J. Eq. 519, 88 Atl. 210.

The defendants now seek to review the decree in that case and set the same aside upon the ground that, at the time of the filing of the bill and of the making of the decree and of the affirmance on appeal, there was no such corporation as the Rubber & Celluloid Harness Trimming Company; its franchise to be a corporation having expired on the 1st day of January, 1900. They allege that they did not discover the fact until after the affirmance, and they allege, therefore, that the fact is a newly discovered fact and amounts to newly discovered evidence, within the rules touching the filing of bills of review.

[1] The facts are these. The complainant was incorporated under the general corporation laws of this state on January 23, 1873, by virtue of an act of the Legislature entitled "An act to authorize the establishment and to prescribe the duties of companies for manufacturing and other purposes," approved March 2, 1849 (P. L. p. 300). The incorporation papers provided that the company would commence its existence on February 8, 1873, and terminate on January 1, 1900.

In 1874 the Legislature passed an act entitled "An act to extend, amend and increase the corporate powers and privileges of the Celluloid Harness Trimming Company"; it was approved on March 17, 1874 (P. L. 1874, p. 1071). This act recited the organization of the company under the act of 1849, and ratified and confirmed the incorporation and the election of directors, and further constituted the company a body corporate in fact and in law by the name which it had chosen, for the purpose of manufacturing and selling celluloid harness trimmings and articles used therewith and for carrying on any business incident thereto in this state. The eleventh section of that act provided that the company should not, from the date of the approval of the act, be bound, controlled, or in any wise affected by the said act of 1849 or any of its provisions or any supplements thereto, except as is in the act of 1874 prescribed. On November 29, 1877, the name of the company was changed to Rubber & Celluloid Harness Trimming Company, being the name now used by it in the prosecution of its business.

From these facts the defendants conceived that the company ceased to exist on January 1, 1900, and that therefore the decree in this suit should not and in fact could not have been made in its favor; there being no legal entity, bearing the name assumed by the complainants, in whose favor the decree could be made.

I think the motion should be denied upon the ground that the act of 1874 continued the existence of the complainant corporation in-

definitely, and that by the plainest construction. After reciting the incorporation of the company under the act of 1849 and the election of directors and the completion of the organization thereunder, it proceeds to ratify all that had been done in the past with regard to those matters and to reincorporate it (section 1), and then it provides in the eleventh section that, after the approval of the act of 1874, the company should cease to be bound, controlled, or in any wise affected by the act of 1849, or by any of its provisions, or by any supplements thereto, except as is prescribed in the act of 1874. I do not see how words could make it plainer that it was the intention of the Legislature to withdraw the corporation from the operation of the general corporation laws and place it under the supervision of the act of 1874.

[2] It is claimed, however, that this act is unconstitutional, for the reason that it violates a provision of the Constitution then in force, which required that every law should embrace but one object, and that such object should be expressed in the title. Particularly is this objection urged to section 11. On this point the facts are quite similar to those in the case of *State ex rel. Walter v. Town of Union*, 83 N. J. Law, 350. There the act complained of was entitled "An act to amend an act to incorporate the town of Union in the township of Union in the county of Hudson, approved March 29, 1864." P. L. 1868, p. 351. This act validated an ordinance passed by the town of Union, but passed irregularly, for the construction of a sewer in the Hackensack plank road. It is claimed that this purpose was not expressed in the title. The Supreme Court, however, held the contrary. The opinion says:

"The unity of the object must be sought in the end which the legislative act purposes to accomplish, and not in the details provided to reach that end. The degree of particularity which must be used in the title of an act rests in the legislative discretion, and is not defined by the Constitution. There are many cases where the object might with great propriety be more specifically stated; yet the generality of the title will not be fatal to the act if, by fair intendment, it can be connected with it."

And it holds the general title, which was given to the act, to be in accordance with the provisions of the Constitution. To the same effect is *State ex rel. Doyle v. Newark*, 34 N. J. Law, 236, also a case in the Supreme Court. The same rule was announced by the Court of Errors and Appeals in *Newark v. Mount Pleasant Cemetery Company*, 58 N. J. Law, 168, 33 Atl. 396, and by Chancellor McGill in this court in *Stockton v. Central Railroad*, 50 N. J. Eq. 52, 69; *Sawter v. Shoen-thal*, 83 N. J. Law, 499, 83 Atl. 1004; *Shultise v. O'Neill* (Sup.) 88 Atl. 854. Following these authorities I must conclude that the act is constitutional.

[3] There is another reason why this motion cannot prevail. It is claimed that the evidence of the nonexistence of this corpora-

tion consists of certain public records to which every person has free access. The evidence so called was as accessible to the defendant at the time this suit was brought as it is to-day. The public offices in which it resides remain to-day as they were then, and, so far as I can see, the only possible reason for calling the evidence newly discovered evidence is that it was not searched for at the time when it should have been set up by proper pleading in the cause. The whole subject of newly discovered evidence, so far as it applies to bills of review, was discussed by Vice Chancellor Garrison in *Richards v. Shaw*, 77 N. J. Eq. 399, 77 Atl. 618; quoting from earlier cases, he says:

"When application is made to file a bill of review upon the discovery of new matter, the rule is that the matter must not only be new, but must be such as the party, by the use of reasonable diligence, could not have known" of it. "If there be any laches or negligence in this respect, that destroys the title to the relief."

Such a bill (of review) must rest upon some new matter which has been discovered after the decree and could not possibly have been used when the decree was made. In my opinion the evidence, which is now claimed to be newly discovered, is not such in any sense whatever. It cannot be called newly discovered evidence for the purpose of a bill of review, because it did not occur to the defendant to make a search for it.

The motion must be denied.

#### SCHARF v. REISER.

(Supreme Court of New Jersey. June, 1914.)

#### 1. STATUTES (§ 51\*)—INCORPORATING LAW BY REFERENCE.

P. L. 1912, p. 630, as to jurisdiction of "disputes involving the domestic relation," in defining such term to mean all complaints for violation of the Disorderly Persons Act of 1898 (P. L. 1898, p. 942), does not provide that any existing law, or part thereof, shall be made or deemed a part of the act, or shall be applicable, within the prohibition of the Constitution that this shall not be done, except by inserting it.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 48; Dec. Dig. § 51.\*]

#### 2. STATUTES (§ 64\*)—EFFECT OF PARTIAL INVALIDITY.

If P. L. 1912, p. 630, as to jurisdiction of "disputes involving the domestic relation," in defining such term by reference to an existing law, be considered in violation of the Constitution, it could be disregarded as a separable provision, leaving in effect the further definition thereof, as all charges against any person for abandonment of wife or children.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 58-66; Dec. Dig. § 64.\*]

#### 3. STATUTES (§§ 107, 117\*)—TITLE AND SUBJECT.

The title of P. L. 1912, p. 630, "An act providing for the hearing and determination of disputes or matters affecting the domestic relation, and conferring jurisdiction on the county juvenile courts," not only embraces, but expresses, the single object of the act, the hearing and de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

termination of disputes or matters affecting the domestic relation.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 121-134, 154-157; Dec. Dig. §§ 107, 117.\*]

**4. HUSBAND AND WIFE (§ 815\*)—ABANDONMENT—SUPPORT—ORDERS—COMMITMENT TO JAIL.**

Under the Poor Law (P. L. 1911, p. 403, § 83), providing that an order for support shall provide for a bond, and that in default thereof accused shall be committed till it be given, unless, in the discretion of the magistrate, the giving of it be suspended, a provision of the judgment that in default of payments to the overseer of the poor, defendant be committed to jail, there to stand committed till the further order of the court, amounting to a committing at the discretion of the court, is unauthorized.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 679-682; Dec. Dig. § 315.\*]

Proceeding by Jacob Scharf, overseer of the poor of the town of Union, against Albert Reiser. There was a judgment against defendant, and he brings certiorari. Reversed.

Harlan Besson, of Hoboken, for prosecutor. Merritt Lane, of Jersey City, for defendant.

SWAYZE, J. [1-4] This is a proceeding under chapter 360 of the Laws of 1912. I see no force in the objection to the constitutionality of this act. The reference to the act relating to disorderly persons does not amount to a provision that any existing law, or any part thereof, shall be made or deemed a part of the act, nor does it intend that any existing law, or part thereof, shall be applicable. All it does is to define the words "disputes involving the domestic relation" by a reference to the Disorderly Persons Act of 1898 (P. L. 1898, p. 942). Even if this were objectionable under the constitutional provision (and I think it is not), it is a severable provision of the act of 1912, which would still suffice to give the juvenile court jurisdiction of all charges against any person for abandonment or nonsupport of wives or children. That is quite enough to cover the present case. Nor do I find any difficulty in the title of the act. It seems to me that it not only embraces, but expresses the object of the legislation, and has but a single object in view, viz., the hearing and determination of disputes or matters affecting the domestic relation. As a part of that scheme jurisdiction is conferred upon the juvenile courts. The procedure now is governed by Poor Law of 1911, c. 186. This makes a change in that it permits the wife of a deserting husband to make a complaint without the intervention of the overseer of the poor. That was done in this case, and I see no objection to it. The procedure is that pointed out in sections 27 to 33, inclusive, and the procedure seems to have been carefully followed in all respects except one. The order authorized by section 33 provides for a bond, and, in default thereof, that accused shall be committed to the county jail or penitentiary until such bond shall be given, unless, in the discretion of the magistrate, the

giving of the bond is suspended. The judgment in this case did not follow the language of the act, but provided that "in default of payments to the overseer of the poor, Reiser should be committed to the county jail, there to stand committed until the further order of the court, unless he shall sooner be discharged by due process of law." This amounts to committing him at the discretion of the court, and I find no statutory authority for that procedure.

The judgment, therefore, I think must be reversed.

**CIVIL SERVICE COMMISSION v. O'NEILL†**

(Supreme Court of New Jersey. Nov. 19, 1913.)

(Syllabus by the Court.)

**MUNICIPAL CORPORATIONS (§ 182\*)—CHIEF OF POLICE—UNCLASSIFIED SERVICE.**

The chief of police in cities governed by the charter act of 1908, p. 486 (2 Comp. St. 1910, p. 1239), is by said act constituted a head of department, and therefore in the unclassified service under section 11 of the Civil Service Act of 1908, p. 235 (3 Comp. St. 1910, p. 3795).

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 466-471; Dec. Dig. § 182.\*]

Application by Edmund Wilson, Attorney General, on the relation of the Civil Service Commission of New Jersey, for a writ of quo warranto against William H. O'Neill. Demurrer to information sustained. Judgment affirmed by Court of Errors and Appeals, 91 Atl. 644.

Argued before GUMMERE, C. J., and PARKER and KALISCH, JJ.

Nelson B. Gaskill, Asst. Atty. Gen., for relator. Borden D. Whiting, of Newark, for respondent.

PARKER, J. The controversy relates to the office of chief of police of the city of East Orange. The information attacks the appointment of respondent, O'Neill, by the mayor and his confirmation by the council as in contravention of the Civil Service Act of 1908 (C. S. p. 3795), which was adopted by East Orange. The information sets up that East Orange adopted as its charter the referendum charter act of 1908 (P. L. p. 486; C. S. p. 1239), and also adopted the Civil Service Act: that the Commission classified the office of chief of police in the competitive class, and gave due notice thereof, but that disregarding the Civil Service Act the mayor nominated respondent to the council as chief of police, the nomination was confirmed by the council, and that he assumed and still exercises said office unlawfully in violation of said act. The demurrer specifies several grounds, of which only the first and third need be considered. The first is, in substance, that the classification of the office in question by the Commission was without warrant of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes

† Duplicate opinion of 88 Atl. 946.

law; the third, that the Civil Service Act does not apply to said office.

The charter act provides, among other things, that one of the city officers shall be a chief of police (section 5); that he shall be the head of the police department (section 27); that all city officers except such as are to be elected or otherwise appointed shall be appointed by the mayor, subject to confirmation by the council. By subsections 37 and 39 of section 37 it is made the duty of the council when so directed as a result of an election based on petition of voters, etc., to organize a board of police commissioners, who shall be city officers, and "whose powers and duties shall be to control and regulate the appointment, suspension and dismissal of the officers, men and employes of the police department of said city, to fix their compensation, make rules and regulations for the government of the department," etc. It is stipulated that on May 4, 1909, these provisions were submitted to the voters and adopted, and that a board of police commissioners was organized accordingly. The Civil Service Act was adopted in 1910, and the appointment of O'Neill followed in 1911.

We are clear that whatever weakness may inhere in respondent's title to the office, it is invulnerable to the attack made by the present information. By section 11 of the Civil Service Act, all heads of departments of municipalities adopting the act are in the unclassified service, and therefore the Commission has no official voice in their appointment. The chief of police in cities governed by the charter act of 1908 is, as we have seen, the head of a department, viz., the police department, by the express language of the act. With these major and minor premises, the syllogism can be completed in no other way than by concluding that the chief of police in cities governed by the act of 1908 is in the unclassified service. This result we consider to be perfectly plain notwithstanding the organization of the board of police commissioners pursuant to the election. The point suggests itself that by reason of the creation of the police board the chief of police ceases to be the head of the department, and that the board is substituted as such head. We think, however, there is no force in this point.

The scheme of the charter act is obviously to provide an alternative system for the supervision of the entire police department by a municipal agency. In cases where the charter act is adopted generally, the plan provided by that act is that the mayor or the council, or both, shall act as a supervisory power and make the necessary rules and regulations for the conduct of the department. This is the course generally pursued in the smaller municipalities, and was evidently intended by the Legislature to be pursued in cities coming within the classification of the act where it was not thought worth while to assign these duties to an agency exclusively

constituted to perform them. On the other hand the citizens might prefer to have such special agency, and in that case by voting for and organizing the police commission they could obtain a body created expressly and exclusively for the purposes specified in the act and already set forth. This leaves the chief of police as still the head of the department, subject to the executive and legislative and supervisory action of the board of police commissioners, just as he was theretofore subject to the legislative and executive and supervisory action of the mayor and council.

This result makes it unnecessary to decide whether after the organization of a police commission the appointment of the chief remains with the mayor or is transferred to the Commission. There seems to be good ground for an argument that the chief is but one of the "officers, men and employes of the police department" whose appointment is expressly committed to the board of police commissioners when organized; but the point is not strictly before us and we refrain from passing upon it.

There will be judgment for the respondent on the demurrer.

(86 N. J. L. 377)

**CIVIL SERVICE COMMISSION v.  
O'NEILL. (No. 88.)**

(Court of Errors and Appeals of New Jersey.  
May 8, 1914.)

Appeal from Supreme Court.

Application by Edmund Wilson, Attorney General, on the relation of the Civil Service Commission of New Jersey, for a writ of quo warranto against William H. O'Neill. Demurrer to information sustained (91 Atl. 643), and relator appeals. Affirmed.

Nelson B. Gaskill, of Trenton, for appellant. Borden D. Whiting, of Newark, for respondent.

**PER CURIAM.** The judgment under review herein should be affirmed for the reasons expressed in the opinion delivered by Mr. Justice Parker in the Supreme Court. 91 Atl. 643.

(88 Conn. 494)

**EASTON v. CONNECTICUT CO. et al.**

(Supreme Court of Errors of Connecticut. July 17, 1914.)

**1. APPEAL AND ERROR (§ 664\*)—REVIEW—RECORD—ERROR.**

Where, upon defendants' motion, the entire testimony was certified up as provided by Gen. St. 1902, § 797, the transcript of the evidence supersedes the findings.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2856-2859; Dec. Dig. § 664.\*]

**2. APPEAL AND ERROR (§ 219\*) — REVIEW — PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.**

Where defendant made no application in the court below to amend the findings of the trial court, he cannot on appeal attack the findings as being unsupported by the evidence, particularly where the entire testimony was certified up in accordance with Gen. St. 1902, §

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



797, for it superseded the findings and rendered formal corrections immaterial.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1315, 1317-1320, 1322, 1323; Dec. Dig. § 219.\*]

### 3. TRIAL (§ 253\*) — INSTRUCTIONS IGNORING ISSUES.

In a personal injury action by a passenger on an auto bus, hurt in a collision between the bus and a street car, where the court charged that the passenger was bound to show by a preponderance of the evidence that she was in the exercise of due care, and was not guilty of any act proximately contributing to her injury, and that, if the jury so found, they should consider the case against both the proprietor of the bus and the street railway company separately and together, and that, if either or both was negligent, judgment should be accordingly, and that, in considering the negligence of the driver of the bus, his failure to begin to turn out promptly might be considered, the question of proximate cause was not ignored.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

### 4. TRIAL (§ 260\*)—INSTRUCTIONS—REFUSAL.

Where the court's general charge sufficiently presents the law applicable to the issues, it is not improper for it to refuse further charges.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. Dig. § 260.\*]

### 5. APPEAL AND ERROR (§ 1002\*)—REVIEW—VERDICT—CONFLICTING EVIDENCE.

Where the evidence is conflicting, the verdict cannot be disturbed on appeal, unless it appears that the jury could not, as reasonable men, have reached the decision rendered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

Appeal from Superior Court, New Haven County; William L. Bennett, Judge.

Action by Emma L. Easton against the Connecticut Company and another. Judgment was for plaintiff for \$2,300, and defendants appeal. Affirmed.

Harrison T. Sheldon and Thomas M. Steele, both of New Haven, for appellant Connecticut Co. William F. Alcorn, of New Haven, for appellant Wolven. Walter J. Walsh and Charles J. Martin, both of New Haven, for appellee.

RORABACK, J. This action was brought to recover damages for injuries sustained by the plaintiff in a collision between an open double-track trolley car of the defendant the Connecticut Company and the defendant Wolven's automobile bus, in which the plaintiff was riding, as a passenger, for hire.

It was conceded that the collision occurred about 8:30 p. m. on September 9, 1913, on Whalley avenue, in New Haven, at a point some distance west of Westville Center. The automobile bus in which the plaintiff was riding was proceeding in a westerly direction and the trolley car in an easterly direction. The collision occurred about midway between Dayton street and West Prospect street. The defendant company maintains a single-track trolley line on Whalley avenue at this point where the accident occurred. The roadway to

the north of the tracks at the time of the accident was a fine macadam pavement about 26 feet wide. On the south side the roadway was rough and narrow, and all travel was on the north. The land north of the street line slopes off precipitately to the West river. To the south of the street line the land of the adjoining property is practically level with the street. There are a few houses on the south side; the fifth building west of Dayton street is a hotel.

When the collision occurred the lights on the car and automobile were lighted, and each vehicle was visible to and seen by the driver of the other when they were over 1,000 feet apart.

After the collision the trolley car came to a stop in the vicinity of the hotel driveway. As a result of the collision, the plaintiff was thrown into the trolley car, and was found unconscious lying on one of the forward seats of the car, with her head toward the south side and her feet toward the north side of the car. All the upright posts on the north side of the car were broken away, except the front post back of the motorman, and a sliver was broken from the rear of this post.

The left running board of the trolley car at the time of the collision was turned up, and was uninjured, except that the rear part was broken, and there was a scratch running the entire length from a point about 3 feet from the front end.

The plaintiff seeks to recover damages for the concurrent negligence of both defendants. Both of them denied the acts of negligence alleged against them in the complaint. The defendant Wolven also alleged in his answer that it was the negligence of the Connecticut Company that caused the injury.

The verdict was against both defendants.

After the verdict was rendered both defendants moved to set aside the verdict, which motion was denied. Both of the defendants appealed. The defendant Wolven assigned but one error. This related to the refusal of the superior court to set aside the verdict.

The plaintiff (appellee) filed a plea in abatement in this court to the appeal of the defendant Wolven, which plea was sustained.

The Connecticut Company appealed from the refusal of the court to set aside the verdict, and, as additional reasons of appeal, assigned the refusal of the court to charge the jury as requested.

[1, 2] Three of the reasons of appeal of the defendant company relate to alleged errors of the court below in finding without evidence that the plaintiff offered evidence to prove and claim to have proved certain facts. No correction of the finding in these particulars is asked for in the assignment of errors, as is provided in section 797 of the General Statutes, but, upon the defendant's motion, the entire testimony has been certi-

led up as provided in that section. This transcript supersedes the finding as disclosing what the evidence tended to prove, so that any formal corrections of the finding in respect to the matters complained of would be unimportant as bearing upon the only assignment of error touched by them. *Powers v. Connecticut Co.*, 82 Conn. 665, 670, 74 Atl. 981, 26 L. R. A. (N. S.) 405. These corrections were material to no other claim of error than that the court erred in not setting aside the verdict.

[3, 4] Complaint is made in the appeal that at least seven requests to charge which related to the question of proximate cause were not complied with. The whole charge proceeded upon the theory that it was incumbent upon the plaintiff to prove every material allegation contained in her complaint by a preponderance of the evidence.

The jury were informed that:

"She must have satisfied you by a fair preponderance of the evidence that she was in the exercise of due care; that she was not guilty of any act which contributed proximately to her injury. Now, if you find that she was acting with due care, then she must prove that her injuries were occasioned or caused by the negligence of both the defendants or of one defendant. You will consider the case brought here against these defendants separately and together. It may be that one of them is negligent and the other not; or it may be that they are both negligent; or it may be that neither of them is negligent. So you will consider the case against each of them separately, and then all the facts together, in order to determine whether any liability has been proven, and, if so, whether that liability is against both, or against one, and against which one."

In speaking of the conduct of Wolven, who was in charge of the auto bus, the court said:

"He says that if his steering gear had not broken down he would have escaped from that place; but I think you should consider, in determining his liability, whether he was free from negligence in taking his car so near to the trolley track in the face of an approaching car before he tried to steer out. I think that you must consider all the evidence upon that point to see when he began to edge over towards the rail, and whether he did not know, or ought not to have known, that he was coming into a dangerous proximity to it, considering the fact that he saw a car approaching. If he was negligent in that respect, why I think you would say that that negligence was a proximate cause of the injury, notwithstanding that after he had got into a dangerous place he failed to escape from it through no fault of his own."

The instructions adequately stated the law upon the material points to which attention was directed by these requests, and there is no foundation for the defendant's criticism that the question of proximate cause was entirely ignored in the charge as given.

Counsel for the defendant requested 15 special instructions. The court, however, did not give any of them, except as they were embodied in the general charge. The court was under no duty to notice these requests specifically as they were made. It is sufficient if the law arising upon the evidence

and issues properly presented is given by the trial judge with such fullness as to correctly guide the jury in its finding. This was done in the present case.

The defendant contends that the court erred in refusing to set aside the verdict, which was against the evidence.

[5] It was conceded that there was a collision, and that the plaintiff was seriously injured in consequence thereof. No claim was made by the Connecticut Company that the plaintiff was not in the exercise of due care when the accident occurred. The main fact relied upon by the plaintiff as against the trolley company was that the motorman failed to exercise reasonable vigilance in watching the movements of the automobile when he knew, or ought to have known, that there was danger of a collision.

The complaint alleged that:

"While the servant of the Connecticut Company, the motorman on said car, was propelling the same at a dangerous rate of speed for said time and place, and while he was negligent in failing to keep a constant lookout for teams and vehicles as he approached said corner, and failed to watch the movements of the defendant Wolven's automobile truck."

It was conceded that the motorman of the trolley car could have seen the automobile when he was more than 1,000 feet away, and that he could have watched it from that time until the vehicles came together.

Most of the evidence upon this part of the case was conflicting and capable of a different interpretation, and this issue was peculiarly within the province of the jury as a question of fact.

The jury has found for the plaintiff.

The superior court has heard all the evidence, and denied the motion to set aside the verdict. The defendant now insists that these conclusions are not justified by the evidence, and we are asked to set them aside. This we cannot do, unless it appears that the jury could not have reasonably reached the decision embodied in their verdict. This does not appear.

There is no error. The other Judges concur.

(83 Conn. 357)

#### DABOLL v. MOON et al.

(Supreme Court of Errors of Connecticut. July 13, 1914.)

#### 1. WILLS (§ 647\*)—LEGACIES—CONDITIONS—RESTRAINT OF MARRIAGE.

While a condition, attached to a legacy, in restraint of marriage generally is invalid as against public policy, a condition that the legatee shall not marry a certain person, or a legacy to a widow to divest if she marries, is valid.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1533-1538; Dec. Dig. § 647.\*]

#### 2. WILLS (§ 647\*)—LEGACIES—CONDITION—RESTRAINT OF MARRIAGE.

The condition of a legacy to testator's son to be paid to him on the death of his present wife, or if he should obtain a divorce from her,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

or should become separated from her, or if within a year after divorce or separation he should become married to a good respectable woman, was not contrary to public policy as a restraint of marriage.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1533-1538; Dec. Dig. § 647.\*]

Case Reserved from Superior Court, New London County; Joel H. Reed, Judge.

Suit by Charles H. Daboll, as administrator de bonis non and trustee of the will of John Moon, deceased, against Jesse A. Moon and others, to construe the will. Case reserved from superior court. Superior court advised to render judgment that the bequest was not violative of public policy or good morals.

Perry J. Hollandersky, of New London, for plaintiff. Abel P. Tanner and Nathan Belcher, both of New London, for Willard B. Moon. William J. Brennan, of New London, for Jesse A. Moon.

THAYER, J. The plaintiff is administrator d. b. n. with the will annexed of the estate of John Moon, who died in 1898, leaving real and personal estate and three sons, John H. Moon, Jesse A. Moon, and Willard B. Moon. One half of the testator's estate is given by the will to Jesse A. Moon upon a condition relating to the son John H., which is now unimportant, as the latter died in 1899. The other half of the estate was disposed of by the following provisions of the will:

"Upon the death of the present wife of said Willard B. Moon, or if he shall obtain a divorce from her or shall become separated from her, at the end of a year from said divorce or separation, or if within said year he shall become married to a good respectable woman, then in either of said events the said Willard B. Moon shall be entitled to and shall receive the income and profit from said trust fund after the payment therefrom of one dollar and fifty cents per week to said John H. Moon, but if said Willard B. Moon shall ever return to live with his present wife his interest in said trust shall be divested and he shall not be entitled to receive any of the benefits thereof. It is my will that my said trustee may if he deem it best use and expend a part of the whole of the principal of said trust for the benefit of said Willard B. Moon, or for any of the purposes of this trust, giving him full power to use his discretion in the management, interpretation and administration of this trust.

"Upon the death of said Willard B. Moon the trust shall continue for the benefit of said John H. Moon as aforesaid, if he still be living, and the funeral expenses of said Willard B. Moon shall be paid out of the same, and if said Willard B. Moon shall have married a good respectable woman as aforementioned, and shall have had issue by her, the income and profit of said trust that would have gone to said Willard shall be expended by my trustee for the benefit of said issue, but if said John H. Moon be then dead, and in any event upon the death of both Willard B. Moon and John H. Moon, after the payment of their funeral expenses said trust shall divest and whatever of said trust fund then be remain—I give, devise and bequeath to the issue of said Willard B. Moon if he have any other than from his present wife and failing them, to said Jesse A. Moon his heirs and assigns forever."

Jesse A. Moon was named as executor and qualified as such, and as trustee under the provision quoted. He afterwards resigned as executor and trustee, and the plaintiff was appointed trustee in his place.

Willard B. Moon and his wife, referred to in the will, are both living, and he has never separated from her by divorce or otherwise, and he has no children. He claims that the condition upon which the testator made the gift to him of the income of the trust fund depend was illegal as against public policy, as encouraging a separation by him from his wife, and therefore void, and that the gift of the income was therefore absolute, and that he is entitled to it as it accrues.

[1] Cases can be found which hold, and perhaps the weight of authority supports the view, that a gift or legacy made upon a condition which constitutes an inducement to a married person to obtain a divorce or to live separate from the other spouse is void as against public policy. *Conrad v. Long*, 83 Mich. 78, 79; *Hawke v. Euyart*, 30 Neb. 149, 46 N. W. 422, 27 Am. St. Rep. 391. So it is said are conditions in restraint of marriage. But the rule in the latter case is qualified, and there are exceptions to it. The condition must be in restraint of marriage generally. A condition that the legatee shall not marry a certain person is valid. A legacy to a widow, conditioned to divest if she marry, is valid. *Chapin v. Cooke*, 78 Conn. 72, 46 Atl. 282, 84 Am. St. Rep. 139. *Bigelow*, in a note to *Jarman on Wills* (6th Ed.) vol. 2, p. 49, a. p. 886, says:

"If the question were open, there might be ground to inquire whether conditions in restraint of marriage generally are contrary to public policy."

[2] The present case is not one where the condition is in restraint of marriage, although somewhat akin to it. The separation which it is claimed that the condition in question tends to promote offers no encouragement to celibacy on the part of the donee. The condition rather encourages a new marriage, for an early remarriage advances the time at which the income shall be paid to him if the condition is fulfilled. The marriage here was a fact at the time the will was made and went into effect. The gift was to vest in the donee upon the death of his wife, upon his divorce from her, or if he permanently separated from her. We are asked to say that the condition upon which the legacy was to vest is void as against the public policy of this state, and that the result of this is to make the gift absolute, so that it vests in the donee without performance of the condition. It is clear from the language of the will that the result claimed would be directly contrary to the expressed intent of the testator. He did not intend that the income should vest in Willard if he should not become separated from his wife by her death, a divorce, or in some other way. The cardi-

mal rule in the interpretation of wills is to seek and carry out the testator's intent. *Wolfe v. Hatheway*, 81 Conn. 151, 154, 70 Atl. 645. This rule is in direct conflict with the one which is urged upon us by counsel for the donee, namely: That as the condition is unlawful the law understands that it is impossible of performance, and that this impossibility is the equivalent of performance. We are not required to attempt a reconciliation between these rules in the present case; the conclusion to which we have come upon the other branch of the case rendering it unnecessary.

Upon the facts appearing in this record it cannot be said that the condition upon which the income of this trust fund was bestowed was against public policy. It has never been the policy of this state as it formerly was the policy of the church to compel people married to each other to continue for life in that relation and cohabit together, regardless of their inaptitude for such cohabitation, and however unfitted they may be in disposition and temperament to mutually perform the duties of the marriage relation. The state does not favor divorces; but it allows them for several causes, because it believes that the interests of society will thereby be better served, and that its own prosperity will thereby be promoted. *Dennis v. Dennis*, 68 Conn. 186, 197, 36 Atl. 34, 34 L. R. A. 449, 57 Am. St. Rep. 95. So, too, the state deems it to be in the public interest that husband and wife in some cases shall live separate and apart, although not divorced. In 1895, before the will under consideration took effect, a law, now General Statutes, § 1354, was passed making the marrying or living together as man and wife of any man and woman, one of whom is epileptic, imbecile, or feeble-minded, a criminal offense punishable by imprisonment in the state prison. This law, as to one class of persons with whom it deals, was sustained as constitutional by this court as legislation in the interest of the public health. *Gould v. Gould*, 78 Conn. 242, 245, 61 Atl. 604, 2 L. R. A. (N. S.) 531. To condition a gift upon the doing of what the state treats by its legislation as promotive of the public interest and its own prosperity, or what it requires to be done in the interest of the public health, cannot be against public policy. To make the condition void as against public policy, it must appear from the language of the will alone or in connection with extrinsic facts that the testator in the particular case in question conditioned his gift upon an illegal divorce or separation. Numerous cases are to be found which support the view that, where a gift is upon condition that the donee shall obtain a divorce or live separate from husband or wife, the condition is valid, when it appears from the will in connection with the surrounding circumstances that a legal divorce or separation was intended, or where a separation already existed or a suit for divorce was pending at the time that the will

was made. *Born v. Horstman*, 80 Cal. 452, 22 Pac. 169, 353, 5 L. R. A. 577; *Cowley v. Twombly*, 173 Mass. 393, 397, 53 N. E. 886, 46 L. R. A. 164; *Coe v. Hill*, 201 Mass. 15, 21, 86 N. E. 949; *Thayer v. Spear*, 58 Vt. 327, 329, 2 Atl. 161; *Ransdell v. Boston*, 172 Ill. 439, 50 N. E. 111, 43 L. R. A. 526; *Cooper v. Remsen*, 5 Johns. Ch. (N. Y.) 459.

Where it is possible that the condition may be legally performed, it will not be presumed that the testator intended an illegal performance. The present gift was upon alternative conditions, one of which was the death of Willard's wife. It will not be presumed that the testator, in the absence of express language so directing, intended that his son should procure his wife's death. His counsel admit that, if the wife's death had been the only condition of the vesting in him of the income, the condition would have been valid. But the will holds out the same inducement to him to procure her death which it does to procure an illegal divorce or separation from her. In *Cowley v. Twombly*, 173 Mass. 393, 53 N. E. 886, 46 L. R. A. 164, supra, where the facts were somewhat similar to those in this case, the court said:

"The scheme of the trust no more tended to induce the son improperly to procure a divorce between himself and his wife, than to induce him to procure her death."

Upon the face of the will, therefore, the condition upon which the income was to vest in Willard was not void, and he has not shown any facts extrinsic of the will which compel a construction which will make it void as against public policy.

There was no occasion for the plaintiff as administrator or as trustee to bring this action. There is no one at present to demand the distribution of the corpus of the trust estate. The son Willard is claiming only the income. The disposition of the corpus of the estate is in no way affected by the validity or invalidity of the condition upon which the gift of the income is limited. The only question which the plaintiff has now to consider, either as trustee or administrator, is whether Willard is now entitled to receive the income. Before the time arrives for the distribution of the body of the estate there may be issue of Willard, either by his present or another wife, to make their own claims as to its distribution. The only question between the parties now being whether Willard is entitled to the income, it could have been settled in an action at law brought by Willard against the present plaintiff as trustee, and such an action should have been brought, instead of bringing the present apparently amicable suit.

The superior court is advised to render judgment that the condition upon which the gift of the income to Willard B. Moon is made is not void as against public policy and good morals. No costs will be taxed in this court in favor of either party. The other Judges concurred.

(88 Conn. 382)

## NYSTROM v. BARKER et al.

(Supreme Court of Errors of Connecticut. July 13, 1914.)

## 1. APPEAL AND ERROR (§ 699\*)—REVIEW—NECESSITY OF FINDING OF FACTS.

The several parts of a charge complained of cannot be considered, in the absence of a finding of facts as required by the rules.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2928-2930; Dec. Dig. § 699.\*]

## 2. APPEAL AND ERROR (§ 694\*)—REVIEW—FINDINGS.

The incorporation in a finding of the entire evidence properly presents the question of a directed verdict and that arising upon a motion to set aside a verdict, but nothing more, since the Supreme Court cannot find facts from the evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2910, 2915; Dec. Dig. § 694.\*]

## 3. APPEAL AND ERROR (§ 1071\*)—HARMLESS ERROR—INADEQUATE FINDINGS.

Where the only questions on appeal are those raised by the motions to direct a verdict, and to set aside a verdict for plaintiff, appellants are not prejudiced by the inadequacy of the lower court's finding of facts.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4234-4239; Dec. Dig. § 1071.\*]

## 4. CONTRACTS (§ 179\*)—CONSTRUCTION—PARTIES.

A contract whereby plaintiff agreed to build a garage "for the Barker Auto Company," signed by the defendants, who were husband and wife, individually, containing no words purporting to bind the corporation, or indicating that the signers acted officially or as agents, was the contract of its individual signers, and not of the corporation; the words "for the Barker Auto Company" referring to the use of the structure, and not to the capacity of the parties signing the contract.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 777, 778; Dec. Dig. § 179.\*]

## 5. HUSBAND AND WIFE (§ 162\*)—CONTRACTS—WIFE'S SEPARATE ESTATE.

Under Gen. St. 1902, § 591, providing that actions may be maintained against a married woman upon any cause of action accruing before her marriage, and upon any contract by her thereafter upon her personal credit for the benefit of her separate or joint estate, a contract by a married woman, married before 1877, for the construction of a garage for a company in which she was a director, and which would indirectly increase the value of her stock therein, was a contract for the benefit of herself and her estate, making her personally liable.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 322, 596, 600, 614, 637-640; Dec. Dig. § 162.\*]

Appeal from Court of Common Pleas, Hartford County; Edward L. Smith, Judge.

Action by Nils E. Nystrom against Mary J. Barker and others. Verdict and judgment for plaintiff, and defendants appeal. No error.

Kendal M. Pierce, of Bristol, for appellants. Epaphroditus Peck, of Bristol, for appellee.

WHEELER, J. The plaintiff sued upon a building contract entitled "Specifications for Carpenter and Mason Work on Garage 60x99

feet, to be built on Riverside Avenue for the Barker Auto Co."; and in its body it provided as follows: "N. E. Nystrom agrees to build garage \* \* \* for the Barker Auto Co." It was signed by the defendants individually.

In their first defense the defendants alleged that the contract sued on was that of the Barker Auto Company, a corporation, and that they signed the same as directors of the corporation, and in its behalf, and not as individuals.

In their second defense they allege fraud by means of false representations.

In a special defense they allege that the defendant Mrs. Barker was and is the wife of the defendant Daniel Barker, and had been married prior to April 20, 1877.

They also filed a counterclaim, alleging that the contract was intended by both parties to be one between the plaintiff and the corporation, and by way of equitable relief claimed, because of the alleged mutual mistake, a reformation of the contract by the addition of the words "Directors of said Corporation" after their signatures.

To the special defense, the plaintiff replied that the contract was made by Mrs. Barker since her marriage upon her personal credit, for the benefit of herself, and of her separate and joint estate. And also that it was entered into by her jointly with her husband for the benefit of her estate and their joint estate.

The issues on the counterclaim were tried to the court and found in favor of the plaintiff.

No evidence of misrepresentation was before the jury. And no evidence was offered aside from the contract to show that the defendants intended to bind the corporation, and did not intend to bind themselves individually.

Two questions only were before the jury: (1) Whether the contract was that of the Barker Auto Company, or that of the individual signers. (2) If the contract was that of the individual signers, whether the marriage of Mrs. Barker prior to April 20, 1877, prevented her becoming liable upon this contract.

[1] The several parts of the charge complained of cannot be considered, in the absence of a finding of facts as required by the rules.

[2] The incorporation in the finding of the entire evidence properly presents the question of a directed verdict and that arising upon a motion to set aside a verdict; further than that it cannot serve, since this court has no power to find facts from evidence.

[3] The defendants are not in this instance prejudiced by the inadequacy of the finding, since the only questions in the case are raised by the motions to direct a verdict, and to set aside the verdict.

[4] The defendants' first claim, that this contract is that of the corporation, and not of the individual signers, is answered by an

inspection of the contract. It contains no words purporting to bind the corporation, neither is it signed in its behalf, nor do the signatures indicate in any way that the signers acted officially or as agents, or intended so to act. *Jacobs v. Williams*, 85 Conn. 219, 82 Atl. 202, Ann. Cas. 1913B, 900.

The words in the heading and body of the contract that the garage is "for the Barker Auto Company" refer to the use of the structure, and to its building. By no possible construction can the words be construed to refer to the liability imposed by the contract, or to the capacity in which its makers signed.

There is thus nothing in the body of the contract indicating a corporate obligation, and nothing in connection with the signatures expressive of an agency, or of the official character of the signers.

It is not a case of mutual mistake. Nor is it an attempt to hold a principal by showing its actual interest without attempting to secure the release of individual signers. Nor is it a case of an ambiguous contract leaving the real contract open to proof as some courts hold.

The plaintiff was entitled to have had the jury directed that the contract upon its face was that of its signers, and not that of the corporation.

The verdict of the jury upon the issues as framed meant that they found that the contract was not signed by the defendants as directors of the corporation, and in its behalf. Upon this ground the motion to set aside the verdict was properly denied.

[6] Mrs. Barker owned stock in the Barker Auto Company. For the benefit of that company she and the other directors contracted to build for it a garage. Jointly with her husband she signed this contract. The building of the garage would add to the assets of the company and as a consequence increase the value of her stock interest.

It was thus a contract in fact for her own benefit, and for the benefit of her separate estate. It was as much for her benefit as an addition to her personal chattels, and it can make no difference that in the one case there is a direct increase in the quantum of her property and in the other an increase in its value.

Our statute should not receive a construction which would permit a woman, married before 1877, to buy stock in, become a director of, a corporation, enter upon contracts intended to increase the value of her investments in the corporation, and then retain the benefit and repudiate the obligation of her contract.

This case is one where the wife's contract benefits her and her estate, and was made upon her personal credit. G. S. 1902, § 591. It does not fall within the decisions relied upon by the defendants.

It is not a contract for the benefit of another as in *Freeman's Appeal*, 68 Conn. 533,

37 Atl. 420, 37 L. R. A. 452, 57 Am. St. Rep. 112; *Barlow v. Parsons*, 73 Conn. 606, 49 Atl. 205; *Hart v. Goldsmith*, 51 Conn. 480; and *National Bank of New England v. Smith*, 43 Conn. 327.

It falls within *Bidwell v. Beckwith*, 86 Conn. 463, 468, 85 Atl. 682, *Belden v. Sedgwick*, 68 Conn. 560, 37 Atl. 417, and *Thresher v. Barry*, 69 Conn. 470, 37 Atl. 1064, and comes clearly under the statute.

There is no error. The other Judges concurred.

(38 Conn. 408)

**FARLEY v. NEW YORK, N. H. & H. R. CO.**  
(Supreme Court of Errors of Connecticut. July 13, 1914.)

**1. MASTER AND SERVANT (§ 204\*)—ASSUMPTION OF RISK—FEDERAL EMPLOYERS' LIABILITY ACT—OPERATION.**

The federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), did not abolish the defense of assumption of risk, save where the carrier's violation of some federal statute, enacted for the safety of employes, has contributed to the injury or death of the employe.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 544-546; Dec. Dig. § 204.\*]

**2. MASTER AND SERVANT (§ 217\*)—DEATH OF RAILROAD ENGINEER—ASSUMPTION OF RISK.**

Where an experienced locomotive engineer who was familiar with engines and tenders and their proportions, and who, not only by reason of his frequent and recent service over the portion of the road where he was killed by coming in contact with an electric wire while passing from the cab over the top of the tender in the course of his duties at an overhead bridge, where the wire was necessarily lower than usual, but by reason of special notices given him, knew and appreciated the danger, he assumed, by continuing in his employment, those risks connected therewith which had remained unchanged and unenhanced by any new and negligent act of defendant; and hence there could be no recovery for his death.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

Appeal from Superior Court, New Haven County; William L. Bennett, Judge.

Action by Eugene F. Farley, administrator, against the New York, New Haven & Hartford Railroad Company for personal injuries resulting in the instantaneous death of plaintiff's intestate. From judgment for defendant, plaintiff appeals. No error.

This case was formerly before this court as reported in 87 Conn. 328, 87 Atl. 990. The undisputed evidence established the following facts:

September 28, 1911, the plaintiff's intestate, John H. Bottomley, met his death while engaged in his employment as a locomotive engineer, and while in charge of a locomotive engine hauling an interstate freight train between Stamford, in this state, and New York City. The train was proceeding westward at the time, and approaching an overhead highway bridge in Larchmont, N. Y., known

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

as the Weaver Street bridge. At the time of the accident he had passed from the cab over the top of the tender and the coal therein to ascertain the amount of water in the tank by looking through a manhole at the rear end of the tender used for the purpose of filling the tank, and was returning when, coming into contact with or close proximity to the running wire, he was instantly killed by the electric current. This wire was suspended, along and over the center line of the tracks upon which the train was traveling. It was used for the operation of trains by electricity, and was charged with a current of high voltage, dangerous to the life of a person who should receive it.

Prior to July, 1907, the defendant's line between Stamford and New York City had been operated solely by steam power. At that time its equipment for operation electrically had been completed, and the running of passenger trains by electricity was then begun, and has since been continued. Freight trains continued to be hauled by steam locomotives. The method employed for electrical operation was that known as the overhead system. The equipment required for this method, and that installed, consisted in part of steel structures by the side of and across the tracks for the support of wires running along the center lines of the several pairs of rails. Two of these were messenger wires so-called. They were hung somewhat higher than the third, which was the running or feed wire from which the current was taken.

The running wire, when suspended at the standard height, was about 22½ feet above the level of the top of the rails. To enable these wires to be carried under overhead bridges it was necessary to depress them as the bridge was approached. This depression was gradual. At the Weaver Street bridge the wires, to pass under it, were brought down to within 15 feet 4½ inches of the top of the rails. Between Stamford and Larchmont, a distance of about 15 miles, there were 15 overhead bridges. The height of the wires passing under them varied from 15 feet 4½ inches to 18 feet 4¼ inches. In the case of only 3 was it more than 17 feet and of 7 it was between 15 and 16 feet only.

The locomotive which the deceased was using was one of medium size, and of a type which had been in use upon the line for 35 years. The tenders attached to this type of engine varied in height from 10½ to 13 feet. The height of the one in use was not shown. Accessible to the engineer in his cab was a tank cock at a level of 18 inches above the bottom of the tank, by means of which it could be determined that the water in the tank had not fallen below that level leaving water enough to run several miles. The tank had been filled at Stamford. There was a water plug a short distance beyond the Weaver Street bridge, and others 2 and 5½ miles further on. There was no evidence as to the actual depth of water in the tank.

Bottomley entered the defendant's service as a fireman prior to July 7, 1907, and had thereafter continued in the employ of the company, until his death, either as fireman or as engineer. The major portion of this service was on the New York division, operating through the electric zone between Stamford and New York City. During the six months immediately prior to his death he had, as engineer, made at least 49 trips through this zone and past the Weaver Street bridge, the most of them being in the day time.

The time-tables furnished Bottomley, and receipted for by him, contained a notice to all trainmen that within the electric zone in question there was danger within 14 inches of the wires, and a warning to be cautious and keep at least that distance away from them. A special written notice and warning to the same effect was also delivered to him, with the requirement that he carefully read it and certify that he had done so upon a blank prepared for that purpose. This certificate which he signed restated the substance of the notice and warning, and recited that he was warned "to use the utmost care to look out for all such wires."

Charles S. Hamilton and Edward P. O'Meara, both of New Haven, for appellant. Thomas M. Steele and Harrison T. Sheldon, both of New Haven, for appellee.

PRENTICE, C. J. (after stating the facts as above). The court assigned two reasons for its direction of a verdict for the defendant, to wit: (1) That the plaintiff had failed to present evidence from which the jury could reasonably have found that the defendant was guilty of negligence in the premises; and (2) that the evidence in support of the defense of assumption of risk was such that it could not reasonably have been found that the risk was not assumed by the intestate's continuing in his employment with full knowledge and comprehension of it. The last of these reasons is so clearly sound and sufficient that we have no occasion to inquire into the other.

[1] The federal Employers' Liability Act, under which this action was brought, did not abolish the defense of the assumption of risk, save in cases where the violation by the carrier of some federal statute enacted for the safety of employes contributed to the injury or death of the employe. *Seaboard Air Line v. Horton*, 233 U. S. 492, 503, 34 Sup. Ct. 635, 58 L. Ed. 1062.

[2] As bearing upon the question of the intestate's assumption of the risk which caused his death, the pertinent facts lie outside of the realm of dispute or uncertainty. They show that Bottomley had full knowledge of all the physical factors in the situation. As an engineer, he was familiar with engines and tenders and their proportions. The engine he was driving was one of moderate size, and of a type long in use. Its tender,

whether of the larger or smaller size, was one in use with this type of engine. It was neither special nor unusual. In his years of experience, for the most part confined to this section of the road, and his recent months of frequent service upon it, as engineer, he must have become acquainted with the existence of the many overhead bridges which here span the tracks, with the narrow space between bridges and tops of engine and tender, and with the manner in which the electric service wires were strung in carrying them under the bridges. These conditions were apparent to casual observation; they had remained unchanged for years; and they were closely related to the performance of his duties.

He must also have known that these wires were electrically charged for the operation of trains. As a locomotive engineer of experience living in this age of the world, he, untold and unwarned, must have been sufficiently intelligent and informed to know of the latent danger which lurked in the wires so charged to one who should come into contact with them or into their immediate vicinity, and of the extremity of that danger. But that matter aside, the knowledge of the danger had been so directly and forcibly brought home to him through the notices and warnings given to him by the defendant that he could not have failed both to know the danger to his life that there would be in permitting himself to come into contact with or near to one of the wires, and to comprehend the character and extent of that danger.

This being so, he certainly knew and comprehended the risk incident to his employment. No one could well be expected to have better knowledge or a more adequate appreciation. Possessed of this knowledge and appreciation, he had for years chosen to continue in his employment. By so doing he assumed its risk, which, during these years, had remained unchanged, and been unenhanced by any new act of the defendant which could by possibility be imputed to it as negligence. *Baer v. Baird Machine Co.*, 84 Conn. 269, 273, 79 Atl. 673.

"When the employé does know of the defect, and appreciates the risk that is attributable to it, then if he continues in the employment, without objection, or without obtaining from the employer or his representative an assurance that the defect will be remedied, the employé assumes the risk, even though it arise out of the master's breach of duty." *Seaboard Air Line v. Horton*, 233 U. S. 492, 504, 34 Sup. Ct. 635, 640 (58 L. Ed. 1062).

There is no error. In this opinion the other Judges concurred.

(3 Boyce, 197)

#### HEITE v. COWGILL.

(Superior Court of Delaware. Kent. April 27, 1914.)

#### 1. WORK AND LABOR (§ 1\*)—MATERIALS.

Where a person is employed to furnish work, labor, and materials for another, the per-

son so employed is entitled to recover the stipulated price or, if there is no agreement as to the price, then such a sum as they are reasonably worth.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

#### 2. SET-OFF AND COUNTERCLAIM (§ 6\*)—"RECOUPMENT."

Recoupment is the right of a person, when sued for work and labor by another, having been damaged rather than benefited by the performance of the work, to recoup his damages so as to avoid the trouble and expense of another action, but, in order to give rise to a right of recoupment, the defendant must have a valid cause of action for which a separate suit could be maintained, and the damage must not have occurred through defendant's fault, in which case he may recover up to the value of the claim of the plaintiff, but may not have an affirmative judgment for any excess.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. §§ 6, 7; Dec. Dig. § 6.\*]

For other definitions, see *Words and Phrases*, vol. 7, pp. 6015-6018.]

#### 3. WORK AND LABOR (§ 24\*) — ACTIONS — PLEADING—GENERAL ISSUE.

Where, in an action for work and labor, defendant filed a general issue with notice of recoupment, he was entitled to prove his counterclaim, provided it was founded on the same contract and grew out of the same transaction, for the loss or damage sustained by reason of plaintiff's failure or refusal to perform either entirely or properly, in reduction and abatement of plaintiff's claim.

[Ed. Note.—For other cases, see *Work and Labor*, Cent. Dig. §§ 43-46; Dec. Dig. § 24.\*]

Action by Edward T. Heite against Levick P. Cowgill. Verdict for plaintiff.

Argued before PENNEWILL, C. J., and BOYCE and CONRAD, JJ.

Thomas C. Frame, Jr., of Dover, for plaintiff. James M. Satterfield, of Dover, for defendant.

PENNEWILL, C. J. (charging the jury). Gentlemen of the jury: The plaintiff in this action seeks to recover from the defendant the sum of \$102.17, with interest, being the balance claimed to be due and owing for work and labor performed and materials furnished upon and for a certain gasoline engine owned by the defendant and used by him in propelling a boat on Jones' river.

The labor and materials claimed to have been furnished for the defendant are particularly mentioned in plaintiff's books of original entry which are in evidence, and which when supplemented by the oath of the plaintiff are taken to be true unless shown to be untrue.

The defense set up by the defendant is what is known in the law as recoupment. That is, he claims that the plaintiff injured his engine more than he benefited it, and is not, therefore, entitled to recover anything in this suit.

The defendant also claims that he is not liable for any part of the bill charged for work, labor and materials furnished in 1911 and 1912 because the plaintiff guaranteed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



that he would put the engine in good and running condition, which he wholly failed to do.

The plaintiff denies that he made any such guaranty; and moreover he insists that the engine was in good condition long before the defendant removed it from the plaintiff's shop in the following year.

Such in brief are the contentions of the parties.

[1] Where one person is employed by another to perform work and labor and furnish materials for him upon an agreed price, the person so employed is entitled to recover the stipulated price for the work done and materials furnished, if the work done and the materials furnished are in accordance with the agreement. But if there was no agreement as to the price for the work and materials, then the employé is entitled to recover for the same such a sum as they are reasonably worth. If they are worth nothing then there can be no recovery.

[2] But there is another principle of law which we must endeavor to explain, for upon that the defendant mainly relies in this case. It is called recoupment, as we have already stated. In plain language it means that if a person performs work and labor for another, and in its performance damages the other party to an amount as great as the performer claims for his services, there can be no recovery. In such case the defendant is allowed to recoup his damages so as to avoid the trouble and expense of another action.

But the claim or damage to be recouped must be a valid cause of action for which a separate suit could be maintained, and must not have occurred through the fault or negligence of the defendant.

Whenever the defendant is permitted to submit his claim for damages as a subject of recoupment he assumes the burden of proof in respect to it, and no recovery can be had for any balance or excess. And the defendant will be barred from any other suit or recoupment for such balance or excess over the plaintiff's claim.

The damages allowed a defendant by way of recoupment must be founded on the same contract and grow out of the same transaction under which the plaintiff claims.

[3] In Woolley on Delaware Practice, volume 1, § 502, it is said:

"The defendant may be allowed to present and give in evidence, under the general issue with his notice of recoupment, his cross or counterclaim to that of the plaintiff founded on the same contract and growing out of the same business transaction, for such loss and damage incurred by him by reason of the refusal or failure of the plaintiff to perform it entirely or properly, in reduction and abatement of the damages claimed by him."

We say to you, therefore, that if you believe the plaintiff, in furnishing the labor and materials for the defendant's engine, by his negligence damaged the engine to any extent, you should deduct from the sum the

plaintiff might otherwise be entitled to recover, the amount of such damages, and if such damage is as great as the sum the plaintiff claims, your verdict should be in favor of the defendant. But you cannot find in favor of the defendant for any sum even though you believe his damage is greater than the plaintiff's claim.

And while you may allow the defendant damages for any injury to his engine caused by the plaintiff in negligently and unskillfully working on the same, you cannot, under the facts of this case, allow him any other damages.

In conclusion we say that, if you believe the plaintiff performed the labor and furnished the materials for the defendant which he claims to have performed and furnished, your verdict should be in favor of the plaintiff for such sum as the labor performed and the materials furnished were reasonably worth, provided you do not believe that in the performance of the labor and the furnishing of the materials the plaintiff negligently and carelessly injured the defendant's engine. If you are satisfied that the defendant's engine was so injured, you should deduct from the sum that would otherwise be due the plaintiff the amount of such damage. And if the amount of such damage is greater, or as great, as the plaintiff's claim, your verdict should be in favor of the defendant.

All that we have said to you so far in respect to the defendant's claim of recoupment applies only to the plaintiff's charge for labor and materials furnished in the years 1911 and 1912, because it is not contended that the engine was injured by anything the plaintiff did prior to that time. And it is not denied that the plaintiff furnished some labor and materials for the engine before 1911. It will be your duty, therefore, to return a verdict in favor of the plaintiff for at least such sum as you believe the labor performed and the materials furnished by the plaintiff for the defendant in and for his engine prior to 1911 were reasonably worth, less the credit of \$47, which was paid prior to 1911.

As to the labor and materials furnished during the years 1911 and 1912, you must be governed by the law as we have stated it. Verdict for plaintiff.

(5 Boyce, 201)

BALTIMORE LIFE INS. CO. v. FLOYD.

(Superior Court of Delaware. New Castle.  
May 19, 1914.)

1. INSURANCE (§ 255\*)—WARRANTY—DISTINCTION BETWEEN WARRANTY AND REPRESENTATION.

A representation respecting a matter not material to a risk does not amount to a warranty, and such a representation, though false, if made in good faith, does not amount to a breach of warranty nor avoid the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 548; Dec. Dig. § 255.\*]

**2. INSURANCE (§ 298\*)—AVOIDANCE OF POLICY FOR BREACH OF WARRANTY—INSURABLE INTEREST.**

Where the beneficiary under a policy of life insurance had a legal insurable interest, insured's misrepresentation as to his relation to the beneficiary, not made in bad faith, was a misrepresentation or misstatement of fact not materially affecting the risk assumed, and hence, not ground for avoidance of the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 677; Dec. Dig. § 298.\*]

**3. INSURANCE (§ 124\*)—"CONTRACT OF LIFE INSURANCE"—NATURE.**

A "contract of life insurance" is an agreement between insurer and insured whereby the insurer undertakes to pay a certain sum of money to a certain person, who usually is a person other than insured, upon the happening of a particular event, usually the death of insured, in consideration of payment by insured of certain stated premiums.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 172, 178; Dec. Dig. § 124.\*]

For other definitions, see Words and Phrases, vol. 4, pp. 3675-3677.]

**4. INSURANCE (§ 114\*) — CONTRACT OF LIFE INSURANCE—INSURABLE INTEREST.**

A contract of life insurance may be effected only for some benefit incident to or contemplated by insured, and an insurable interest in the beneficiary arises from his relationship to insured within certain degrees, or from the fact of pecuniary interest, such as that between partners, and between debtors and creditors; and a person may take out insurance upon his own life for the benefit of one having no insurable interest therein, if the transaction is bona fide and free from speculation, but insurance procured upon a life by one, or in favor of one, under circumstances of speculation or hazard amounts to a wager contract, void as in contravention of public policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 136-138; Dec. Dig. § 114.\*]

**5. INSURANCE (§ 114\*)—EVIDENCE OF INSURABLE INTEREST—PAYMENT OF PREMIUMS.**

One of the tests as to the validity of a contract of life insurance is to determine by whom the premiums are paid; when insured pays the premiums the contract is generally upheld, but where the premiums are paid by the beneficiary, there is a tendency to condemn it.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 136-138; Dec. Dig. § 114.\*]

**6. INSURANCE (§ 655\*)—INTEREST OF INSURED—EVIDENCE—GOOD FAITH.**

Where the beneficiary under a policy of life insurance has an insurable interest in the life of insured, such interest is evidence which may be considered in connection with all the other evidence in determining the good faith of the transaction.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1677-1685; Dec. Dig. § 655.\*]

**7. INSURANCE (§ 646\*)—ACTION—BURDEN OF PROOF.**

In an action on a policy of life insurance, the burden of proving the legality of the contract, plaintiff's performance of conditions precedent, and defendant's liability, by a preponderance of the evidence, rests upon plaintiff.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1645-1668; Dec. Dig. § 646.\*]

**8. EVIDENCE (§ 588\*)—JURY—DELIBERATION—WEIGHT OF EVIDENCE.**

Where the evidence in a civil action is conflicting, it is the jury's duty to reconcile it if it can, and, if it cannot, to reject that considered least worthy of credit and accept that

considered most worthy of credit, having regard to the intelligence and the bias of the witnesses and their ability to see, comprehend, and remember that to which they have testified.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2437; Dec. Dig. § 588.\*]

Action by William Floyd against the Baltimore Life Insurance Company. Motion for nonsuit refused, and verdict for plaintiff.

Argued before WOOLLEY and RICE, JJ.

Andrew C. Gray, of Wilmington, for appellant. Lilburne Chandler, of Wilmington, for respondent.

Appeal (No. 6, January term, 1914) from a judgment of a justice of the peace. Action of assumpsit brought before the justice by William Floyd against the Baltimore Life Insurance Company, to recover under an insurance policy issued to Albert Hanlin in which the plaintiff was the beneficiary. Motion for nonsuit refused. Verdict for plaintiff.

The contentions of the parties appear in the charge of the court.

At the conclusion of the plaintiff's case, counsel for defendant moved for a nonsuit on the ground that the applicant for insurance made a false answer to the question as to the relationship between himself and the beneficiary.

WOOLLEY, J. (delivering the opinion of the court). [1] The judges that constitute this court sat in the Keatley Case, 82 Atl. 294, either below or above, and are clear upon the policy of the law touching the subject of insurance warranties. The rule of the common law was that all representations made by an applicant for insurance, were warranties, whether they were material or immaterial to the risk, and a false representation or misstatement of fact made by the applicant amounted to a breach of warranty, regardless of its materiality to the risk. From this rule the American courts have gradually and very generally departed, and under a line of cases known as nonserious ailment cases, the courts have held that a representation respecting a matter not material to the risk, did not amount to a warranty, and that such a representation, if proven to be made in good faith but nevertheless false, did not amount to a breach of warranty and did not operate in avoidance of the contract. The law as thus established by force of judicial decisions has been enacted into statutes by several states. This was done by the state of Pennsylvania, and by the state of Delaware since the making of the contract of insurance sued upon in this case. Though not decided in any reported case, we hold this to be the law of the state of Delaware at the time the defendant entered into the contract here sued upon.

[2] It may be a business policy of the defendant insurance company not to issue a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

policy of insurance to a person seeking insurance, in favor of a beneficiary not a relative, yet after all, that person may have an insurable interest, if the insured pays the premiums; and while an insurance company may establish any legal business policy for its governance that it may see fit, yet we think that a statement made by the applicant for insurance that merely disturbs that business policy but does not reach to something that materially affects the risk, is not a misstatement or misrepresentation that avoids the policy. It appears to us that while the applicant may have made a misrepresentation as to his relation to the beneficiary, nevertheless, there is evidence of a legal insurable interest in the beneficiary, though not so related to the insured; and while the misrepresentation of the applicant as to the degree of his relationship to the beneficiary may have been false, there was no evidence that it was made in bad faith. We are of opinion that the statement of the applicant, if untrue, was a misrepresentation or misstatement of fact that did not materially affect the risk assumed by the insurance company in making the contract of insurance, and therefore, the motion for a nonsuit should be refused.

WOOLLEY, J. (charging the jury). Gentlemen of the jury: In explanation of the rather lengthy charge we are about to deliver to you, we may say that though this case involves a sum of money inconsiderable in amount, the principles of law involved are important, not only to the determination of the case in hand but to the business of life insurance and to litigation that might hereafter arise therefrom.

This is an action brought upon a contract of insurance, wherein it is claimed on the part of the plaintiff that Albert Hanlin, the insured, procured from the Baltimore Life Insurance Company, the defendant, a policy of insurance for the sum of \$244, payable upon the death of the insured unto William Floyd, the plaintiff; that the contract of insurance was sought and procured by the insured and the premiums thereon, though paid to the insurance company by one Payton Rose, were paid by him upon the authority and with the money of Hanlin the insured; and that Floyd, the beneficiary named in the policy of insurance, was a cousin of the insured, though described in the application for insurance as his uncle, and that the relationship between the two established in Floyd, the beneficiary, an insurable interest in the life of Hanlin, the insured, that gave to him a right to recover and to maintain this action for the amount stipulated by the company to be paid upon the death of Hanlin, the insured; that the insured is dead and the amount due the beneficiary by the defendant insurance company is the sum of \$122 with lawful interest thereon from the date upon which the payment should have been made.

The defendant on the other hand contends,

that if there ever existed a contract between it and the deceased Hanlin, there exists no contract upon which the plaintiff may now maintain this action at law, for the following reasons:

First, that in his application for insurance, the insured made a false representation as to his relationship with the beneficiary, in declaring him to be his uncle, and thereby made a misrepresentation material to the risk;

Second, that Floyd, the beneficiary, had no insurable interest in the life that was insured for his benefit, in that Floyd, the beneficiary, was in no way related to Hanlin, the insured;

Third, that the alleged contract of insurance was sought and procured by Floyd, the beneficiary, and not by Hanlin the insured, and that the premiums thereupon were paid not by Hanlin the insured, but by another otherwise than with the money or upon the authority of the insured, and was therefore a wager contract; and

Fourth, that Hanlin, the insured is not dead.

These issues raise several questions, both of law and fact, with respect to the former of which we will instruct you and with respect to the latter, you are the sole judges.

The first question is whether the contract of insurance between the insured and the insurer is vitiated by an alleged misrepresentation by the insured in his application for insurance as to the relationship of the beneficiary to himself. We are of opinion and charge you, that if such a misrepresentation was made, it was not such a misrepresentation or misstatement of fact that was material to the risk and therefore does not avoid the contract. For this reason we refuse the prayer of the defendant to give you binding instructions to return a verdict in its favor, as for various reasons we decline a like prayer made in favor of the plaintiff.

The next several questions may be considered together and they are whether the beneficiary had an insurable interest in the life insured, and whether if he had or had not, was the contract of insurance under the circumstances in which it was procured and maintained, a valid contract in law.

[3] A contract of life insurance is an agreement between the insurer and the insured, whereby the insurer undertakes to pay a certain sum of money to a certain person, who may be and usually is a person other than the insured, upon the happening of a particular event, usually the death of the insured, in consideration of the payment by the insured of certain premiums, made at stated periods.

[4] Such an undertaking, though based upon a contingency that has in it an element of chance, when entered into with legal requisites and for a lawful purpose, is in this day a perfectly legal and commonplace trans-

action, but the legitimate scheme of life insurance is inclined to be distorted and to some it affords an invitation for a mischievous kind of gambling. To avoid this misuse of a most useful character of undertaking, in which a beneficiary may become interested in the early death of the insured, it is held that the insurance upon a life shall be effected and resorted to only for some benefit incident to or contemplated by the insured, and that insurance procured upon a life by one or in favor of one under circumstances of speculation or hazard amounts to a wager contract and is therefore void, upon the theory that it contravenes public policy. Just what constitutes a wager contract and therefore a void contract of insurance, varies with the different circumstances of each case and the different principles of law applicable thereto.

The presence of an insurable interest on the part of the beneficiary is urged as a request to avoid the appearance of a wager contract, holding that without such an interest, the interest of the beneficiary is speculative. An insurable interest in the beneficiary may be shown by proof of the fact of relationship between the beneficiary and the insured within certain degrees, and by proof of pecuniary interest, such as arise between partners and between debtors and creditors. Evidence of such an insurable interest is evidence that the contract is not a wager and is evidence of the contract's validity. But a contract of life insurance may be a valid contract though the beneficiary be without an insurable interest, because no longer does the presence or absence of an insurable interest of the beneficiary alone control the question whether the contract is valid or void.

If the beneficiary has an insurable interest and the transaction is otherwise legal, the policy is valid; if he has not such an interest, the policy may still be valid, if the transaction is bona fide and free from speculation.

The rules of law as gathered from the cases and to be applied by you to the facts of this case, are these:

Mr. Justice Brown, of the Supreme Court of the United States, in *Langdon v. Union Mut. L. Ins. Co.* (C. C.) 14 Fed. 272, said:

"There is no case, to my knowledge, which holds that a party may not insure his own life and make the policy payable to any one he may select, though such person have no legal interest in his life."

In *Lamont v. Grand Lodge I. L. H.* [C. C.] 31 Fed. 177, Justice Shiras, of the Supreme Court of the United States, says:

"Where a third party, without any insurable interest in the life of another, procures a policy of insurance on the life of such person, either by having a policy issued directly to himself, or by having the person whose life is insured take out a policy to himself, and then assign it, these facts, as is held in *Warnock v. Davis* [104 U. S. 775, 26 L. Ed. 924], conclusively show that the transaction is a mere speculation on the life of another, and as such is contrary to public policy, and therefore void.

\* \* \* Public policy requires that a person having no insurable interest in the life of another shall not be permitted to speculate on such life and thereby become interested in its early termination; but public policy does not forbid a person from in good faith making provision for the future of another in whom he may be interested, even though the latter may not have an insurable interest in his life."

To the same effect are the decisions of the Supreme Court of Pennsylvania. In *Downey v. Hoffer*, 110 Pa. 109, 20 Atl. 655, referring to *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192, it is said:

"A man may insure his own life and direct that the insurance money be paid to anybody he pleases—whether that person has any insurable interest or not—the insured paying the premiums. There is nothing speculative either in the origin or continuance of such a contract, as long as the insured keeps it within his control and pays the premium himself;" etc.

[5] The authorities for these propositions of law are cited in a note to the case of *Dolan v. Association*, 16 L. R. A. (N. S.) 555, in which the law is concisely stated as follows:

"With one or two possible exceptions, the courts all agree that, in case the transaction is bona fide, a person may take insurance upon his own life for the benefit of one having no insurable interest in his life; and that the latter may collect and hold the amount which becomes due upon the policy. \* \* \*

"The general rule that, although a person without legal insurable interest in the life of another may not procure insurance upon the life of such other, the person insured, in the absence of bad faith, may himself contract directly with the insurer and make the policy payable to whomsoever he will, regardless of the party's insurable interest. \* \* \*

"As is said in *Reed v. Provident Sav. Life Assur. Soc.* [190 N. Y. 111, 82 N. E. 734], supra: 'What will distinguish the one contract from the other is the fact as to the party actually contracting with the insurer; and the distinction is substantial and controlling accordingly.'

"The doctrine is based upon the theory that it is not reasonable to suppose that a person will insure his own life for the purpose of speculation, or be tempted to take his own life in order to secure the payment of money to another, or designate as the beneficiary a person interested in the destruction, and not in the continuance, of his own life. *Hess v. Segenfelder* (*Morgan v. Segenfelder*) [127 Ky. 348, 105 S. W. 476], 82 Ky. Law Rep. 225, 14 L. R. A. (N. S.) 1172 [128 Am. St. Rep. 343]. \* \* \*

"One of the tests as to the validity of the contract is to determine by whom the premiums are to be paid. If the one taking the insurance pays the premiums, the transaction is generally upheld. But there is a strong, though not universal, tendency to condemn contracts in which the premiums are paid by the beneficiary."

[6] Giving consideration to this instruction upon the law, we say to you, that if you find that the contract of insurance sued upon was procured and entered into by Hanlin, the insured, and the premiums were paid by Hanlin, the insured, either personally or through his agent, and the circumstances otherwise indicate a bona fide nonspeculative transaction, the contract cannot then be held a gambling contract, and your verdict should be for the plaintiff, for the amount of his claim, and interest, whether the plaintiff, as benefi-

ciary, had or had not an insurable interest in the life insured for him. If, however, you find that the plaintiff had an insurable interest in the life of the insured, in the manner before defined to you, evidence of such an insurable interest is evidence which you may consider in connection with all the other evidence in the case, in determining the good faith of the transaction and in reaching a verdict for the plaintiff. But if you find that the plaintiff had no insurable interest in the life of the insured, that is, he was not related to the insured as a relation or in a friendly way, and that the plaintiff procured or was the instrumentality in procuring the contract of insurance for the insured, but in his own favor as beneficiary, and that the contract was not procured by the insured and the premiums thereon were not paid by him or by his agent with his money or upon his obligation, you may find the transaction void as a wager transaction and then your verdict should be for the defendant.

The last question for your decision rests upon the life or death of the insured. If you find that Hanlin is not dead, that being the contingency in any event upon which the defendant is liable to make payment, your verdict, of course, should be for the defendant.

[7] This, gentlemen, is a civil case, and it is distinguished in its mode of proof from criminal cases. In a case of this character the burden of proving, the legality of the contract, the performance of the conditions precedent on the part of the plaintiff and the liability of the defendant therein, rest upon the plaintiff. And that he must prove, not as in criminal cases beyond a reasonable doubt, but by what is termed the preponderance of the evidence.

[8] If you find the evidence to be conflicting, it is your duty to reconcile it if you can, and if you cannot, you should reject that testimony which you consider least worthy of credit and accept that which you consider to be most worthy of credit, and in doing so you should have regard to the intelligence, the understanding, the interest or the bias of the witnesses, and their ability to see, comprehend and remember that to which they have testified.

Verdict for plaintiff for \$132.37.

(245 Pa. 86)

NOVICKY et al. v. KRAUCZUNAS et al.  
(Supreme Court of Pennsylvania. April 20, 1914.)

RELIGIOUS SOCIETIES (§ 18\*)—PROPERTY—INJUNCTION.

A Roman Catholic bishop, to whom the legal title of church property had been conveyed, after being required by a decree of court to convey the legal title to trustees appointed by the congregation, placed the church under an interdict prohibiting the holding of worship therein. Several members of the congregation, after unsuccessfully attempting to enjoin a priest, appointed by members disobeying the in-

terdict, from holding in the building services similar to those of the Roman Catholic Church, obtained a revocation of the interdict, and then again sought to enjoin such priest from conducting services in the church, and the other members from installing therein any minister other than an ordained priest of the Roman Catholic Church, and from diverting the church property to worship other than that prescribed by that church. Held that, since the interdict was a disciplinary measure not affecting a diversion of the property from the purposes for which it had been dedicated, plaintiffs, though having no standing to complain while the interdict was in force, were entitled, with the interdict removed, to the relief prayed for.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 111-129; Dec. Dig. § 18.\*]

Appeal from Court of Common Pleas, Lackawanna County.

Bill for injunction by Joseph Novicky and others against Anthony Krauczunas and others. From an order continuing preliminary injunction, and final decree for plaintiffs, defendants appeal. Affirmed.

The facts appear in the opinion of the Supreme Court, and in *Krauczunas v. Hoban*, 221 Pa. 213, 70 Atl. 740; *Mazalka v. Krauczunas*, 233 Pa. 138, 81 Atl. 938; and *Novickas v. Krauczunas*, 240 Pa. 248, 87 Atl. 686.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and STEWART, JJ.

William J. Hand and A. A. Vosburg, both of Scranton, for appellants. John G. Johnson, of Philadelphia, and T. P. Hoban and John P. Kelly, both of Scranton, for appellees.

STEWART, J. This protracted controversy had its inception in the refusal of the bishop of the diocese within the bounds of which was included St. Joseph's Lithuanian Catholic Church, and to whom the title of the property of the said St. Joseph's Lithuanian Catholic Church had been conveyed for a special and temporary use, to reconvey the same to the trustees of the congregation in accordance with the express desire of a majority of the adult members of the congregation at a meeting regularly called, on the ground, as claimed, that under the canons of the Roman Catholic Church the title to all church property is required to be in the name of the bishop of the diocese, to be held by him, not for the particular congregation, but for the church at large. This phase of the controversy was before us in *Krauczunas v. Hoban*, 221 Pa. 213, 70 Atl. 740, which was an appeal from a decree supporting the contention of the bishop, and we there held, reversing the decree of the court below, that under the provisions of the act of April 26, 1855 (P. L. 328), the title to the church property was in the congregation of St. Joseph's Lithuanian Catholic Church regardless of what the canons of the Roman Catholic Church required, and that the property was subject to the control and disposition of the lay members of the congregation, but subject,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 91 A.—42

however, to all the terms and conditions upon which the same may have been bequeathed, devised, or conveyed to such unincorporated church. We accordingly reversed the decree of the lower court and directed that a decree be entered requiring that a conveyance be executed by the bishop of the diocese for the premises held by him in trust for St. Joseph's Lithuanian Catholic Congregation of the city of Scranton to the plaintiffs, the regularly chosen trustees of the congregation, in trust for said congregation.

In obedience to this decree Bishop Hoban reconveyed the property to the trustees appointed by the congregation; but simultaneously therewith he issued his episcopal decree placing St. Joseph's Church under an interdict forbidding Catholic worship therein, and forbidding, under pain of ecclesiastical censure, any Catholic to enter the church so long as the interdict remained unrevoked.

Next followed the case of *Mazaika v. Krauczunas*, 233 Pa. 138, 81 Atl. 938, which was an appeal by the trustees of the congregation from a decree of the lower court directing a reconveyance of the church property by the trustees to the bishop pursuant to a resolution adopted by a majority of the congregation at a regularly called meeting. We sustained the appeal, reversing the action of the court below, on the ground that the action taken at the congregational meeting, as disclosed by the resolution adopted—to which we refer without reciting—was a clear attempt to invest the bishop with authority over the congregation's property which the law expressly forbade.

So stood the case—the trustees appointed by the congregation holding the legal title to the property—when certain of the original members of St. Joseph's Lithuanian Catholic Church congregation, who, obeying and observing the episcopal interdict, had refrained from worshipping in St. Joseph's Church, and had established a place of worship elsewhere, filed a bill in which they alleged that the trustees of St. Joseph's Lithuanian Catholic Church were permitting certain pastors or ministers not regularly ordained priests of the Catholic Church, in good standing, to officiate and conduct worship therein, and praying that such pastors and ministers be restrained from intermeddling with the temporal or spiritual affairs of the congregation, and that the trustees be restrained from installing in such church any pastor or minister other than a regularly ordained minister of the Catholic Church in good standing. This bill was sustained in the court below, and an injunction issued as prayed for. On an appeal (*Novickas v. Krauczunas*, 240 Pa. 248, 87 Atl. 686) we again reversed the lower court. In the opinion filed in the case we said:

"The situation as thus presented is briefly this: The congregation can have no other worship in their church than that prescribed and authorized by the Catholic Church through a regularly ordained priest in good standing; and

yet it can have no such worship so long as the church rests under episcopal interdict; and the interdict will be removed only as the members of the congregation will consent to an alienation of their church property such as the law of the land forbids quite as expressly and explicitly as it does the diversion of church property to other uses than those to which the property was originally dedicated, and for which it must be held. Deprived of the right of Catholic worship in their own church by ecclesiastical authority, except upon conditions which that authority has no right to exact, and which the congregation is protected by law in resisting, it may well be questioned whether an abandonment of all religious worship in the church, under the interdict, would not be quite as much a diversion of the property from its original uses as permitting religious services therein to be conducted by ministers belonging to a different communion. But we decide nothing as to that. What we do decide, and all we decide, is that, because the evidence in the case makes it apparent that the purpose of the bill is to accomplish indirectly that which we have repeatedly declared may not be done, the plaintiffs in the bill have no standing to ask equitable relief. If they desire to proceed further, their appeal must be first to the ecclesiastical authority which has forbidden Catholic worship in the church for rescission of the episcopal interdict that inhibits it."

Subsequently, 13th April, 1912, very shortly after the opinion in the case last referred to had been filed, the episcopal interdict forbidding Catholic worship in St. Joseph's Church was formally and publicly withdrawn, thus removing the only obstacle to the resumption of Catholic service in the church. This was followed by a formal and public revocation of a decree excommunicating the trustees because of their resistance to the demands of the bishop with respect to the title to the church property. Thereupon the present bill was filed by plaintiffs, members of St. Joseph's Lithuanian Catholic Church at the time the episcopal interdict was issued, on their own behalf, and on behalf of all other members desiring to join therein, setting forth the above facts, and averring further that the defendants, notwithstanding the removal of every obstacle to the resumption of Catholic worship in the church, persistently have refused to permit the regularly appointed pastor of the congregation, and the only one acting under episcopal authority in that relation, to conduct services therein, and have persistently kept and maintained as pastor of the congregation Rev. Stanislaus Mickiewicz, not ordained by or in communion with the Catholic Church, but in communion with and holding allegiance to another distinct ecclesiastical establishment, and praying that an injunction issue restraining the said Rev. Stanislaus Mickiewicz from conducting religious worship or service in said church or in any wise officiating as a member in said church, and enjoining and restraining the other defendants from installing in the church the said Rev. Stanislaus Mickiewicz, or any pastor or minister other than a regularly ordained priest of the Catholic Church in good standing, from establishing any form of worship therein other than that prescribed and au-

thorized by said Catholic Church through a regularly ordained priest, and from diverting said church and property of said congregation to any form of public worship other than that prescribed and authorized by the said Catholic Church. The answer to the bill admits that from its inception the congregation of St. Joseph's Church was in ecclesiastical relation and union with the Roman Catholic Church, and that since the erection of the church building the same has been used by the congregation for public worship according to the rights of the Roman Catholic Church down until by the episcopal interdict Catholic worship therein was forbidden during the continuance in force of the interdict. The contention made by the answer is that:

"The effect of the said interdict, issued in accordance with the laws of the Roman Catholic Church, and the final refusal of the church authorities in December, 1911, to remove the same, was to make the said St. Joseph's Lithuanian Catholic Congregation an independent congregation, and that the said congregation is not now in any manner subject to the jurisdiction of the authorities of the Roman Catholic Church."

The court below awarded the injunction as prayed for, and this appeal followed. While the answer contains much more than we have recited, what we have here given of it states the whole question. It avers that the episcopal interdict was not revoked in good faith; but into that question we will not enter, for the one sufficient reason that whether in good or bad faith it has effectually removed the one and only consideration on which we based our recent decision in *Novickas v. Krauczunas*, supra. The complaint there was that defendants were diverting the property from its original uses by allowing other worship therein than that prescribed by the Catholic Church. We have distinctly asserted that it was not in the power of the congregation to divert the property from its original use, but held that the plaintiffs had no standing to ask equitable relief so long as the episcopal interdict, which prevented defendants from having Catholic worship in the church, was in force, and that their appeal must first be to the ecclesiastical authority which had forbidden Catholic worship in the church for rescission of the interdict that prescribed it. Nothing can be found in any of the opinions of this court touching this controversy from first to last which gives even the slightest warrant for supposing that any departure was intended from the settled rule that forbids a diversion of property of a religious society from the uses, purposes, and trusts to which it may have been lawfully dedicated. It is a fact, if not expressly admitted too clear for contradiction, that St. Joseph's Lithuanian Catholic Church of Scranton was originally dedicated and devoted to Christian worship according to the rights and regulations of the Roman Catholic Church, and that the con-

gregation owning the church property was in organic union with the Roman Catholic Church subject to its government and discipline. The contention on part of the defendants is that this relation was severed by episcopal action when the interdict was proclaimed. A clear corollary to this would be that, while the congregation may not divert the property, which is its own, from the uses and trusts to which it was originally dedicated, the bishop of the diocese by his episcopal authority may—a deduction to which we cannot agree. The whole purpose of the interdict was disciplinary; it was a temporary suspension of the right of Catholic worship in the church with a view, as we found, through exercise of ecclesiastical power, to accomplish a purpose on the part of the bishop which we had condemned as against the law of the land. It was not intended to separate the body of St. Joseph's congregation from the Roman Catholic Church, or to renounce for the congregation its claim to the church property. It would have been ineffective had it been otherwise. So long as the episcopal interdict was in force we declined to interfere, at the instance of those obeying the interdict, to prevent those defying it from having a form of worship in the church nearest akin to that which the interdict forbade; but now, with the interdict removed, the appellees, emboldened perhaps by our indulgence, openly assert their independence of the authority of the Catholic Church, and their purpose to devote the church property to other uses than those to which it was originally devoted, by uniting the church to another wholly separate and distinct church organization. For this no warrant can be found in any of the decisions of this court. Such of the complainants as were members of St. Joseph's congregation when the interdict was issued remain members, notwithstanding they have meanwhile been worshipping in another church, and as members they have an undoubted right to protest against any diversion of the church property to other than its original uses.

The assignments of error are accordingly overruled, and the decrees are affirmed, at the cost of the appellants.

(245 Pa. 326)

**KESTNER et al. v. HOMEOPATHIC MEDICAL & SURGICAL HOSPITAL OF READING.**

(Supreme Court of Pennsylvania. May 18, 1914.)

**1. NUISANCE (§ 3\*)—INJUNCTION—MAINTENANCE OF HOSPITAL.**

Where, in a suit to enjoin defendant from conducting its hospital to the injury of complainants, who owned a residence situated but a few feet distant from the hospital, it appeared that objectionable noises and cries of pain of hospital patients disturbed complainants by day and at night and depreciated the value of their property, the court properly enjoined de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



defendant from using its buildings as a hospital during the continuance of an existing internal construction and while the emergency operating room was maintained in close proximity to such residence.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 4, 5, 9-25; Dec. Dig. § 3.\*]

**2. NUISANCE (§ 25\*)—HOSPITALS—INJUNCTION—DEFENSE.**

Where a hospital is conclusively shown to be a nuisance, its status as a charitable institution is no defense, in an action to enjoin its maintenance.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 5, 60-63; Dec. Dig. § 25.\*]

**3. NUISANCE (§ 3\*) — INJUNCTION — MAINTENANCE OF HOSPITAL — INJURY TO ADJACENT PROPERTY.**

Where, in a suit to enjoin defendant from conducting its hospital to the injury of complainants, who owned a residence situated a few feet distant from the hospital, it appeared that persons occupying rooms under the control of defendant were permitted to throw refuse on complainants' property, the court properly enjoined defendant from permitting the continuance of such acts.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 5, 60-63; Dec. Dig. § 3.\*]

**4. NUISANCE (§ 32\*)—INJUNCTION—PLEADING—AMENDMENT.**

An amendment to a bill to enjoin defendant from maintaining the emergency operating room of its hospital in close proximity to complainants' dwelling house, which amendment averred that defendant allowed persons occupying rooms to throw refuse on complainants' property, was properly allowed, where it did not appear that defendant was in any way prejudiced thereby.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 77-83; Dec. Dig. § 32.\*]

**5. APPEAL AND ERROR (§ 1041\*)—HARMLESS ERROR—AMENDMENT TO BILL.**

If permitting an amendment to a bill for an injunction tended to prejudice defendant because of its counsel's failure to examine the amendment carefully and file an answer to new matter, the prejudice was avoided where complainants' counsel agreed that the answer filed should be considered as a denial of all the facts contained in the amended bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4106-4109; Dec. Dig. § 1041.\*]

**Appeal from Court of Common Pleas, Berks County.**

Injunction by George L. Kestner and another, executors of the last will and testament of Elizabeth Kestner, deceased, and others against the Homeopathic Medical and Surgical Hospital of Reading. From a decree awarding an injunction, defendant appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Joseph R. Dickinson, of Reading, for appellant. Cyrus G. Derr, of Reading, for appellees.

POTTER, J. In this bill in equity, complainants sought to have the defendant restrained from conducting its hospital in such a manner as to unduly annoy and injure the complainants, or to impair the value of their property adjoining the hospital. In the

original bill it was averred that complainants were the owners of a house and lot of ground in the city of Reading, and that the defendant corporation owned adjoining ground, both north and south thereof, and had established and maintained on the north a home for its hospital nurses, and on the south a hospital, adjacent to the residence of complainants; that the moans, shrieks, and groans of persons receiving surgical aid in the rooms of the hospital, facing complainants' house, were of such a character as to render wretched the lives of complainants and of friends visiting them, and were such as to affect their nerves and impair their health; and that the management and carrying on of the hospital rendered complainants' house unfit for residential purposes, depreciated its value in the market, and inflicted irreparable injury. Elizabeth Kestner, one of the complainants, having died, the bill was amended to show that fact, and an averment was added that defendant had annoyed and continued to annoy complainants by permitting persons occupying rooms in the hospital to throw refuse across the party line fence and upon complainants' property.

The trial judge found as facts that the building of complainants was partly three-storied and partly two-storied, and had 21 windows and 9 doors facing defendant's hospital; the windows and all the doors, except two, being from 9 to 12 feet distant from the hospital building. The two doors were 17 feet distant. The rooms facing the hospital included the parlor, living room, dining room, kitchen, pantry, and summer kitchen on the first floor, and sleeping rooms on the second floor. The hospital has 48 windows facing complainants' property. A wooden fence about nine feet high separates the two yards. The trial judge further found:

"On the northern side of defendant's hospital facing the Kestner property were maintained, among other things, a dispensary for dressing surgical wounds and treating medical cases, an emergency operating room, private rooms for patients, women's private ward, two public wards of ten beds each for women, a maternity ward with three beds, a delivery room with one bed, and a main operating room. There were from 45 to 55 inmates constantly, and from 150 to 350 accident cases are treated per month, of which the public ambulance brings 30 per month. Prior to the filing of the plaintiff's bill, and after the filing thereof, noises came to the Kestner property from the defendant hospital, mostly from the emergency operating room; the noises consisting of shrieks, groans, moans, and yells of persons, and cries of children being operated upon, or in pain from other causes; the said noises occurring at all hours, day and night, and almost daily, disturbing the family at meals in the dining room, less than 13 feet from the said operating room, disturbing their sleep in the bedrooms facing the area and the hospital, suddenly waking them as late as 2 and 3 o'clock in the morning, and keeping them awake, making them nervous, and disturbing their comfort and happiness and the comfort and happiness of guests invited to an entertainment in their house, and breaking up the party, and disturbing the last moments of the aged mother

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and making the entire family nervous, unhappy, and miserable. From time to time, before and since the filing of the bill, articles, such as cigarette stumps, orange peel, and quids of tobacco, were thrown by some one from the hospital side to and upon the Kestner property."

[1] The trial judge also found that the hospital was equipped with the modern surgical and medical appliances, employed sufficient physicians and nurses, and used with promptness approved methods of relieving patients from pain and suffering and of preventing the outbursts complained of. Also that shrieks and screams were of no greater frequency than those emanating from well-regulated hospitals treating the same number of patients; that such noises are bound to occur wherever sick or injured persons may be, and particularly in a hospital where a large number of persons are brought, or come, for medical and surgical treatment; and that defendant, wherever possible, prevented such outcries and stopped them as quickly as possible. These findings of fact were amply supported by the evidence. Under the authorities, the complainants were clearly entitled to equitable relief.

[2] Thus in 2 Joyce on Injunctions (1909) § 1068, it is said:

"Hospitals are not prima facie or per se nuisances, but they may under some circumstances become nuisances and be subject to an injunction against their maintenance or continuance, where the evidence is clear and certain."

In 1 Wood on Nuisances (3d Ed. 1893) § 9, it is said:

"The locality, the condition of the property, and the habits and tastes of those residing there, divested of any fanciful notions, or such as are directed by dainty modes and habits of living, is the test to apply in a given case (of alleged private nuisance). In the very nature of things there can be no definite or fixed standard to control every case in any locality. The question is one of reasonableness or unreasonableness in the use of property, and this is largely dependent upon the locality and its surroundings."

The law of the case is also thus summarized in 15 Am. & Eng. Ency. L. (2d Ed.) 764:

"Although a hospital or asylum is not in itself a nuisance, its management may cause it to become grievously so; and where the existence of the nuisance is unequivocally established, reluctant as the courts are to interfere with eleemosynary institutions, neither the status of the hospital or asylum as a charitable organization, nor the fact that it is of statutory creation, constitute any justification for a continuance of such nuisance or interposes any defense to the abatement thereof."

The same principle is also illustrated in Deaconess' Home & Hospital v. Bontjes, 207 Ill. 553, 69 N. E. 748, 64 L. R. A. 215. The syllabus there reads:

"The carrying on of a hospital in proximity to complainant's dwelling may be enjoined as a private nuisance without a judgment at law, where the evidence is clear and certain that the hospital, as conducted, injures the health of complainant's family and destroys their peace and comfort."

In Sparhawk v. Pass. Ry. Co., 54 Pa. 401, it was held, as set forth in the syllabus, that:

"To make out a case of special injury to property from nuisance, something materially affecting its capacity for ordinary use and enjoyment must be shown. \* \* \* Noises that distress and annoy physically and may affect health are regarded as nuisances, and the ownership of property will not justify the use of it in that way."

In Ladies' Decorative Art Club's Appeal, 10 Sad. 150, 13 Atl. 537, a decree of the court below awarding an injunction was affirmed by this court. In that case Thayer, P. J., said in the court below:

"The law upon the subject is well settled and very plain. Where a noisy nuisance is complained of, it is a question of degree and locality. If the noise is only slight and the inconvenience merely fanciful, or such as would only be complained of by people of elegant and dainty modes of living, and inflicts no serious or substantial discomfort, a court of equity will not take cognizance of it. No one has a right to complain that his next-door neighbor plays upon a piano at reasonable hours, or of the cries of children in his neighbor's nursery, nor of any of the ordinary sounds which are commonly heard in dwelling houses. On the other hand, if unusual and disturbing noises are made, and particularly if they are regularly and persistently made, and if they are of a character to affect the comfort of a man's household or the peace and health of his family, and to destroy the comfortable enjoyment of his home, a court of equity will stretch out its strong arms to prevent the continuance of such injurious acts."

In the present case, the court below being of opinion that the nuisance might be abated by removing the operating room to some other part of defendant's building, merely enjoined the carrying on of the hospital in the building adjoining complainants' premises, until such removal should be made.

[3] The decree also restrained defendant from permitting persons occupying rooms in the hospital to throw refuse matter upon complainants' premises. The relief granted in this respect was properly allowed. The occupants of the rooms were under the control of defendant, and it was therefore responsible for their actions, within the limits of that control.

Counsel for defendant criticize the terms of the injunction awarded by the decree as being uncertain, vague, and indefinite. The effect of the injunction is, however, to restrain defendant from using its building as a hospital, during the continuance of the present internal construction, and while the emergency operating room is maintained in its present proximity to complainants' residence. It is apparent that the purpose was to require the removal of the operating room to some other portion of the building, where complainants would not be annoyed by the noises emanating therefrom. The requirement in this respect is, we think, sufficiently certain and definite.

[4] We do not see any merit in the objection which is made to the amendment, which was allowed to be filed, to the original bill. The allowance was clearly proper, and it does not appear that defendant was in any way prejudiced or injured thereby.

[6] It is suggested that, by reason of the oversight of defendant's counsel in failing to examine carefully the amendment, no answer was filed to the averment with respect to the throwing of refuse on complainants' property. But any possible prejudice to defendant in this respect was avoided by the agreement of complainants' counsel that the answer filed should be considered as a denial of the facts contained in the amended bill. Testimony was presented by both sides as to the deposit of refuse on complainants' premises. We do not see that defendant has any just cause to complain of the filing of the amended bill.

The assignments of error are all dismissed at the cost of appellant, and the decree of the court below is affirmed.

(245 Pa. 272)

**CENTRAL MARKET STREET CO. v.  
NORTH BRITISH & MERCANTILE  
INS. CO. OF LONDON AND ED-  
INBURGH.**

(Supreme Court of Pennsylvania. May 4, 1914.)

**1. INSURANCE (§ 146\*)—FIRE INSURANCE POL-  
ICY—CONSTRUCTION.**

A fire insurance policy susceptible of two interpretations must be construed most strongly against the insurer.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 292, 294-298; Dec. Dig. § 146.\*]

**2. INSURANCE (§ 326\*)—FIRE INSURANCE POL-  
ICY—CONSTRUCTION—PREMISES.**

Where a lessee of one floor of a building was insured against loss by fire of its furnishings on that floor, which furnishings consisted of appurtenances to a moving picture and amusement parlor, and a clause in the policy provided that it should be void if moving picture celluloid films were kept "in the above-described premises," the word "premises" meant merely the floor leased by insured, and did not include those other parts of the building over which it had no control, especially where the policy declared that the extent of the insurance was to reimburse insured for the expense of betterments or improvements paid for by insured, and the only improved part of the building was that occupied by him.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 782-791; Dec. Dig. § 326.\*]

**3. INSURANCE (§ 377\*)—ACTION ON FIRE IN-  
SURANCE POLICY—BREACH OF CONDITION—  
ESTOPPEL.**

Where at the time of issuing a fire insurance policy the insurer knows or ought to know that one of the conditions is inconsistent with the facts, and the insured is guilty of no fraud, the insurer is estopped from setting up the breach of such condition as a defense in an action on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 942, 966, 967, 975-997; Dec. Dig. § 377.\*]

**4. INSURANCE (§ 392\*)—ACTION ON POLICY—  
ESTOPPEL BY ACCEPTANCE OF PREMIUMS.**

Where an insurance company accepts unearned premiums with knowledge of facts avoiding the policy, it is estopped to assert the avoidance in an action on the policy after a loss has occurred.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1041-1056, 1058-1070; Dec. Dig. § 392.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by the Central Market Street Company against the North British & Mercantile Insurance Company of London and Edinburgh on a fire insurance policy. From judgment on verdict directed for plaintiff, defendant appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZIS-  
KER, JJ.

John G. Johnson and James Wilson Bayard, both of Philadelphia, for appellant. Thomas Stokes, of Philadelphia, for appellee.

MESTREZAT, J. This is an action of assumpsit brought on a policy insuring the plaintiff, then known as the Moving Picture Company of America, against loss by fire to an amount not exceeding \$2,500 upon its fixtures, furniture, improvements, and betterments contained in the brick building, Nos. 926-928 Market street, Philadelphia. The defense was that the plaintiff company, in violation of its warranty, had stored celluloid moving picture films in the premises, and that the fire which destroyed the property was due to the explosion or ignition of the films.

The policy was issued on June 26, 1911, and ran for one year, until June 26, 1912. It insured the plaintiff against loss or damage by fire—

"to an amount not exceeding \$2,500, to the following described property while located and contained as described herein and not elsewhere, to wit: \* \* \* On betterments and improvements made to the building, chiefly masonry and carpenter work, decorations, painting, glazing and electric wiring and fixtures; on fixtures and furniture of every description, including carpetings, stage appliances, stationary seats, and all apparatus and appliances, appertaining to the business of the assured as a moving picture and amusement parlor (excluding moving picture machine and films). All while contained in the brick buildings, situate 926-928 Market street, Philadelphia, Pa."

The policy also contained the following:

"In consideration of the reduced rate at which this policy is issued, it is warranted that no moving picture films, composed in whole or in part of cellulose nitrate, commonly known as 'celluloid' films, will be kept, stored, or handled in the above-described premises, otherwise this policy is void."

The whole building was leased from the owner by one Lubin, who sublet the first story to the plaintiff company which used it as a moving picture theater or parlor. The basement and second floor of the building were occupied by the General Film Company with a stock of moving picture films, and the third, fourth, and fifth floors were occupied by the Lubin Manufacturing Company, developing and printing moving picture films and manufacturing moving picture machines. The General Film Company furnished the plaintiff with films for use in its business in consideration of a certain weekly

sum for the service. It received three films daily, which were got at 8:30 in the morning and returned to the General Film Company at 11:30 in the evening of the same day. The plaintiff company never had on its premises more than three films at one time which were necessary for its daily exhibition. It kept no films on the premises at night. It was not connected in any way with the two tenants of the other parts of the premises, and had no control whatever over any part of the building, except the first floor, which was used by it in its daily exhibitions of moving pictures. No films were stored by the insured company in any part of the building, but films were stored by the General Film Company in the part of the building occupied by it. The plaintiff company paid the premium on August 14, 1911. A fire occurred about 8:30 o'clock in the morning of January 13, 1912, which totally destroyed the insured property.

The facts are not in dispute. The learned trial judge directed a verdict for the plaintiff on two grounds: (1) Because the warranty in the policy was only a warranty against the keeping of inflammable films in the first floor rented by the plaintiff; and (2) because the defendant company, having had notice, five or six months before the fire, that inflammable films were stored upon the premises, and having thereafter taken no action either to cancel the policy or to assert a right to an increase of the premium commensurate to the risk, was presumed to have waived the warranty.

The contention of the defendant company is that "the above-described premises," contained in the warranty clause of the policy, refer to the whole building, and not to the first floor, leased to and occupied by the plaintiff as a moving picture parlor, and that the storage of celluloid films in other parts of the building than that leased to the plaintiff was a breach of the warranty. It is not claimed by the defendant that the use of the three films by the plaintiff company during its business hours each day was prohibited by the policy, but that the storage of inflammable films in any part of the building by the other tenants avoided the policy.

[1] If the policy is reasonably susceptible of two interpretations, it must be construed most strongly against the insurer, and this would require us to hold with the learned court below and against the defendant's contention.

[2] We think, however, the word "premises" in the warranty clause of the policy means, and was intended to mean, the part of the building occupied and used by the plaintiff company as lessee, and not the entire building. The prohibition, it should be observed, is not against storing films in "the above-described building," but in "the above-described premises." When the defendant issued the policy it knew that the plaintiff company occupied only the first floor of

the building and as lessee, and that the company was using or intended to use it as a moving picture parlor. The stage appliances and stationary seats had been attached to the first floor and the betterments and improvements were made to this part of the building. The insurance, it will be noted, was upon the improvements, the fixtures, the personal property, "and all apparatus and appliances appertaining to the business of the assured as a moving picture and amusement parlor (excluding moving picture machine and films)." All the property insured, therefore, was on the first floor of the building, and was to be used by the plaintiff in its moving picture exhibitions. The policy declares that the intent of the insurance under the first item was "to reimburse the assured (lessee) for the expense of betterments, and improvements paid for by the assured." These improvements were, therefore, made to that part of the building occupied by the plaintiff as lessee, which was the first floor of the building. It is clear that the defendant knew that the first floor had been altered and improved by the plaintiff company as lessee and furnished by it to be used in moving picture exhibitions, and that the improvements, fixtures, furniture, etc., placed on the floor by the assured were the property intended to be covered by the policy. That floor was the "premises" occupied by, and in the control of, the plaintiff.

The lease gave the plaintiff company no authority or control over any other part of the building or the right to use or improve any part of it except the first floor. The company could enter upon no other part of the premises for any purpose, and could neither store or handle films on any other floor nor prohibit the General Film Company or any other occupant of any part of the premises from storing or handling films in his part of the building. It is apparent, therefore, that if the plaintiff warranted against the storage of celluloid films in any other part of the building than the first floor, it was without power to compel compliance with the warranty. The lessees of the other parts of the building were in possession and had control of the floors occupied by them. So far as the plaintiff was concerned, those parties could use their parts of the building for storing combustible films or for any other lawful purpose. It is therefore not within the bounds of reason that the plaintiff company would enter into a contract which it and the insurer knew it was powerless to comply with, and in construing the policy this is an important, if not a controlling, fact to be taken into consideration. It was with full knowledge of all the facts which clearly disclosed the intention of both parties to insure the property on the first floor of the building let to the plaintiff that the policy was issued by the defendant company and accepted by the plaintiff company. This floor, and not the entire building, was manifestly "the above-described

premises" on which the plaintiff warranted that no celluloid films should be kept, stored, or handled. The covenant was strictly observed by the plaintiff, and it is not pretended that the plaintiff or any person under its control stored the prohibited films in that part of the building.

[3] We also agree with the learned trial judge that, if the warranty was broken by the storage of celluloid films in other parts of the building than that occupied by the plaintiff, the defendant was estopped from asserting the breach in its defense to this suit. It is the settled law of this state that where at the time of issuing an insurance policy the company knows, or ought to know, that one of the conditions is inconsistent with the facts, and the insured has been guilty of no fraud, the company is estopped from setting up the breach of such condition.

[4] The principle is equally well settled that, if an insurance company accept unearned premiums or assessments with a knowledge of facts avoiding the policy, it is estopped to assert the avoidance after a loss has occurred. The same doctrine prevails in other jurisdictions. *Whited v. Germania Fire Ins. Co.*, 76 N. Y. 415, 32 Am. Rep. 330; *McKinney v. German Mut. Fire Ins. Society*, 89 Wis. 653, 62 N. W. 413, 46 Am. St. Rep. 861; *Pierce v. Nashua Fire Ins. Co.*, 50 N. H. 297, 9 Am. Rep. 235; *Richards v. Louis Lipp Co.*, 69 Ohio St. 359, 69 N. E. 616, 100 Am. St. Rep. 679. In *Rivara v. Queen's Insurance Co.*, 62 Miss. 720, 729, the court says:

"If the assured has been guilty of no fraud, the insurer is estopped from setting up the breach of any condition of the policy, when it knew at the time the policy was issued that the condition was inconsistent with the facts, or the breach of any condition after the policy was issued, if it has induced the assured to believe that such breach was waived and has thereby misled him."

In 3 *Cooley on Insurance*, 2683, the learned author, citing numerous decisions from many jurisdictions in support of the text, says:

"The acceptance by an insurance company, with knowledge of facts authorizing a forfeiture or avoidance of the policy, of premiums or assessments which were in no degree earned at the time of such forfeiture or avoidance constitutes a waiver thereof. This waiver is based on the estoppel of the company to declare void and of no effect insurance for which, with knowledge of the facts, full compensation has been received."

Applying this doctrine to the facts of the present case, it is clear that if there was a breach of the warranty that no inflammable films should be stored in any part of the building the defendant company is not in a position to avail itself of the broken covenant. The policy was issued on June 28, 1911. At that time the basement and second story of the building were occupied by the General Film Company with a stock of moving picture films some of which at least were inflammable. The business of that company was to furnish films, inflammable and non-

inflammable, for moving picture exhibitions, and it kept both kinds of films in the part of the building which it occupied. This was known to the defendant company as early as July 14, 1911, when a representative of the owners of the building gave notice of the fact to the company. On at least two or three subsequent occasions the insurance company received a like notice that inflammable films were stored in the building. It made no objection and no demand for an increase of premium commensurate to the risk; on the contrary, it gave consent to the owners who had insurance on the whole building to store such films in the building. After the insurance company had received these notices and had given its consent to the owners to store combustible films in the building, it received the premium due for the policy issued to the plaintiff. With a knowledge of a breach of the warranty, the defendant company could have canceled the policy and could have refused to receive the payment of the premium. It did neither, but accepted the premium and permitted the policy to continue in force so far as the plaintiff knew. Having received and retained the benefits of the contract, the insurer will not be permitted, after a loss has occurred, to declare a forfeiture of the policy and thereby deprive the insured of the protection for which it paid and which the insurer led it to believe it had.

The judgment is affirmed.

#### WELLER v. DAVIS.

(245 Pa. 280)

(Supreme Court of Pennsylvania. May 11, 1914.)

#### 1. MINES AND MINERALS (§ 125\*)—SURFACE SUPPORT—ACTION FOR DAMAGES—EVIDENCE.

Where, in an action for damages to plaintiff's house and surface rights from removal of underlying coal, plaintiff admitted that defendant was entitled to mine the coal and made no claim for the value thereof, it was not error to exclude from evidence the lease for the coal.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. § 247; Dec. Dig. § 125.\*]

#### 2. APPEAL AND ERROR (§ 204\*)—OBJECTION BELOW—NECESSITY.

Refusal to strike out testimony cannot be reviewed on appeal, where no objection was made to the testimony when it was offered; the proper course for counsel to have pursued in such case being to request the court to instruct that the jury disregard the testimony and to assign error to the refusal of such request.

[Ed. Note.—For other cases, see *Appeal and Error*, Dec. Dig. § 204.\*]

#### 3. TRIAL (§ 234\*)—INSTRUCTIONS—EVIDENCE AND MATTERS OF FACT.

Where, in an action for damages to plaintiff's surface rights from the removal of underlying coal, the jury inspected the premises, it was not error to instruct that: "Your own observation of what you saw is the best possible evidence. \* \* \* Sworn testimony as a rule cannot be relied upon thoroughly, \* \* \* but what you see, \* \* \* especially in your official capacity as jurymen, is the best possible evidence to guide you"—especially where the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

amount of the verdict did not indicate that the jury ignored the testimony of the witnesses.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 534-538, 566; Dec. Dig. § 234.\*]

**4. MINES AND MINERALS (§ 125\*)—SURFACE RIGHTS—ACTION FOR DAMAGES—SUBMISSION OF ISSUES—EVIDENCE.**

In an action for damages to plaintiff's surface rights from the mining of coal, evidence that dynamite was used for blasting in defendant's mine and that this blasting disturbed plaintiff's property, authorized submitting to the jury plaintiff's claim for damages due to blasting by defendant.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 247; Dec. Dig. § 125.\*]

**5. APPEAL AND ERROR (§ 1067\*)—HARMLESS ERROR—REFUSAL OF INSTRUCTIONS.**

Where, in an action for damages to plaintiff's surface rights from the mining of coal, plaintiff's claim for damages for coal taken was not supported by evidence, and his claim was limited to the depreciation in value of his land and buildings, refusal of the court to instruct that plaintiff was not the owner of the coal under his lot was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4229; Dec. Dig. § 1067.\*]

**6. TRIAL (§ 251\*)—INSTRUCTIONS—CONFORMITY TO PLEADING AND PROOF.**

Where, in an action for damages to plaintiff's surface rights from the mining of coal, plaintiff's statement of claim alleged that defendant had removed the pillars forming the direct and lateral support of plaintiff's land, thereby causing the damages complained of, and there was evidence that defendant was negligent in the performance of the work, the court properly refused to charge that negligence was not alleged or proven.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587-595; Dec. Dig. § 251.\*]

**7. TRIAL (§ 252\*)—INSTRUCTIONS—CONFORMITY TO EVIDENCE AND FACTS.**

Where, in an action for damages to plaintiff's surface rights from the mining of coal, there was some evidence of negligence, the court properly refused to instruct that the measure of damages for the removal of lateral support is the injury to the land in its natural condition and does not include buildings or other improvements.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

Appeal from Court of Common Pleas, Schuylkill County.

Trespass by Charles Weller against Ellsworth Colliery—John H. Davis—for injuries to the surface of land from coal mining operations. From a judgment for plaintiff, Davis appeals. Affirmed.

Errors assigned were various rulings on evidence, instructions to the jury, and answers to points referred to in the opinion of the Supreme Court, and the third assignment, which was as follows:

(3) The court erred in its charge to the jury, as follows: \* \* \* "To enable you to get at the truth I have said this for the purpose of informing you of the fact that your own eyes and your own observation of what you saw is the best possible evidence that can guide you. Sworn testimony as a rule cannot be relied upon thoroughly, because there is always more or less contradiction—honest men differ—but what you see, that is within your own personal knowledge,

coming to you especially in your official capacity as jurymen, is the best possible evidence to guide you gentlemen in getting at the truth."

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Geo. M. Roads, of Pottsville, for appellant. William Wilhelm, of Pottsville, for appellee.

POTTER, J. The plaintiff in this case is the owner of a lot of ground with a two-story frame house erected thereon, situated at New Castle, Schuylkill county. It appears from the record that the defendant operated a coal mine, part of which was situated directly under plaintiff's land. Between the years 1908 and 1911 plaintiff's ground cracked and settled to such an extent that the house was badly damaged. It was alleged, and testimony was offered on behalf of plaintiff in the court below tending to show, that the injury to the property resulted from the removal by defendant of coal, which was necessary to the support of the surface of the land, and that this caused the ground to sink and crack and resulted in the wreck of the house. Defendant, on the other hand, endeavored to show that the damage resulted from operations in an adjacent mine for which he was not responsible. The trial resulted in a verdict for plaintiff. From the judgment entered upon this verdict the defendant has appealed.

[1] The first assignment of error is to the action of the trial judge in sustaining an objection on behalf of plaintiff, to the admission in evidence of the lease to defendant for the coal mine which underlaid plaintiff's ground. The lease was offered for the purpose of showing defendant's title to the coal and his right to mine it, and also for the purpose of contradicting plaintiff's claim that he was the owner of the coal beneath the surface. It appears, however, that plaintiff admitted at the trial, and here admits, that defendant was entitled to mine the coal, and plaintiff made no claim at the trial for the value of the coal. The exclusion of the lease does not therefore appear to have resulted in any harm to appellant.

[2] The second assignment of error is to the refusal of the court below to strike out certain testimony of the witness Strauch given, while under cross-examination, in reply to questions of the trial judge. No objection was made to the testimony at the time when it was offered. The refusal to strike it out is therefore not the subject of review here. The proper course for counsel to have pursued was to have requested the court to instruct the jury to disregard the testimony. The refusal of such a request might have been assigned as error. *McDyer v. East Penna. Ry. Co.*, 227 Pa. 641, 76 Atl. 841.

[3] In the third assignment, it is alleged that the trial court erred in charging the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jury with respect to the effect as evidence, of what they had personally seen while inspecting the premises. We do not feel, however, that the comment of which complaint is made necessarily went further than the acknowledged rule, which is that the jury may make use of knowledge acquired by a view of the premises, for the purpose of enabling them better to understand the testimony of the witnesses, and to determine the relative weight of conflicting testimony as to the values. Without doubt they could use the evidence of their senses to that extent, at least. The amount of the verdict does not indicate that the jury ignored the testimony of the witnesses. Evidence offered upon behalf of plaintiff tended to show that the property before the injury was worth from \$3,000 to \$3,500 and afterwards was worth from \$200 to \$400. That indicated a minimum depreciation of \$2,600, which was the amount of the verdict. Some of the estimates would have justified a larger award. We think the testimony was sufficient, if credited, to support a finding by the jury that defendant was responsible for the injury to plaintiff's land and buildings. In his general charge the trial judge, after using the language of which complaint is made in the third assignment, called the attention of the jury specifically to the testimony of the plaintiff's witnesses as to the amount of damages. Defendant offered no evidence on this subject.

[4] In the fourth assignment of error counsel for appellant cites a portion of the charge which included a reference to the disturbance of vertical support of the property by blasting, and it is alleged by counsel that the evidence does not support any claim for damages due to blasting by defendant. An examination of the record does show that dynamite was used for blasting in appellant's mine, and there was testimony tending to show that this blasting disturbed the property of appellee. We think this evidence was sufficient to justify the submission of that question to the jury.

[5] In the fifth assignment, it is alleged that the trial judge erred in refusing to affirm a point which instructed the jury that the plaintiff was not an owner of the coal under his lot. It is conceded that the court below erred in this respect, but it is contended that the error was harmless. In plaintiff's statement there was a claim for the value of coal taken. But no evidence was offered in support of this item, and on the trial the claim for damages was limited to the depreciation in value of the land and buildings. Nothing else seems to have been submitted to the jury in the charge. It is not therefore apparent that the error in answering the point could have harmed the defendant in any way.

[6] The sixth and seventh assignments of error are to instructions to the jury given in answer to points submitted by defendant,

setting forth that negligence was not charged in plaintiff's statement, and that there was no evidence from which the jury could find that the defendant was negligent in the work of removing the coal. While in his statement plaintiff did not charge defendant with such negligence directly, he did aver that defendant has "been pursuing a method known as 'robbing' certain veins and has taken away the pillars that were the direct and lateral support to the surface of plaintiff's lot, thereby causing" the damages for which recovery was sought. This charge was supported by the testimony. In the case of *Noonan v. Pardee*, 200 Pa. 474, this court said (page 482 of 200 Pa., 50 Atl. 255, page 256 [55 L. R. A. 410, 86 Am. St. Rep. 722]):

"Where there has been a horizontal division of the land, the owner of the subjacent estate, coal, or other mineral owes to the superincumbent owner, a right of support. This is an absolute right arising out of the ownership of the surface. Good or bad mining in no way affects the responsibility; what the surface owner has a right to demand is sufficient support, even, if to that end, it be necessary to leave every pound of coal untouched under his land."

This doctrine was again reiterated in *Berkey v. Coal Mining Co.*, 229 Pa. 417, 78 Atl. 1004.

In the present case it was therefore unnecessary for plaintiff to prove negligence on the part of defendant, in order to maintain his action and the jury might have been so instructed. There was, however, some evidence tending to show that defendant was negligent in the performance of the work, and the trial judge therefore rightfully refused to instruct the jury that there was no such evidence.

[7] The ninth assignment of error is to the refusal to affirm a point that the measure of damages for the removal of lateral support is the injury to the land in its natural condition, and cannot include injury to buildings or other improvements. The point was defective in that it contained no qualification that, where negligence is shown, damages for the injury to buildings and improvements may be recovered. In *Matulys v. Coal & Iron Co.*, 201 Pa. 70, 76, 77, 50 Atl. 823, 825, our Brother Brown said that:

"There can be no recovery for injuries to buildings or improvements resulting from the withdrawal of such support, in the absence of proof of negligence or carelessness in excavating or mining on the adjoining land."

Further on in the same opinion it is said that:

"For an injury to buildings \* \* \* an action can only be maintained when a want of due care, or skill, or positive negligence, has contributed to produce it."

As there was some evidence of negligence in this respect, it was not error to decline the point as drawn.

We see no merit in any of the other assignments of error. The case was clearly one for the jury, and in the manner of its presentation we find nothing which amounts

to reversible error. The verdict seems to have been warranted by the evidence.

The assignments of error are all overruled, and the judgment is affirmed.

(245 Pa. 223)

**LONGSTRETH et al. v. CITY OF PHILADELPHIA et al.**

(Supreme Court of Pennsylvania. May 4, 1914.)

**1. WORDS AND PHRASES — "MORAL OBLIGATION."**

A "moral obligation" is a duty which would be enforceable at law were it not for some positive rule which exempts the party in that particular instance from legal liability.

[Ed. Note.—For other definitions, see Words and Phrases, vol. 5, p. 4580; vol. 8, p. 7724.]

**2. MUNICIPAL CORPORATIONS (§ 860\*)—CONTRACTS—COMPENSATION FOR EXTRA WORK—RIGHT TO ALLOW.**

A city cannot, by ordinance, appropriate money claimed by a contractor to be due for extra work, where there is no moral obligation to make such payment.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1815-1818; Dec. Dig. § 860.\*]

**3. MUNICIPAL CORPORATIONS (§ 360\*)—CONTRACTS—COMPENSATION FOR EXTRA WORK—OBLIGATION TO PAY.**

A city is under no moral obligation to pay a contractor anything additional for alleged extra work where he has been fully paid under the terms of his contract for everything done by him.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 892, 892½; Dec. Dig. § 360.\*]

**4. APPEAL AND ERROR (§ 1010\*)—FINDINGS OF FACT—EVIDENCE.**

In a contractor's action against a city for compensation for alleged extra work, a finding that he had been paid under his contract for all work done could not be disturbed on appeal, when sustained by evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 8979-8982, 4024; Dec. Dig. § 1010.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill in equity for an injunction by William M. Longstreth and others against the City of Philadelphia and others. From decree granting an injunction defendants Joseph M. Smith and others, executors of the estate of Michael O'Rourke, deceased, appeal. Affirmed.

Ralston, J., in the court below, filed the following opinion:

On March 29, 1909, the councils of the city of Philadelphia passed a resolution which recited as follows: "Whereas, Michael O'Rourke, under contract with the city of Philadelphia, constructed the Aramingo Main Sewer, between Richmond street and the bulkhead line, on a basis of unit prices, and during the construction of the portion east of Richmond street certain changes were authorized in the plans for said work entailing additional cost, not represented by unit prices, of forty-six thousand seven hundred and twenty (46,720) dollars, the said amount being the net cost between building in water as contemplated, and pumping out water, building of flumes, coffer dams and rental of wharves, etc.; the city saved by said

change of plan on unit prices the sum of thirty-eight thousand three hundred and thirty-one (38,331) dollars and sixty (60) cents, for all of which additional cost no compensation was allowed him, although the total claim did not exceed the limit of the contract."

After other recitals it was resolved that the mayor be authorized to appoint an arbitrator to investigate and adjust the claim of Michael O'Rourke and to transmit the decision of the arbitrator to councils. In accordance with this resolution the mayor appointed J. J. De Kinder, Esq., as arbitrator, who, on July 28, 1910, filed his opinion, finding in favor of O'Rourke in the sum of \$30,722.22, with interest from November 10, 1902.

On March 16, 1911, councils passed an ordinance appropriating to the department of public works \$46,083.30, and authorized and directed the director of that department to draw, and the city controller to countersign, a warrant for that amount in favor of the estate of Michael O'Rourke.

The present bill was filed by taxpayers of the city, and prays that the controller be enjoined from countersigning, and the city of Philadelphia from paying, any warrants drawn to the order of the estate of Michael O'Rourke in payment of the sums appropriated by this ordinance of councils.

If the city was under any legal or moral obligation to pay this claim, the ordinance is valid. If there is no obligation, legal or moral, upon the city, then the ordinance is an attempt to make a gift of the city's money, and is void, as being beyond the power of councils. It is contended on the part of the plaintiffs that the city was under no legal or moral obligation to pay the claim, while, on the other hand, the executors of Michael O'Rourke contend that the city was under a moral obligation to make the payment.

[1] In order to determine this question it is necessary to know exactly what is meant by the term "moral obligation." In *Hawkes v. Saunders, Cowp.*, 289, Lord Mansfield said: "Where a man is under a moral obligation which no court of law or equity can enforce, and promises, the honesty and rectitude of the thing is a consideration." This doctrine prevailed in the English law for some years. It was attacked in a note to the case of *Wenall v. Adney*, 3 Bos. & Pul. 248, and the conclusion reached by the writers of the note was declared to be correct in *Eastwood v. Kenyon*, 11 Ad. & El. 438.

It was never held that every moral obligation was a consideration for a promise, but, on the contrary, the principle was limited to a few instances which might better have been put upon the ground of waiver or ratification; as, for instance, a promise to pay a debt incurred during infancy or coverture, or one that has been barred by the statute of limitations or bankruptcy. See Langdell, *Summary of the Law of Contracts*, § 71; *Lenke on Contracts*, 615; *Pollock on Contracts*, 169; also *Hare on Contracts*.

The principle was considered in *Kennedy v. Ware*, 1 Pa. 445, 44 Am. Dec. 145 (1845), in which the doctrine as stated by Lord Mansfield was repudiated. Gibson, C. J., said: "It is shown by a masterly review of all the cases in a note to *Wenall v. Adney*, 3 Bos. & Pul. 248, that Lord Mansfield's principle was intended for cases in which the promisor has received an actual benefit, but is protected from liability for it by some statute or stubborn rule of law. All the cases put forth by him for the sake of illustration are certainly of that stamp. 'Indeed Lord Mansfield, appears,' adds the annotator, 'to have used the term moral obligation, not as expressive of any vague or undefined claim arising from nearness of relationship, but of those imperative duties which

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



would be enforceable at law were it not for some positive rule which, with a view to general benefit, exempts the party in that particular instance from legal liability."

See, also, *Accommodation Loan & S. F. Association v. Stonemetz*, 29 Pa. 534.

This language is repeated by Chief Justice Mitchell in *Bailey v. Philadelphia*, 167 Pa. 569, at page 573, 31 Atl. 925, at page 927 (46 Am. St. Rep. 691). In that case a teacher was elected supervising principal by a sectional school board. After she had entered upon the performance of her duties, the board of education refused to confirm her election and regraded the school so as to dispense with the office of supervising principal. She held herself ready at all times to perform her duties as principal, and brought suit to compel the board of education to certify her name on the roll of teachers, but the suit was decided against her. Councils subsequently appropriated money to pay her salary, and the ordinance was held to be valid. Chief Justice Mitchell held that the law does not prohibit the city from recognizing a moral obligation as defined above; that is to say, that "there is nothing in the law or in sound public policy to prohibit the city from being honest, and paying its bona fide debts which are good in consequence and justice, though for sufficient other reasons there is a general rule which prevents them from being enforceable by law."

The term "moral obligation" being understood as meaning "a duty which would be enforceable at law were it not for some positive rule which exempts the party in that particular instance from legal liability," it remains to determine whether there was any such obligation upon the part of the city in the present case.

The history of the case briefly is as follows: On August 25, 1899, Michael O'Rourke entered into a written contract with the city for the construction of a sewer in the Aramingo canal. The prices fixed by the contract were for items of work completed and in place, with no additional allowance to the contractor for labor, dredging, pumping, or any work incidental to the building of the sewer. At the request of the contractor, the city assented to a change in the method of building a part of the sewer. By the original contract a section of the sewer was to be built under water by lowering blocks of concrete upon pile heads. The contractor preferred to build a bulkhead between two piers, pump out the water, and build the sewer above water or "in the dry." This was accordingly done, and the contractor was paid the prices fixed in the contract for all material used in the construction of the sewer. The total amount to be expended under the contract was not to exceed \$200,000. The total amount paid to the contractor for the work done under the contract, according to the prices fixed in the contract, amounted to \$161,096.30. The contractor thereupon brought suit against the city and claimed to recover the amount it cost him to build the bulkhead between the piers, flumes, and so forth, which were necessary in order to build the sewer "in the dry," namely \$46,720. As this amount added to what he had already received would exceed the sum of \$200,000, the extreme price limited in the contract, the claim was reduced to \$38,903.70; that is, the difference between the amount paid him, \$161,096.30, and the price limited in the contract, \$200,000. This case was tried before a judge without a jury and decided in favor of the city, on the ground that the prices fixed in the original contract included all labor, machinery, material, and so forth necessary to the completion of the work, and that the contractor was not entitled to recover for work and material not entering into the construction of the sewer, but expended in incidental work in order to build the sewer "in the dry." No appeal was taken from this decision. The facts as outlined above and the decision of the court thereon are

more fully set out in the findings of fact and conclusions of law and the opinion of the court in the case.

The suit having been decided adversely to the plaintiff, the ordinances of councils hereinbefore mentioned were passed, and the plaintiff presented a claim before the referee. This claim was not the same as that upon which the suit was brought, namely, for the extra expense of building the bulkhead, flumes, and so forth, in order to construct the sewer "in the dry," but the contractor claimed that if the work had been done under water, or "in the wet," as originally contemplated by the city engineers, he would have received, according to the prices fixed by the contract, \$191,818.50, whereas, by the method adopted by him less labor and material were required, so that, although he was paid according to the terms of the contract for all the work done, he received only \$161,096.30, or \$30,722.20 less than he would have received had the original plans been followed. A statement showing the difference between the work actually done and what would have been necessary under the original plans will be found at page 190 et seq. of the referee's report. The contractor therefore contends that if the sewer had been constructed under the original plan it would have cost the city \$38,331.60 more than it did cost.

There can be no doubt as to the character of the claim, because it is fully set out in the testimony taken before the referee, and the referee awards to the contractor \$30,722.20, which is the difference between what the contractor said the work would have cost if the original plans had been followed (\$191,818.50) and what it cost actually (\$161,096.30). The claim of the contractor is therefore for money to which he claims he would have been entitled if he had done the work and furnished the materials as originally planned. It is impossible to determine how much the contractor would have received had the work been done as originally contemplated, because the calculation is based entirely upon the estimate of the engineers, which was merely an approximate calculation. However, whether or not the contractor would have been entitled to more money if he had done the additional work, the fact remains that he did not do the work. His claim is for work which was not done but which might have been done if the change of plan had not been made. He does not claim, nor has any attempt been made to show, that he has not been paid according to the contract for all the work that he did, and his contention may be thus stated: He might have got more money if he had done more work; he did not do the work, hence the money was saved to the city; therefore he should receive the amount saved; in other words, the city should pay him for work he did not do, in order that he should receive as much as he had expected to get.

The learned referee finds that "the expense to the contractor in following out his own ideas, to which the city acquiesced, was far in excess of what it would have cost him had he gone ahead and simply adhered to the *modus operandi* specified in the agreement of August 25, 1899."

There is no evidence to warrant this finding. It is true that in the case tried before the court the cost of erecting the cofferdam, flumes, and so forth was stated, but, on the other hand, the expense to which the contractor would have been put had he followed the original plan is not given. Chief Engineer Webster enumerated some of the expenses incidental to the building of the sewer under water, such as floating pile drivers, platforms, extra heavy derricks to lower blocks of concrete weighing 70 tons, the building of tramways, &c. Until the cost of these appliances is determined, it is impossible to say whether or not the method pursued by the contractor was more or less expensive than that contemplated in the original plans.



The learned referee also says: "Where the fixed charge has once been debited against a given unit quantity, and this quantity is afterwards largely reduced, every unit of the reduced quantity must be taxed with an additional amount to make up the difference." This would seem to mean that where a contractor bids on an estimated amount of work, and the work turns out to be less than estimated, the contractor is likely to lose money, or at least not to make as much as he had expected.

In the estimate of the quantities of work attached to the specifications of the contract, it is expressly stated that the estimates are approximate only, and the contractor must satisfy himself and verify their accuracy, and will not be allowed to set up any claims against the city based on the inaccuracy of the estimates or the amount of the work to be done or quantities of materials to be furnished under the contract. The approximate quantities are not to be used in making payments, but payments will be made upon quantities determined by the chief engineer as the work progresses.

Therefore the quantity of work stated in the estimates as probably necessary has no relation to the amount of pay which the contractor was to receive. He is to be paid for the amount of work which he does, and not for the amount of work which the engineers estimated that he would probably be required to do.

The claim made by O'Rourke in the suit against the city was not allowed, on the ground that it was for work which by his contract he was bound to do, and that he had been paid all that he was entitled to under the contract.

The claim presented before the referee was for work which O'Rourke did not do, but which he claimed he would have done if a change in the method of performance had not been made.

The court finds:

1. That the city was under no legal obligation to pay O'Rourke as claimed.

2. That the city was under no moral obligation to pay O'Rourke either for the cost of doing the work "in the dry," or for the work which he claims he would have done had the sewer been built "in the wet," but which he did not do.

In *O'Rourke v. Philadelphia*, 211 Pa. 79, 60 Atl. 499, a case somewhat similar to the present one, Mr. Justice Mestrezat said: "There is but a single question involved in this appeal, and it is whether councils can, by the ordinance presented as the basis of this claim, bind the city to pay for work done in pursuance of a written contract for which the city has paid the price stipulated in the contract. To state the question would seem to be a full and complete answer to it against the contention of the plaintiff." This language is appropriate to the present case, except that the claim here is for work which the contractor did not perform.

For the reasons stated, the relief prayed for in the bill will be granted. Counsel will prepare a decree. The defendants will pay the costs.

The court found, *inter alia*, as follows:

"6. The contractor built the sewer in a good and workmanlike manner, according to the contract as modified by the above letters, and was paid for all the items of work entering into the construction of the sewer, according to the prices named in his proposal, a total amount of \$161,096.30."

"10. If the sum now claimed by virtue of the ordinance in suit is the amount of money which the contractor spent in the construction of dams, shoring, false work, and other temporary work in connection with the construction of the sewer from Richmond street to the bulkhead, then under the contract the unit prices therein specified included payment for all of these

items. And the contractor, therefore, was paid for them by the express terms of the contract, and there is no moral obligation on the part of the city to pay him or his representatives any of the sums claimed."

Exceptions were filed by the executors of the estate of Michael O'Rourke, which were afterwards dismissed, and the following decree entered:

And now, November 20, 1913, this cause came on to be further heard at this term, and was argued by counsel, and upon consideration thereof, it is ordered, adjudged, and decreed as follows, viz.: That John M. Walton, city controller, be perpetually restrained from countersigning, and the city of Philadelphia from paying, any warrants drawn to the order of the estate of Michael O'Rourke, deceased, in payment of the sums mentioned in the ordinance of March 16, A. D. 1911, annexed to the bill of complaint as Exhibit A, or any of them, and that plaintiffs shall recover costs.

The executors of the estate of Michael O'Rourke, deceased, appealed.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

John G. Johnson and John L. Burns, both of Philadelphia, for appellants. Thomas Raeburn White, of Philadelphia, for appellees.

PER CURIAM. [2-4] The court below found as a fact that appellants' decedent, who had a contract with the city of Philadelphia in connection with the construction of a sewer, had been fully paid for all the work called for by his contract, and that, as he had done nothing additional, there was no moral obligation resting upon the city to pay him more. Under this finding, which is not to be disturbed, because sustained by the evidence, the ordinance of the city councils, awarding him more, was invalid. *O'Rourke v. Philadelphia*, 211 Pa. 79, 60 Atl. 499; *Cunningham v. Dunlap*, 242 Pa. 341, 89 Atl. 129.

Decree affirmed at appellants' costs.

\*(245 Pa. 256)

#### In re BERTIN'S ESTATE.

#### Appeal of ACLY.

(Supreme Court of Pennsylvania. May 4, 1914.)

#### 1. EXECUTORS AND ADMINISTRATORS (§ 526\*)—ADJUDICATION OF ANCILLARY ADMINISTRATOR'S ACCOUNT—DISTRIBUTION—DISCRETION.

On the adjudication of an ancillary administrator's account, the orphans' court may in its discretion either distribute the fund among the parties entitled to it, or remit it to the forum of the domicile for that purpose.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 2350-2354; Dec. Dig. § 526.\*]

#### 2. EXECUTORS AND ADMINISTRATORS (§ 315\*)—ADJUDICATION OF ANCILLARY ADMINISTRATOR'S ACCOUNT—DISTRIBUTION—DISCRETION.

Where, on the adjudication of the account of an ancillary administrator, it appeared that testatrix was a citizen of and resided in France at the time of her death, and that the interpretation of the French law applicable to distribution of decedents' estates was necessary to a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

proper determination of a claim of legacy presented to the accountant by a citizen of this country, the auditing judge properly exercised his discretion in holding that the claimant would have to establish the validity of her legacy in the domiciliary jurisdiction before payment would be ordered in the ancillary proceedings, and in directing that a fund sufficient to meet the claimant's legacy be retained in the accountant's hands to await the decision of the French court.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1298-1314; Dec. Dig. § 315.\*]

#### Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of Helen Malcolmson Serrill Bertin, deceased. From a decree dismissing exceptions to adjudication, *Julia Acly* appeals. Affirmed.

The auditing judge, Anderson, J., in the court below, stated the facts in part as follows:

The testatrix, who was by birth an American citizen, had intermarried with a Frenchman, M. Bertin, and thus became a citizen of France. The marriage was under the French law of separate estates, by which married women retain the control of their property after marriage. She died domiciled at Paris, France, in February, 1910, and left her surviving her said husband and a daughter, Evelyn Serrill Bertin, and a last will and testament with codicil thereto, both dated July 29, 1904, and duly admitted to probate in this jurisdiction, and upon which ancillary letters of administration c. t. a. issued to the accountant July 8, 1910.

By her will, after reciting that she had, by deed bearing even date therewith, made a donation of the whole of her estate to her husband, with the stipulation that in case of the existence of children at the time of the distribution of her estate the donation would be subject to the reduction required by French law, and stating, "My testament which I am about to make has therefore no other object than to provide for the case in which I should die a widow without children," she gave, *inter alia*, to *Julia Acly* the sum of one hundred and twenty-five thousand francs.

By "codicil to my testament for the case in which I should die without having made provision concerning my daughter," she provided that *Julia Acly* should have the care of her daughter and direct her education, and after providing for the payment of her expenses, etc., she gave *Miss Acly* 125,000 francs, to be paid either at the death or on the day of the marriage of the said daughter, with interest at legal rates from the date of her death to the day of the death or marriage of her said daughter.

At the audit claim was made on behalf of *Miss Julia Acly* for payment of the said legacy of 125,000 francs with interest thereon, according to the terms of the codicil, out of the fund now accounted for in this jurisdiction. It was shown that the testatrix's daughter had after testatrix's death been declared a major or of age by her father, under the provisions of French law, before attaining the age of 21 years, and that she was married on December 10, 1912. It was also shown that all the debts of the testatrix in France had been paid.

Objection to the claim, however, was made on the ground that the legacy in the will was dependent upon the testatrix dying a widow and without children, and that as testatrix was survived by her husband and child the legacy under the will never took effect; and that the legacy under the codicil was predicated upon the legatee's having the care and education of testatrix's

daughter, and that she did not perform this duty. It was further objected that under the circumstances of the case (the husband and child having both survived testatrix), the legacy was invalid under the French law. Counsel for the daughter claimed the entire fund on her behalf as universal heir under the French law, and both he and counsel for the accountant asked that the fund be remitted to the domicile for distribution under the laws of France, where all claims might be properly and definitely adjudicated.

It appeared that the claimant, who was a native of the state of New York, had resided for some years in New Jersey, went to France, came back to New Jersey, and subsequently at the instigation of the testatrix returned to France and acted as governess for her daughter for some years, and then established herself in Paris taking apartments there for the purpose of receiving and educating young American ladies who might come to that country for that purpose. She was in France prior to the making of the will, at the time of its execution, resided there at the time of testatrix's death, and for some time thereafter. She subsequently came back to New Jersey and re-established a residence in that state, where she now resides.

The auditing judge decided that the fund for distribution should be remitted to the jurisdiction of the domicile for such action as the court of France might take as to the claim, subject, however, to an agreement by counsel representing the universal heir that a fund sufficient to meet the legacy should be retained in the hands of the accountant to await the determination of the question by the French court.

Exceptions to the adjudication were dismissed by *Lamorelle, J.*

Argued before *BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.*

*Clement B. Wood* and *Charles E. Morgan*, both of Philadelphia, for appellant. *H. Gordon McCouch* and *Edward Hopkinson, Jr.*, both of Philadelphia, for appellee.

*MESTREZAT, J.* [1] We agree entirely with the conclusion of the learned court below, and that it entered a proper decree under the facts and law applicable to the case. The question involved is not one of jurisdiction, but of the proper exercise of the discretionary power of the court to require the claimant, under the facts, to establish the validity of her legacy in the domiciliary jurisdiction before the ancillary jurisdiction will direct its payment out of the fund for distribution in this proceeding. In *Dent's Appeal*, 22 Pa. 514, 520, it is said:

"But it must be remembered that this is not a question of jurisdiction, but merely one of judicial discretion. \* \* \* From these authorities it is clear that the orphans' court had a right to exercise its discretion in deciding whether it would distribute the fund itself, among the parties entitled to it, or remit it to the forum of domicile for the purpose. And the question before us is whether there has been such an unwise exercise of that discretion as to justify a court of review in reversing the decree."

[2] In the exhaustive opinion filed by the learned auditing judge it is said, *inter alia*:

"It would seem to the auditing judge, therefore, after careful consideration of the authorities, a proper exercise of discretion to require that this matter be referred to the courts of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

domicile so that an authoritative decree might be obtained under that law as to the rights of the claimant, especially in view of the fact that both at the time of the making of the will and of the testatrix's death, and for some time thereafter, the present claimant was resident, if not domiciled, in Paris, where the will was probated, and by the public probate was put upon notice of its contents, and could without extra trouble and costs have made her claim to intervene in the courts of the domicile. Her present situation as a resident of this country grows out of her voluntary act in leaving the place of the testatrix's domicile since her death, and the hardship, if there be any, would seem quite as grievous upon the universal heir to defend against the claim here."

The facts of this case, as pointed out in the adjudication, clearly justified the action of the court below. Madame Helen Malcolmson Serrill Bertin, the testatrix, since her marriage in Philadelphia in 1890 had resided in and was a citizen of France, where she died in February, 1910. Julia Aclý, a citizen of this country and the claimant in this proceeding, went to Paris in 1892 after the death of her parents, and remained there, engaged most of the time in educational work, until the autumn of 1911, except about seven months in the year 1905, which she spent in this country. After her return to Paris she was employed by the testatrix on a salary for 18 months. She was never a citizen or resident of this state. It is apparent that the appellant had the opportunity to have her claim adjudicated by the proper domiciliary tribunal of France while she was a resident of Paris. The law of the domicile governs the distribution of a decedent's personal estate, and the validity of the appellant's legacy must therefore be determined under the law of France. Instead of asserting her claim in the forum of the domicile, she left that jurisdiction and came here to have our courts interpret the French law applicable to the distribution of decedents' estates. We are not asked to construe the law of a sister state, written in our own language, with which the courts of the other states are more or less familiar. This we have done, and in the exercise of a proper discretion will continue to do in the distribution of a decedent's estate under ancillary proceedings. Here the appellant's claim must be adjudged by the French Code, which necessarily requires a knowledge of the French language as well as of the French law, or that the court interpret a translation instead of the original instrument. Courts are not presumed to know a foreign language sufficiently well to translate it without the aid of an interpreter and adjudicate the rights of litigants depending on the construction of a legal instrument written in the language. The claimant called as a witness a member of the New York bar, familiar with the English and French languages, who translated the will and codicil executed in French by Madame Bertin, the testatrix, and also certain provisions of the French Code regulating the dis-

position of decedents' estates. She also called a French barrister to prove the French law regulating the civil rights of husband and wife where they have been married under the law of separate estates, and the law as to wills and codicils which determines the validity of the appellant's legacy. The appellee offered to produce similar expert testimony to sustain her contention and to defeat the appellant's claim. Had the court determined the validity of the appellant's legacy under the testimony, the rights of the parties would have depended, not on the court's interpretation and application of the law ruling the case, but on the court's opinion as to which of the witnesses correctly translated the will and codicil and correctly interpreted the French Code. The necessity of remitting the appellant's claim to the courts of the domicile for an authoritative adjudication is too apparent, we think, to require further discussion.

The decree entered by the orphans' court does not offend the act of March 31, 1905 (P. L. 91). It retains a fund sufficient to meet the appellant's legacy in the hands of the accountant to await the decision of the French court. When a decision has been made, the court of ancillary jurisdiction will distribute the fund to the party legally entitled thereto. The act provides that the personal representative "shall not be required to deliver to any foreign executor or administrator any fund. \* \* \* But such fund shall be distributed under the direction of the orphans' court. \* \* \*" This was the practice in the orphans' court at the date of the enactment, and hence the act was simply declaratory of the existing law. There is nothing in the act which prohibits the orphans' court from withholding distribution until the court of the foreign domicile has determined the validity of the claim under the laws of that jurisdiction. The ancillary court may proceed at once to determine the legality of the claim and make distribution, but the act does not require it. If the court should be of opinion that a proper distribution of the fund can only be made after an adjudication of the validity of the claim by the courts of the domicile, the postponement of the distribution for that purpose would be the exercise of a discretion not condemned by the statute. The Legislature intended by this enactment to protect citizens of the state by requiring our courts to make distribution of the fund in the hands of the ancillary administration, but it did not intend to compel the court to distribute the fund to a legatee until the validity of the legacy under the law of the domicile was duly established. This is all the decree of the court below requires, and it cannot be successfully attacked by the claimant, whether she be a citizen of this or any other state of the Union.

Decree affirmed.

(245 Pa. 370)

**PROVIDENT LIFE & TRUST CO. v. McCAUGHN et al.**

(Supreme Court of Pennsylvania. May 18, 1914.)

**1. STATUTES (§ 138\*)—TITLE AND SUBJECT-MATTER—SUPPLEMENT TO FORMER ACT.**

Where the provisions of the supplement to a former act, the title of which is sufficient, are germane to the subject of the original act, the subject of the supplement is ordinarily covered by a title containing a specific reference to the original by its title giving the date of its approval and declaring the act to be a supplement thereto.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 205, 206; Dec. Dig. § 138.\*]

**2. STATUTES (§ 121\*)—TITLE AND SUBJECT-MATTER—SUPPLEMENT TO FORMER ACT—REVENUE LAWS.**

The title to Act June 7, 1911 (P. L. 673), reading "An act being a further supplement to an act, entitled 'An act to provide revenue by taxation,' approved the 7th day of June, A. D. 1879, amending the amendment of the supplement thereto which became a law on the first day of June A. D. 1889, which amendment herein amended was approved the 8th day of June, A. D. 1891, relating to the tax on capital stock, approved the 8th day of June, 1893, relating to taxing bonds, mortgages, and other securities," is sufficient to cover the provisions of the act.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 146, 173, 174; Dec. Dig. § 121.\*]

**3. CONSTITUTIONAL LAW (§ 229\*)—TAXATION (§ 42\*)—SECURITIES OWNED BY ORGANIZED BODIES—EQUAL PROTECTION OF LAW—CLASSIFICATION.**

The provision of Act June 7, 1911 (P. L. 673), that securities owned by corporations, limited partnerships, or joint-stock associations, and held in any other manner than for "the whole body of stockholders or members, as such," shall be taxed as though belonging to individuals does not create an unlawful classification, though it casts a heavy burden on those within its scope, as compared with others.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 685; Dec. Dig. § 229.\* Taxation, Cent. Dig. §§ 90-95; Dec. Dig. § 42.\*]

**4. TAXATION (§ 116\*)—SECURITIES OWNED BY ORGANIZED BODIES—"STOCKHOLDER"—"MEMBER"—"EQUITABLE INTEREST"—"REMAINDER."**

As used in Act June 7, 1911 (P. L. 673), providing "that corporations, limited partnerships, or joint-stock associations, liable to tax on capital stock, shall not be required to pay any further tax on the mortgages, bonds, and other securities owned by them, and in which the whole body of stockholders or members, as such, have the entire equitable interest in remainder, but corporations, limited partnerships and joint-stock associations owning or holding such securities as trustees, executors, administrators, guardians, or in any other manner than for the whole body of stockholders or members thereof as sole equitable owners in remainder, shall return and pay the tax imposed by this act upon all securities so owned or held by them, as in the case of individuals," the word "stockholders" applies to corporations, "members" to partnerships or joint-stock associations, "equitable interest" to a division according to natural right and justice and not to a strict equitable title, and "remainder" to

the part remaining after all prior lawful obligations are satisfied.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 212, 213, 219, 271, 273; Dec. Dig. § 116.\*]

For other definitions, see Words and Phrases, vol. 7, pp. 6667-6669; vol. 8, p. 7804; vol. 3, pp. 4470, 4471; vol. 8, p. 7720; vol. 3, pp. 2439, 2440; vol. 7, p. 6070; vol. 8, p. 7784.]

**5. TAXATION (§ 116\*)—SECURITIES OWNED BY ORGANIZED BODIES—CONSTRUCTION OF STATUTE.**

Under the express provisions of Act June 7, 1911 (P. L. 673), every concern falling within its scope must pay a direct tax on all securities owned by it, which are not a part of its capital to such extent that its stockholders or members who stand toward it in a relation like stockholders are the sole owners of the right to an equitable distribution thereof.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 212, 213, 219, 271, 273; Dec. Dig. § 116.\*]

**6. TAXATION (§ 137\*)—PROPERTY SUBJECT—INSURANCE SECURITIES HELD BY POLICY HOLDERS.**

Where a corporation was authorized by the statute incorporating it to carry on the business of life insurance and that of a trust company, which statute contemplated that the insurance business should be conducted separate from the other business, and where the stockholders as such derived no profits from the insurance business, but the net profits of the same were held to be divided among policy holders only, the insurance securities being held for the policy holders as equitable owners in remainder and not "for the whole body of stockholders or members as such," within Act June 7, 1911 (P. L. 673), were taxable under such statute, though each policy holder who had paid a certain amount of premiums was entitled to one vote at the election of corporate directors.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 243, 249; Dec. Dig. § 137.\*]

**7. TAXATION (§ 47\*)—DOUBLE TAXATION—WHAT CONSTITUTES.**

That the state authorities gave the fact of possession of securities by a corporation some consideration as an element in determining the value of the corporation's capital stock did not make it double taxation to subsequently tax such securities.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 104-114; Dec. Dig. § 47.\*]

**8. TAXATION (§ 47\*)—DOUBLE TAXATION—LEGISLATIVE POWER.**

The Legislature may impose double taxation within proper limits.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 104-114; Dec. Dig. § 47.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by the Provident Life & Trust Company to enjoin Blakely D. McCaughn and another, assessors, and Simon Gratz and others, members of the Board of Revision of Taxes of the City and County of Philadelphia, from collecting a tax. From judgment for plaintiff, defendants appeal. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

John C. Bell, Atty. Gen., William M. Hargest, Second Deputy Atty. Gen., and Michael J. Ryan, City Sol., of Philadelphia, for appellants. John G. Johnson, Abraham M. Beltler, and Samuel Dickson, all of Philadelphia, for appellee.

**MOSCHZISKER, J.** This appeal involves the constitutionality of the act of June 7, 1911 (P. L. 673) its proper construction, if valid, and the question of its application to the plaintiff corporation.

[1, 2] The act is entitled:

"An act being a further supplement to an act, entitled 'An act to provide revenue by taxation,' approved the 7th day of June, A. D. 1879, amending the amendment of the supplement thereto which became a law on the first day of June, A. D. 1889, which amendment herein amended, was approved the 8th day of June, A. D. 1891, relating to the tax on capital stock,' approved the 8th day of June, A. D. 1893, relating to taxing bonds, mortgages, and other securities."

The court below held this title "insufficient and confusing"; but the learned chancellor who heard the case seems to have become confused by viewing the act of 1911 as though its title related only to the statute of 1893 and not to the act of 1879 (P. L. 112), which it supplemented.

"When an act of assembly is a supplement to a former act, if the subject of the original act is sufficiently expressed in its title, and the provisions of the supplement are germane to the subject of the original, the general rule is that the subject of the supplement is covered by a title which contains a specific reference to the original by its title, giving the date of its approval, and declaring it to be a supplement thereto." *Provident Life & Trust Co. v. Hammond*, 230 Pa. 407, 412, 79 Atl. 623, 629.

Although the title before us makes reference to the act of 1893, yet it plainly states that the present statute is a supplement to the act of 1879 "to provide revenue by taxation," and that it relates to "taxing bonds, mortgages and other securities." These references, particularly when taken in connection with the one to the act of 1891 "relating to the tax on capital stock," are ample to put the plaintiff and all others in a like position on notice; and the title is sufficiently comprehensive to cover the provisions here brought into question.

[3] But the appellant contends that the statute creates an unjustifiable classification; further that its application to the plaintiff corporation will result in an unlawful discrimination. Under this act, securities owned by corporations, limited partnerships, or joint-stock associations, which are held in any other manner than for "the whole body of stockholders or members, as such," are taxed as though they belonged to individuals. We cannot say that this is unlawful classification; although it may cast a heavy burden upon those who fall within its scope as compared with others not in the same class, yet that result is the work of the lawmaking power, and, so long as no constitutional provision has been violated, the question of

its weight is not for us to heed or comment upon. But it may not be out of place to notice that, when the act of 1911 was passed, purely mutual insurance companies were and for some time had been taxed on their gross assets like individuals; and the securities which the defendants here claim the right to tax are assets involved in the doing of a mutual insurance business. Again, the classification cannot be set aside on the ground that it affects the appellant alone, for there is no finding upon the record or evidence to justify the conclusion that the plaintiff company is the only concern to which the act in question can apply. While a fund exactly like the one represented by the securities here sought to be taxed may not be held by any other company at the present time, nevertheless the words of the statute are so broad and general that we are unable to say that no other fund exists, or will in reasonable anticipation exist in the future, embracing securities in such a way as to bring them within its scope; in other words, even if it be true that these are the only insurance fund investments to which the act now applies, or is likely to apply in the future, its provisions are sufficiently comprehensive to cover all securities held by concerns within its purview for any purpose whatsoever, where the "whole body of stockholders or members, as such," have not the "entire equitable interest in remainder" in such assets. Hence we cannot condemn the act as special legislation; and so far as the alleged unlawful discrimination is concerned, since the fundamental law merely exacts uniformity of taxation within a class, comparison with other corporations outside the class created by the present statute cannot be considered. *Commonwealth v. Delaware Div. Canal Co.*, 123 Pa. 594, 620, 621, 623, 16 Atl. 584, 2 L. R. A. 798.

[4] While we hold the act valid legislation, yet, before discussing the question of its application, we must consider the proper interpretation of certain material words and phrases which occur therein. The statute first provides that every corporation, joint-stock association, or limited partnership, of which a report is required by law, shall pay a tax upon its capital stock; and this includes the plaintiff company. It then provides:

"That, for the purposes of this act, interests in limited partnerships or joint-stock associations shall be deemed to be capital stock, and taxable accordingly."

After this comes the part upon which the defendants rely to sustain their position; i. e.:

"That corporations, limited partnerships, and joint-stock associations, liable to tax on capital stock, \* \* \* shall not be required to pay any further tax on the mortgages, bonds, and other securities owned by them, and in which the whole body of stockholders or members, as such, have the entire equitable interest in remainder; but corporations, limited partnerships and joint-stock associations owning or holding such securities as trustees, executors,

administrators, guardians, or in any other manner than for the whole body of stockholders or members thereof as sole equitable owners in remainder, shall return and pay the tax imposed by this act upon all securities so owned or held by them, as in the case of individuals"

—i. e., a direct tax of four mills on every dollar of value. It seems obvious that the word "stockholders," as used in this act, was meant to apply to corporations, and the word "members" to partnerships or joint-stock associations; and we so interpret the statute. The evident intent of the Legislature was to compel corporations to pay the direct tax fixed by the act on all securities "owned by them" and held "in any manner" other "than for the whole body of stockholders as equitable owners in remainder"; or, in other words, to make corporations pay such a tax on all securities "owned or held by them" in which "the whole body of stockholders" have not "the entire equitable interest in remainder," and this notwithstanding the payment of a capital stock tax. As well stated by the learned court below:

"The phrase 'the entire equitable interest in remainder' is not used as technical language applicable to estates in land but as descriptive of a right to the application of a balance found upon an accounting."

And, as admitted by the learned counsel for the appellee, the phrase "equitable ownership" \* \* \* does not refer to a strict equitable title similar to that of *cestui que trust*. A legal definition of "equitable interest" is "that which can be sustained or made effective or available in a court of equity" (Anderson's Law Dictionary); and the meaning of this phrase in its ordinary sense, as, for instance, when applied to an interest in a fund, is the "right to have it divided according to natural right or natural justice" (Webster's New International Dictionary). The word "remainder," as used in the statute, no doubt, is meant to signify the part remaining after all other prior lawful obligations are satisfied. The words under consideration are new to the taxing laws of the commonwealth, and therefore cases cannot be cited with reference thereto; but when we consider the history of the statutory development of this branch of the law, and the particular phrasing now before us, together with the rule that a court must search for a rational meaning to apply to legislative language, the several interpretations here made seem reasonably to present the sense of the statute.

[6] Briefly, we take the act to mean that every concern which falls within its scope must pay a direct tax upon all securities owned by it which do not belong to capital; that is, which are not a part of its capital to such extent and in such a sense that its stockholders, or members who stand toward it in a relation like stockholders, are the sole owners of a right to an equitable distribution thereto (i. e., of so much of the fund which embraces the securities as may remain after all expenses and debts properly charge-

able thereto have been satisfied). But, when the statute is so construed, the question of the propriety of its application to the plaintiff corporation still remains to be considered.

[8] Some years ago an effort was made to tax the securities in the plaintiff's insurance fund, under the act of June 8, 1891 (P. L. 229), which, in place of the new words employed in the act of 1911, used the phrase "owned by them in their own right"; and in *Provident Life & Trust Co. v. Durham*, 212 Pa. 68, 79, 80, 61 Atl. 636, 640, we held that this could not be done, stating:

"These securities constitute a fund owned by the company in its own right to meet contingent (insurance) liabilities. \* \* \* The Provident Life & Trust Company is a corporation conducting the business of a life insurance and trust company. \* \* \* In order to keep track of its different branches, the receipts from insurance are credited to the insurance branch, and the expenses, death losses, and payments on endowment policies are charged to this branch; the surplus, with accumulations of interest, is held as a reserve fund to meet the payment of policies as they mature and to make certain the fulfillment of the contracts of insurance."

Later, in *White v. Provident Life & Trust Co.*, 237 Pa. 375, 380, 85 Atl. 463, 464, in discussing the character of this fund and the rights of policy holders therein, we said:

"The defendant company is authorized to carry on not only the business of life insurance, but also that of a trust company. \* \* \* But the charter contemplates that its life insurance business shall be conducted separate and apart from its other business. \* \* \* The stockholders of the company as such are to derive no profits from the insurance business. The act of February 18, 1869 (P. L. 184), which is a supplement to the act of incorporation, provides 'that all the net profits to be derived from the business of life insurance, after deducting the expenses of the company, shall be divided pro rata among the holders of the policies of such life insurance, equitably and ratably, as the directors of said company shall and may, from time to time, ascertain, determine, and report the same for division.' 237 Pa. 385, 85 Atl. 466. Whatever the fund in question may be called, \* \* \* its office must be the ultimate protection of the policy holders. \* \* \* At its maturity the policy holder is entitled to his pro rata share of the fund which has been retained for his benefit."

And we there held that the plaintiff, a holder of matured policies, was possessed of such an equitable interest in this fund as entitled him to a decree "requiring the defendant corporation to state an account" and "to pay over to him his equitable and ratable proportion thereof." Although we said in *Provident Life & Trust Co. v. Durham*, 212 Pa. 68, 61 Atl. 636, that those insured by this company are not entitled to "securities in kind but to money," yet this can make no difference in the application of the act of 1911, so long as the investments sought to be taxed are held for the policy holders "as equitable owners in remainder," and not for the "whole body of stockholders"; nor can the fact that none of the securities is physically marked actually to designate them as insurance assets be given controlling ef-

fect, particularly in view of the finding that "the plaintiff keeps a separate account of the assets pertaining to that side of its business." In this connection it is to be observed that in the White Case, *supra*, we note that the insurance department of the plaintiff company is conducted on a "mutual basis, \* \* \* separate and apart from its other business," and that "the stockholders, \* \* \* as such," can "derive no profit" therefrom; and we there conclude that all moneys from insurance receipts which accumulate after the payment of the cost of doing business and the maintenance of a proper reserve belong "equitably and rateably" to the policy holders to such an extent that they can call upon a court of equity to enforce their rights in the premises. All of which means that the securities in the insurance fund are held for the policy holders as "equitable owners in remainder"; and therefore it cannot be said that the plaintiff company possesses them "for the whole body of stockholders or members, as such"; and this is the pinch of the case.

The appellant contends, however, that, by the terms of its charter, policy holders are members of the corporation, and that under the terms of the act of 1911, *supra*, securities held for their benefit cannot be taxed. We have already determined that the word "members," as used in this act, applies to limited partnerships and joint-stock associations and not to corporations. But conceding that there may be such a thing as a member of a corporation for profit, yet, under the language of the present statute, it is clear that the limiting words "as such," which appear between commas immediately after the phrase "stockholders or members," are intended to restrict or qualify the word "members," so as to give it the meaning of members having an interest practically the same as that of stockholders. Since the term "members" is appropriate to "limited partnerships or joint-stock associations," and the statute provides that, for its purposes, interests therein shall be "deemed to be capital stock," it seems obvious that this word has relation to such concerns and is intended in the qualified sense we have suggested. Although the policy holders of the plaintiff company have, in a limited way, through the restricted right to vote for directors, privileges ordinarily enjoyed by members of a corporation, nevertheless they are not on a plane with stockholders; hence it cannot be said that the securities in question are held for "the whole body of stockholders or members, as such," and the contention as to the effect of their alleged membership fails. But, in addition, an examination of the relevant acts of assembly will show there is very little foundation for the claim that these policy holders are in any real sense members of the plaintiff corporation. The first section of the Charter Act of March 22, 1865 (P. L. 555), confers upon the plaintiff

all the rights, etc., given by the first, second, third, fifth, sixth, seventh, ninth, tenth, eleventh, sixteenth, and seventeenth sections of the Insurance Company Incorporation Act of April 2, 1856 (P. L. 211); the second section provides that its affairs "shall be managed by nine directors, stockholders of said company"; and the third, for its capital stock. The remaining sections only once refer to policy holders; the seventh providing that:

"At the election for directors, besides the votes to which stockholders are entitled, each policy holder \* \* \* (having paid a certain amount in premiums) shall be entitled to one vote."

The charter was amended in 1866 (Act of March 12 [P. L. 184] by making provision for the regular annual meeting for stockholders, together with some other matters unnecessary here to mention and the fourth section of this act provides that:

"Every stockholder \* \* \* shall be entitled, at each annual election \* \* \* to vote for one director."

Then again, when we look at the act of 1856, *supra*, we find that the stockholders alone constitute the corporation, and that its seventh section provides that such corporation shall be empowered to insure the respective lives of "its members and others." The next place where members are mentioned is in the eleventh section, and it provides that if a company organized thereunder is to do an insurance business on the mutual principle "alone, and not in connection with a stock capital," then "and in that case" all persons insuring with the company become members during the period they shall remain so insured; but this does not apply to the plaintiff company, for its charter (Act of 1865, *supra*, § 1) stipulates that it "shall transact its business" on the "mutual principle," combined with a "stock capital." In point of fact, most of the sections of the act of 1856 which designate policy holders as members are not incorporated in the plaintiff's charter. Under the circumstances, we fail to see any reasonable justification for the claim that the policy holders of this company are members thereof, within the meaning of the act of 1911.

[7] Finally the appellee contends that to uphold the attempted assessment would subject it to double taxation. The figures involved tend to show that the investments in question have never as yet been directly taxed, but at the same time they indicate that the state authorities gave the fact that these securities were held by the plaintiff company some consideration, as an element, in determining the value of its capital stock; and this, to a certain limited extent, they had a right to do (*Commonwealth v. Mortgage Trust Co.*, 227 Pa. 163, 179, 76 Atl. 5), for undoubtedly the possession of such a large fund in connection with the insurance business of the company would in an indirect way affect the value of its capital stock, just as large trust funds in its trust department would have a similar effect. That the possession of



the insurance assets entered into the assessment of capital stock to this extent seems to be admitted; but nothing appears to show that they were further considered. We have no doubt, had those who assessed the capital stock realized that the plaintiff company would be obliged to meet this additional annual tax, they would have taken into account its probable indirect depreciatory effect, which they might well do; but although, apparently, this was not done, so far as the evidence before us indicates, no actual double taxation is shown.

[8] If it were, however, such taxation, within proper limitations, is not unknown to our law or beyond the power of the Legislature to impose. *West Chester Gas Co. v. Chester County*, 30 Pa. 232; *Pittsburgh, F. W. & Chicago Ry. Co. v. Commonwealth*, 66 Pa. 73, 5 Am. Rep. 344; *Commonwealth v. U. S. Exp. Co.*, 157 Pa. 579, 27 Atl. 396; *Commonwealth v. Westinghouse Airbrake Co.*, 151 Pa. 276, 24 Atl. 1111, 1113; *Commonwealth v. Navigation Co.*, 162 Pa. 603, 610, 29 Atl. 664.

It would serve no useful purpose to review the various cases concerning past efforts to tax the securities in this fund; some of them we have had occasion to refer to in the course of this opinion, but none of them controls here, for they all arose prior to the act of 1911. We conclude that the act now before us creates a new and valid classification for purposes of taxation, and that the plaintiff company is within the class; further that the act violates neither the Constitution of Pennsylvania nor that of the United States. We have endeavored to discuss all points essential to a proper determination of this appeal, but do not deem it necessary to pass specifically upon each of the 51 assignments of error; the last of these, which goes to the decree, is sustained; the remaining ones are not in proper form (*Prenatt v. Messenger Printing Co.*, 241 Pa. 267, 270, 88 Atl. 439), and they are dismissed.

The decree is reversed, and the injunction dissolved; the plaintiff to pay the costs.

(245 Pa. 244)

#### IN RE SIMPSON'S ESTATE.

#### Appeal of PHILADELPHIA TRUST, SAFE DEPOSIT & INS. CO.

(Supreme Court of Pennsylvania. May 4, 1914.)

#### 1. WILLS (§ 472\*)—CONSTRUCTION.

A testator who had been twice married and died leaving seven children by his second wife, and the children of two deceased children by his first wife, bequeathed \$200 to the latter grandchildren, and made "no other gift or bequest to them," and in the next clause of the will divided the residue of his estate into seven parts, of which he gave absolutely five to trustees for his daughters, after the daughter's death the "capital" to be divided among her living children and the issue of any deceased child, and in the case of any daughter dying without issue surviving, "then the estate \* \* \* devised in trust for her for life shall go \* \* \* to such

person or persons \* \* \* as the same would have gone (under the intestate laws \* \* \*) had she \* \* \* died \* \* \* possessed thereof intestate and unmarried. Provided however, that in such case, any shares \* \* \* that would go to any of my daughters herein named shall \* \* \* vest in their trustees herein constituted and appointed upon the same trust upon which my said daughters' shares of my estate are herein \* \* \* devised." *Held*, that pursuant to the last and controlling manifestation of the testator's intent, where one daughter died without issue, her next of kin of the half blood were entitled to part of her share.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 990, 991; Dec. Dig. § 472.\*]

#### 2. WILLS (§ 439\*)—CONSTRUCTION—INTENT OF TESTATOR.

Where the meaning of testamentary words is clear and unequivocal, the testator's intention becomes equally so, and must control in the construction of the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 952, 955, 957; Dec. Dig. § 439.\*]

#### Appeal from Orphans' Court, Philadelphia County.

Adjudication of trustee's account in the estate of James Simpson, deceased. From a decree directing distribution, the Philadelphia Trust, Safe Deposit & Insurance Company, trustee for Josephine S. Lentz, Virginia A. Hill, Priscilla T. Lippincott, Elizabeth C. Simpson, and others appeal. Affirmed.

Exceptions were filed to the adjudication by the Philadelphia Trust, Safe Deposit & Insurance Company, trustee, and by Priscilla T. Lippincott, which exceptions were dismissed and the account confirmed. Error assigned was in dismissing exceptions to the adjudication and confirming the account.

Argued before BROWN, MESTREZAT, ELKIN, POTTER, and MOSCHZISKER, JJ.

John G. Johnson and Maurice Bower Saul, both of Philadelphia, for appellant Philadelphia Trust, Safe Deposit & Ins. Co. Henry Spalding and Alfred Moore, both of Philadelphia, for appellants Lentz and others. Walter Biddle Saul, of Philadelphia, for appellee Heineman. James Arthur Ewing, of Philadelphia, for appellees Ewing and others. Franklin E. Barr, of Philadelphia, for appellees Simpson and another.

BROWN, J. [1] James Simpson, who had been married twice, died October 29, 1886. By his first marriage he had two children, Arthur and Adam, both of whom died, leaving children, before he made his will. By his second marriage he had seven children, two sons and five daughters, all living at the time of his death. After some minor bequests and devises and a direction as to the use to be made of his residence, the testator provided as follows by the seventh clause of his will:

"Inasmuch as I consider that the families of my deceased sons, Arthur and Adam are abundantly and sufficiently provided for now in order in my judgment to make a fair and equal division of my estate (considering the opportunities

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and advantages which I gave to my said sons Arthur and Adam) I give and bequeath the sum of one hundred dollars (\$100) to the two children of my said son Adam to be equally divided between them share and share alike and make no other gift or bequest to them. And I give and bequeath the sum of one hundred dollars (\$100) unto the said children of my said deceased son Arthur S. Simpson to be equally divided between them share and share alike and make no other gift or bequest to them."

By the next clause the testator disposed of his entire residuary estate, dividing it into seven equal parts, two of which he gave absolutely to his two surviving sons James and Charles. He gave the remaining five parts or shares to trustees for his five daughters, one of whom, Mary B. Castleberry, died June 27, 1913, without leaving issue surviving. The following condition annexed to the bequest of the one-seventh of the testator's residuary estate in trust for her is annexed to the bequest to each of the other four daughters:

"And from and immediately after the decease of my said daughter then in trust to assign transfer pay over divide and distribute all the capital of the said seventh part or share (so given and devised in trust for her for life) to and among the child or children of the said Mary living at her death and the issue of any of her children who may then be deceased their several and respective heirs executors, administrators and assigns in equal parts and shares but so that any issue of such deceased child or children shall only have and take the same share which his her or their deceased parent would have taken if living. And in case of the decease of my said daughter Mary without leaving a child or children or the issue of any deceased child or children her surviving then the estate real and personal given and devised in trust for her for life shall go and I hereby give and devise the same to such person or persons and for such estates and shares therein to whom and as the same would have gone (under the intestate laws of this commonwealth) had she my said daughter Mary died seised and possessed thereof intestate and unmarried. Provided however that in such case any shares or proportions thereof that would go to any of my daughters herein named shall go to and vest in their trustees herein constituted and appointed upon the same trusts upon which my said daughters' shares of my estate are herein given and devised."

At the adjudication of the account of the testamentary trustee of the fund bequeathed for the use of Mary B. Castleberry, the balance in its hands was claimed by those who were of her whole blood, to the exclusion of the children and grandchildren of her deceased half-brothers, Arthur and Adam. This claim was based upon the seventh clause of the testator's will, in which, after giving \$100 to the children of each of his deceased sons, he says he makes no other gift or bequest to them. It is contended that this excludes them from any participation in the fund which was held in trust for the deceased daughter. On the other hand, the children and grandchildren of the two deceased half-brothers of the deceased cestui que trust claim two shares of the fund under the following clause in the bequest for her use and benefit:

"In case of the decease of my said daughter Mary without leaving a child or children or the issue of any deceased child or children her surviving then the estate real and personal given and devised in trust for her for life shall go and I hereby give and devise the same to such person or persons and for such estates and shares therein to whom and as the same would have gone (under the intestate laws of this commonwealth) had she my said daughter Mary died seised and possessed thereof intestate and unmarried."

The court below sustained the claim of the descendants of the two half-brothers, and from its decree, awarding the fund in the hands of the accountant to those who would have been entitled to it under the intestate laws if Mary B. Castleberry had died seised and possessed thereof, intestate, and unmarried, we have this appeal.

[2] When the estate of the testator was distributed among those to whom he directed it to go in the first instance, the children of his two deceased sons were entitled to but \$200, for he had so provided, and his reason for directing that they should receive no more upon his death appears in the nominal bequests to them. If there were nothing in the subsequent clauses of the will indicating an intention that, upon a certain contingency, these grandchildren should further participate in the distribution of the testator's estate, the clause upon which the appellant relies would exclude them from the distribution of the fund in the hands of the accountant. What does the testator clearly and unequivocally say shall become of the seventh part of his residuary estate, to be held in trust for his daughter Mary, if she should die without leaving a child or issue surviving? If she should so die, the testator himself gives and bequeaths that part or share to those to whom it would have gone under the intestate laws of this commonwealth had the daughter died seised and possessed thereof, intestate and unmarried. If the daughter Mary had died seised and possessed in her own right of the fund before the court below for distribution, the appellees, descendants of her brothers of the half blood, would have participated equally with her brothers and sisters of the whole blood, and the expressed intention of the testator must control in this as in all cases. The words which he used to express his intention as to what should be done upon the death of his daughter Mary, without leaving issue, with that portion of his estate held in trust for her, can have but one meaning, and that meaning must be given to them. The question in expounding a will is always, What do the words of the testator mean? Hancock's Appeal, 112 Pa. 532, 5 Atl. 56. With the meaning of testamentary words clear and unequivocal, the intention of the testator becomes equally so and is always prevailing. All this is conceded by learned counsel for appellants, but it is insisted that a controlling intention of the testator, as expressed

in the seventh clause of his will, runs all through it, excluding the appellees, children and grandchildren of the two deceased sons, Arthur and Adam, from any participation in his estate in addition to the bequests of \$200. In support of this it is urged that the testator's equal distribution of his estate will be defeated if the decree of the court below is sustained. This assumes—and, indeed, it is so argued here—that the equality which he had in mind can be maintained only by construing his whole will as meaning that the entire residuary estate belongs exclusively, and without regard to any contingency contemplated by the testator, to the children by his second marriage. He undoubtedly intended equality in the distribution of his estate, but the construction which we are asked to put upon his will might lead to an inequality which, it may be safely assumed, he never contemplated. One of his daughters has already died without leaving issue; the other four may leave no issue; one of the two sons by the second marriage is dead, and apparently left no issue; upon the death of each of the other four daughters leaving no issue, the entire residuary estate, under the contention of appellant, would ultimately pass to the issue of one of the sons by the second marriage. It may be that, to avoid a contingency of inequality in the ultimate distribution of his estate, the testator directed that, upon the death of any daughter without leaving issue, the share of his estate held in trust for her should be distributed under the intestate laws as if it had belonged absolutely to her, an unmarried woman. But it is entirely immaterial what his purpose was in making such provision in disposing of what continued to be a part of his estate, for he had a right to say just where his whole estate, or any portion of it, should ultimately go, and the court below has but given effect to his clearly expressed intention. If he had intended to exclude the children and grandchildren of his two sons by his first marriage from the present distribution, he could have easily so provided, as he did in excluding the husband of a deceased daughter, dying without issue, from participation in the distribution of the share of his estate held in trust for her.

The court below relied upon certain authorities in support of its decree allowing the claims of the appellees to two distributive shares of the fund in the hands of the accountant. As the decree of distribution is the one made by the testator himself, authorities were hardly needed to vindicate it, and we shall refer to only one of those cited by the lower court. In *Stickle's Appeal*, 29 Pa. 284, the testator, after bequeathing to Peter Stickle \$1, in addition to what he had already given him, gave all the residue of his property to his sister for life, and at her death the same was to be equally divided among his "nearest heirs." Stickle was one

of those heirs. Upon the death of the sister, in distributing the estate which had been left to her for life, Stickle's claim to a portion of it, as one of the nearest heirs of the testator, was resisted, on the ground that, by the \$1 legacy given him, the testator intended he should have no more out of his estate. The court below held that he was entitled only to the \$1 legacy. In reversing this and holding that he was entitled to participate equally with the other nearest heirs, Mr. Chief Justice Lewis used the following language, which is peculiarly appropriate in construing the will now before us:

"Where there are two clauses in a will which are so inconsistent with each other that it is impossible to give effect to both, the first must give way to the last, because the latest manifestation of the will of the testator is to control. But in the construction of a written instrument, it is the duty of the court to endeavor to give effect to every part of it. It is only when this is impossible that the rule first mentioned has place. With this principle in view, we see no difficulty in the case before us. The legacy of \$1 is payable immediately and absolutely. The residuary legacy does not take effect in possession until after the death of the tenant for life. The enjoyment of the first by the legatee depended upon his being alive at the death of the testator. The enjoyment of the other by the legatee rests on the contingency of his surviving the tenant for life. They are not so inconsistent with each other as to require either to give way. Both may well take effect. It may be possible that the legacy of \$1 to Peter Stickle was given under the erroneous notion that it would cut him out of all further share in the estate. But the bequest can have no such effect; whereas here, the testator, in a subsequent clause, gives a residuary legacy to a class which clearly includes the first legatee. He is one of the 'nearest heirs' of the testator, and by that description he must come in equally with the other residuary legatees named in the auditor's report. If an heir is not to be disinherited except by express direction, or necessary implication, he surely cannot be deprived of his legacy, expressly given, by an implication not necessarily arising from any part of the will, and which, at most, is but a bare suspicion. The testator may have intended to cut him off with \$1, but he has expressed a contrary intention."

The latest manifestation of the intention of James Simpson, as found in his will, and which is therefore controlling, is that upon the death of his daughter, the share of his estate which had been held in trust for her should go to those who would be entitled to it under the intestate laws if she had died unmarried, intestate, and seised thereof. This expressly includes the appellees, and no line of reasoning based upon the seventh and earlier clause of the will can possibly exclude them.

*Sullivan v. Straus*, 161 Pa. 145, 28 Atl. 1020, *McGovran's Estate*, 190 Pa. 375, 42 Atl. 705, *Everitt's Estate*, 195 Pa. 450, 46 Atl. 1, and *Tucker's Estate*, 209 Pa. 521, 58 Atl. 889, are four of the five cases relied upon as authorities in support of this appeal, but they are not to be so regarded, for the testator or testatrix in each case, in plain words, unmistakably excluded from any participation in his or her estate the parties claiming dis-

tributive shares of the same. This is manifest from a mere glance at each of the wills.

One of the members of the court below, in dissenting from the decree concurred in by all of his colleagues, was of opinion that Herr's Estate, 28 Pa. 467, is "practically the present case," and this view has been pressed upon us by learned counsel for appellant, but we cannot adopt it. John Herr, the testator, left surviving him six children and two grandsons, children of a daughter who was deceased at the time his will was executed. For these grandsons he made the following provision:

"I give and bequeath unto my two grandsons, Benjamin Eshelman and John Eshelman (being the children of my daughter Anna, deceased), one thousand dollars, lawful money of Pennsylvania; that is to say, I give five hundred dollars to each of them, their heirs and assigns for ever, and the same to be their share or shares in full coming to them out of my estate, both real and personal, and to be paid unto them as they severally arrive at the age of twenty-one years."

By a subsequent clause a fund was given to a trustee for the support and maintenance of an imbecile daughter, with a direction that, upon her death, any unexpended balance in the hands of the trustee should be equally divided among the children of the testator and the legal representatives of any that might be dead. In holding that this provision did not include the two grandsons, children of the daughter Anna, who was dead when her father made his will, we said:

"Looking through the will, it is observable that the testator provides specifically for his wife, his two grandsons then living, and for his sons John and Henry; and then directs that the residue of his estate, including also the sums charged on lands given to the sons, shall be divided into six equal shares among his six children, whom he names. Mrs. Eshelman is not named among his children, because he had in a previous clause taken notice of her death. In an after clause of the will he recites the imbecility of Barbara, and appoints a trustee for her share, and then orders that after her death so much of her share as may remain unexpended shall go to 'all my children, or if any of them be dead, to their legal representatives share and share alike.'

"It is argued that this language was intended to comprehend Mrs. Eshelman, and that her surviving son is thereby admitted to the bequest; but, after an attentive consideration of all that has been urged both by the auditor and by counsel in support of this view, we are unable to adopt it for these two reasons:

"1. The testator, in providing specifically for his grandsons, declared that the \$1,000 given to them was to be 'their share or shares in full coming to them out of my estate both real and personal.' He looked to no further provision for them in any contingency which might befall his family. That he meant this bequest to be their full share of his estate is so incontestably proved by his words that any construction which would give them more would derange the scheme of distribution he had in mind, and substitute another will for that which was written.

"2. The hypothetical words quoted above, 'if they or any of them be dead,' must have referred to the children whom he enumerated as living when he made his will, because the event on which they were to succeed to Barbara's share, was future—her death. It seems absurd to make the testator speak hypothetically of the

future death of Mrs. Eshelman, whom he had already buried. The leading principle, said Judge Rogers in Gross's Estate, 10 Barr, 361, in relation to such a devise is, that where a bequest is to children in a class, children in existence at the death of the testator are alone entitled, among whom posthumous children are to be considered.

"If any of them be dead' is exactly equivalent to the phrase, 'if any of them shall be dead at the happening of the future event specified'; and would any father speak of a deceased daughter in that way? Whilst contemplating his own death and Barbara's the testator did not forget Anna's, for he mentions it, and provides for her children, and enumerates his remaining children, and of them exclusively—not of them including Anna, he says, if any shall be dead when Barbara dies, their representatives shall take. He had classified in his thought the several objects of his bounty, and appointed each a portion in their order. By his grandsons he meant the children of his deceased daughter; by his children and their representatives he meant his living children and those who should come after them. It is so apparent from all parts of the will that this was the distinction in his mind, that we cannot disregard it consistently with his unquestionable right to do as he would with that which was his own."

Nothing in the foregoing words has any application in construing the will now before us. In the will that was then construed the testator declared that the provision he had made for his two grandsons was to be "their share or shares in full coming to them out of my estate, both real and personal." No such words are found in the will of James Simpson, and when John Herr subsequently declared who were to take any unexpended balance in the hands of the trustee upon the death of the incompetent daughter, he intended by the word "children," as Mr. Justice Woodward plainly showed, his children living at the time of his death.

More has been said than was needed to sustain the decree of the court below, which is affirmed at appellant's costs.

(245 Pa. 318)

#### In re MELVILLE'S ESTATE.

Appeal of STERN et al.

(Supreme Court of Pennsylvania. May 11, 1914.)

#### 1. WILLS (§ 184\*)—FAILURE OF REVOKING INSTRUMENT—RESIDUARY BEQUESTS.

Where testator by codicil declared the revocation of the residuary bequest made in his will to the executors, such revocation was effective, though he declared that it was made to carry out a provision of the codicil creating a charity, and such charity failed because of his death within 30 days.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 462-467; Dec. Dig. § 184.\*]

#### 2. WILLS (§ 184\*)—FAILURE OF REVOKING INSTRUMENT—RESIDUARY BEQUESTS.

Where the failure of the dispositive part of a revoking instrument is due to a defect in the instrument, the revocation is inoperative, but, where such failure occurs because of extrinsic circumstances the revocation will prevail.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 462-467; Dec. Dig. § 184.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Orphans' Court, Philadelphia County.

In the matter of the estate of George W. Melville, deceased. From a decree sustaining exceptions to adjudication, Max J. Stern and another appeal. Affirmed.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

John G. Johnson, John M. Campbell, and Maurice Bower Saul, all of Philadelphia, for appellants. William W. Porter and James A. Walker, both of Philadelphia, for appellees.

STEWART, J. [1] We have here two appeals involving precisely the same question. The several appellants are the persons named in the following clause, indicated as the twenty-ninth, appearing in the last will of Admiral George W. Melville, deceased, bearing date 5th July, 1910, and duly probated:

"I do hereby appoint Dr. Max J. Stern, M. D., of Philadelphia, and Walter M. McFarland, of New York, ex-officer of the navy, and at present writing in the employ of the Babcock & Wilson Boiler Company, of New York, conjointly to be the executors of this my last will and testament to act without bond, and they to be equally my residuary legatees in all things relating to this my last will and testament."

The will contained numerous devises and specific and pecuniary legacies, among others devises and legacies very considerable in value and amount to his two surviving daughters and their respective children. While it was testator's expectation that his estate would be adequate to the payment of all these legacies—he so expresses himself in the twenty-first clause of the will—it is evident that it was a matter about which he was more or less uncertain, since in the twenty-seventh clause he directs that:

"If it be found from any clause that the amount of my bonds, mortgages, and other belongings will not cover the monetary bequests I have made in this my last will and testament, that monetary legacies or bequests be scaled down in amounts from \$10,000, such amounts as will cover all other legacies; the amount in no case to be reduced below \$5,000."

The legacies so to be scaled down were the legacies to his sisters and their respective children. The fact referred to is without consequence, except as it affords some measure of the testator's intended beneficence in making the appellants his residuary legatees. To this last will testator made four separate codicils, none of which call for special reference here, excepting the last, which is dated 22d February, 1912, and gives rise to the present controversy. This codicil proceeds:

"Having had an expert accountant assist me in making an inventory of my estate and finding that after all the bequests contained in my will and several codicils there may remain about \$150,000 of my undistributed estate, and being desirous of using the residuary estate in some manner that will alleviate the sufferings of the indigent, deserving and aged poor, I desire the estate to be used for such purpose."

A devise and bequest of the entire residuary estate follows to the Pennsylvania Company for Insurance on Lives and Granting

Annuities, the income to be expended in purchasing annually for aged and deserving poor entrance into desirable homes established for such purposes. The codicil concludes:

"In order to carry out the provisions of this codicil, clause No. 29 of my will dated July 5, 1910, is hereby abrogated. The clause referred to relates to the appointment of Max J. Stern and Lieut. Walter M. McFarland as the residuary legatees of my original will. The fund thus established is to be chartered, if necessary, in the state of Pennsylvania and is always to be designated 'Estella Polis Melville Charity.'"

The testator died 17th March, 1912, within 30 days after the execution of the codicil, and the charity contemplated in the codicil therefore failed. The will and codicils were later proven, and letters testamentary on the estate were granted to these appellants. The question which now concerns us arises on the adjudication of the account of the executors, and, as stated by appellants, it is whether the revocation contained in the codicil of the twenty-ninth clause in the will appointing appellants residuary legatees was conditional or absolute. The orphans' court in banc hold the revocation absolute, and, the charity having failed, awarded the residuary estate to the daughters of the testator as his sole heirs and next of kin. The contention of appellants is that the revocation was conditional, depending upon the efficiency and sufficiency of the charitable bequest, and that, the charitable bequest failing, the purpose of the revocation being thereby defeated, the residuary clause in the will remained unrevoled.

Whether we seek to resolve the question by ascertaining from the will and codicil the intention of the testator, or by applying settled rules of law, the result must be the same. The testator made the codicil because subsequent to the making of his will he had ascertained that his estate was \$150,000 in excess of what he had supposed. He indicates in his will too clearly to admit of question that in making appellants residuary legatees his thought was that the residuary estate would, at most, be inconsiderable. He was by no means certain that his estate would be adequate for the payment of his pecuniary bequests, and therefore provided for their abatement in case of a deficiency. What induced the making of the codicil was his discovery that, except as his will was changed, \$150,000 of his estate would pass to these appellants under the residuary clause, whereas up to that time he had rested in the belief that whatever amount, if any, would pass under the residuary clause would be an inconsiderable part. So much we may safely conclude from what appears in the will and codicil. The substitution of another by the codicil to succeed to this enlarged residuum was equivalent to a positive expression that those appointed by the will to take should be excluded because of his

better understanding of conditions. The language of the codicil makes it clear to our mind that the new disposition made thereby was the result of a predetermination to revoke the old. We find nothing to indicate that testator in any event intended that appellants were to share to any considerable extent in his estate. It is not necessary, however, to decide the question on any such ground. We refer to it only to show that in this case the rule of law applicable does not defeat or disappoint in the slightest way any intention of the testator that can reasonably be derived from his will.

The codicil, executed with the same formalities as the will and duly probated, contains an express revocation of the twenty-ninth clause of the will, which appoints the executors residuary legatees; the revocation leaves nothing to implication. True it is that the expressed purpose in the revocation is in order to carry out the provisions of the codicil; that is, the establishment of a charity.

[2] The dispositive part of the codicil failed, not, however, through any defect in the instrument, but because of something dehors the death of the testator within a calendar month from the making of the codicil. Upon such state of facts can it be said that the revocation was conditioned on the efficiency of the charitable bequest, and that the charity failing the revocation fell with it? The authorities answer the question in the negative. They all recognize a clear distinction between failure of the dispositive part of the revoking instrument because of a defect in the instrument and failure because of extrinsic circumstances; and there is entire concurrence of view that in the former case the revocation is inoperative, while in the latter it must prevail. Thus in *Jones v. Murphy*, 8 Watts & S. 275, it is said by Rogers, J.:

"A will, though rendered inoperative by extrinsic circumstances, may revoke a former will. Thus, if properly executed and tested to pass freehold lands according to the statute of Charles II, though it should be prevented from operating by the incapacity of the devisee or any other matter dehors the will, the former will is nevertheless revoked by it. So a will devising lands in fee to the heir at law, though void as to the purpose of a will, yet operates as a revocation, if attested according to the statute."

A leading case in our own reports is *Price v. Maxwell*, 28 Pa. 23, and peculiarly illustrative here. In that case the question was whether a revocation contained in a later will containing an express revocation was affected or impaired by failure of the devise contained in it, by reason of the testator dying within the time required by the act to give the devise effect. Lewis, C. J., in disposing of the case, says:

"If the will of 1856 contained no express clause of revocation of all former wills, a question might arise whether the will of 1841 was revoked by the devise afterwards made. Where there are two wills, in some respects inconsis-

ent, the latter revokes the former only so far as they are inconsistent with each other, unless there is an express clause of revocation. Jarman on Wills, 159. Where the second will is styled a codicil, or appears to have been intended for one, it is the duty of the court to construe them together as constituting one will; and in such case the revocation by implication will only take place where there is a clear inconsistency, and then only to the extent of that inconsistency. Even in the case of a codicil an express revocation of a former will must have its legitimate effect. But in the case before us the property given to the school in the first will is included in a general devise in the second will of all the testator's estate to the same institution. There is, therefore, a manifest inconsistency, showing that there was no intention that both wills should stand. The same thing is apparent from the appointment of new executors. But it is not necessary to regard these circumstances, because we have an express clause of revocation in the will of 1856, and that clause is not in any respect avoided or impaired by the act of 1855. It stands in full force. The result is that the will of 1841 is revoked. But it is contended that this revocation was made upon condition that the devise to the school in the will of 1856 should take effect. How do we know this? Perhaps the intention to make the new disposition induced the revocation of the old; and perhaps the new disposition was only the result of a predetermination to revoke the old. There is nothing to lead the mind with anything like logical certainty to the deduction that either was the result of the other; and it is very clear that the heirs at law are not to be disinherited upon a mere peradventure. We have no right to add conditions not expressed by the testator, nor implied from his acts. He had it in his power to make conditions, but he made none, and we can make none for him. The rule in regard to revocations arising from inconsistent dispositions seems to be that, where the second devise fails by reason of a defective execution of the second will, it is no revocation of the first (*Jarman on Wills*, 154); but, where it fails from want of capacity in the devisee to take, the prior devise is revoked (*French's Case*, 1 Roll. Abr. 614; *Roper v. Radcliffe*, 10 Mod. 230; 8 Vin. Abr. 141, Tit. Devise R). Mr. Justice Rogers, in the case of *Jones v. Murphy*, stated the rule correctly when he held that, if the second will was properly executed according to the statute, though it should be prevented from operating by the incapacity of the devisee, or any other matter dehors the will, the former will is nevertheless revoked by it. 8 Watts & S. 300."

To the same effect are *Lutheran Congregation of Union Church's Appeal*, 113 Pa. 32, 5 Atl. 752; *Teacle's Estate*, 153 Pa. 219, 25 Atl. 1135; *Wain's Estate*, 156 Pa. 194, 27 Atl. 59.

Our cases are in entire harmony with the general rule on this subject, which is thus stated in 1 *Jarman on Wills*, 334:

"If, on the other hand, the new devise be ineffectual, on account of the attestation being insufficient for a devising, though sufficient for a revoking will, the revoking clause becomes inoperative on the principle before noticed that the revocation is conditional and dependent on the efficacy of the admitted new disposition, and, that failing, the revocation also fails; the purpose to revoke being considered to be, not a distinct independent intention, but subservient to the purpose of making the new disposition of the property; the testator meaning to do the one so far only as he succeeds in effecting the same. But it seems that, if the second devise fails, not from the infirmity of the instrument, but from the incapacity of the devisee, the prior devise is revoked."

Page in his treatise on Wills, § 271, thus states the rule:

"The later revoking instrument is much oftener a will or codicil. In the discussion of this branch of the subject a distinction must be noted between wills which contain an express clause of revocation and those which do not contain such a clause. If the later will contains an express clause of revocation, the earlier will is thereby rendered invalid, irrespective of the disposition of property made by the second will; and this is true even if the other provisions of the revoking will prove ineffectual."

And, again, in section 277, the author says:

"The testator may revoke his prior will by a later one which contains a clause of absolute revocation and is properly executed, and which by reason of something outside the will is ineffectual to pass the property sought to be devised. This differs from the case where the second instrument contains a revoking clause, and nothing more; for in the cases under consideration the instrument contains a revoking clause and a dispositive portion which fails of effect. The question is whether the revoking clause is conditioned upon the validity of the dispositive part or not. The general rule upon this point is that a second will inconsistent with the first, perfect in form and execution, but incapable of operating as a will on account of some circumstance dehors the instrument, revoked the first instrument when the second contains a clause of expressed revocation."

The authorities cited, to which others of like effect might be added, compel a conclusion adverse to the appellants' contention. The several decrees are therefore affirmed, and the appeals are dismissed, at cost of the respective appellants.

(123 Md. 680)

**MAYOR AND CITY COUNCIL OF BALTIMORE v. J. L. ROBINSON CONST. CO. (No. 22.)**

(Court of Appeals of Maryland. June 26, 1914.)

**MUNICIPAL CORPORATIONS (§ 337\*) — CONTRACTS—BIDS—DEPOSITS.**

Under Baltimore City Charter, as amended by Laws 1908, c. 163, providing that a contract for supplies or work shall be awarded to the lowest responsible bidder; that bids when filed shall be irrevocable; that each bid shall be accompanied by a certified check of \$500; and that the successful bidder, failing to execute the contract and furnish a bond, shall forfeit his check as liquidated damages—one may not withdraw his bid, even before the opening of the bids, and so, being refused permission to do so, and refusing to sign the contract, on it being awarded him, he cannot recover the amount of his check.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 864, 865; Dec. Dig. § 337.\*]

Appeal from Superior Court of Baltimore City; Carroll T. Bond, Judge.

"To be officially reported."

Action by the J. L. Robinson Construction Company against the Mayor and City Council of Baltimore. Judgment for plaintiff, and defendant appeals. Reversed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Alexander Preston, Dep. Sol., of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellant. Forrest Bramble, of Baltimore (W. W. Lingenfelder, of Baltimore, on the brief), for appellee.

CONSTABLE, J. This appeal involves the right of a bidder, for a municipal contract, to recover from the municipality the amount of money deposited at the time of submitting the bid, where the bidder requests the withdrawal of the proposal before the opening of the same by the municipal officers. The facts upon which the declaration is based are uncontradicted, and from them it appears: That the appellant, acting through the board of awards, advertised for proposals and bids to construct a schoolhouse in the city of Baltimore. That the appellee, among others, submitted a proposal for said construction, and in compliance with the advertisement and the provisions of the city charter filed therewith a certified check for \$500. On the day the bids were to be opened, and just before they were opened, the president of the appellee company stated to the board that he thought from the information he had gained from the other bidders present that he had made an error in his proposal, and requested to withdraw the same. He had learned that the amount of his bid was very much below that of the others, and so much lower that he felt assured a mistake had been made. The board refused to allow the bid to be withdrawn, and proceeded to open all of the bids, whereupon it was found that the appellee's bid was the lowest by about \$14,000. After the opening the board suggested to the representative of the appellee that he go over the estimate for the purpose of discovering where, if at all, the mistake was. It was found that, in making up the general tabulation of the costs of the various items, including the bids of the subcontractors, the amount for heating and ventilating had been put down at \$952.13 while it should have been \$11,952.13, the amount of the subcontractor's bid, thus making the total of the bid \$11,000 less than had been intended. The board, however, awarded the contract to the appellee, which refused to execute the formal contract. Whereupon the board declared the deposit forfeited and readvertised for bids. This suit was then instituted for a return of the \$500 deposited. The appellant demurred to the declaration, but the court overruled the demurrer, and the ruling upon the prayers being in favor of the right of action, the appellant has brought this appeal from the judgment rendered against it. The rulings upon the demurrer and the prayers involve one and the same principle of law, so they will be considered as a whole.

An act of the Legislature regulates proposals for contracts with the city of Baltimore. Section 15 of the charter, as amended

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

by chapter 163 of the Acts of 1908, provides as follows:

"All bids made to the mayor and city council of Baltimore for supplies or work for any purpose whatever, unless otherwise provided in this article, shall be opened by a board, or a majority of them, consisting of the mayor, who shall be president of the same, the comptroller, city register, city solicitor, and the president of the second branch, which board, or majority of them, shall, after opening said bids, award the contract to the lowest responsible bidder. \* \* \* Bids when filed shall be irrevocable. The successful bidder shall promptly execute a formal contract to be approved as to its form, terms and conditions by the city solicitor, and he shall also execute and deliver to the mayor a good and sufficient bond to be approved by the mayor, in the amount of the contract price. To all such bids there shall be attached a certified check of the bidder upon some clearing house bank, and the bidder who has had the contract awarded to him, and who fails to promptly and properly execute the required contract and bond shall forfeit said check. The said check shall be taken and considered as liquidated damages, and not a penalty, for failure of said bidder to execute said contract and bond. Upon the execution of said contract and bond by the successful bidder, the said check shall be returned to him. The amount of said check shall be five hundred dollars, unless otherwise provided by ordinance, or an order or regulation of the department for whose use the bids are made and contract entered into. The checks of the unsuccessful bidders shall be returned to them after opening the bids and awarding the contract to the successful bidders."

In the face of these provisions can a bidder, refusing to execute a contract awarded to him for municipal work, force the return of his deposit, or once having filed his proposal, can he withdraw it before the bid is accepted and recover his deposit? It will be noticed that, in plain terms, the section directs that the bidder shall deposit a certified check to indemnify the city in case he, as the successful bidder, fails to execute the contract and furnish a bond; that bids when filed are irrevocable; and that the contract shall be awarded to the lowest responsible bidder. It certainly must be that there was the intention that these explicit directions should have some force and meaning. We must ascribe a reasonable construction to them or we render the statute a mere nullity. These provisions involve the preliminary steps to the making of the contract for the work to be done. These are the conditions which must be subscribed to by any one who wishes to be in a position to get a contract with the city. They do not make the proposal and the acceptance the contract, but the formal contract is to be entered into later. They make plain to the bidder just what obligation he is entering upon when he submits a bid. He knows that his bid is irrevocable, but he further knows that if he, for any reason, after his bid is accepted, does not want to enter into a contract the condition of his becoming a bidder obligates him expressly to reimburse the city to the extent of \$500 damages. If the contract were made by the bid and acceptance, the bidder then would be compelled to carry it out or be

responsible for it, without a court of equity, for sufficient cause, relieved him, by rescinding the contract.

Judge Dillon in his work on Municipal Corporations, at section 810 (5th Ed.), expresses the meaning and effect of such a charter provision:

"After the opening of the bids, the ascertainment of the lowest or most favorable bidder, and the adoption of a resolution, that the contract be awarded to him does not make a completed contract between the municipality and the bidder, when the charter requires that all contracts relating to city affairs shall be in writing, or when the advertisement so specifies, or when some further step remains to be taken, \* \* \* where a bidder accompanies his bid for the performance of a public work with the deposit of a certain sum, under an agreement to forfeit the sum deposited in case of his neglect or refusal to enter into the contract for the work, and without default on the part of the board he fails to execute the contract, he cannot recover back his deposit, and the board may declare the same forfeited."

And McQuillin on Municipal Corporations, at section 1221, says:

"Money accompanying a bid as security that the bidder will enter into a contract if his bid is accepted cannot be recovered if the bidder fails to enter into the contract. The rule that courts incline against forfeitures has no application to such a case, and the rule is never carried to the extent of relieving parties against the express terms of their own contract. A bidder has no right to withdraw his bid even before the bids are opened, nor have the municipal authorities the right to permit him to withdraw it."

Also in 28 Cyc. p. 661:

"A bidder has no right at law, nor have the municipal officers power to permit him to withdraw his bid and deposit."

In *Wheaton Building Co. v. Boston*, 204 Mass. 218, 90 N. E. 598, a contractor had filed a bid with the proper authorities to build a schoolhouse, and was required to file a deposit with his bid. Afterwards he found that he had made a mistake in his estimates, and sued the city for the recovery of his deposit. This case is practically identical with the one at bar. The Massachusetts court held that he could not recover his deposit, and said on pages 222 and 223:

"But it is plain that the statute contemplated some obligation on the part of the bidders, even though there was none on the part of the city. Statute 1890, c. 418, § 5, provides that 'every proposal \* \* \* shall be accompanied \* \* \* by a \* \* \* check or certificate of deposit, for the faithful performance of such proposal. \* \* \*' This section must be given a reasonable effect. It would be a nullity if it should be held that the bidder was at liberty to withdraw without any liability at any time before the formal contract, which alone could bind the city, should be executed. The reasonable construction is to hold that the bidder is bound to stand by his proposal, at least after its acceptance, and to the extent of his bond or deposit, but no further. If the case was free from statutory regulation, and it did not appear that a more formal contract was contemplated, the mere acceptance of the proposal would constitute a contract, and neither party could refuse to carry it out without becoming liable to all the damage sustained. \* \* \* The Legislature, perhaps in recognition of the hardships, which might follow from requiring the bidder to be bound though the city was not, restricted the lia-



bility of the former to the extent of the deposit."

To the same effect is *Robinson v. Board of Education*, 98 Ill. App. 100, where the bidder asked, before the bids were opened, to withdraw his bid because a mistake had been made by him. Also the same ruling in *Village v. Gahan*, 136 Ill. 523, 26 N. E. 1085; *Turner v. Fremont*, 170 Fed. 259, 95 C. C. A. 455; *Davin v. Syracuse*, 69 Misc. Rep. 285, 126 N. Y. Supp. 1002.

This may seem a hardship upon a bidder who has actually made a mistake, but if the statute is to have any effect that must be the result. The statute is an essential part of the proposal, and the bidder makes all its terms and conditions an obligation upon himself when he submits a bid. While it may appear a hardship upon the bidder, the practical side, as illustrated by this record, of awarding contracts by closed bidding shows it to be a wise provision for municipalities. After the bids were all in, and before the bids were opened, this appellee easily ascertained from his competitors the amounts of their bids. What would there then be to prevent a dishonest bidder, upon finding that his bid was extremely low, from declaring that he had made a mistake, and thus put the city to the costs of delay and readvertising?

The case of *Moffett v. Rochester*, 178 U. S. 373, 20 Sup. Ct. 957, 44 L. Ed. 1108, relied upon by the appellee, was upon a bill in equity for a reformation of the proposal, and therefore is not authority for the form of action in this case. In fact all of the cases cited by the appellee are cases in equity, and in the most of them there was no statute involved.

Judgment reversed, without awarding a new trial, with costs to the appellant.

(123 Md. 542)

**SOPER et al. v. MICHAL.** (No. 21.)

(Court of Appeals of Maryland. June 25, 1914.)

**1. GAMING (§ 60\*)—GAMBLING MACHINES—SUMMARY SEIZURE.**

The police authorities of a city cannot, as a measure of preventive justice, summarily seize slot machines when no charge whatever of a violation of the gaming laws has been made against the owner, even though the machines are gambling devices, where they are not required as evidence of any contemplated criminal proceeding.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 117; Dec. Dig. § 60.\*]

**2. GAMING (§ 63\*)—OFFENSES—POSSESSION OF GAMBLING IMPLEMENTS.**

It is within the power of the Legislature to make the possession of gambling implements or machines an offense.

[Ed. Note.—For other cases, see *Gaming*, Cent. Dig. § 120; Dec. Dig. § 63.\*]

**3. REPLEVIN (§ 71\*)—EVIDENCE.**

In replevin for machines summarily seized and retained by the police commissioners as a measure of prevention against gaming, evidence

as to why plaintiff sold the machines out of the state was not germane to the case being tried.

[Ed. Note.—For other cases, see *Replevin*, Cent. Dig. §§ 285-291; Dec. Dig. § 71.\*]

**4. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

The exclusion of evidence was not reversible error, where the matter in issue had been fully testified to without objection.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4195, 4200-4204, 4206; Dec. Dig. § 1058.\*]

*Appeal from Superior Court of Baltimore City; Chas. W. Heusler, Judge.*

"To be officially reported."

*Replevin by Frank Michal against Morris A. Soper and others. Judgment for plaintiff, and defendants appeal. Affirmed.*

Argued before **BOYD, C. J.**, and **BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.**

**Robert F. Stanton**, of Baltimore, for appellants. **James A. Latane**, of Baltimore (**Albert S. J. Owens**, of Baltimore, on the brief), for appellee.

**STOCKBRIDGE, J.** This is an action of replevin to recover 98 machines of the variety commonly designated as "slot machines," a roulette wheel, and the appurtenant mechanism, which had been seized by the appellants as police commissioners of Baltimore city. At the time of the seizure all of the articles were in the possession of the appellee, in a single room, part of the first floor of a building on Born alley, the remainder of the floor being occupied and used as a carpenter shop. The ownership of the property in question is not entirely clear. Some portion of the machines seem to have belonged to the appellee, while some may have been sent to him for alteration or repair. A small number of them had, in addition to their main feature, a musical or chewing gum attachment, but in all the leading characteristic was the possibility held out for gambling, and some of the machines at the time of seizure were susceptible of no other use. There is no evidence to show that they ever had been used by the appellee for such a purpose, either at the place on Born alley or elsewhere.

[1, 2] The important question in this case is the right of the police authorities of the city of Baltimore to summarily seize and retain possession of these machines as a matter of preventive justice when no charge whatever of a violation of the laws of this state against gambling had at the time, or has at any time since, been made against the appellee, and there is no claim that they were required as evidence in any existing or contemplated criminal proceeding. It is contended on behalf of the appellants that a slot machine is per se a gambling device, and therefore malum per se, and liable to confiscation in the hands of whomsoever found. The proposition as stated is too broad for this court to adopt, in view of the decision in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



State v. Howell, 83 Mo. App. 198, and the language used by this court in Wagner v. Police Com'rs, 93 Md. 182, 48 Atl. 455, 52 L. R. A. 775, 86 Am. St. Rep. 423:

"Until it has been shown before the proper tribunal that it was designed to be put, or has been put, to an illegal use, it (a slot machine) cannot be seized as a preventive measure."

It is within the power of the Legislature to make the possession of gambling implements or machines an offense, as was done with regard to policy slips, game at certain seasons, and oysters below a certain size, but it has not thus far done so, and the mere possession of such a device cannot, as the law stands, be deemed and treated in the criminal courts as a violation of law, still less when the question is raised indirectly in the tribunals exercising only a civil jurisdiction. The courts have gone very far in the construction of statutes to extend the inhibition of laws relating to lottery and gambling to slot machines. Such cases as *Loiseau v. State*, 114 Ala. 34, 22 South. 138, 62 Am. St. Rep. 84, *Bobel v. People*, 173 Ill. 19, 50 N. E. 322, 64 Am. St. Rep. 64, *State v. Gaughan*, 55 W. Va. 692, 48 S. E. 210, and *Territory v. Jones*, 14 N. M. 579, 99 Pac. 338, 20 L. R. A. (N. S.) 239, 20 Ann. Cas. 128, are examples, but in nearly every one of these cases the question arose in a criminal proceeding, and involved the use or intended use of the machines, not the possession merely. The extreme ruling is that in the case of *Lang v. Merwin*, 99 Me. 486, 59 Atl. 1021, 105 Am. St. Rep. 293, in which the voters of a certain town filed a bill for an injunction, to restrain the use of a slot machine in a cigar store, and the injunction was granted. But here also the intervention of the court was asked, to prohibit the use of the machine, and the maintenance of a gambling place, not the possession of the machine.

The two Wagner Cases (93 Md. 182, 48 Atl. 455, 52 L. R. A. 775, 86 Am. St. Rep. 423, and 95 Md. 519, 52 Atl. 509, 93 Am. St. Rep. 412) announce the law in this state, and in a manner conclusive of this case. In the latter case this court said:

"The doctrines clearly announced in the former appeal conclusively settle the following propositions: First, that only such property or articles as are intended to be used in violation of law and can be used for no legitimate purpose can be summarily seized by the police authorities; and, secondly, that articles or property that may or may not be used for legal purposes cannot be seized until it has first been properly established that the article was procured, held, or used for an illegal purpose; and, thirdly, that in order to properly establish that the article was designed to be put, or has been put, to an illegal use there must be a proceeding in a court of criminal jurisdiction, and the question of the guilt or innocence of the owner or of person who uses the article cannot be determined in a replevin case."

Such being the law, there was no error in the ruling of the lower court on the prayers.

In what has been said this court must not be understood as holding that the police may

not seize property for use as evidence, or that in a proper case and before a proper tribunal they may not, upon a conviction, confiscate or even destroy the property so taken, but this case was not in a form where the guilt or innocence of Michal could be established.

[3, 4] There was an exception reserved to the ruling of the trial court in refusing to permit the plaintiff, Michal, on cross-examination, to answer the question why he sold the machines outside of the state. Either this was a collateral issue, not germane to the case being tried, and for that reason properly excluded, or else it was intended to bear on the intent of the plaintiff. The intent of a person is often an important element in a criminal case, and in some the intent is the gist of the case. In this case the intent could only be relevant to show that the plaintiff intended to make an illegal use of the machines, and what his intent was in that respect had already been fully testified to without objection. No reversible error can be predicated upon this ruling. *Peters v. Tilghman*, 111 Md. 227, 73 Atl. 726.

Some question was raised that the police board could not be proceeded against by way of replevin to recover possession of goods illegally seized. But the same form of action was resorted to in the Wagner Case, *supra*, and inferentially approved, and, unless such an action is maintainable, the police board would be amenable to no authority, no matter how wanton and unjustifiable the seizure of the property of a citizen might be.

Judgment affirmed, with costs.

(123 Md. 506)

BRADLEY et al. v. BRADLEY. (No. 15.)

(Court of Appeals of Maryland. June 25, 1914.)

1. APPEAL AND ERROR (§ 339\*) — DECISIONS REVIEWABLE—"DETERMINATION OF A COURT OF LAW."

Under Code Pub. Gen. Laws 1904, art. 5, § 6, providing that all appeals or writs of error allowed from any judgment or determination of a court of law to the Court of Appeals shall be taken within two months from the date of such judgment or determination, an appeal from rulings of the circuit court upon the trial of issues sent from the orphans' court is an appeal from some "determination of a court of law" and must be taken within two months, or it is too late.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1883-1887; Dec. Dig. § 339.\*]

2. COURTS (§ 202\*)—ORPHANS' COURT—DECISIONS REVIEWABLE—CIRCUIT COURT—ISSUES FROM ORPHANS' COURT.

The circuit court has no authority to enter a judgment on a verdict rendered on issues sent from the orphans' court, and the appeal in such cases is taken from the determinations and rulings of the court in the trial of the issues.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 480-486; Dec. Dig. § 202.\*]

3. APPEAL AND ERROR (§ 977\*) — DECISIONS REVIEWABLE—MATTERS RESTING IN DISCRETION.

Orders denying a new trial, refusing to vacate and set aside the verdict, overruling ob-

jections to certifying the verdict of the orphans' court, and refusing to arrest any orders thereon, are within the discretion of the trial court, not reviewable by the Court of Appeals.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3860-3885; Dec. Dig. § 977.\*]

**4. APPEAL AND ERROR (§ 230\*)—PRESENTATION OF GROUNDS OF REVIEW—EXCEPTIONS.**

A litigant cannot employ a motion for a new trial as a means of bringing to the Court of Appeals for review any matter occurring during the trial of the case to which objection was not made at the time; but such objection, to be of any avail, should be made before a motion in arrest of the judgment.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 230;\* Trial, Cent. Dig. §§ 183-190.]

**5. APPEAL AND ERROR (§ 241\*)—MOTION IN ARREST—MATTERS REVIEWABLE.**

A motion in arrest of judgment presents nothing for review, where there is no error apparent upon the face of the record existing at the time the motion was made.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1413-1418; Dec. Dig. § 241;\* Trial, Cent. Dig. § 192.]

**6. APPEAL AND ERROR (§ 548\*)—MOTION IN ARREST—NECESSITY OF BILL OF EXCEPTIONS.**

A motion in arrest of judgment presents nothing for review, where there is no bill of exception in the record showing any evidence before the court to support the motion and upon which the court acted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2433-2440; Dec. Dig. § 548.\*]

Appeal from Circuit Court, Montgomery County; Glenn H. Worthington, Judge.

"To be officially reported."

Caveat to the will of Henry Bradley, deceased, by George G. Bradley and others, against Jane B. Bradley. Verdict for defendant on trial of issues from the orphans' court, and caveators appeal. Appeal dismissed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Daniel W. Baker, of Washington, D. C. (W. O. Spates, J. Roger Spates, and John A. Garrett, all of Rockville, on the brief), for appellants. Bonic & Bonic, of Rockville (Talbot & Prettyman, of Rockville, and Marbury, Gosnell & Williams, of Baltimore, on the brief), for appellee.

BRISCOE, J. The motion to dismiss this appeal must prevail. The reasons therefor are fully set out in the motion to dismiss filed by the appellee on the 3d of April, 1914, prior to the argument of the case in this court, and are also apparent from the face of the record itself.

The first and second grounds relied upon by the appellee in his motion to dismiss are absolutely conclusive, and they are as follows: (1) Because the appeal was not taken within the time prescribed by the statute, in such case made and provided; and (2) because the rulings of the circuit court for

Montgomery county from which the appeal was taken, and which are sought to be reviewed by this court, were matters solely within the discretion of the trial court.

The order for an appeal, as set out in the record, is as follows:

"The caveators, plaintiffs, note an appeal in the above-entitled cause to the Court of Appeals from all of the rulings of the court as contained in the record, including among other things the rulings of the court on the admission and rejection of evidence, the prayers granted and refused, the charge where excepted to by caveators, the overruling of the motion for a new trial on the ground that the juror Diamond was incompetent and such incompetency was unknown to attorneys and caveators (plaintiffs) until after the trial, the overruling of the motions filed November 12, and December 2, 1913, respectively."

The order of court of December 2, 1913, was an order overruling the motion to vacate and set aside the verdict and overruling the motion "objecting to any order certifying the verdict to the orphans' court." These motions were both based upon the reason:

"That the juror Herbert L. Diamond was incompetent and disqualified to sit in the cause, and that such disqualification and incompetency was unknown to the attorneys or plaintiffs, until after the verdict, as shown by the affidavits accompanying the motion for a new trial."

It will be seen, then, that the rulings of the court, here appealed against, were made after a verdict in favor of the appellee on a trial of issues sent from the orphans' court of Montgomery county to the circuit court of that county on a caveat to the will of Henry Bradley, deceased, and it is conceded that they all relate to the alleged disqualification of the juror Diamond, who had been sworn as a juror, on the panel.

There are no bills of exception presenting the rulings or determinations of the court below, either upon the admissibility of evidence, the instructions of the court or other rulings, in the course of the trial.

[1, 2] An appeal from rulings of a court of law, upon the trial of issues sent from the orphans' court, is an appeal from some "determination of a court of law," and must be taken within the time provided by the statute. *Hoppe v. Byers*, 60 Md. 381; *Houston v. Wilcox*, 121 Md. 100, 88 Atl. 82.

The statute (section 6, art. 5, of the Code of Public General Laws) provides that all appeals, or writs of error, allowed from any judgment or determination of a court of law to the Court of Appeals of this state shall be taken within two months from the date of such judgment or determination, and not afterwards; and the transcript of the record shall be transmitted to the Court of Appeals within three months from the time of the appeal taken, or writ of error allowed.

It is well settled that the circuit court has no authority to enter a judgment on a verdict rendered on issues sent from the orphans' court, and the appeal in such cases is taken from the determinations and rulings

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the court, in the course of the trial of the issues. *Browne v. Browne*, 22 Md. 103; *Hubbard v. Barcus*, 38 Md. 166; *Conrades v. Heller*, 119 Md. 462, 87 Atl. 28; *Berry v. Safe Deposit Co.*, 93 Md. 242, 43 Atl. 502; *Johns v. Hodges*, 60 Md. 215, 45 Am. Rep. 722.

In this case, the verdict of the jury was in favor of the appellee on all the issues and was rendered on August 23, 1913. There was no appeal taken until the 2d day of December, 1913, and as this date was not within the time limited by the statute for an appeal, but afterwards, the appeal from the rulings or determinations of the court during the trial below is clearly too late. *Thomas v. Thomas*, 57 Md. 504; *Hopper v. Jones*, 64 Md. 578, 4 Atl. 273.

[3, 4] The orders overruling the motion for a new trial, overruling the motion to vacate and set aside the verdict, and similar orders here appealed against, were orders within the discretion of the trial court and are not reviewable by this court on an appeal.

In *Johns v. Hodges*, 60 Md. 215, 45 Am. Rep. 722, this court, in dealing with an appeal from similar orders, said:

These applications to the court being an appeal, in effect, to the discretion of the court to grant a new trial, the exercise of the court's discretion is not a subject of review in this tribunal.

In *Whitcomb v. Mason*, 102 Md. 284, 62 Atl. 749, 4 L. R. A. (N. S.) 565, it is said:

It is well settled that no appeal will lie from an order granting or refusing a new trial the motion for which is always addressed to the sound discretion of the court. Nor will a litigant be permitted to employ a motion for a new trial as a means of bringing to this court for its review any matter occurring during the trial of the case to which objection was not made at the time of its occurrence.

Appeals from such orders as overruling a motion for a new trial, objecting to an order certifying the verdict to the orphans' court, and for the arrest of any orders thereon, were treated by this court, in *Johns v. Hodges*, supra, as presenting orders within the discretion of the court and not reviewable by this court on appeal.

In *Green v. State*, 59 Md. 123, 43 Am. Rep. 542, the court said:

There was no sufficient ground for arresting the judgment. According to all the authorities an objection of this character should have been made at an earlier stage of the cause, to be of any avail. *Busey v. State*, 85 Md. 116, 36 Atl. 257; *Young v. State*, 90 Md. 585, 45 Atl. 531; *State v. Vincent*, 91 Md. 728, 47 Atl. 1036, 52 L. R. A. 83.

[5] Even if we treat the order overruling the motion to vacate and set aside the verdict as a motion in arrest of judgment, there is no error apparent upon the face of the record, existing at the time the motion was made, for us to review.

The verdict was rendered on the 23d of August 1913, and the motion was entered and heard on November 13, 1913.

[6] Besides this, there is no bill of exception in the record showing any evidence before the court to support the motion and upon which the court acted, in overruling the motion. *Johns v. Hodges*, supra; *Green v. State*, supra.

Appeal dismissed.

(123 Md. 638)

# WALLACE v. MAYOR AND CITY COUNCIL OF BALTIMORE. (No. 36.)

(Court of Appeals of Maryland. June 25, 1914.)

MUNICIPAL CORPORATIONS (§ 739\*)—PUBLIC GOVERNMENTAL FUNCTIONS — NEGLIGENCE — LIABILITY.

A city maintaining waterworks to provide water to its citizens for domestic use for a compensation, is not liable for negligently failing to provide gratuitously water for use in extinguishing fires, in the performance of which duty it is acting in a governmental capacity.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 1556, 1557; Dec. Dig. § 739.\*]

Appeal from Baltimore Court of Common Pleas; John J. Dobler, Judge.

"To be officially reported."

Action by J. B. Wallace, trading as J. B. Wallace & Son, against the Mayor and City Council of Baltimore. From a judgment sustaining a demurrer to the declaration, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

George Washington Williams, of Baltimore (John Holt Richardson, of Baltimore, on the brief), for appellant. Robert F. Leach, Jr., Asst. City Sol., of Baltimore (S. S. Field, City Sol., of Baltimore, on the brief), for appellee.

CONSTABLE, J. This is an appeal from a judgment on a demurrer to a declaration. The appellant brought suit against the appellee for the loss of property from a fire in Baltimore city. The declaration alleges that the appellant rented a stable, wherein he stabled and stored property; that the appellee owned and operated a system of waterworks under the authority of its charter, and charged tolls and rents for the use of the water; that the said stable was supplied with water, for which the usual rate was paid; that there were located near and convenient to the said stable hydrants and fire plugs used by the appellee for extinguishing fires, and also private hydrants of the appellant, which connected with the said water system; that the building adjoining the stable caught fire, and, in response to an alarm, the fire department connected its hose with the proper fire plugs, but it was thereupon discovered that the water supply had been cut off from those plugs, whereupon it was necessary to go to other fire plugs in order to get water, but in the meantime the fire had burned into the stable of the appellant and com-

pletely destroyed his property. It was further alleged that a contractor, while lawfully working and digging in the vicinity of the said stable, had knocked out from one of the pipes of the water system a wooden plug, which had been negligently placed in said pipe, and that, as a result of the negligence of placing said plug and allowing it to remain unguarded, it was necessary to cut off that section of the water system supplying the fire plug in that vicinity with water, and but for that the fire would have been extinguished without the loss of the appellant's property.

The grounds of the demurrer were: (1) Because the injury complained of was, according to the averments of the declaration, too remote to fix any liability upon the appellee—the cause alleged was not the natural or proximate cause of the injury; (2) because, so far as the appellee maintains its water system and plant for use by its fire department in extinguishing fires, it is performing a governmental function, for failure or negligence in connection with which it is not liable. We will consider only the second of these grounds.

The liability of municipalities for injuries growing out of negligence in failure to supply water for the extinguishment of fires has never been before this court, but has been before the courts of other states in many cases, and in every instance, so far as our research discloses, with one exception, the liability of the municipality has been denied, and in that jurisdiction where the municipality was held liable (*Lenzen v. New Braunfels*, 13 Tex. Civ. App. 835, 35 S. W. 341) the opposite conclusion was reached in two later decisions (*Butterworth v. Henrietta*, 25 Tex. Civ. App. 467, 61 S. W. 975; *Greenville Water Co. v. Beckham*, 55 Tex. Civ. App. 87, 118 S. W. 889).

It is seen from the averments of the narrative that there is not involved in this case the question of the liability of the appellee for its failure to furnish water to the appellant for which he was paying rental, but only its failure to furnish water to the fire department for its use in extinguishing a fire.

Dillon on the Law of Municipal Corporations, § 66, states:

"Municipal corporations \* \* \* possess a double character; the one governmental, legislative, or public; the other in a sense proprietary or private. \* \* \* In its governmental or public character the corporation is made by the state one of its instruments, or the local depository of certain limited and prescribed political powers, to be exercised for the public good on behalf of the state rather than for itself."

And the same author states (section 1340):

"The protection of all buildings in a city or town from destruction or injury by fire is for the benefit of all the inhabitants and for their relief from a common danger, and municipalities are usually authorized by statute to provide and maintain fire engines, and to supply water for the extinguishment of fires. The statutes generally do not impose any duty, and, when availed of, the task undertaken is discretionary in its

character. The grant of such power must be regarded as exclusively for public purposes and as belonging to the municipal corporation, when assumed, in its public, political or legislative character. A city, therefore, does not, by accepting or acting under such a statute, and building its waterworks, enter into any contract with, or assume any implied liability to, the owners of property to furnish means of water for the extinguishment of fires upon which an action can be maintained. There is no implied contractual or other relation between the city and the public, within its boundaries, with respect to the construction of waterworks, which makes the city liable for a failure to exercise reasonable care and diligence in respect to their maintenance. Accordingly, when it has been sought to hold municipal corporations for the loss and destruction of buildings through the inadequacy of the water supply to protect them, or to extinguish fires, the courts have usually held that the municipality is not liable. The fact that water rates or rents are paid by the inhabitants of the city does not create an implied liability in such a case. \* \* \* Within these principles it has been held that there is no liability by a city for loss sustained by fire where the wrongful act charged was neglect in cutting off water from a hydrant, but for which the fire might have been extinguished, or in failing to keep the reservoir in repair, whereby the supply of water became inadequate, or because the pipes were inadequate or out of order."

The same principle is laid down in *McQuillin on Municipal Corporations*, § 2682:

"In a previous volume, it was stated that, 'where a municipality owns its own plant, it is liable for injuries sustained by a consumer by reason of an insufficient supply.' This statement is incorrect, however, in so far as it may be construed as imposing liability on municipalities possessing their own water plant for their negligence in not furnishing sufficient water or pressure to extinguish fires, or in not keeping the mains, hydrants, etc., in repair, which results in loss by fire, since it is well settled that in such a case the municipality is engaged in the performance of a governmental, as distinguished from a corporate, duty."

In *Farnham on Waters*, § 158c, it is stated:

"It is no part of the duty imposed upon a municipal corporation by its organization to undertake to prevent or extinguish fires that may occur within its limits. But the protection of property is within the objects over which it may legitimately be given control, and it may, therefore, be empowered to procure a supply of water for the purpose of aiding the inhabitants in preventing or extinguishing fires that may occur. In undertaking to provide a supply of water for the prevention and extinguishment of fires, however, and in the organization of a department for that purpose, it acts in its purely governmental capacity, and it cannot be called to account by a private citizen for the use which it makes of such power. The extent and manner of the exercise of its powers are necessarily to be determined by the judgment and discretion of the municipal authorities, and the municipality is not liable for a defect in their execution. It is, therefore, not liable for failure \* \* \* to keep a sufficient supply of water."

In determining municipal liability for injuries due to negligence in the operation of waterworks, courts have generally viewed the subject in a twofold aspect, due to the fact that a municipal corporation, in maintaining waterworks, not only sells water to its inhabitants for domestic purposes, in the performance of which function it is practically always held to be acting in a private corporate capacity and for its own benefit, but

also gratuitously furnishes water to be used in extinguishing fires, in the performance of which duty it is acting in a public governmental capacity. *Taintor v. Worcester*, 123 Mass. 311, 25 Am. Rep. 90; *Grant v. Erle*, 69 Pa. 420, 8 Am. Rep. 272; *Mendel v. Wheeling*, 28 W. Va. 233, 57 Am. Rep. 664; *Springfield Ins. Co. v. Keeseville*, 148 N. Y. 46, 42 N. E. 405, 30 L. R. A. 660, 51 Am. St. Rep. 667; *Wright v. Augusta*, 78 Ga. 241, 6 Am. St. Rep. 256; *Miller v. Minneapolis*, 75 Minn. 131, 77 N. W. 788; *Edgerly v. Concord*, 62 N. H. 8, 13 Am. St. Rep. 533; *Robinson v. Evansville*, 87 Ind. 334, 44 Am. Rep. 770.

Indeed, so practically unanimous have been the decisions denying the liability of the municipality for losses from fire through the alleged negligence in connection with the waterworks that it is impracticable to give all of the authorities so holding, but for further authorities reference is made to the full notes and citations on the question in 61 L. R. A. 95, and 25 L. R. A. (N. S.) 239.

We are unable to discover anything in the charter provisions of the appellee or in any of the Maryland authorities which render inapplicable the overwhelming opinion on this subject.

Judgment affirmed, with costs to the appellee.

(123 Md. 612)

**WHITCOMB v. NATIONAL EXCH. BANK OF BALTIMORE. (No. 33.)**

(Court of Appeals of Maryland. June 25, 1914.)

**BILLS AND NOTES (§ 256\*)—DISCHARGE OF INDORSER—"RENUNCIATION"—STATUTORY PROVISIONS.**

Negotiable Instruments Act (Code Pub. Gen. Laws 1904, art. 13) § 141, providing that a holder may renounce his rights against any party to the instrument, but a renunciation must be in writing, unless the instrument is delivered to the person primarily liable, is not limited to a renunciation made without consideration, but applies to a release of liability of an indorser under a transaction amounting to an accord and satisfaction, which can only be proved by an instrument in writing, notwithstanding section 138, designating acts which discharge an instrument without purporting to prescribe the proof by which the acts must be established; the word "renunciation" describing, not only the act of surrendering a right without recompense, but applying to the relinquishment of a demand on an agreement supported by a consideration.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 581-599; Dec. Dig. § 256.\*

For other definitions, see Words and Phrases, vol. 7, p. 6096.]

Appeal from Superior Court of Baltimore City; Carroll T. Bond, Judge.

"To be officially reported."

Action by the National Exchange Bank of Baltimore City against James A. Whitcomb. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

Charles F. Carusi, of Washington, D. C. (Semmes, Bowen & Semmes, of Baltimore, on the brief), for appellant. G. Ridgely Sappington and Charles G. Baldwin, both of Baltimore, for appellee.

URNER, J. The Negotiable Instruments Act, forming article 13 of the Code of Public General Laws, provides by section 141 as follows:

"The holder may expressly renounce his rights against any party to the instrument, before, at, or after its maturity. An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument. But a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon."

In view of this provision the court below declined to submit for determination as an issue of fact the question whether there had been an *oral* agreement for the release of the defendant as an indorser of the promissory note in suit.

The judgment below was in favor of the National Exchange Bank of Baltimore city, the present appellee, for a balance, including interest, of \$3,331.90 on a promissory note of the Roxbury Distilling Company for the original sum of \$9,000, dated October 13, 1908, payable on demand to the appellee's order, and indorsed by the appellant and others before delivery. It is shown by the proof that this note was given as a substitute for a time note to the bank which had been executed by the same parties. At the inception of the last-mentioned note the distilling company had deposited with one of the indorsers, for their common indemnification, 18 bonds of the company of the par value each of \$1,000. After the substituted demand note had been in existence for about a year, it was reduced by a payment of \$5,000, and the bonds just referred to were delivered to the bank as collateral security for the remainder of the indebtedness. This occurred in November, 1909. Interest was paid on the note to December 31st of that year, after which no further payments of any kind were made until August, 1913, when a dividend of \$335.95 upon the collateral bonds was paid by the receivers of the distilling company, and this was followed by another of \$135.31 from the same source on the note itself in December, 1913. The defendant indorser testified that the sum paid on the note in 1909 represented the amount realized by the distilling company from a sale of \$5,000 worth of whisky to the defendant, which was made in pursuance of an arrangement for such an application of the proceeds. The money required for this purchase was obtained by the defendant upon a mortgage of a portion of his property. It was through his action that the bonds held as an indemnity for the in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 91 A.—44

dorsers were delivered to the bank as collateral. The defendant states that these results were accomplished by him under an agreement with Mr. Waldo Newcomer, president of the National Exchange Bank, that in consideration of this service the defendant should be released from further liability on his indorsement. This testimony is met by Mr. Newcomer's express denial that there was any such agreement; but the defendant claims the right to have the disputed question of fact submitted, under a prayer for that purpose, to the finding of the court sitting as a jury.

The theory advanced by the defendant is that the provision we have quoted from the Negotiable Instruments Act applies only to renunciations made without consideration, and that it has no reference to releases of liability under agreements which operate by way of accord and satisfaction. In view of the general policy of the statute we are unwilling to restrict its application by adopting the construction suggested. Assuming that the transaction described by the defendant, and upon which he relies, would furnish a sufficient basis for an accord and satisfaction with respect to his liability as an indorser, we are of the opinion that under the plain and comprehensive language of the act the only mode of proving the alleged release is by a renunciation in writing. Undoubtedly the word "renunciation," as used in the section quoted, appropriately describes the act of surrendering a right or claim without recompense, but it can be applied with equal propriety to the relinquishment of a demand upon an agreement supported by a consideration. It is defined as meaning: "The act of renouncing or giving up some thing possessed." Webster's International Dictionary. "The act of giving up a right." Bouvier's Law Dictionary (15th Ed.). "The legal act by which a person abandons a right acquired, but without transferring it to another." Century Dictionary. These definitions are practically the same as those given in the same authorities for the word "release," as follows: "A giving up or relinquishment as of a right or claim." Webster. "The giving up or abandoning a claim or right to the person against whom the claim exists or the right is to be exercised or enforced." Bouvier. "A surrender of a right." Century. Both the terms thus similarly defined are classed as synonyms of "relinquishment." There can be no doubt that the word we are interpreting is sufficiently broad in its meaning to include the release of a claim by virtue of an accord and satisfaction as well as a waiver of liability made gratuitously. If we were to accept the defendant's theory, it is evident that the result would be to restrict the term to a portion only of the transactions to which it is capable of being applied. We see no occasion to thus narrow its effect, and there is cogent reason for duly regarding its

plain and comprehensive significance. The statute in which it is used was enacted upon the recommendation of the commission representing Maryland in the movement to promote uniformity of legislation. The same measure has been adopted as a part of the statutory law of a number of the states of the union. The primary purpose of its enactment was to secure uniformity in the law governing negotiable instruments. *Vanderford v. Farmers' & Mechanics' National Bank of Westminster*, 105 Md. 164, 66 Atl. 47, 10 L. R. A. (N. S.) 129. In order that this object may be realized it is important that differences of judicial construction as to its application should be avoided so far as may be reasonably practicable. This end can best be attained by allowing to the language of the statute the full effect to which it is legitimately entitled. The surest means of producing an opposite tendency would be the attempt to introduce possible, but unnecessary, distinctions and qualifications for the purpose of restricting the scope and meaning of the terms employed in this well-considered legislation.

The Supreme Court of Washington has had occasion to construe the uniform Negotiable Instruments Act, which is in force in that state, in reference to the identical question we have now under review. In *Baldwin v. Daly*, 41 Wash. 416, 83 Pac. 724, it was held that an agreement by the payee of a note to release the surety, while supported by a sufficient consideration, was ineffective because the renunciation was not in writing, as required by the act. After quoting the section already set forth in this opinion, the court observed:

"This plainly provides that the renunciation of a debt must be in writing where the debt is evidenced by a negotiable instrument; and, if 'renunciation' is used therein in the sense of 'release,' there can be no question that the appellant must show a written renunciation in order to prove the allegations of his answer. Counsel for the appellant argues that the word is used in a sense different from that of release, and that, while a renunciation must be by a writing, a release may be proved by parol. But we cannot think the statute permits of this distinction. The words, 'the holder may expressly renounce his rights against any party to the instrument,' must refer to the release and discharge of a party to the instrument from his obligation to pay it, else they can have no legitimate meaning."

This ruling was followed in the later case of *Pitt v. Little*, 58 Wash. 355, 108 Pac. 941. In *Leask v. Dew*, 102 App. Div. 529, 92 N. Y. Supp. 891, affirmed in 184 N. Y. 599, 77 N. E. 1190, the provision in question was applied to a gratuitous relinquishment, as was also the case in *Edwards v. Walters*, 2 Ch. 157, and *Francis v. Bruce*, 44 Ch. Div. 627, where a similar clause in the English Bills of Exchange Act was considered.

It is contended that the construction we are adopting is inconsistent with section 138 of the statute, which specifies the acts by

which a negotiable instrument is discharged, as follows:

"(1) By payment in due course by or on behalf of the principal debtor; (2) by payment in due course by the party accommodated, where the instrument is made or accepted for accommodation; (3) by the intentional cancellation thereof by the holder; (4) by any other act which will discharge a simple contract for the payment of money; (5) when the principal debtor becomes the holder of the instrument at or after maturity in his own right."

The argument is that, inasmuch as accord and satisfaction is a method of discharging a simple contract for the payment of money, and admits of proof by parol at common law, and as section 138 does not require that an extinguishment of the debt by any of the methods it mentions shall be evidenced in writing, it could not have been intended by section 141 that the provision as to the proof of "renunciation" should apply to such a defense as the present. It is to be noted that section 138 is confined to a designation of acts which discharge the instrument, and does not purport to prescribe the character of proof by which they must be established. Section 141 deals specifically with the subject of discharge by renunciation, and provides in effect that an extinguishment of liability to be thus accomplished must be evidenced in writing, unless the instrument is delivered up to the party primarily liable. The earlier section relates generally to causes of discharge, while the later refers in part to the mode of proof as to a particular method of producing such a result. To the extent that acts which "will discharge a simple contract for the payment of money," as mentioned in section 138, may be included in the category of "renunciations," the intent of the statute is that they must be proven by the holder's written declaration. There is no such inconsistency with section 138 involved in the construction we have placed on section 141 as to require or justify the restriction of its scope and operation within narrower limitations than its plain terms import.

Judgment affirmed, with costs.

(123 Md. 603)

CROTHERS v. CROTHERS et al. (No. 28.)

(Court of Appeals of Maryland. June 25, 1914.)

**1. EXECUTORS AND ADMINISTRATORS (§ 499\*)—COMPENSATION—RIGHT TO.**

Where one of two coexecutors dies, and his executors are required by the surviving co-executor to file accounts, such executors are not entitled to compensation from the estate for filing accounts; the commissions due from the estate to the two coexecutors being the only payment for which it is liable, but the surviving coexecutor, who required the filing of such accounts, is personally liable for payment of compensation therefor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2180; Dec. Dig. § 499.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 127\*)—DUTIES OF COEXECUTORS.**

Where one of two joint executors dies, it is the duty of the survivor to complete the administration.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 527-530; Dec. Dig. § 127.\*]

**3. EXECUTORS AND ADMINISTRATORS (§ 498\*)—JOINT EXECUTORS—RIGHTS OF.**

Where one of two joint executors dies after the estate has been settled except for the final accounting, the estate of the deceased co-executor is entitled to one-half of the commissions allowed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2125-2129; Dec. Dig. § 498.\*]

**4. EXECUTORS AND ADMINISTRATORS (§ 109\*)—LIABILITY OF EXECUTOR—TOMBSTONES.**

Where an estate is solvent, the executor is, in the absence of statute, entitled to an allowance for the cost of a suitable stone to mark the grave of the deceased; but the expenditure must be proportionate to the estate and condition in life of the deceased.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 435-438, 440-447, 763; Dec. Dig. § 109.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 109\*)—EXPENDITURES BY EXECUTOR—BURIAL EXPENSES—TOMBSTONES.**

An expenditure of an amount equal to 20 per cent. of the estate of a deceased person in the erection of a tombstone and beautification of a burial lot is grossly disproportionate, and the executor will not be allowed the full sum.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 435-438, 440-447, 763; Dec. Dig. § 109.\*]

**6. EXECUTORS AND ADMINISTRATORS (§ 123\*)—COEXECUTORS—ESTOPPEL TO QUESTION EXPENDITURES.**

Where one of two joint executors, who was also a beneficiary, acquiesced in his coexecutor's expenditure of an amount equal to one-fifth of the estate in the erection of a monument and the beautification of the burial lot wherein the remains of testator were deposited, such executor is estopped to question the suitability of the expenditure though it necessitated a diminution of his legacy.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 496-530; Dec. Dig. § 123.\*]

**7. GUARDIAN AND WARD (§ 73\*) — DUTY OF GUARDIAN.**

It is the duty of a guardian to keep separate all guardianship funds in his hands, and the executor of a guardian will not be entitled to an allowance for moneys paid out to the ward after the death of the guardian; there being a presumption that the executor found the money in a fund held separate from the general estate of the guardian.

[Ed. Note.—For other cases, see Guardian and Ward, Cent. Dig. §§ 322-324; Dec. Dig. § 73.\*]

**8. EXECUTORS AND ADMINISTRATORS (§ 128\*)—DUTY OF ADMINISTRATOR.**

An administrator should not mingle the funds of his intestate with his own property, and the executor of an administrator is not entitled to a credit for sums paid over to an administrator de bonis non thereafter appointed; the presumption being that the money so paid was found in a fund held separate from the general estate of the testator.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 531, 532; Dec. Dig. § 128.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Appeal from Orphans' Court, Cecil County.  
"To be officially reported."

Petition of Augustus C. Crothers to compel Emerson R. Crothers and another, executors of Austin L. Crothers, deceased, to file an inventory and render an account. From an order allowing certain credits and denying others, the petitioner appeals, and defendants cross-appeal. Reversed in part and remanded.

See, also, 121 Md. 114, 88 Atl. 114.

Argued before BOYD, C. J., and BRISCOE, BURKE, URNER, and STOCKBRIDGE, JJ.

William T. Warburton, of Elkton (Henry A. Warburton, of Elkton, on the brief), for appellant. William S. Evans, of Elkton (James F. Evans, of Elkton, on the brief), for appellees.

STOCKBRIDGE, J. There are four questions raised by the present appeal. Each will be understood, as well as the principle of law controlling it, without a repetition of all the facts incident to the administration of the estate of Charles C. Crothers, and which will be found in the first appeal in this case, reported in 121 Md. 114, 88 Atl. 114.

After that decision had been rendered and the case remanded to the orphans' court of Cecil county, the executors of Austin L. Crothers, the deceased executor of Charles C. Crothers, produced in that court, in compliance with the prayer of the petition of the surviving executor of Charles C. Crothers, an account of the administration of the estate of said deceased by Austin L. Crothers and, as directed by this court, the vouchers for the payments for which allowance was claimed in the account. To the allowance of four of the credits so claimed exceptions were filed by Augustus C. Crothers, the surviving executor of Charles C. Crothers, and from the rulings of the orphans' court thereon, the first appeal in this record was taken.

[1-3] 1. The first issue presented is the right of the appellees to be compensated by way of commissions upon the statement and filing of the account. It arises under the following circumstances: At his death Charles C. Crothers left as his executors his two brothers, Augustus C. Crothers and Austin L. Crothers, since deceased. The active duties of administration appear to have been performed by Austin L. Crothers from the time of the death of the original testator in 1897 down to his own death in 1912, with but a single exception, the execution of a release for a legacy given to John L. Crothers and which recites the payment of it as made by the appellees. Commissions as provided for by the statute are the compensation allowed to an executor or administrator for services performed in the settlement of the estate of a deceased person, not merely for the statement of an account of the administration, and, where one of two joint administrators or executors dies, it is the plain duty of the survivor to complete the administration

which has been begun. It was not an obligation which devolved on these appellees as executors of a deceased executor (Haslett v. Glenn, 7 Har. & J. 23); nor does it present the contingency provided for in article 93, § 11, of the Code (1912) by which an administrator of a deceased administrator is required to state an account of the administration of his decedent. Any allowance to these appellees as commissions was without warrant of law, and cannot be sustained.

There are, however, certain special and unusual circumstances surrounding this case which cannot be ignored. By his petition the surviving executor shows that for 15 years he paid no attention to the performance of his duties as executor, duties which rested on him in no less degree than on his coexecutor, and it was not until after the death of his coexecutor, Austin L. Crothers, that he roused himself, and even then the impelling motive seems to have been less the proper discharge of his obligations as executor than the belief that he had not received full payment of a legacy left to him by the will of C. C. Crothers. In that petition he asked that the appellees be required to file "a full, itemized, and detailed statement of the assets belonging to said estate, the amount that has been distributed, and the amount or amounts still due and owing any of the devisees or legatees under the will of the late Chas. C. Crothers." While not in terms a prayer to require the statement of an account, it was such in effect. The appellees were thus brought into court to perform an act at the instance of the surviving executor which was part of his duty in his representative capacity, and which the appellees were under no legal obligation to voluntarily perform. Having done this at the instance of the appellant, they are entitled, not to commissions upon the estate of Charles C. Crothers, but to a just and reasonable compensation for the services performed. The charge for such service is not one properly to be borne by the estate of Charles C. Crothers. The commissions to be allowed upon the passing an account by the surviving executor are full compensation, so far as the estate is concerned, for the entire administration, and of such commissions the estate of Austin L. Crothers will be entitled to one-half. *Richardson v. Stansbury*, 4 Har. & J. 275. The appellees were, in their capacity as executors, under no legal obligation to make up the account stated by them, at the instance of the appellant; hence the compensation for such statement of account will be payable by the appellant personally, to the appellees personally.

[4] 2. By the account presented the estate of Charles C. Crothers amounted to the sum of \$10,397.68, and after the payment of all creditors of the deceased and the expenses of administration there remained a balance of \$4,332.81. The estate was therefore solvent. Among the items for which allowance was asked was the curbing of the cemetery



lot and the erection of a monument at a cost of \$1,675, and to this allowance exception is taken. The view pressed upon the court is that Austin L. Crothers had assumed to do this individually, and not as executor, and that, unless such expenditure is authorized by the will of a deceased, it can only be allowed in conformity with statutory authority. The evidence of the individual assumption of this expenditure by Austin L. Crothers is too nebulous to sustain any conclusion of fact. The statutes of this state do not expressly or as a part of the proper funeral expenses make any provision for a tombstone. A somewhat similar claim was disallowed in *Stonesifer v. Shriver*, 100 Md. 24, 59 Atl. 139. That case, however, did not decide the point now in issue. There the question was how far a husband was liable individually for the burial expenses of his wife, and how far they might be charged against her separate estate, and the decision dealt only with the legal liability of the estate of a married woman, holding that, if the erection of a tombstone was to be regarded as an essential part of the burial expenses, it constituted one of the necessities for which the husband was legally liable. In a number of states an allowance for tombstones as part of the funeral expenses is made by statute, of which Kentucky, Massachusetts, New Hampshire, and Rhode Island are examples.

In the case of an estate which is insolvent, the decisions are not harmonious; such allowances were sustained in *Re Rooney*, 3 Redf. Sur. (N. Y.) 15, and *Phillips v. Duckett*, 112 Ill. App. 587, but disallowed in *Burbridge v. Rogers*, 7 Ky. Law Rep. 42, and in *Re Ville's Estate*, 9 Lanc. Law Rev. (Pa.) 353.

But, where an estate is solvent, by an almost unbroken line of decisions it is held that, even without statutory provision to that effect, the cost of a suitable stone to mark the grave of a deceased is properly allowable as a portion of the funeral expenses, but such an expenditure must not be disproportionate to the amount of the estate, or unsuitable to the condition in life of the deceased. *Hatchett v. Curbow*, 59 Ala. 516; *Van Emon v. Tulare Co. Court*, 76 Cal. 589, 18 Pac. 877, 9 Am. St. Rep. 258; *Crapo v. Armstrong*, 61 Iowa, 697, 17 N. W. 41; *Spire v. Lovell*, 17 Ill. App. 559; *Pistorius' Appeal*, 53 Mich. 350, 19 N. W. 31; *Laird v. Arnold*, 42 Hun (N. Y.) 136; *Ferrin v. Myrick*, 41 N. Y. 315; in *Re Webb's Estate*, 165 Pa. 330, 30 Atl. 827, 44 Am. St. Rep. 666. See, also, notes in 33 L. R. A. 666, and 28 L. R. A. (N. S.) 574.

[5, 6] In the present case we find an allowance asked for between 15 and 20 per cent. of the gross amount of the estate for curbing of cemetery lot and erection of monument, and it calls for no discussion to determine that the amount asked is grossly disproportionate to the estate of Charles C. Crothers. What would be a proper allowance is not a matter for this court to determine. That rests in the exercise of the sound discretion

of the orphans' court of Cecil county, upon such evidence produced to it as it shall deem requisite. Some aid may be derived from the amounts allowed in other cases, but it would be inappropriate for this court to make suggestions, since each case is, and must be, dependent upon its own particular facts.

It further appears that the appellant made no objection to this expenditure when made, and, having been silent then, so far as appears from the evidence, he ought in equity and good conscience, after this long lapse of time, and when death has forever closed the lips of the active executor, to be estopped from repudiating this charge against the estate. By the will of Charles C. Crothers sundry pecuniary legacies were given. In the account as stated by these appellants allowance is asked only for a percentage of the sums so bequeathed, while the releases offered in evidence recite the payment of the full amounts. If the only person to be affected by the disallowance of this item or any part of it was Augustus C. Crothers, it would be eminently proper to hold him estopped from questioning this allowance, but, as others may be affected who are not similarly chargeable with laches, it is proper that the orphans' court should have before it, if possible, evidence as to the amounts actually received by the legatees, and, if it shall appear as a fact that any of them, other than Augustus C. Crothers, did not receive the full amount of their respective legacies, then the allowance for a tombstone should be reduced to a just and reasonable amount, proportionate to the size of the estate, and with due regard to the condition in life of the deceased.

[7] 3. The third item, to the allowance of which exception is taken, reads as follows: "For amount paid William A. McNamee, ward, Chas. C. Crothers, guardian, per voucher, \$777.13."

The facts out of which this arises, so far as shown by the record are that on January 6, 1897, Charles C. Crothers became guardian of William A. McNamee. Later in the same year Mr. Crothers died, and the "first and final" guardianship account was passed in June, 1901, by Austin L. Crothers, one of the executors of Charles C. Crothers. The estate accounted for amounted to \$777.13, of which sum \$509.39 was allowed for disbursements made and a balance shown to be due the ward of \$267.74. On the 17th of August of the same year (1901) W. A. McNamee executed a release to "Charles C. Crothers, guardian, his heirs, executors, and administrators" for the entire amount of the guardianship estate. In the account Austin L. Crothers charged himself "with the amount due ward in hands of Charles C. Crothers, former guardian." As it was the clear legal duty of Mr. Crothers as guardian to keep separate all guardianship funds in his hands, and not commingle them with his own individual property, in the absence of evidence tending to show such commingling the court

must assume that he did that which it was his legal duty to do, and to interpret the entry in the guardianship account already quoted from as meaning that this guardianship fund came to the hands of the executors of the guardian plainly earmarked, and was by him paid over to the ward in 1901 upon his arrival at age. The record contains no proof to show any condition of facts different from that which the law imputes, and this item cannot be allowed upon the proof contained in this record, as a payment made by Austin L. Crothers out of the individual property of Charles C. Crothers.

[8] 4. The allowance asked of an item of \$169.25 paid Helster Hess, administrator d. b. n. of estate of Robert Johnson, is in a similar position. Charles C. Crothers had been appointed administrator of Robert Johnson in 1895. On the 17th of August, 1897, he passed an account in which \$263.25 was retained to meet a certain claim. Six months later, in February, 1898, a release was executed to the executors of Charles C. Crothers by the administrator d. b. n. of Robert Johnson for \$169.25. There is no evidence with respect to this payment that there had been any commingling by Charles C. Crothers of his own funds with those held by him as administrator, and the inference from the facts given is that there had been no such commingling, as no allowance is asked for \$94, the difference between the amount retained by the administration account and that paid over to the administrator d. b. n. On the contrary, the natural inference is that the claim for which \$263.25 was retained at the time of passing the account had been settled by a payment of \$94, and the balance turned over to the administrator d. b. n. This allowance should, therefore, under the proof now before us, have been rejected.

Inasmuch as this case will have to be remanded to the orphans' court of Cecil county, in order that the parties may take further testimony, if they so desire, in regard to the second item considered in this opinion, it will be proper to permit the appellees to take further evidence with regard to the third and fourth items, and show, if they are able, the actual source from which the money was derived to pay William A. McNamee and Helster Hess.

There is a cross-appeal in this case by the executors of Austin L. Crothers from the refusal of the orphans' court of Cecil county to allow a payment of \$750 to be charged as a payment on account of a pecuniary legacy of \$3,500 given by Charles C. Crothers to Augustus C. Crothers. The latter's claim is that, while he received a check for this sum, it was not intended as a payment on account of the legacy, but was given for the purpose of paying the bill of Dr. W. S. Halstead for an operation performed on Charles C. Crothers. That such was the fact is directly testified to by Mrs. A. C. Crothers, and there

is no sufficient evidence in the record to overcome this. The action of the orphans' court in respect to this item will accordingly be affirmed.

Order affirmed in part and reversed in part, and cause remanded for further proceedings; costs to be paid out of the estate.

(123 Md. 436)

HENRY v. LEECH et al. (No. 9.)

(Court of Appeals of Maryland. June 24, 1914.)

1. GIFTS (§ 47\*)—UNDUE INFLUENCE—BURDEN OF PROOF—CONFIDENTIAL RELATIONS.

Within the rule that the burden of proof as to undue influence is on the donee in case of a gift to one in a confidential relation to the donor, a gift by parent to child is not presumed to be invalid; but it must be first shown that the natural relationship between them has been reversed, and that the child has become a guardian to the parent.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 81-86; Dec. Dig. § 47.\*]

2. GIFTS (§ 49\*)—ACTION TO SET ASIDE—UNDUE INFLUENCE—EVIDENCE.

Evidence in a suit to set aside a gift, made a few months before his death, by an old man to his daughter, held insufficient to show undue influence; but to merely raise a suspicion.

[Ed. Note.—For other cases, see Gifts, Cent. Dig. §§ 95-100; Dec. Dig. § 49.\*]

Appeal from Circuit Court No. 2 of Baltimore City; Carroll T. Bond, Judge.

Suit by Timothy Edgar Henry, an infant, by James D. Henry, his father and next friend, against Ella Leech and husband. Bill dismissed, and plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Daniel S. Sullivan, of Baltimore (Charles Pielert, of Baltimore, on the brief), for appellant. J. Purdon Wright and Armstrong Thomas, both of Baltimore, for appellees.

PATTISON, J. The appellant, the plaintiff below, an infant, by his father and next friend, filed his bill in circuit court No. 2 of Baltimore city seeking to annul and set aside a gift made by his grandfather, John Welsh, unto his aunt, Ella Leech, one of the appellees. The bill alleges, in substance, that the said Welsh departed this life on or about the 19th day of April, 1913, at or about the age of 82 years, leaving the said Ella Leech, a daughter, and the plaintiff, a son of a deceased daughter, as his next of kin and only heirs at law, "that by reason of his great age and physical infirmities the mind and will of the said Welsh at the time of his death and for a considerable period prior thereto were so weak as to render him incapable of conducting any business with any rational comprehension of his acts," and that on or about the 29th day of November, 1912, the defendant, Ella Leech, by means of artifice and undue influence exercised by her over the said John Welsh when his mind and

will was weakened by sickness and infirmity and old age, did induce him to assign or transfer to her the sum of \$3,377, then on deposit in the Savings Bank of Baltimore. The prayer of the bill asks that the court assume jurisdiction of this fund, and that it be disbursed or distributed to those entitled thereto and that the defendants account for any sum or sums withdrawn from said fund and used by them; and that they be restrained and enjoined from disposing of, or in any wise interfering with, said fund or any part of it. The defendants answered the bill denying the alleged impaired condition of the mind and will of John Welsh and also denying the exercise of any artifice or undue influence practiced upon him by the said defendant, Ella Leech, inducing him to assign or transfer to her the money so deposited by him in said bank, and averring therein that said gift was made to her voluntarily of his own free will acting with and in the possession of his full mental powers. The court, after hearing evidence, dismissed the bill and dissolved the preliminary injunction which had been granted upon the filing of the bill. It is from this order or decree of the court, dismissing the bill and dissolving the injunction, that the appeal is taken.

[1] Before considering the evidence here offered we should determine whether this case falls within the doctrine of confidential relations where the burden of proof is upon the grantee to establish to the satisfaction of the court the perfect fairness of the transaction. The rule is designed, in some degree, as a protection to the parties against the effects of overweening confidence. 1 Story, Eq. Jur. 307.

As was said in *Highberger v. Stiffler*, 21 Md. 353, 83 Am. Dec. 593:

"Wherever a fiduciary relation exists, legal or actual, whereby trust and confidence are reposed on the one side, and influence and control are exercised on the other, courts of equity, independent of the ingredients of positive fraud, through public policy as a protection against overweening confidence, will interpose to prevent a man from stripping himself of his property. Story's Eq. §§ 303-322. The relation requires the parties to abstain from all selfish projects. The general principle is, if a confidence is reposed, and that confidence is abused, courts of equity will grant relief.' \* \* \* In such cases it is not necessary to prove actual exercise of overweening influence, misrepresentation, importunity, or fraud aliunde the act complained of. \* \* \* The general rule that he who bargains in a matter of advantage with a person placing a confidence in him is bound to show that a reasonable use has been made of that confidence, a rule applying equally to all persons standing in confidential relations with each other. Story's Eq. § 312."

See *Colegate D. Owings' Case*, 1 Bland, 392, 17 Am. Dec. 311; *Brooke v. Berry*, 2 Gill, 153; *Todd v. Grove*, 33 Md. 188; *Eakle v. Reynolds*, 54 Md. 305; *Williams v. Williams*, 63 Md. 371; *Whitridge v. Whitridge*, 76 Md. 54, 24 Atl. 645; *Zimmerman v. Bitner*, 79 Md. 115, 28 Atl. 820; *Bauer v. Bauer*, 82 Md. 241, 33 Atl. 643; *Berger v. Bullock*, 85 Md. 441, 37 Atl. 368; *Brown v. Mercantile*

*Trust Co.*, 87 Md. 377, 40 Atl. 256; *Reck's Executor v. Reck*, 110 Md. 497, 73 Atl. 144; *Thiede v. Startzman*, 113 Md. 278, 77 Atl. 666; *Kensett v. S. D. & Trust Co.*, 116 Md. 526, 82 Atl. 981; *Beinbrink v. Fox*, 121 Md. 102, 88 Atl. 106.

But it is sometimes difficult to lay down with precision what is meant by the expression "confidential relations" or "relations in which dominion may be exercised by one person over another." *Cook v. Lamotte*, 15 Beav. 299, cited in *Whitridge v. Whitridge*, 76 Md. 73, 24 Atl. 645. Such a relation will undoubtedly be presumed in certain cases; as, for instance, in that of a guardian and ward, parent and child, attorney and client, and also in that of principal and agent, and may exist in many other situations. *Brown v. Mercantile Trust Co.*, supra, and other cases above cited. This court in the case of *Bauer v. Bauer*, 82 Md. 242, 33 Atl. 643, speaking through Judge Briscoe, said:

"It is well-settled law that a gift of voluntary conveyance between parties standing in the confidential relation of child to parent is *prima facie* void, and can only be upheld upon proof that it was the free, voluntary, and unbiased act of the person making it. *Whitridge v. Whitridge*, 76 Md. 54 [24 Atl. 645]. This is so, because a child is presumed to be under the control of parental influence, as long as the dominion of the parent lasts, and whilst that dominion exists it lies on the parent maintaining the gift to disprove the exercise of parental influence by proof that the child had independent advice, or in some other way. But a voluntary conveyance of property from a parent to a child rests upon a different principle, and is not *prima facie* void. 'It turns,' says Mr. Pomeroy in his work upon Equity Jurisprudence, 'upon the exercise of actual undue influence and not upon any presumption of invalidity. A gift from parent to child is certainly not presumed to be invalid.' 2 Pomeroy Eq. § 1396. If, however, the confidential relation is shown by competent proof to exist, then the burden is imposed upon the grantee to show that the transaction was a righteous one."

In the case of *Highberger v. Stiffler*, supra, the mother, who was advanced in years, had intrusted to her son the conduct of all her business, and it was there held that:

"The natural relation of the parties was reversed by the influence of time. The parent had become a child, and the child was guardian to the parent. The same dependence, overweening confidence, and explicit acquiescence which rendered one an automaton in the hands of the other existed, 'et ubi eadem ratio, ibi idem jus.' The wish of the agent had become the will of the principal, whatever the former suggested the latter executed. There was no consent of two minds, but a merger of the principal's mind into the agent's."

In a case of a voluntary gift by the parent to a child, like the one before us, the reversed relations of the parties must first be shown to exist before the rule can be applied and before the gift can be presumed to be void. In all such cases where it is shown that a confidential relation exists as a fact—where confidence is reposed on the one side and the resulting superiority and influence on the other—the rule should be applied. *Zimmerman v. Bitner*, 79 Md. 126, 28 Atl. 820. In the case before us the relation exist-

ing between the parent and child is not that confidential relation upon which the rule is based. Until a few days prior to the time when the gift was made the father and daughter had been separated for a number of years with practically no intercourse between them and no outward indication of the existence of any close or intimate relation that might naturally have been expected between parent and child. The evidence does not disclose a single instance where the business affairs of the father were intrusted or confided to the management of the daughter. He had looked after and managed his own affairs. He had sold his farm and had deposited the money received therefor in the bank, of which fact the daughter was entirely ignorant. There is nothing in the evidence from which we can reach the conclusion that there existed between the father and daughter a confidential relation such as is meant and contemplated by the rule above mentioned. There might have been, and probably was, a relation existing between them such as might naturally arise from near kinship and mutual affection. But it was not such a relation as would imply dominion or control either over the property or person of the donor.

[2] Having determined that this case does not fall within the rule, there is no presumption that the gift was void, and thus the burden of proving that the gift was not the free, voluntary, and intelligent act of the donor is upon the plaintiff. A number of witnesses produced by the plaintiff testified as to acts and expressions of the donor which the plaintiff contends show a want of mental capacity in him to make a valid gift or conveyance. Such conduct of the donor showed that he was an eccentric person, and to some extent it may have reflected upon his mental condition, but such conduct, we think, in view of the positive and direct evidence of others who testified in support of his mental soundness, does not warrant us in concluding that the gift is void for a want of mental capacity in the donor. There are facts and circumstances found in the record which give rise to strong suspicion of undue influence exercised upon the donor by the daughter and the lack of free, voluntary action on his part. But after carefully weighing the evidence, we think the facts of undue influence and the lack of free, voluntary action on the part of the donor are not sufficiently established to justify us in deciding that the gift is void. The donor was at the time of the gift an old man and in bad health. He had by economy, we may say parsimony, saved the money that passed to his daughter under the gift complained of, and it was all he had. It was but a few days before the gift was made that he unexpectedly called at the home of his daughter and obtained permission from her to make his home with her for the remainder of his life. The daughter had not heard from him for months, and was not aware of the fact that for weeks

immediately preceding his visit to her he had been sick in the hospital. It is quite clear that the old man had at such time reached the conclusion that his days were numbered and that the end was near. The first night after entering the home of his daughter he was taken violently sick and his life was despaired of. Not only was a physician sent for, but a priest was likewise called in and the last rites of his church were administered to him. He, however, recovered from his attack, and it was on the following day that the donor for the first time imparted to his daughter, the donee, his desire that she should have the money deposited in bank to his credit. The daughter testified that her father said to her:

"I have come to you to spend the rest of my life, and the money I have in bank I am going to turn over to you; give it to you so you can do with it what you please. Draw it out of bank, invest it as you want, but take care of me the rest of my life."

On the following day arrangements were made by which the money was to be transferred from him to her, and the husband remained home from his work to assist in the transfer. He went to the bank in the morning, got the form of the assignment which was to be executed by the donor, and upon being told that it was necessary for the attending physician to certify to the mental soundness of Mr. Welsh, he, after first carrying the form of the assignment to the donor, but before getting his signature thereto, called upon the physician with the paper writing, and said to him, "Doctor, the old man wants to get some money for this, and you sign this, please," which he did. In signing the paper as requested, the physician not only certified to the donor's mental soundness, but also signed as a witness to the execution of the paper, and thereafter, returning with the husband, paid a professional visit to the donor. The physician testified that when he signed the paper he thought it was simply an application for sick benefits, and did not know at the time that he was certifying to the mental soundness of Mr. Welsh, but stated that had he known the contents of the paper and the purpose for which he was signing, he nevertheless would have signed it. Subsequently, on the same day, the donor signed the paper writing transferring the money to his daughter, and she with her husband in the afternoon of that day went to the bank and had the money transferred from her father's account to the joint account of herself and husband. Some days thereafter a part of this money was withdrawn and was applied by them in the purchase of the ground rent of the property owned by them and where they at the time lived. About the same time the services of an attorney were procured and an instrument of writing prepared by him, which was thereafter executed by Mr. Welsh and witnessed by three persons, including the attorney who prepared it. By it Mr. Welsh admitted that

he had given the money to his daughter absolutely and unconditionally without any restrictions, and in it said:

"I have given her this money because of my great regard and affection for her; because of the regard and affection which she has always shown to me; and because of her careful attention and faithful services to me and my household after her mother's death, and during the time which I have lived at her home during the years 1906 and 1907; and also to partially repay her for taking me in and giving me a home during the remainder of my life and for her care and attention and faithful nursing during this time."

It was stated by both his daughter and her husband that the execution of such a paper was suggested by the donor, and that it was at his request that the lawyer was employed to prepare it. The reason assigned by Mr. Welsh for the execution of the above-mentioned writing, as stated by his daughter and husband, was that she should not be disturbed in her right to such money under the gift. Little was asked the donor concerning the paper writing at the time of its execution, although, as testified to by the witnesses to its execution, it was read over to him, and one of them, a neighbor, Mr. Radcliffe, testified, saying:

"I went up to the bed and said, 'Now, Mr. Welsh, how old are you?' 'Eighty or eighty-one; I am not sure which,' I said, 'This is a very important thing; do you know what you are doing?' He says, 'I do.' I says, 'Are you giving this to your daughter of your own free will?' He says, 'Of my own free will.' He said, 'She has been a good daughter to me, and I feel it my duty to repay her.'"

And in his cross-examination he testified that Mr. Welsh answered in a strong voice and said: "I know exactly what I am doing." The lawyer who prepared the paper, and who was one of witnesses to its execution, did not at such time, so far as the record discloses, make any inquiries to ascertain the facts elicited from the donor by Mr. Radcliffe, nor did he testify in the case, although he had, during the time of his employment, one or more conversations with Mr. Welsh, and was in a position, no doubt, by reason of the information acquired at such times, to have thrown some light upon the issues here involved.

The daughter and son-in-law were the only ones present at the time the gift was made, and are therefore the only persons who can testify as to what was said and done at such time, and the daughter in her testimony in relation thereto made a number of conflicting statements, and we are rather impressed with the views of the court below, as expressed in its opinion, "that she was making evidence to fit what she conceived to be the needs of the case." The haste with which the assignment was consummated and the fact that the grandson, the plaintiff, was overlooked by the grandfather in the disposition of his property and estate, although he had on several occasions not long before the gift was made stated to others that the plaintiff with his aunt, the

defendant, would upon his death be his beneficiaries, together with other facts and circumstances in the case, cast grave suspicion upon the conduct of the defendant. But this cannot be substituted for the proof required of the plaintiff that the gift was made as the result of undue influence exercised upon the father by the daughter, inducing him to make it, and that it was not the free and voluntary act of the donor. The physician who visited the donor on the day the gift was made, as well as upon other days both before and after such time, and the priest who saw him either upon the day the gift was made or in the closing hours of the preceding day when he was desperately ill and from which attack he had largely recovered at the time of the gift, and who subsequently saw him on many occasions before his death a few months thereafter, both testified that his mental faculties were clear at such time. And the two witnesses to the execution of the aforesaid paper writing confirming the gift hitherto made by the donor to his daughter, that were sworn, testified that at such time the donor's mind was clear, and on that occasion he said that "he fully intended to do what he had done" and acknowledged that such gift to his daughter was his free and voluntary act. As was said in the opinion of the learned judge in the court below: "This gift may have been unwise, carelessly made, and unfair in our view. It may have resulted from an impulse which a more vigorous, or a more thoughtful man would have resisted. And, too, the defendant may have been greedy in taking advantage of the old man's impulse. All these things may be true, and yet the gift may have been made with a free will," and thus beyond the interposition of a court of equity.

The plaintiff in this case has not met the burden of proof imposed upon him, and is not entitled to the relief sought, and therefore the decree of the court below will be affirmed.

Decree affirmed, with costs to the appellee.

(123 Md. 644)

HUNTER et al. v. HIGHLAND LAND CO.  
OF BALTIMORE CITY.

RUPP et al. v. SAME.

(Nos. 37, 38.)

(Court of Appeals of Maryland. June 25, 1914.)

1. MORTGAGES (§ 529\*)—FORECLOSURE—SALES.

Mere inadequacy of price, standing alone, is not sufficient ground to vacate a sale of mortgaged premises on foreclosure, unless it is so gross as to indicate some mistake or unfairness in the sale for which the purchaser or trustee of the mortgagee is responsible.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1537-1548; Dec. Dig. § 529.\*]

2. MORTGAGES (§ 526\*)—FORECLOSURE SALES—EVIDENCE.

On exceptions to the confirmation of a foreclosure sale of mortgaged property, evidence held insufficient to show that the inadequacy of the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

price resulted from the fraud or unfairness of the purchaser or mortgagee.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1530-1534; Dec. Dig. § 526.\*]

### 3. EVIDENCE (§ 568\*)—FORECLOSURE SALES—OPINION EVIDENCE—EFFECT.

Bare opinion evidence among witnesses as to the value of mortgaged property will not warrant the vacation of a foreclosure sale on the ground that the price obtained, which was less, was inadequate.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 2392-2394; Dec. Dig. § 568.\*]

### 4. MORTGAGES (§ 529\*)—FORECLOSURE SALE—PLACE OF HOLDING.

Where the plat of mortgaged property was located at T., and the property itself was not attractive in appearance, the fact that the mortgagee held the foreclosure sale at T. instead of on the property or at the real estate exchange of a neighboring city does not show unfairness warranting vacation of the sale on the ground of inadequacy in price, where it did not appear that any persons who would have attended the sale, if held at other places, did not attend at T., and the mortgagee claimed that it was necessary to sell at the place where the property was platted, so that the lots could be identified.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1537-1548; Dec. Dig. § 529.\*]

### 5. MORTGAGES (§ 529\*)—FORECLOSURE—VACATION.

A foreclosure sale of mortgaged property will not be vacated on the ground of inadequacy of price resulting from sale at a bad time of the year, when the evidence showed that a re-sale would be only an experiment.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1537-1548; Dec. Dig. § 529.\*]

Two Appeals from Circuit Court, Baltimore County, in Equity; N. Charles Burke, Judge.

"To be officially reported."

Foreclosure suit by the Baltimore Trust Company against the Highland Land Company of Baltimore City. Upon report of sale, Charles B. Hunter filed exceptions to the ratification of the sale, as did Walter R. Rupp and others. From an order confirming the sale, the several exceptors appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

R. Lee Shingluff, of Baltimore, W. Gill Smith, of Towson, and W. Herdman Schwatka and Charles F. Harley, both of Baltimore, for appellants. Albert C. Ritchie, of Baltimore (Ritchie, Janney, Griswold & Hamilton, of Baltimore, on the brief), for appellees.

PATTISON, J. The Highland Land Company, a body corporate, on July 25, 1912, executed and delivered to the Baltimore Trust Company, also a body corporate, a mortgage on certain real estate lying partly in Baltimore county and partly in Baltimore city to secure a loan of \$80,000. The aforesaid mortgage indebtedness was to be paid July 25, 1913, one year after the date of the execution of the mortgage, and by the terms of the mortgage, if it were not then paid, the right of foreclo-

sure would exist. It was not paid at such time, and because of such default the mortgage was on the 28th day of August assigned to one Charles D. Fenhagen for the purpose of foreclosure, and on the following day proceedings were instituted in the circuit court for Baltimore county, sitting as a court of equity, and the mortgaged property was thereafter, on the 17th day of December, 1913, under the power contained in the mortgage, sold by said Fenhagen, at public sale, at the courthouse door at Towson, to James Carey Martien for \$42,000. The sale so made to Martien was reported to the court on the 19th day of December, and thereafter, on the same day, the Baltimore Trust Company, by order of the court and with the assent of Martien, was substituted as purchaser of the property. On January 6, 1914, Charles B. Hunter and W. Frank Thomas and Enoch Harlan, assignees of Charles B. Hunter, judgment creditors of the Highland Land Company, and the appellants in the first of these appeals, filed exceptions to the ratification of the sale to Martien.

There are five exceptions as shown by the record, but they may be stated in three, as follows: (1) That the sale was made at "a grossly inadequate price." (2) That the sale of the property should not have been made at Towson, Baltimore county, Md. (3) That the sale was made at "a very disadvantageous time."

On the 8th of January, Walter R. Rupp and other creditors of the land company, appellants in the second of these appeals, also filed exceptions to the ratification of the sale made to Martien, the grounds thereof being the same as those above stated, made by the appellants in the first of these appeals. Judge Burke, who sat in the lower court, heard testimony upon the exceptions filed in each of these cases, and by his order of March 20, 1914, he overruled the exceptions and finally ratified and confirmed the sale. It is from that order that these appeals are taken.

[1-3] As to the first of the above-stated objections, the law is well established that mere inadequacy of price, standing by itself, is not sufficient to vacate a sale, unless it be so gross and inordinate as to indicate some mistake or unfairness in the sale for which the purchaser is responsible, or misconduct or fraud on the part of the trustee or mortgagee making the sale. *Glenn v. Clapp*, 11 Gill. & J. 1; *Cohen v. Wagner*, 6 Gill, 236; *Johnson v. Dorsey*, 7 Gill, 269; *Hubbard v. Jarrell*, 23 Md. 66; *Bank of Commerce v. Lanahan*, Trustee, 45 Md. 396; *Mahoney v. Mackubin*, Trustee, 52 Md. 357; *Garritte v. Popplein*, 73 Md. 322, 20 Atl. 1070; *Shaw v. Smith*, 107 Md. 523, 69 Atl. 116; *Vollum v. Beall*, 117 Md. 620, 83 Atl. 1095; *Edgcombe Park Co. v. Finney*, 121 Md. 326, 88 Atl. 143.

We have very carefully examined the evidence in this case, and we find nothing that shows mistake or unfairness in the sale for

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index

which the purchaser can be held responsible, nor do we find anything indicating misconduct or fraud on the part of the mortgagee or any person connected with the sale. The exceptants conceded "that the advertisement of sale was sufficient, and that all due and proper publicity was given the same," and this is shown to be true by the record before us.

The property was advertised in the *Democrat and Journal*, a newspaper published in Baltimore county, and in the *Daily Record*, and in the *Baltimore Sun*, newspapers published in Baltimore city. In addition to this, a notice of such sale drafted by John W. Watson, president of the Highland Land Company, was mailed at his request to nearly 1,000 persons who he thought might be interested in the purchase of the property. In the advertisement the property was fully described and the time, terms, and manner of sale fully set forth, and we may add that the terms of sale were fair and reasonable.

The proceedings were instituted for the sale of the property as early as August 28th and yet the sale was not made until the 17th of December following. This delay was occasioned in great part by the indulgence shown by the mortgagee and its representatives to the mortgagor and those interested in avoiding a sale of the property under the mortgage.

The land company or its representatives attempted to borrow money from other sources to pay off the mortgage indebtedness owing by it to the trust company, and the latter company or its representatives awaited patiently the result of such efforts, and it was not until late in November, after the efforts of the mortgagor to procure money with which to pay off said mortgage were shown to have been unsuccessful, that the property was advertised for sale in December.

We find nothing in the conduct of the mortgagee or those representing it indicating the least desire to take unfair advantage of the financial condition of the land company. It is shown by their conduct and by what was said by Mr. Ritchie when upon the stand as a witness that the mortgagee did not wish to become the owner of the mortgaged property, but merely wished to collect the mortgage indebtedness, with such costs as had been accrued, which amounted at such time to about \$60,000. The wishes and requests of the mortgagor company and those interested in it, except that the sale of the property be further or indefinitely postponed, were granted or complied with by the mortgagee and its representatives.

The property sold was unimproved and undeveloped for building purposes; parts of it were in woods and other parts overgrown with weeds and grass. There was nothing upon it, or at least on the greater part of it, to indicate that it was in course of development for building purposes. A plat had been made of this property, and streets and alleys

had been laid out upon it and lots located upon said streets and alleys, as shown upon said plat, but these streets and alleys were never opened or graded. The streets, alleys, and lots had been staked and marked off, but these stakes had disappeared, for Mr. Ritchie tells us that, when he and Mr. Poe went upon the property, it was impossible to find a marked street or alley or to locate any of the lots.

The witnesses offered by the exceptants placed the value of the property at a sum much larger than the amount at which it was sold, while the witnesses produced by the mortgagee company placed the value of it at or about the amount at which it was sold. The witnesses for the exceptants valued the lands as building lots, although the improvements and developments necessary to render it available for such purposes had not been made, and, to make such improvements and developments, the expenditure of much money will be required, and when so made there is no certainty of a speedy and profitable disposition of the lots, especially so in view of the protracted and unprofitable efforts of the president of the mortgagor company in disposing of nearby lots where the lands had been so improved and developed. The value so placed upon the land by such witnesses is therefore uncertain and more or less speculative; and, moreover, the fact that the mortgagee, as testified to by Mr. Ritchie, has expressed itself as being at all times ready and willing to turn over the property bought by it to the mortgagor or to any one else upon the payment to it of the amount of the mortgage indebtedness, with costs and expenses of sale, amounting to about \$60,000, and that this offer has never been accepted, not only by the mortgagor, but by any investor, strongly assails the correctness of the valuation of \$90,000 placed upon it by the witnesses for the exceptants, which, after all, was their mere opinion of its value, and as was stated in *Vollum v. Beall*, *supra*, the difference of opinion among witnesses as to the value of property will furnish no proper ground for disturbing a sale fairly made, when the trustee or mortgagee acts in entire good faith in making the sale.

The proof in this case does not show such inadequacy of price, if it be shown at all, as to indicate misconduct, fraud, or unfairness on the part of the mortgagee, its assignee, or those having any connection with the sale of the land under the mortgage, and consequently no warrant can be found for disturbing the sale for such alleged inadequacy of price.

[4] As to the objection that the property was not sold at the proper price, Mr. Watson, president of the land company, testified that in his opinion the property should have been sold on the ground "or at the Real Estate Exchange in Baltimore city," assigning his reason therefor that it would have been more convenient for the people who were in the market for such land to attend the sale.



Mr. West, another witness offered by the exceptants, testified that, if it were to be sold to individuals, it should have been offered upon the ground, but, if it were to be sold to developers, it should have been offered at the Real Estate Exchange. He, however, stated no reasons for the opinion so expressed. Mr. Martenet, also a witness for the exceptants, testified that in his opinion it should have been sold on the premises, and, when asked how would the Real Estate Exchange compare with Towson, he answered, "I do not know that there is any particular difference." It will thus be seen that the witnesses for the exceptants were not in full accord as to where the sale should have been made. The record, however, does not disclose that a single person who would have attended the sale, had it been at either the Real Estate Exchange or upon the premises, failed to attend the sale at Towson. Mr. Ritchie, counsel for the mortgagee or its assignee, in stating the reasons why the property was sold at Towson, said that, inasmuch as a greater part of the land was in the county, he thought it should be sold in the county and not at the Real Estate Exchange in the city of Baltimore, and, in stating why the property was sold at Towson and not upon the premises, he assigned the following reasons: (1) That the lots to be sold were very much scattered. Some far removed from others. (2) When upon the premises, one lot could not be distinguished from another; nor could a lot on the plat be identified with such lot on the ground. (3) That "the property did not look particularly attractive to me. A good part of it was woods and a large part of it was also in weeds. It looked a great deal better to me on the plat than it did on the ground, and I wanted to sell in a way that I thought would bring the best possible price." These reasons appear to us to be sufficient to have induced the mortgagee or assignee to make the sale at Towson, and we find nothing in the evidence to set aside the sale upon this objection urged against it.

[5] The remaining objection is that it was not sold at a proper time. Mr. Watson, witness for the exceptants, testified that he thought that December was a bad month in which to make the sale, and, when asked why, said:

"It is just before the holidays; it is just at a time when developers are practically closing up the year, and probably would not go into anything until they found out where they were. And then I had another reason; if I thought they would wait until the currency question was settled, the money market was not very good, and for that reason I had asked Mr. Ritchie to try and put it off until the spring."

Other witnesses for the expectants assigned their reasons why, in their opinion, the property should not have been sold in December, none of which, however, are more potent or convincing than those assigned by Mr. Watson, which, in our opinion, are not suffi-

cient to warrant us in disturbing the sale when considered in connection with the reasons assigned by Mr. Ritchie for making the sale at such time.

Mr. Ritchie, in his testimony, stated that after a consultation with real estate gentlemen and the auctioneers, and after an inspection of the property, he concluded that it was utterly hopeless to make sale of the property to individual lot buyers; that "the only people we thought could be interested in the property at all would be those who would develop it as an entirety; and that such persons would much prefer to buy the property in December than in the spring, for, if the sale was not made until the spring, probably the purchaser could not perfect his plan and be able to dispose of the lots in the spring and summer of that year. But, if sold in December, he could at once proceed to develop the property and make it available to purchasers in the spring and summer, the most propitious seasons of the year for the sale of individual lots." The evidence offered to sustain this objection consists merely of the opinion of witnesses expressed by them with no sound or convincing reason therefor.

This court has held that a sale should not be set aside and a resale ordered as a mere experiment (*Bank of Commerce v. Lanahan, Trustee, supra*), and this we think would be the result of our decision, should we set aside this sale. We will therefore affirm the order of the court below.

Order affirmed, with costs to the appellee in each of the appeals.

(123 Md. 663)

#### SULLENS v. FINNEY. (No. 39.)

(Court of Appeals of Maryland. June 25, 1914.)

#### COVENANTS (§ 84\*)—RESTRICTIONS ON BUILDING—PERSONS BOUND—ESTOPPEL.

Where, after land was mortgaged, the mortgagor platted it, and conveyed part of the lots, released from the mortgage, by deeds containing uniform covenants as to kind and place of buildings to be placed on the deeded lots, the mortgagee, obtaining title to the remaining lots by foreclosure of the mortgage, is not estopped to deny that they are subject to the same restrictions, because he was general manager of the mortgagor company; his acts as such being always controlled by its board of directors, and he not being interested in it as director or stockholder.

[Ed. Note.—For other cases, see *Covenants*, Cent. Dig. §§ 90-92; Dec. Dig. § 84.\*]

Appeal from Circuit Court No. 2 of Baltimore City; James M. Ambler, Judge.

"To be officially reported."

Suit by William B. Finney against Thomas Sullens. Decree for complainant, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



C. Alex. Fairbank, Jr., of Baltimore, for appellant. Morrill N. Packard and Charles E. Stein, both of Baltimore, for appellee.

URNER, J. This is a suit by the vendor for the specific performance of an agreement for the purchase of real estate. The defense is that the title proposed to be conveyed is incumbered by certain building restrictions, and is therefore not of the character for which the contract of sale stipulates. It was held by the court below that the title was not open to this objection, and, from the resulting decree, the vendee has appealed.

The property embraced in the purchase consists of certain lots of ground forming part of a tract of land, situated in the suburbs of Baltimore, which has been developed for residence purposes under the name of "Edgecombe Park." It is shown by the record that the vendor's title was obtained in 1913 under proceedings for the foreclosure of a mortgage taken by him in 1907 upon a body of land containing 125 acres, a portion of which has in the interval been platted and subdivided for the development mentioned. The mortgage was executed by the Wylie Heights Company, which had just acquired the property, and it was given to secure a loan of \$25,000 made to the company by the present appellee for application on the purchase money. There were pre-existing loans to the amount of \$100,000, the payment of which the company assumed. The plat showing the subdivision of a part of the tract into building lots, streets, avenues, and alleys, and indicating the building line for the houses to be erected, was placed on record in 1908. There were 338 lots included in the development. Seventy-nine of them had been sold prior to the foreclosure of the mortgage. In the deeds for 69 of the lots so disposed of were uniform covenants and agreements to the effect that the premises should be used solely for residence purposes; that only one dwelling should be built on each lot; that residences erected thereon should cost not less than \$5,000 and should be located on the building lines established by the grantor company, and according to plans, including exterior color scheme, by it approved; that no stable or other outbuildings should be constructed and no wall or fence, except hedges, should be maintained on the lots conveyed, without the company's consent in writing; that after proper sewerage disposal had been provided by the company no cesspools should be maintained, and that no swine should be kept and no nuisances of any kind should be permitted on the premises; that the grantee, and his heirs and assigns, should pay 50 cents per month for each lot for the maintenance of the sewerage system to be connected with the property, until such time as it shall be served by the sewerage system of Baltimore. It was provided in each of the deeds by which the 69 lots in question were convey-

ed that the covenants and agreements we have indicated should run with and bind the lots respectively granted until January 1, 1930, when they should terminate. There was no covenant by the grantor company to hold or convey the remaining lots in the development subject to the same restrictions. In the conveyance of the other 10 lots, included in the 79 which were sold before the appellee obtained his title by foreclosure of the mortgage to which we have referred, there were two instances in which the only conditions imposed were against the sale of spirituous or malt liquors, three in which the deeds contained covenants similar to those applied to the 69 lots except as to the cost of the buildings, and there was a deed for 5 lots which was without any restrictions. Ten houses have thus far been erected in the development. The remaining 249 platted lots and the whole of the undeveloped portion of the original 125-acre tract have passed to the appellee under foreclosure of a mortgage which antedated the deeds for the 79 lots sold other parties and which contained no limitations whatever upon the use of the property. In the meantime the title of the Wylie Heights Company had been transferred to the Edgecombe Park Company by an absolute and unrestricted conveyance. Exceptions to the sale under which the appellee acquired the property were considered, and the action of the lower court overruling them was affirmed in *Edgecombe Park Co. v. Finney*, 121 Md. 320, 88 Atl. 143.

The appellant's objection to the title offered him by the appellee, as to the lots covered by the agreement of purchase involved in this suit, arises from the anticipation that the owners of lots which have been sold subject to restrictions may insist upon the observance of similar conditions in the use of the remaining lots embraced in the same development. This apprehension is said to be justified by the rule that, where there is a general plan for the improvement of property, a restrictive covenant imposed by the grantor upon the individual purchasers of the land, in pursuance of such a plan, is enforceable at their instance as against the remainder. *Summers v. Beeler*, 90 Md. 474, 45 Atl. 19, 48 L. R. A. 54, 78 Am. St. Rep. 446; *Safe Deposit Co. v. Flaherty*, 91 Md. 489, 46 Atl. 1009; *Peabody Heights Co. v. Willson*, 82 Md. 186, 32 Atl. 386, 1077, 36 L. R. A. 393; *Halle v. Newbold*, 69 Md. 265, 14 Atl. 662; *Thruston v. Minke*, 32 Md. 487; *Foreman v. Sadler*, 114 Md. 574, 80 Atl. 298; *Wood v. Stehrer*, 119 Md. 143, 86 Atl. 128. It is not denied that ordinarily this rule would be unavailing to affect a title which, like the present, has been acquired from the common grantor before the plan of improvement was inaugurated, or any of the rights for whose protection it is invoked were created. It is, of course, perfectly clear that after the execution and delivery of the mortgage it was beyond the power of the mortgagor, by his

own act, to impair or modify the estate conveyed, and that the sale under the mortgage invested the purchaser with the entire title held by the mortgagor at the time the instrument was recorded. *Duval v. Becker*, 81 Md. 537-548, 32 Atl. 308; *Felgner v. Slingluff*, 109 Md. 480, 71 Atl. 978; Code, art. 66, § 11. But it is urged that, under the special circumstances of this case, the mortgagee, who has since become the owner in fee, is estopped to deny that the remaining lots are subject to the same restrictions as those mentioned in the deeds for the lots owned by other purchasers. In support of this theory our attention is called to evidence showing that at the time the mortgage to the appellee was executed he became the general manager of the mortgagor company under an agreement in writing which provided that, in consideration of his loan of \$25,000 to the company being made without interest, he should be entitled to receive one-half of all the net profits which the company might make thereafter in the sale of the mortgaged lands, and that until the whole should be disposed of and the profits therefrom divided the company would employ the appellee as its general manager without salary, and would do no act in reference to the development and sale of the lots without his approval. It was stipulated that, upon the payment of \$5,000 per acre to the mortgagee, areas of not less than an acre could be released from the lien of the mortgage. The 79 lots conveyed prior to the foreclosure were so released, but only \$1,000 seems to have been paid on account of the mortgage debt. On April 16, 1910, the company executed another mortgage to the appellee securing a loan of \$5,720, and at the same time it was agreed in writing that the appellee's rights under the agreement of 1907 should be relinquished, and, in lieu of a share of the profits, he should receive 4 per cent. interest on the \$25,000 loan until its maturity. It appears that the appellee was at no time interested in the company either as director or stockholder. His connection with it as general manager ceased at the time of the second agreement to which we have just referred. According to the record, his acts as manager were always controlled by the board of directors.

If it be assumed that the evidence sufficiently shows the existence of a general plan for the improvement of the land, we can have no doubt upon the facts before us that the appellee's title is nevertheless superior to the operation of the restrictive covenants by which it is supposed to be affected. His rights as mortgagee were of record, and notice of their existence and extent must be imputed to every subsequent purchaser. It has been held to be essential to the application of the doctrine of equitable estoppel with respect to the title to real estate—

"that the party claiming to have been influenced by the conduct or declarations of another to his

injury was himself not only destitute of knowledge of the true state of the title, but also of any convenient and available means of acquiring such knowledge. Where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." *Brant v. Va. Coal & Iron Co.*, 93 U. S. 337, 23 L. Ed. 927; *Park Asso. v. Shartzler*, 83 Md. 13, 34 Atl. 536.

There is nothing in the record to suggest the idea that any of the purchasers of lots were, in fact, led by any conduct on the part of the appellee to believe that he was thereby subordinating to their interests the estate secured by his mortgage. It was doubtless supposed by all parties concerned that the covenant for the payment of the mortgage debt would be performed. But those who may have purchased lots with the expectation that the restrictive covenants contained in their deeds would be extended to the entire development must be presumed to have contracted with reference to the possibility of a default and foreclosure under the existing mortgage. There is evidence without contradiction that the remaining land would be practically unmarketable if subjected to the restrictions set forth in the deeds for the 69 lots. The record does not justify a conclusion which would thus prejudice the appellee's interests.

The case of *Peabody Heights Co. v. Willson*, 82 Md. 186, 32 Atl. 386, 1077, 36 L. R. A. 393, to which the appellant has specially referred, was altogether different in its facts from the case at bar. There the restrictions were expressly imposed, by agreement between the original vendor and vendee, upon the whole body of the land acquired for development, and the question was whether they were intended merely for the benefit of the vendor, or were provided also for the common advantage of all purchasers, and would, therefore, be binding upon a grantee with notice of their terms.

In our opinion, the title proposed to be conveyed to the appellant under his contract of purchase is free from the infirmity which he suggests, and, as it was not questioned on any other ground, the decree for specific performance was properly passed.

Decree affirmed, with costs.

(123 Md. 537)

#### ROAD DIRECTORS OF ALLEGANY COUNTY v. SEABER. (No. 19.)

(Court of Appeals of Maryland. June 25, 1914.)

#### BRIDGES (§ 39\*) — INJURIES FROM DEFECTS — LIABILITY OF COUNTY.

A county agency, the road directors of A. county, with unqualified authority, under Laws 1904, c. 262, §§ 212, 216A, and Code Pub. Civ. Laws, art. 25, §§ 1, 13, for bridge construction, having actually built and maintained a bridge over a state boundary river, under agreement with and partly at the expense of the county of the other state at the farther end of the bridge, cannot be denied any interest in the bridge, and so absolved from liability for in-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jury to a traveler from its unsafe condition, merely because it is within a town, invested by its charter with general power of control over its streets and highways.

[Ed. Note.—For other cases, see Bridges, Cent. Dig. §§ 80-85, 96, 99-102, 106, 107, 109; Dec. Dig. § 39.\*]

Appeal from Circuit Court, Allegany County; Robert R. Henderson, Judge.

Action by Louise M. Seaber against the Road Directors of Allegany County. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Walter C. Capper and Albert A. Doub, both of Cumberland, for appellant. David A. Robb, of Cumberland (Bruce & Barnard and D. L. Sloan, all of Cumberland, on the brief), for appellee.

URNER, J. The appellee while passing along the wooden sidewalk of a public bridge over the Potomac river between Westernport, in Allegany county, Md., and Piedmont, in Mineral county, W. Va., was injured by having her foot and limb caught and wrenched in a hole in the flooring caused by the breaking off, some time previously, of a small portion of one of the boards near the bridge railing. A suit against the road directors of Allegany county, a body corporate, for the injuries thus sustained resulted in a verdict for the plaintiff, and the defendant has appealed. There is an exception to the refusal of the trial court to withdraw the case from the jury. It is not denied, and upon the record it could not be doubted, that if the defendant is capable of being charged at all with responsibility for accidents resulting from a failure to keep the bridge in repair, there is in the particular case now before us a legal sufficiency of evidence to support recovery. The defense, however, raised under the general prayer just mentioned, and specifically stated in the defendant's sixth prayer, which was also rejected, is that according to the uncontradicted evidence the bridge upon which the injury sued for occurred was wholly within the corporate limits of the town of Westernport, a municipal corporation, duly empowered by the laws of the state to exercise control over the streets, alleys, highways, and bridges within its limits, and that the defendant had therefore no jurisdiction over the bridge in question and no authority to make expenditures for its maintenance or repair.

The present bridge between Westernport and Piedmont, which replaced one formerly occupying the same site for a long period of time, was erected about 10 years ago by Allegany county, under an agreement with the county court of Mineral county, W. Va., in pursuance of which each of the contracting parties paid one-half of the cost of the con-

struction. The towns of Westernport and Piedmont, whose inhabitants were desirous of having sidewalks on the bridge, were to make contributions towards meeting the additional expense thus occasioned. It is left uncertain by the record as to whether Piedmont paid its proportion of the cost of adding the sidewalk, but the evidence shows definitely that Westernport did not contribute. The agreement between the two counties provided that the expense of keeping the bridge in repair should be chargeable to the counties and municipal corporations mentioned in proportion to the amounts paid by each towards its erection. It appears from the proof that the road directors of Allegany county have had control of the bridge and assumed the duty of making the necessary repairs, and that they have been reimbursed to the extent of one-half of the cost of this work by the county court of Mineral county. Neither of the municipalities has made any payments on account of the repairs. The boundary lines of the town of Westernport, of the county of Allegany, and of the state of Maryland are coincident on the southern shore of the Potomac river at the point where the bridge in question enters Piedmont. It is in evidence that the whole of the bridge, with the possible exception of the abutment at the southern terminus, is located within the corporate limits of Westernport. The hole which caused the plaintiff's injury was near the end of the bridge on the Maryland side of the river.

The road directors of Allegany county are a body corporate, created by chapter 262 of the Acts of 1904, which amended the Code of Public Local Laws of the county. It was provided by section 212 that "their powers, duties and obligations with respect to the public roads in Allegany county shall be coextensive with the powers, duties and obligations heretofore resting upon the county commissioners of Allegany county with respect to the public roads and bridges in said county, except in so far as the same may be modified or changed by the provisions of this act." They were authorized and directed by section 216A to "take charge and supervision of all roads and bridges in Allegany county," and to "see that no obstructions, hindrances or injury are or is permitted upon any road or bridge under their supervision." By article 25, § 1, of the Code of Public General Laws it is enacted that the county commissioners of the various counties shall have "charge of and control over the property owned by the county, and over county roads and bridges." Section 2 of the same article provides that they shall in their respective counties "have control over all the public roads, streets, and alleys, except in incorporated towns." There is no such exception, however, in the separate provision, by section 13, that "They may build and repair bridges and levy upon the property of the county

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Townsend, executors, and from a judgment of the superior court sustaining the will, the caveators appeal. Reversed, and new trial ordered.

Plaintiff during the trial introduced as a witness Dr. Robert W. B. Mayo, a duly licensed practitioner of medicine and surgery, who testified that he saw testatrix at a hospital on Sunday, February 25, 1912, the day prior to her operation, and again on the morning of the 26th after she had taken a quarter of a grain of codeine. After testifying to her condition generally, he was asked:

"Assuming a person in testatrix's condition had taken the night before at 10:30 a quarter of a grain of codeine, and in the morning between 9 and 9:15 another quarter of a grain of codeine, and just a little while before the will was made an eighth of a grain of morphine and  $\frac{1}{150}$  grain of atropin was injected hypodermically, what would be the nature and probable effect on her mental condition at the time she executed the paper?"

An objection to this question was sustained, and plaintiff took his first exception. The witness was further asked the following question:

"Assuming that testatrix had taken the drugs as specified in the previous question, about half an hour before the will was signed, what would be the effect of those drugs on her mental condition, if any, at the time she signed the paper?"

An objection to this question was also sustained, which constituted plaintiff's second exception. The same question was practically repeated, and an objection thereto was sustained, and an exception thereto constituted plaintiff's third exception.

Plaintiff's first, third, sixth, seventh, eighth, and tenth prayers were as follows:

Plaintiff's Prayer No. 1. If the jury find from the evidence that at the time of executing the paper writing mentioned in this case, and purporting to be the last will and testament of Lucy B. Townsend, and dated the 26th day of February, 1912, the said Lucy B. Townsend was not of sound and disposing mind and capable of making a valid deed or contract, then she was not in possession of that description of mental capacity which is required by law, and their verdict should be in favor of the caveators on the second issue, and their answer thereto should be, "No." And the jury are instructed that the meaning of the words "sound and disposing mind and capable of making a valid deed or contract," in respect to the disposition of property by last will and testament, is that the party making such will must at the time of making the same have fully understood the nature of the business in which she was engaged, and must have had sufficient capacity at said time to know and recollect her property and to make a disposition thereof with judgment and understanding with reference to the amount and situation of the property, and to recollect the relative claims of the different persons who were, or should have been, the objects of her bounty, and also sufficient capacity to understand the manner in which she, in fact, did dispose of her property. And the jury are further instructed that it is not necessary for them to find that Lucy B. Townsend was insane in the popular sense of the word before they can adjudge her incapable of making a valid deed or contract.

Plaintiff's Prayer No. 3. The court instructs

the jury that she who is not capable to execute a valid deed or contract is, under the testamentary system of this state, incompetent to make a valid will or testament. It is not sufficient of itself that a testatrix should be able to describe her feelings or give correct answers to ordinary questions; her feelings at the moment may dictate her description of them, and the question may prompt the answers, and yet she may be inadequate to the transaction of other business, and unable to dispose of her estate with understanding and discretion.

Plaintiffs' Prayer No. 6. If the jury find that, before the paper writing, offered in evidence, and purporting to be the last will and testament of Lucy B. Townsend, and dated the 26th day of February, 1912, was executed by the said Lucy B. Townsend, she read said paper writing, and if they further find that, at the time of the execution of said paper writing, she was capable of understanding the business in which she was engaged and of executing a valid deed or contract, then the legal presumption is that she knew and understood the contents of said paper writing. But the jury are further instructed that this presumption is not conclusive, but may be rebutted; and the defendants are bound under the fourth issue to satisfy the jury that Lucy B. Townsend understood the contents of said paper writing; and, unless the jury are so satisfied, the verdict must be for the plaintiffs on the fourth issue, and their answer thereto must be, "No."

Plaintiffs' Prayer No. 7. The court instructs the jury that it was necessary for Lucy B. Townsend to know and understand the actual contents of the fourteenth item or residuary clause of the paper writing offered in evidence, and purporting to be the last will and testament of Lucy B. Townsend, dated the 26th day of February, 1912; and if they find that, before the said paper writing was executed by her, she read said paper writing, including the said fourteenth item or clause, and if they further find that, at the time of executing said paper writing, she was capable of understanding the business in which she was engaged and of executing a valid deed or contract, then the legal presumption is that she knew and understood the contents of said paper writing, including said clause or item. But the jury are further instructed that this presumption is not conclusive, but may be rebutted; and the defendants are bound to satisfy the jury that Lucy B. Townsend understood the contents of said item or clause; and, unless the jury are so satisfied that she did understand the contents of said fourteenth item or clause, their answer to the fifth issue should be "Fourteenth item," even though they may find for the defendants on the second issue, and even though they may further find that Lucy B. Townsend knew and understood the remaining contents of said paper writing.

Plaintiffs' Prayer No. 8. The court instructs the jury that it was necessary for Lucy B. Townsend to know and understand the actual contents of the fourteenth item or residuary clause of the paper writing offered in evidence, and purporting to be the last will and testament of Lucy B. Townsend, dated the 26th day of February, 1912; and if they find that, before the said paper writing was executed by her, she read said paper writing, including the said fourteenth item or clause, and if they further find that, at the time of executing said paper writing, she was capable of understanding the business in which she was engaged, and of executing a valid deed or contract, then the legal presumption is that she knew and understood the contents of said paper writing, including the said clause or item; but the jury are further instructed that this presumption is not conclusive, but may be rebutted; and if the jury find that said Lucy B. Townsend instructed Mr. George R. Willis, the draftsman of said

paper writing, that she wished the rest and residue of her estate, mentioned in the fourteenth item of said paper writing, to go to her nieces and nephews, and if they further find that, not having any nieces and nephews, by these words she meant some other persons, and that in reading said fourteenth item she failed to know and understand that said item did not give said rest and residue to the persons for whom she intended it, then, the jury are instructed that she did not know and understand said fourteenth item; and their answer to the fifth issue must be "Fourteenth item," even though they may find for the defendants on the second issue, and even though they may further find that Lucy B. Townsend knew and understood the remaining contents of said paper writing.

Plaintiffs' Prayer No. 9. The jury are instructed at the request of the plaintiffs, that if they shall find from the evidence in this case that all parts of the paper writing offered in evidence, dated the 26th day of February, 1912, and purporting to be the last will and testament of Lucy B. Townsend, were read by the said Lucy B. Townsend at a time when she was possessed of sufficient capacity to execute a valid deed or contract, and that said paper writing was then signed by the said Lucy B. Townsend in the presence of three witnesses, then the presumption of law is that the contents of said paper writing, and all parts thereof, were known to, and understood by, the said Lucy B. Townsend, and that it was not necessary that the said Lucy B. Townsend should have understood the legal operation and effect of said paper writing or any part thereof. But the jury are further instructed that this presumption may be rebutted, and, if the jury shall find from all the evidence in the case that the contents of the fourteenth item or residuary clause of her alleged will were, in fact, unknown to the said Lucy B. Townsend when she executed said paper writing, then the answer of the jury to the fourth issue shall be, "Unknown in part," and their answer to the fifth issue shall be, "Fourteenth item."

Plaintiffs' Prayer No. 10. That, according to the undisputed evidence in this case, Lucy B. Townsend, at the time of the execution of the paper writing dated the 26th day of February, 1912, and purporting to be her last will and testament, did not know and understand the contents of the fourteenth item or residuary clause of said paper writing; and the jury must so find in answer to the fifth issue.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Robert Biggs and Charles F. Harley, both of Baltimore (C. Arthur Eby, of Baltimore, on the brief), for appellants. Joseph C. France, of Baltimore, for appellees.

BURKE, J. On the 26th day of February, 1912, Lucy B. Townsend executed a paper writing purporting to be her last will and testament, which was admitted to probate by the orphans' court of Baltimore city. This paper, which we shall denominate in this opinion her will, contained 14 items. It appointed Samuel Clinton Townsend and William Stone Townsend executors, and letters testamentary were issued to them. The first 11 items of the will contained pecuniary bequests to certain named persons. By the twelfth item she bequeathed to her sister, Anna Grace Lyon, all her jewelry, clothing, furniture, pictures, books, and silverware, if she should be living at the time of the testa-

trix's death; if, however, she should be dead at that time, the same should constitute a part of the rest and residue of the estate. By this item she also bequeathed to her said sister the rents, issues, and profits on the sum of \$50,000, which she directed to be set aside for the use of her sister for life, and after her death to be and become a part of the residue of the estate. By the thirteenth item the rents and profits of a like sum were directed to be paid to her brother, John Lytleton Lyon, for life, and at his death said sums should fall into, and become a part of, the residuary estate. The fourteenth item, which deals with the residuary estate, is here transcribed:

"Item XIV. All the rest and residue of my estate, real, personal and mixed, including the respective amounts set aside for the use of my brother and sister, for life, and after their respective deaths unto such persons living at that time who would under the laws of Maryland, inherit real estate of me had I died intestate."

A caveat to the will was filed by John L. Lyon and Anna Grace Lyon, the only surviving brother and sister of the testatrix, and thereupon the orphans' court of Baltimore city transmitted certain issues to the Baltimore city court for trial. The case was tried three times. Twice the jury were unable to agree. Upon the third trial a jury in the superior court of Baltimore city, to which the case had been removed, rendered a verdict sustaining the will. The appeal before us is taken by the caveators from the ruling of the court made during the progress of the trial.

The first and third issues were withdrawn by consent, and the case was tried upon the following issues:

(2) Was the paper writing dated the 26th day of February, in the year 1912, and purporting to be the last will and testament of said Lucy B. Townsend, executed by her when she was of sound and disposing mind, and capable of executing a valid deed or contract?

(4) Were the contents of the paper writing dated the 26th day of February, in the year 1912, purporting to be the last will and testament of Lucy B. Townsend, read to or by her, or known or understood by her, at or before the time of the alleged execution thereof?

(5) What parts, if any, of the said paper writing were unknown to, or misunderstood by, the said Lucy B. Townsend, at the time of the alleged execution thereof?

The modal execution of the will was admitted by the caveators at the trial, and the caveatees were relieved of the necessity of proving the same. At the conclusion of the whole case the defendants submitted two prayers by which the court was asked to direct a verdict for the defendants: First, because there was no legally sufficient evidence in the case to show that at the time of the execution of the will the testatrix was of unsound mind and incapable of executing a valid deed or an ordinary contract; and,

secondly, because the evidence was legally insufficient to sustain a verdict on the fourth and fifth issues. These prayers were rejected.

[1] The evidence offered by the plaintiff, if believed by the jury (and it was the sole tribunal to pass upon the weight of the evidence and the credibility of the witnesses), was legally sufficient to have carried the case to the jury upon each issue submitted.

[2, 3] The mental capacity required by the law for the making of a will and the character and scope of the evidence which may be resorted to upon the issue of testamentary capacity have been the subject of many adjudications of this court and elsewhere. The law is so definitely settled upon these subjects that a brief quotation from two cases will be sufficient in the consideration of the questions raised under the second issue.

In *Davis v. Calvert et al.*, 5 Gill & J. 269, 25 Am. Dec. 282, it was said:

"The written law of this state furnishes the rule by which the capacity of a testator is to be measured; and the inquiry must always be whether, at the time of executing or acknowledging the will or testament, he was capable of executing a valid deed or contract; that is, here, the standard by which the mental capacity of a testator is to be ascertained, and no inferior grade of intellect will suffice. That state of mental capacity is to be determined by the condition of the testator's mind at the time of his executing or acknowledging the will or testament; for, notwithstanding his incapacity at a prior or subsequent time should be proved, it does not necessarily follow that he was incompetent when the will or testament was made, as his incapacity before or after that time might have been the effect of a temporary cause. But for the purpose of shedding light upon the state of his mind, at the time the will or testament was made, evidence of his condition, and of his bodily imbecility, both before and after that period, may be produced. And the jury may, upon the whole evidence, infer incompetency at the time of executing or acknowledging the will or testament, according to the character and cause of the entire incapacity proved, which may be established by proof of the conversations or actions, or declarations of the testator inconsistent with sanity, or of all of them taken together. The general maxim is: '*Semel furibundus semper furibundus præsimitur.*' It is not of itself sufficient to avoid a will or testament that its dispositions are imprudent, and not to be accounted for. But a will or testament may, by its provisions, furnish intrinsic evidence, involving it in suspicion, and tending to show the incapacity of the testator to make a disposition of his estate, with judgment and understanding, in reference to the amount and situation of his property, and the relative claims of the different persons who should have been the objects of his bounty, such as a disposition of his whole estate, to the exclusion of near and dear relations, having the strongest natural claims upon his affections, a wife and children for instance, or other near relations, without any apparent or known cause, which alone would be a suspicious circumstance, although not furnishing per se sufficient ground for setting aside the instrument."

[4] Judge Schumucker, in *Davis v. Denny*, 94 Md. 390, 50 Atl. 1037, said:

"This court has frequently been called upon to define the testamentary capacity which a testator is required to possess in order to make a valid will. Its decisions upon that subject

have uniformly held, with slightly varying forms of expression, that such capacity consists in the possession by the testator at the time of making his will of a full understanding of the nature of the business in which he is engaged; a recollection of the property of which he intends to dispose and the persons to whom he means to give it; and also an understanding of the manner in which he, in fact, disposes of it, and of the relative claim of the different persons who are or should be the objects of his bounty. *Davis v. Calvert*, 5 Gill & J. 301 [25 Am. Dec. 282]; *Colvin v. Warford*, 20 Md. 367, 388; *Higgins v. Carlton*, 28 Md. 125 [92 Am. Dec. 666]; *McElwee v. Ferguson*, 43 Md. 479; *Brown v. Ward*, 53 Md. 382 [36 Am. Rep. 422]. Sanity and mental capacity are presumed by the law to exist in reference to making wills as well as to other transactions, and the burden of proof is upon those who alleged their nonexistence. *Brown v. Ward*, supra; *Higgins v. Carlton*, supra; *Tyson v. Tyson*, 37 Md. 582."

[5] A brief statement of the more important and essential parts of the evidence produced by the appellants will now be made. It is not, however, the province of this court to determine whether the testatrix possessed the required capacity, as defined in the cases cited, to make a valid will; but whether the jury might have reasonably concluded from the evidence offered by the plaintiff that she was mentally incompetent to do so.

We state the question in this way for the reason that it was earnestly contended by the counsel for the appellees that the court ought not to reverse the case for any errors that might be found in the exceptions, because there was no legally sufficient evidence in the case to support a finding for the plaintiffs upon any of the issues, and therefore whatever error the court may have committed in its rulings was not reversible error.

The testatrix in 1880, being then Miss Lucy B. Lyon, of Richmond, Va., and about 34 years of age, married Samuel Townsend, of Baltimore, who was much her senior, and who died in 1904. Notwithstanding the great disparity in their ages, their married life appears to have been a happy one. Mrs. Townsend survived her husband about 8 years, and died in the Hospital for Women of Maryland, in the city of Baltimore, a few days after a surgical operation had been performed upon her for appendicitis. This operation was performed between the hours of 12 and 1 o'clock on February 26, 1912. The will in controversy was executed in the anæsthesia room of the hospital a short time before the operation was performed. This room adjoins the operating room, and at the time Mrs. Townsend signed the will she was sitting upon what is called a "carrier"—a conveyance used to transport patients into the operating room. Mrs. Townsend had been taken to the hospital on the previous night, Sunday, February 25th, from the house of Mrs. Smyser. Mrs. Townsend never had any children, and at the time of her death there were no lineal descendants of her husband living. The testatrix was the third wife of Samuel Townsend. By a former marriage

he had issue, and at the time of his death he left surviving him one grandchild—the only son of a predeceased son. This grandson was dead at the date of the will. There were certain nephews and nieces of Samuel Townsend living in Baltimore, and the relations between them and the testatrix appear to have been of a uniformly cordial and friendly character. She spoke of them at times as her nephews and nieces, and they addressed her as aunt.

At the time of her death, Mrs. Townsend's only surviving brother and sister were the caveators. The sister was unmarried. The brother was married, but had no issue. She had no nephews and nieces of her own blood. On her mother's side she had some first cousins and one aunt living. On her father's side there were some first, second, and third cousins living in Pittsburgh, who appear to be people of wealth and social importance. There was no intimacy between them and her. They met occasionally, but did not correspond, and really knew very little about each other.

Mrs. Townsend's father died when she was a young girl, leaving a widow and five children surviving, George, John, Lucy B. (Mrs. Townsend), Grace, and Harry. They appear to have been in poor financial circumstances, and the burden of supporting the family devolved upon John and George. These two brothers supported Mrs. Townsend up to the time of her marriage, and the relations between her and them were close and affectionate.

Mrs. Dickinson, the aunt of Mrs. Townsend, testified that Mrs. Townsend was very fond of her brother John; that she admired him and he used to write her the most beautiful letters; that she thought him a man with a high sense of honor, a man of great capacity, and a man that any one could love and depend on, and that he was a good, consistent Christian; that John commenced to participate in the care of the family upon the death of his father, which occurred when he was but 11 years of age; that he left home and went to Pittsburgh, where he was successful and continued to assist in the support of the family.

Mrs. Townsend, at the time of her marriage, was described as—

“a very intelligent woman, a very sensible woman, a woman that was not easily influenced; she was well sustained and a person who had a great deal of executive ability, and was competent to do anything that was to be done.”

She lived at home until her marriage. She was the eldest daughter, and took charge of the house when her mother was in bad health. Shortly after the death of her husband in 1904 it is shown by the evidence of the caveators that her health began to fail, and that after the death of her brother Harry, who died in 1909, she “began to go back materially, both mentally and physically.” Her brother George died in 1911. She was very much attached to her brothers, and

their deaths were a great shock to her. The death of her brother Harry appears to have greatly affected her nervous system. She developed serious Bright's disease. We quote from the testimony of Mrs. Dickinson, as it appears in the record:

“Mrs. Townsend was greatly disappointed by Harry's death; she bought a place thinking she would have her brother to live there with her, but, as he died, she felt that she had no one and she would have to go through life alone, and witness thought it affected her health very materially, both physically and mentally, *because she never got any better but grew worse and worse every year.* Witness also said she was very capricious at times, but witness thought she was perfectly able and competent to attend to her affairs, for she never called upon any one to assist her in that; that she was always anticipating evil; that she thought something dreadful was going to happen every day, and that seemed to be on her mind all the time. She could not sleep at night; she said if she opened her eyes at night she would always see her deceased brother sitting there in the corner looking at her. She said she could not sleep; that rats were running over her all night, and that spooks were walking around her bed; she seemed to have hallucinations to a great degree. Witness drove with her every day, and she would go to sleep just as soon as they entered the survey and sleep all the time until they got home; it was impossible to keep her awake.”

Claude M. Dean, testifying to a conversation he had with Mrs. Townsend in June 1911, immediately following the death of her brother George, said that during the talk—

“she fell off in a kind of a stupor, or kind of semiconsciousness, and remained that way possibly a second or two, and that other times possibly a minute or two, while as she came to she started to tell the same thing over again, and when she started to tell it the third time I began to take notice, and I found that when she got through she told the same thing over six different times; \* \* \* she repeated herself so often, over and over again, during the conversation; she would kind of fall off in a sleep, stupor, or appearing to be asleep for a second or two, sometimes lasting longer, possibly a minute or two.”

Mrs. Mary B. Todd testified that she visited Mrs. Townsend in August, 1911, and went driving with her frequently; that “Mrs. Townsend would nearly always drop off asleep during the drive; she seemed very drowsy and slow, and not very active; she was always willing and anxious to go, but seemed to go beyond her strength always; witness noticed how slowly she came and went up and down the steps of her house. She asked witness to look at her limbs, and she saw great big purple spots on them. During this same visit witness observed that she would constantly repeat herself; she seemed to forget that she had told things, and would tell them over.” Mrs. Todd saw Mrs. Townsend in October, 1911. She testified that at that time Mrs. Townsend looked so wretched that she would not have been surprised at her death, and was thoroughly alarmed at her condition. She saw her again in November, 1911, and said that “she seemed to witness to be gradually growing worse each time witness saw her, and she seemed



less alert, less cheerful, less mentally active, or physically and mentally."

Mrs. Sarah J. Lyon, the wife of John L. Lyon, one of the caveators, testified that in October, 1911, Mrs. Townsend visited her at her house in New York City. She said that Mrs. Townsend looked so bad that witness would not have been surprised if she had died any minute. She was all swollen under the eyes, and she did not seem to realize what she was doing half the time. She went with witness to the theater four times inside of 48 hours, and during the intermissions she would sleep—sleep all the time. Then she would wake up and hold the program, and seemed to know what was going on at that time. The next day she would say to witness, "Why, Jane, what was all that about last night? I don't remember a thing about it." Witness "would say so and so, and she would say she did not know it."

In February, 1912, Mrs. Townsend was in Baltimore stopping at the home of Mrs. Smyser. She was taken ill there, and Dr. Robert T. Wilson, a physician and surgeon who had previously been her attending physician, was called to see her. He considered her a very sick woman, and tried to induce her to go to the hospital but she would not consent to do so. On Sunday night February 25, 1912, she informed Dr. Wilson that on the preceding Thursday she had fallen in the bathroom. He was of the opinion that the fall had ruptured the appendix sac and that she had peritonitis. He told her she must go to the hospital. We quote from his testimony as it appears in the record:

"She did not want to go, and it made her very excited; she did not want to go, but witness talked to her about her ill condition and told her she must go. She then made up her mind to go. The approaching operation made her more apprehensive. On the 26th she was just as ill as the night before. She was so ill that witness considered an operation should be done just the first moment possible. Witness considered her then to be in a dying condition, and it was urgent an operation should be done to give her the only chance that might be any chance for her."

Dr. Robert W. B. Mayo, the chief resident surgeon of the Woman's Hospital, testified that when he saw Mrs. Townsend on Sunday night she was an extremely ill woman. She was quite restless and anxious and apprehensive because of being brought to the hospital and because of the pending operation; that the next morning she was just the reverse of the night before.

"She was depressed and sleepy. Of course when spoken to she would awaken and answer a few words and lapse into a period of sleepiness again; what we call a semicomatose condition."

He further said:

"The operation was performed upon the abdomen, and a cut or incision was made through the abdominal wall down to this lining I mentioned, the peritoneum, and as soon as that was nicked with the knife the pus gushed out to a height of six or eight inches, so much was in there, and it was under pressure and it gushed out with the nick in the lining, the membrane."

The operation was not completed because of Mrs. Townsend's serious condition, but drains were inserted to relieve her of the pus. She had uræmia and septicæmia—both blood poisoning—the first caused by diseased kidneys, and the second by the pus in the abdomen. The immediate cause of her death was uræmic poisoning, hastened by the septicæmia and the shock of the operation.

It was admitted that a dose of one-fourth of a grain of codeine was administered to Mrs. Townsend at about 10:30 p. m. Sunday, February 25, 1912, and another dose of one-fourth of a grain of codeine was administered to her about 9:15 a. m. on Monday, February 26, 1912, and a dose of one-eighth of a grain of morphine and  $\frac{1}{160}$ th grain of atropin was administered to her hypodermically about 12 o'clock noon on Monday, February 26, 1912.

We now state what we understand to be the substance and effect of the evidence produced by the plaintiffs as to the circumstances attending the preparation and execution of the will:

Twelve o'clock was the time fixed for the operation. On the morning of February 26, 1912, Mr. George R. Willis received a call over the telephone from William S. Townsend telling him that Mrs. Townsend was about to be operated upon, and that she wished to make some changes in her will. The will referred to was one which had been prepared in December, 1909, after the death of Harry Lyon. It was in the possession of Mr. Willis. The pecuniary bequests in this will, with three exceptions, were identical with those contained in the will in controversy. By the will of 1909 the whole residuary estate was given equally to George, John, and Anne Grace Lyon, with a limitation over to the survivors in the event of the death of either. Mr. Willis went at once to the hospital, and saw Mrs. Townsend in her room, and was with her not longer than 15 minutes—possibly not that long. He went from the hospital to his office and hurriedly prepared the will, which was taken by Mr. Luther M. R. Willis to the hospital for execution. Mr. George R. Willis testified that Mrs. Townsend told him she wanted the residuum of her estate left to *her nieces and nephews*. Testifying as to his visit to the hospital, his conversation with Mrs. Townsend, and the preparation of the will, Mr. Willis said:

"I remember I was very busy that morning and received a telephone message from the hospital, sent by Mr. William S. Townsend, that Mrs. Townsend wanted to see me, and that she was going to be operated on that morning by Dr. Finney, and that I should hurry. I got up there as fast as I could. I dropped everything I was doing and went up. I was shown into her room by Dr. Wilson. There was a nurse in her room, but they all went out, and Mrs. Townsend and myself were alone in that room. She was lying in bed and told me that they were going to operate on her; they thought it best. I asked her who advised it, and she said, 'Dr. Finney.' I told her that she ought to be entirely satisfied. She then said that she wanted to make an alteration in her will. My recollection



is she asked me where the will was, and I told her it was in my strong box. She said, 'Maria is dead' (that was Mr. Townsend's grandson's widow); 'I want to eliminate, I want to take out the legacy I had given her, and I want to give a legacy to a little girl, whose name I had not heard before. I took the name down to give her a legacy. Q. What name was that? A. Bloom; I think the name of Juanita Bloom. Q. Did you know how to spell Juanita? A. No; I asked her how to spell it, and she spelled it for me, and I wrote it down, and then she said she did not want Grace to have but the income on \$50,000; and she did not want her brother John to have any more than the income on \$50,000; she said that was enough for them. I took that down; I asked her: 'Where do you want the rest to go?' She said: '*I want it to go to my nieces and nephews.*' 'Is that all you want?' She said, 'Yes.' I took Mr. Townsend's automobile at the hospital and hurried back to my office, and got out the old will, and had the first page of it copied, because the legacies in the new one were the same as in the old one, with the exception of eliminating one and increasing another and adding another. Then I dictated as rapidly as I could in a way I would not have dictated it had I had the time, but making it clear and certain that \$50,000 out of her fortune was set aside for her brother and sister respectively, and using language such as I have used in wills, which would, in my judgment, carry it over to her nieces and nephews had she any. I did not know that she had no nieces and nephews, but the language that I employed in the will would have taken it, in my opinion, to her nieces and nephews, had she had nieces and nephews."

When Mr. Luther Willis visited the hospital he found Mrs. Townsend in the anæsthesia room resting upon the carrier referred to. The dose of morphia and atropin, above mentioned, had been administered to her hypodermically after Mr. George R. Willis had left the hospital. Dr. Wilson, Miss Keen, a nurse, and Dr. Buckler were in the room when Mr. Willis entered. He handed Mrs. Townsend the will, and asked if she could read it, or whether she wanted him to read it. She said she could read it. She sat upon the carrier, asked for her glasses and some water, and began to read the will aloud. When she came to the bequest to Mrs. Smyser she stopped, saying: "I thought I told your father—I intended to tell him—to raise that the same as Edith's." She said, "You know Mrs. Smyser is Edith's and Clint's sister, and I wanted her to have the same as Edith had." That Dr. Wilson spoke up and said: "We can change that, and we will witness it." The witness, at her direction, took a pen and struck out the \$500 and made it \$1,000." After this correction had been made, she continued reading the will, and when she reached the residuary clauses, or, as Mr. Luther Willis stated, he "*supposes halfway down the residuary clause,*" an incident happened which plays a most important part in this case. Dr. Wilson, after testifying to the increase made in the bequest of Mrs. Smyser, testified as follows:

"Q. Then what happened? A. Then she started to read again, and in a little while she came to a stop. Q. What part of the will was that? A. Around the rest and residue; around that portion. Q. Around the rest and residue? A. She stopped. Q. Is that the fourteenth item,

the rest and residue? A. It was about there. Q. What happened there? A. It was very quickly after her reading the other; *she came very quickly to this part.* Q. She came quickly down to the rest and residue? A. Yes. Q. When she got to the rest and residue what happened? A. Just at that time she stopped and her eyes closed and she went backwards into a semiconscious condition. It did not last long, but the nurse was behind her. Q. What nurse was that? A. Miss Keen. She was behind her; so she supported her. As I say, she came forward and started to read again. Q. How did she read? A. In a mechanical way. Q. Go ahead. A. She kept on reading; her voice, I think, *got slower.* Q. What? A. I think her voice got slower, and she finished reading, and then she signed her name. Q. Was anything said by Mrs. Townsend about the number of witnesses? A. She said in Virginia she thought it required three witnesses. Q. When was it she said that? A. When she got to the end; when she had finished reading it."

Miss Keen, a trained nurse, said that Mrs. Townsend towards the last fell back as if under the influence of morphia.

"Well, she simply just fell just in that way (illustrating), and I caught her. You see I had my arms around her and lifted her up again, and she went on and finished reading the will. It indicated to me that she was going under the influence of morphia."

Dr. Wilson and Miss Keen were subscribing witnesses to the will, and each testified that Mrs. Townsend at the time of its execution was not competent to make a will, and both were of opinion that the anodynes which had been administered had caused the incident mentioned. The residuary clause was not explained to her. It is admitted that a grave mistake was made, and it is evident that the persons who would take the larger portion of the estate under that clause are not the ones she intended to have it. If that clause be sustained the real will and intention of Mrs. Townsend would be thwarted.

[6] To what extent, if any, the mental faculties of Mrs. Townsend were affected by the administration of the drugs mentioned was one of the most material inquiries in the case, and we do not see why the offers of proof embraced in the first, second, and third exceptions were excluded. The witness Dr. Mayo was qualified to testify, and the testimony sought to be elicited bore upon the issue of mental capacity, and tended to support the evidence of Dr. Wilson and Miss Keen as to the cause of the incident which occurred during the execution of the will. While we would not reverse upon the first exception, because the evidence objected to was, in substance, introduced afterwards, we think there was serious error in the rulings on the second and third exceptions.

For the determination of the legal questions which arise upon the ruling upon the prayers, we are not required to review the evidence produced by the appellee. Suffice it to say that upon the material questions involved—mental capacity and the circumstances attending the execution of the will—there is great conflict, but with that we have

nothing to do. It is not the office of this court to weigh or balance conflicting evidence. That is the exclusive duty of the jury.

We come now to the consideration of the rulings of the court on the prayers submitted by each party at the close of the whole case. The plaintiffs offered ten prayers. The second, fourth, and fifth were granted, and the others refused.

[7] The plaintiffs' first and third prayers, which the reporter is requested to set out in the report of the case, were upon the subject of testamentary capacity. They announce correct principles of law, lay down the proper rules for the guidance of the jury in considering the second issue, and should have been granted. The sixth prayer related to knowledge by the testatrix of the contents of the *whole will*, and the seventh, eighth, ninth, and tenth to knowledge of the contents of the fourteenth, or residuary, clause of the will.

[8] Assuming for the moment that the question of the knowledge of the contents of the whole will, or of the residuary clause, was open, under the facts, for the finding of the jury, the sixth, seventh, and eighth prayers were defective, under the facts and circumstances of this case, in shifting the burden of proof to the defendant. The presumption of knowledge of the contents of a will which arises from due execution and the reading of a will by a competent testator is not overcome by the mere fact that this presumption may be rebutted. In the form in which the issue was submitted, the answer of the jury, in case they found for the plaintiffs on the fourth issue, should have been: "Were not known and understood."

[9] The eighth prayer required the jury to find whether the testatrix "failed to know and understand that said item did not give said rest and residue to the persons for whom she intended it." This was tantamount to requiring the jury to find whether she knew the legal effect and operation of the words used in the fourteenth clause, and in this respect the prayer was also defective. It was said in *Munnikhuyzen v. Magraw*, 35 Md. 280, that:

"If she knew and understood what the actual contents of the will were, that would be sufficient, although, in point of fact, she may have had some erroneous opinions with regard to their legal effect and operation. Sane persons, when they express themselves in writing, are presumed to mean what the writing imports, and it would be dangerous and in plain violation of the statute of frauds, to allow it to be impeached or overthrown by evidence aliunde, showing that they meant something else, or did not understand its true import and operation."

[10] The ninth and tenth prayers, upon the assumption previously made, were free from objection.

The defendants' third prayer, as modified by the court, was granted, and their fourth and fifth prayers were also granted. These prayers are here inserted:

Third prayer: "The court instructs the jury at the request of the defendants: (1) That legal capacity to make a valid will is the degree of intelligence sufficient to make a valid deed or an ordinary contract. (2) The question whether the bodily diseases of Lucy B. Townsend and the opiates administered to her had deprived her of sufficient intelligence to make a valid will, as above defined, must be determined by the external acts and appearances and the speech and conduct of the said Lucy B. Townsend during the entire testamentary transaction, in connection with testimony as to her condition. (3) And if the jury shall find that the said Lucy B. Townsend had sufficient intelligence, as above defined, then their answer to the second issue must be, 'Yes,' even although the jury shall further find that the residuary clause of the will fails to carry out her intention with regard to the residue of her estate."

Fourth prayer: "The court instructs the jury at the request of the defendants: (1) The jury cannot infer mental incapacity merely and alone from the failure of Lucy B. Townsend, while she was reading the will in controversy, to discover that the legal effect of the language used in the residuary clause was to give the residue of her estate to persons to whom she did not intend it to go. (2) And, unless the jury shall find from the facts in this case, other than such mistake in said residuary clause, some evidence satisfying them that the said Lucy B. Townsend, at the time of the execution of said will, was of unsound mind and not capable of making a valid deed or an ordinary contract, then the answer to the second issue should be, 'Yes,' the answer to the fourth issue should be, 'Yes,' and the answer to the fifth issue should be, 'No parts.'"

Fifth prayer: "The court instructs the jury at the request of the defendants: (1) That in answering the fourth and fifth issues the jury must determine whether Lucy B. Townsend knew and understood what the contents of her will were; and not whether she understood the legal operation and effect of all or any part of the language used. (2) And if the jury shall find that the said Lucy B. Townsend, at the time of the execution of the will in controversy, was possessed of sufficient intelligence to make a valid deed or an ordinary contract—and shall further find that she read aloud the whole of her will, then knowledge and understanding of its contents must, under the facts of this case, be conclusively presumed. And the answer of the jury to the fourth issue should be, 'Yes,' and the answer to the fifth issue should be, 'No parts.'"

[11] The third prayer gave the jury no satisfactory rule by which to measure the testatrix's testamentary capacity, to guide them in determining from all the facts and circumstances of the case whether she had sufficient capacity to make the will. To say "that legal capacity to make a valid will is the degree of intelligence sufficient to make a valid deed or an ordinary contract" is to announce a general legal proposition; but such a statement does not furnish the jury any sufficient guide in their deliberations, and, as the prayers of the plaintiffs which defined the meaning of testamentary capacity were refused, the case went to the jury without any plain and definite instruction upon that question.

[12] The second clause of the prayer shuts out from the consideration of the jury the provisions of the will, especially the fourteenth clause, and places restrictions upon the jury which were well calculated to fetter them unduly in their deliberations and

to mislead them as to the scope of their inquiries. The correctness of the third clause of the prayer will be considered later.

The conflicting contentions of the parties—presenting the most material and important legal question in the case—are manifest upon the prayers which relate to the knowledge of the contents of the will. The position of the plaintiffs is that, notwithstanding the fact that Mrs. Townsend was competent to make the will and that she did, in fact, read it before she signed it, they have a right, under the facts and circumstances in evidence, to have the jury pass upon her knowledge of the contents of the whole will and of the fourteenth clause as distinct and independent issues of fact. The position of the defendants is that, assuming the capacity of the testatrix and that she read the will, the presumption of knowledge of contents, under the facts of this case, is conclusive. This proposition is embodied in the defendants' fourth and fifth granted prayers.

[13] There is in this state no invariable and unyielding rule of law upon this subject. The general rule undoubtedly is that knowledge of contents is conclusively presumed in the circumstances stated in the defendants' fourth and fifth prayers. That rule was applied in *Taylor v. Creswell*, 45 Md. 422, and in *Griffith v. Diffenderfer*, 50 Md. 466. These cases rest upon the principles announced in *Guardhouse and others v. Blackburn*, L. R. 1 P. & D. 109, and *Atter v. Atkinson* and another, L. R. 1 P. & D. 665, and other English cases. In *Taylor v. Creswell*, supra, it was shown that the will was drawn by the attorney for the testatrix according to her directions, and was then read over to her, and she said that she understood it and was satisfied with its provisions. The court said that:

"Under such circumstances, the jury was bound by the presumption of law in favor of knowledge of the contents of the will on her part."

The court then quoted in support of its judgment the general rule announced in *Atter v. Atkinson*, supra.

In *Griffith v. Diffenderfer*, supra, the will and codicil assailed were read to the testatrix "line by line, just as they were written," and being in the full possession of all her faculties, the court found that there was nothing to except the case from the operation of the general rule. But this rule is not of universal application, and cases may occur where the rule ought not to be applied.

In *Taylor's Case*, supra, the court said that:

"It is essential, of course, to the validity of every will that the party making it should know and understand its contents; otherwise it is not his will. But where a person of sound mind executes a will, and the same is his free and voluntary act, the law presumes knowledge on his part of its contents. This presumption, it is true, may be rebutted by the facts and

circumstances surrounding its execution, and cases may arise in which it is proper to submit to the jury the distinct question whether the testator understood its contents. Where, for instance, there are suspicious circumstances surrounding the execution of a will, made by a person suffering from extreme debility arising from old age or sickness, especially if he could neither read nor write, or where a will is prepared by a person standing in a confidential relation, or who is largely benefited by it, or even where the testator is of sound mind, if there be proof to show that he did not understand its contents, an extreme case, however, in these and other like instances, it may be proper for the jury to find affirmatively that the testator understood the contents of the will."

The case we are dealing with is a most unusual and exceptional one. The will does not express the real intention of the testatrix, and, under the fourteenth item, the greater part of her estate goes to persons who have no claim upon her bounty and to whom she never intended to give it. Assuming the testimony of the plaintiffs as to the circumstances attending the execution of the will to be true, the case, in our judgment, falls clearly within the exception to the general rule. It would be strange, indeed, if the mere fact of reading the will, under such circumstances, should be held conclusive of her knowledge of its contents. The fourteenth item of the will was open to attack under the fourth issue. *Munnikhuisen v. Magraw*, supra; *Fisher v. Boyce*, 81 Md. 46, 31 Atl. 707. Without further prolonging this opinion, our conclusion is that the trial court committed reversible error in its rulings embodied in the second and third exceptions; in refusing the plaintiffs' first, third, ninth, and tenth prayers; and in granting the defendants' third prayer as modified; and in granting the defendants' fourth and fifth prayers.

The rulings, therefore, must be reversed, and the case remanded for a new trial.

Rulings reversed, and a new trial awarded.

(123 Md. 391)

PHILLIPS v. STATE. (No. 3.)

(Court of Appeals of Maryland. April 24 and June 24, 1914.)

INTOXICATING LIQUORS (§ 154\*)—LICENSES—STATUTES—CONSTRUCTION.

Code Pub. Loc. Laws, art. 4, § 667, provides that the regulations as to the sales of intoxicating liquor in the city of Baltimore shall not apply to sales by bottlers of fermented liquors not to be drunk on the premises. Section 671 provides that no licenses to sell intoxicating liquors other than by wholesale traders, brewers, and bottlers of fermented liquors shall be granted in the city of Baltimore except by the board of liquor license commissioners. Section 688, as amended by Acts 1908, c. 196, imposes a license of \$1,000 upon wholesale dealers, but provides that persons may be licensed to conduct a bottling business by selling fermented liquors only in quantities not less than 12 pints upon payment of \$160. Held, that a bottler of soft drinks, who arranged with a brewer to buy beer by the barrel and to have the brewer bottle the beer at a fixed price for the service, was not entitled to sell under a bot-

tlar's license; such practice being an evasion of the liquor laws.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 168; Dec. Dig. § 154.\*]

Appeal from Criminal Court of Baltimore City; James M. Ambler, Judge.

Frank Phillips was convicted of unlawfully selling intoxicating liquors, and he appeals. Affirmed.

Argued before BOYD, C. J., and BURKE, THOMAS, URNER, and STOCKBRIDGE, JJ.

Thomas J. Mason, of Baltimore, for appellant. Lindsay C. Spencer, Asst. State's Atty. of Baltimore, Edgar Allan Poe, Atty. Gen. (William F. Broening, State's Atty., and Harry W. Nice, Asst. State's Atty., both of Baltimore, on the brief), for the State.

PER CURIAM. The court is of opinion that the license relied on by the traverser being a license for conducting a bottling business in fermented liquors, did not authorize him to sell beer bottled at the bottling plant of the George Gunther, Jr., Brewing Company of Baltimore county, referred to in the record. For reasons to be hereafter more fully stated, the judgment will be affirmed.

Judgment affirmed; the appellant to pay the costs.

BOYD, C. J. The appellant was convicted of selling fermented lager beer in violation of the statute applicable to Baltimore city relating to the sales of intoxicating liquors. The material question for our consideration is the construction of the provisions of article 4 of the Code of Public Local Laws, in reference to a license "to conduct a bottling business by selling fermented liquors only, and in quantities or packages not less than twelve pint bottles." There are six counts in the indictment, and the traverser filed a special plea to the indictment and to each count thereof. That plea was demurred to by the state, and, the demurrer having been sustained, a plea of not guilty was entered, and an agreed statement of facts was filed. As the plea and the agreed statement were intended to raise the same question, we will not discuss them separately or pass on any purely technical points as to the statements in them.

Section 687 of article 4 of the Code of Public Local Laws provides that:

"No person shall offer for sale or keep for sale in the city of Baltimore any intoxicating liquors, except as hereinafter provided; but this shall not apply to sales made by a person under a provision of law requiring him to sell personal property, nor to sales of liquors by wholesale, nor to sales by the maker, brewer or distiller thereof, nor to sales by bottlers of fermented liquors, not to be drunk on the premises; save and except as hereinafter specially provided in reference to wholesale dealers and jobbers, brewers, distillers and bottlers, in section 688, wherein the rights and duties of said classes of persons are set forth and defined."

A board of liquor license commissioners for Baltimore city is provided for, and section 671 provides that no licenses to sell intoxicating liquors, other than by wholesale traders, distillers, brewers, rectifiers, and bottlers of fermented liquors, shall be granted in the city of Baltimore except by said board. Various provisions and regulations are then prescribed in reference to licenses to be granted by the board, and section 688 (as amended by chapter 196 of the Acts of 1906; see page 620 of the act) provides that distillers, brewers, and wholesale dealers or jobbers, other than wholesale druggists, shall be allowed to sell spirituous liquors in quantities of not less than one pint each, and fermented liquors in packages of not less than two dozen pint bottles, or 12 quarts, each, but in no case to be drunk on the premises; that distillers and brewers shall require no licenses, and wholesale dealers and jobbers (other than wholesale druggists) shall be entitled to receive a license upon applying to the clerk of the court of common pleas and paying the sums named, which sum after May 1, 1910, was \$1,000 per annum. That section then provides:

"But any person, copartnership, or corporation (other than brewers, who, as hereinbefore stated, require no license) may be licensed to conduct a bottling business by selling fermented liquors only, and in quantities or packages not less than twelve pint bottles, by applying direct to the clerk of the court of common pleas and paying him"—

the sums named, which sum was \$160 per annum after May 1, 1910.

On May 1, 1913, a license was granted by the clerk of the court of common pleas "to Frank Phillips, of 1805 E. Biddle St., bottler of fermented liquors, to sell fermented liquors only and in quantities or packages not less than 12 pint bottles." On May 1, 1913, the traverser was, and had been for a long time before then, a bottler of soft drinks, such as sarsaparilla, soda, ginger ale, etc., with a bottling plant at 1805 E. Biddle St., and prior to May 1, 1913, he had bottled beer at that bottling plant but had not done so since then. The beer sold by him as charged in the indictment was bottled at the bottling plant of the George Gunther, Jr., Brewing Company in Highlandtown, Baltimore county. He had a contract with that company as follows:

"Whereas, the George Gunther, Jr., Brewing Company, a body corporate of Baltimore county, has erected at its brewery a plant for the bottling of beer and fermented liquors for the use of licensed bottlers of fermented liquors. Now this agreement, witnesseth: That I, Frank Phillips, being a licensed bottler of Baltimore city, in consideration of the premises and one dollar (\$1.00), in hand paid, do hereby contract with the said George Gunther, Jr., Brewing Company of Baltimore county for the use of said bottling plant for the purpose of bottling beer and fermented liquor sold by me in Baltimore city. It is further agreed that I shall purchase the beer of the said brewing company, paying therefor five dollars and forty cents (\$5.40) per barrel, from the vat, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

shall further pay the said brewing company two and one-half cents (2½¢) per dozen bottles for the use of the said bottling plant in bottling said beer."

That contract was signed and sealed by Frank Phillips, and beneath his signature was an indorsement of the acceptance of the contract by the company.

The agreed statement shows that the traverser sold 72 pints of fermented lager beer to one person and 21 pints to another on June 28, 1913, and for his right to make the sales he relies on the license and contract referred to above.

Attorneys for both sides stated that they have found no decision exactly in point, and it was conceded that the case must depend upon the construction of the statute. It seems to us that such construction is perfectly plain and simple. The license itself on which the traverser relied describes him as a "bottler of fermented liquors," but we cannot understand how it can be said that, under the agreed statement of facts, he was such, within the meaning of the statute. That statement says, "The beer sold by him as charged in the indictment in this cause was bottled at the bottling plant of the George Gunther, Jr., Brewing Company in Highlandtown, Baltimore county," and that he has not bottled any beer at his bottling plant since the 1st day of May, 1913. Under his contract with the brewing company, he agreed to pay the company \$5.40 per barrel for the beer and 2½ cents per dozen bottles for the use of the bottling plant in bottling said beer. The record does not show how many dozen bottles there are in a barrel of beer, but, if we assume, for illustration, that there are 20, then the traverser contracted to pay \$5.40 for the beer and 50 cents for bottling it. What possible difference would it have made if he had simply agreed to pay \$5.90 for the 20 dozen bottles of beer? If he simply purchased the beer in bottles at that rate, it could hardly be contended that he could have sold it under a bottler's license, and yet it is claimed that, simply because he paid the brewing company so much per barrel for the beer and so much per dozen for bottling it, he is only required to pay \$160 per annum for his license. Any one buying the same quantity of bottled beer and selling it would have been required to pay \$1,000 for his license, and of course the Legislature never intended such a distinction to be made between the ordinary purchaser and one such as the traverser was under this contract.

The statute exempts brewers from taking out licenses, and, if the construction contended for on the part of the appellant be adopted, a brewer could make contracts such as this with dealers all over the city, and each of them could sell the beer of such brewer on paying \$160 for the license, while a dealer

not making such a contract would have to pay \$1,000. It is true that under the \$1,000 license the dealer can sell other liquors, but it is equally true that one who has no such contract as the plaintiff has cannot sell beer alone unless he gets a license for which he must pay \$1,000, while the plaintiff could sell it upon paying \$160 each year for his license, if his contention be sustained.

Section 687 speaks of "sales by bottlers of fermented liquors," not sales by those who purchase from bottlers of fermented liquors, and section 688 provides that any person, co-partnership, or corporation "may be licensed to conduct a bottling business by selling fermented liquors only," etc. The traverser did not conduct the business of bottling fermented liquors to be sold in quantities or packages of not less than 12 pint bottles, but the brewing company conducted the bottling business, and the traverser was simply a purchaser from that company. If the traverser was only required to pay \$160 for his business under the circumstances mentioned, then any person might sell fermented liquors under a similar license if he bought the beer from any brewer, and paid him for bottling it, whether the brewery was in or out of this state, for, inasmuch as the statute exempts brewers from taking out licenses, what difference could it make whether the brewery was located in or out of this state? The statute was manifestly intended to apply to cases where the licensee conducts a bottling business of his own, and only sells fermented liquors which he bottles himself. As the brewer who makes the beer is exempted from taking out a license in order to sell it, the Legislature apparently deemed it proper to permit one engaged in bottling it to sell it under a license at a much less rate than would be charged for most licenses under the liquor laws of Baltimore city, probably owing to the fact that it was supposed that, in order to bottle the liquors properly, a more or less expensive plant would be required. Whatever the reasons were, however, it is clear that the Legislature never intended, not only to exempt brewers from paying for any license, but to enable them to reduce the license of their customers from \$1,000 to \$160 by entering into a contract with them to bottle the beer at so much per dozen bottles.

Of course the fact that the traverser was a bottler of soft drinks did not relieve him, for, without stating other reasons, the statute providing for the license in question only applies to the sale of fermented liquors bottled in the plant of the licensee and not to a sale of those bottled as this beer was.

Without further prolonging this opinion, the reasons given are sufficient to sustain the conclusion reached by us, as shown by the per curiam order heretofore filed, by which we affirmed the judgment and required the appellant to pay the costs.

(123 Md. 619)

**WESTMINSTER METAL & FOUNDRY CO.**  
v. **COFFMAN et al.** (No. 32.)

(Court of Appeals of Maryland. June 25, 1914.)

**SET-OFF AND COUNTERCLAIM (§ 35\*)—UNLIQUIDATED DAMAGES—BREACH OF CONTRACT TO SELL.**

Damages for breach of contract to sell goods, by failure to deliver, are unliquidated, and so not the subject of set-off; the contract not fixing the amount thereof, though Uniform Sales Act (Code Pub. Civ. Laws, art. 83, § 88), states the measure.

[Ed. Note.—For other cases, see Set-Off and Counterclaim, Cent. Dig. §§ 58-64; Dec. Dig. § 35.\*]

Appeal from Circuit Court, Carroll County; Wm. H. Forsythe, Jr., Judge.

Action by Andrew K. Coffman and another, against the Westminster Metal & Foundry Company. Judgment for plaintiffs, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

Ivan L. Hoff and Edward O. Weant, both of Westminster, for appellant. F. Neal Parke, of Westminster (Lane & Keedy, of Hagerstown, and Bond & Parke, of Westminster, on the brief), for appellees.

**PATTISON, J.** The suit in this case was brought against the appellant, the Westminster Metal & Foundry Company, by the appellees, Andrew K. Coffman and Joe Brenner, trading as the Reliable Junk Company, use of the Maryland Surety & Trust Company.

The declaration contains the common counts, for goods bargained and sold, for work done and materials provided, for money lent, for money paid by the plaintiff to the defendant at his request, for money received by the defendant for the use of the plaintiff, and for money found to be due from the defendant to the plaintiff on accounts stated between them, and one special count, for goods, consisting of brass, lead, etc., sold and delivered by the plaintiff to the defendant at the times and for the prices therein named, under a contract between them. The defendant pleaded thereto "never indebted" and set-off. The plea of set-off contains the common counts for goods bargained and sold, for goods sold and delivered, for work done and materials provided, for money found to be due by the plaintiff to defendant on accounts stated between them, and two special counts, numbered therein 5 and 6. The fifth count alleges:

"And for that the plaintiffs on the 17th day of July, 1912, agreed to sell to the defendant and the defendant agreed to buy of the plaintiffs 30,000 pounds of red brass and 10,000 pounds heavy yellow brass, to be delivered by the plaintiffs at the freight depot in the city of Westminster, in Carroll county, Md., within 60 days from date of agreement, at and for the price of 12½ cents per pound for the red brass and 10 cents per pound for the heavy yellow brass, and the defendant says that it was at all times ready and willing to accept and pay for said red

brass and heavy yellow brass, and that it made frequent demands upon the plaintiff for the delivery of the same, but that the plaintiff wholly failed and refused to make said delivery, or to perform any part of their contract. And the defendant further says that because of the said failure and refusal on the part of the said plaintiff, it was compelled to go into the open market and purchase, at a price largely in excess of the agreed price aforesaid, to wit, at the rate of 14½ cents per pound of red brass, similar to that which the said plaintiff so as aforesaid sold, but failed and refused to deliver, and at the rate of 10½ cents per pound of heavy yellow brass similar to that which the said plaintiff so as aforesaid sold, but failed and refused to deliver."

The sixth count alleges:

"And for that the plaintiff on the 10th day of December, 1912, agreed to sell to the defendant and the defendant agreed to buy of the plaintiff 50 tons of stove plate and 50 tons of heavy cast iron, to be delivered by the plaintiff at the property of the Westminster Metal & Foundry Company on John street, in the city of Westminster, in Carroll county, Md., during the months of December, 1912, and January, 1913, at the price of \$10 per ton for the stove plate and \$12 per ton for the heavy cast iron, and the defendant says that it was at all times ready and willing to accept and pay for all said stove plate and heavy cast iron, and that it made frequent demands upon the plaintiff for the delivery of the same, but that the plaintiff wholly failed and refused to make said delivery or to perform any part of their contract. And the defendant further says that because of the said failure and refusal on the part of the plaintiff it was compelled to go into the open market and purchase at a price largely in excess of the agreed price aforesaid, to wit, at the rate of \$14.75 per ton for stove plate similar to that which said plaintiff so as aforesaid sold, and at the rate of \$14.75 per ton for the heavy cast iron similar to that which the said plaintiff so as aforesaid sold, but failed and refused to deliver."

The plaintiff demurred to said fifth and sixth counts of the defendant's plea of set-off, and the demurrer was sustained. The case was submitted to the court for trial upon issues joined on the remaining pleas, and the court, sitting as a jury, found in favor of the plaintiff, and judgment in its favor was entered upon such finding.

The main question involved in this appeal is whether or not the appellant's set-off is for liquidated or unliquidated damages. It is well established by the law of this state that if such damages are unliquidated, then they cannot be so pleaded. The defense of set-off is unknown to the common law, and owes its origin altogether to statute.

Section 12 of article 75 of the Code of Public General Laws of 1912 provides:

"In any suit brought on any judgment or bond or other writing sealed by the party, if the defendant shall have any demand or claim against the plaintiff, upon judgment, bond or other instrument under seal, or upon bill of exchange, check, \* \* \* he shall be at liberty to file such demand, or claim in bar, or plead the same in discount of the plaintiff's claim, and judgment for the excess of the one claim over the other, as each is proved, with costs of suit, shall be given for the plaintiff or the defendant, according as such excess is found in favor of the one or the other of these parties, if such excess be sufficient to support a judg-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ment in the court where the cause is tried according to its established jurisdiction," etc.

Section 13 of the same article applies to suits upon simple contracts.

The object of allowing this defense is to prevent circuity of action and to enable the parties to adjust in one suit claims which at common law could not be settled without two or more actions. And it may be stated in general terms that to authorize a set-off, the debts must be mutual, must be between the parties in their own rights, must be the same kind or quality, *and be certain and clearly ascertained or liquidated*. 1 Poe's Pleading, § 613; Smith v. Washington Gas-light Co., 31 Md. 12, 100 Am. Dec. 49; Hearn v. Cullin, 54 Md. 533; Steuart v. Chappell, 98 Md. 527, 57 Atl. 17.

We must therefore, in deciding this appeal, determine whether the claim of set-off in this case is for liquidated or unliquidated damages.

This court has, in a number of cases, laid down the rule to be applied in ascertaining whether the claim made is for liquidated or unliquidated damages. In most instances the question has arisen in attachment proceedings. Nevertheless, we think the rule or test applied in those cases may be properly applied in this case, inasmuch as the question there decided was whether the claim made was one for liquidated or unliquidated damages, and that is the sole question here.

The rule is stated in the case of Dirickson v. Showell, 79 Md. 49, 28 Atl. 896, where the attachment was quashed upon the ground that the claim was for unliquidated damages, not that an attachment could not have been issued for the recovery of such damages, but because no bond had been given by the plaintiff, as required by the statute in cases of unliquidated damages. The court, in discussing the contract in that case, said:

"Is this a claim for unliquidated damages, where the measure or standard of the damages is not fixed by the contract itself? If the contract itself fixes the amount due, or affords by its terms a certain measure for ascertaining that amount, an attachment will lie if the necessary jurisdictional facts appear; and the test is whether the contract furnishes a standard by which the amount of the indebtedness or damages may be determined with sufficient certainty to permit the plaintiff to verify his claim by affidavit. Wilson v. Wilson, 8 Gill, 192 [50 Am. Dec. 685]; Fisher v. Consequa, 2 Wash. C. C. 382 [Fed. Cas. No. 4,816]; Warwick v. Chase et al., 23 Md. 154; McAllister v. Eichengreen, 34 Md. 54; Williams, Garnishee, v. Jones, 38 Md. 555; Orient Ins. Co. v. Andrews & Locke, 66 Md. 371 [7 Atl. 693]."

To these may be added the cases of Stenart v. Chappell, 98 Md. 527, 57 Atl. 17, and Blick v. Mercantile Trust & Deposit Co., 113 Md. 487, 77 Atl. 844.

It was said by our predecessors in Warwick v. Chase, supra, that:

"In Fisher v. Consequa, 2 Wash. C. C. 382 [Fed. Cas. No. 4,816], the contract was to deliver teas of a certain quality, and, on failure to do so, to pay the difference between teas of such a quality and such as should be delivered. There the standard was fixed by the contract,

and so, also, in Wilson v. Wilson, 8 Gill, 192 [50 Am. Dec. 685]. In the case of Clark v. Wilson, 3 Wash. C. C. 560 [Fed. Cas. No. 2,841], where an attachment had issued to recover damages for the nonperformance of the stipulations of a charter party, the court, after reviewing the case of Fisher & Consequa, dissolved the attachment, because the contract did not show a standard by which the damages, consequent upon its violation, were to be ascertained. As we have said, the proposition generally stated is that the standard must be shown by the contract, without the aid of inferences from extrinsic facts or circumstances."

The contracts referred to and set up in the defendant's plea of set-off, and under which he attempts therein to recover for breaches of them, are separate and distinct from the contract under which the plaintiff is seeking to recover. The measure of damages for breaches of each of these two separate contracts is defined and established by the Uniform Sales Act (section 88, article 83, of the Code of 1912) which is as follows:

"(1) Where the property in the goods has not passed to the buyer, and the seller wrongfully neglects or refuses to deliver the goods, the buyer may maintain an action against the seller for damages for nondelivery.

"(2) The measure of damages is the loss directly and naturally resulting in the ordinary course of events, from the seller's breach of contract.

"(3) Where there is available market for the goods in question, the measure of damages, in the absence of special circumstances showing proximate damages of a greater amount, is the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered; or if no time was fixed, then at the time of the refusal to deliver."

The defendant contends that the damages for the breach of these contracts are liquidated and not unliquidated; "that nothing remains uncertain or speculative as to such damages." In support of its contention the defendant cites us to the case of Wilson v. Wilson, supra. That case, in our opinion, however, differs widely from the case before us, and in distinguishing it from that case we cannot do better than use the apt and appropriate language and sound reasoning of this court in the case of Smithson & Owens v. U. S. Telegraph Co., 29 Md. 166, in distinguishing that case from the Wilson Case, which applies with equal force to this case. This court there said, in speaking of the Wilson Case:

"The amount of the damages was fixed by the contract; or, what was the same thing, the contract furnished a standard by which they could be certainly ascertained. The contract was, that Tinsley & Co. were to guarantee the inspection of the flour which they were to deliver, and if it would not pass superfine, then Wilson was to furnish them with the inspector's certificate of the flour as passed by him, and Tinsley & Co. were to make such deductions as was customary between the different qualities of flour in the place where the flour might be inspected and superfine flour. It was shown that the flour did not pass superfine, and that the difference in the value of the flour, according to the custom of the place where it was inspected, was 50 cents per barrel. The court, in speaking of the damages in that case, say: 'They were as easily ascertained as the value of goods sold where no price was fixed as value. The standard was so



clearly ascertained by the contract itself, as to enable the plaintiff to aver it in his affidavit. There is, we think, a broad distinction between this case in 8 Gill and the case before us, and, so far from sustaining the proposition of the plaintiff, is an authority against him. \* \* \* Wilson could have charged no greater sum than 50 cents per barrel; that was the amount of damages agreed and fixed upon so soon as the inspector should certify. Tinsley & Co. could claim to pay no less, and if a jury had been called, they could have assessed neither more nor less. The mode of ascertaining the amount was just as certainly fixed by the contract, so that there could be no difficulty in ascertaining the amount and reducing it to a certain sum by force of the contract. There could have been no circumstances adduced to alter the amount; the damages were therefore liquidated and ascertained. \* \* \* Not so in this case; no stipulation was made by the defendants that they, in the event of such and such a failure, would pay so much, to be ascertained from fixed data by some particular persons, the law fixed the contract between these parties. \* \* \* They might \* \* \* have had many defenses to offer in proof, either to exonerate them from liability altogether, or to mitigate the damages; surely damages, which may be gotten rid of altogether or mitigated by proof of circumstances, cannot be liquidated."

A case much like the one before us is *Godkin v. Bailey*, 74 N. J. Law, 655, 65 Atl. 1032, L. R. A. (N. S.) 1134. In that case the plaintiff sued in assumpsit for the price of goods sold and delivered. The defendants pleaded the general issue and set-off. The set-off claimed by them was the difference in price paid by them for lumber which the plaintiff had failed to deliver. The statute of that state upon which the court rested its decision authorizes the set-off of demands which are not for unliquidated damages. The court there said:

"In the case at bar, \* \* \* the claim of the defendants was for the difference between the contract price and the price actually paid by them. \* \* \* Such is not the rule. The true measure of damages, as stated by Benjamin on Sales, is the difference between the contract price and the value of the goods at the date fixed for delivery. The value is *prima facie* the market price, but there may be cases where there is no market, and the value must be otherwise determined, for example, by the price of the best substitute procurable. Benjamin, Sales, 5 Eng. Ed. 987. \* \* \* Even in cases where there may be said to be a market price, the determination of that price involves a consideration of the identity in the quality of the goods and an allowance for differences in prices actually paid, which vary from day to day, and with the skill in bargaining of the vendor and the purchaser in each case. The market price must often, if not usually, be determined by a jury in view of the different elements which may cause variations in any particular case. The final result must be uncertain, and the damages are therefore unliquidated."

Our attention has been called to the case of *Kelley, Maus & Co. v. Matthew Caffrey*, 79 Ill. App. 278, in which that court held that damages like those now under consideration were liquidated and not unliquidated, but later in *Horn v. Noble*, 95 Ill. App. 99, the court decided that such damages were unliquidated, and still later the Supreme Court of Illinois in *Higbie v. Rust*, 211 Ill. 333, 71

N. E. 1010, 103 Am. St. Rep. 204, treated such damages as unliquidated.

The damages claimed in the defendant's set-off plea are, we think, unliquidated, and were not properly pleaded in this case, and therefore the court below committed no error in its rulings upon the demurrers, and we will affirm the judgment.

Judgment affirmed, with costs to the appellees.

(123 Md. 398)

# BOARD OF SCHOOL COM'RS OF CAROLINE COUNTY v. MORRIS. (No. 6.)

(Court of Appeals of Maryland. June 24, 1914.)

## MANDAMUS (§ 67\*)—PROCEEDINGS OF PUBLIC OFFICERS—STATE BOARD OF EDUCATION—SCOPE OF REMEDY.

Code Pub. Civ. Laws, art. 77, § 11, provides that the board of education shall cause the provisions of the article to be carried into effect, and may, if necessary, institute legal proceedings for that purpose, and that they shall explain the true intent and meaning of the law, and shall decide without expense to the parties all controversies that arise under it; their decision being final. Section 25 authorizes the board of county school commissioners to consolidate schools when, in their judgment, consolidation is practicable, and to arrange for and pay charges for transporting pupils to and from, while section 43 declares that in every school-house district in each county there shall be kept for ten months in each year, if possible, one or more schools, according to population. *Held*, that the state board of education has general visitatorial power over the schools, and hence, where the board of county school commissioners consolidated two schools, providing for transportation of pupils from one to the other, property owners aggrieved must present their grievance to the state board of education, and mandamus will not lie to question the determination of the county board, for the question is not a purely legal one, but involves the exercise of discretion.

[Ed. Note.—For other cases, see *Mandamus*, Dec. Dig. § 67.\*]

Appeal from Circuit Court, Caroline County; Albert Constable, Wm. H. Adkins, and Philemon B. Hopper, Judges.

"To be officially reported."

Application by George W. Morris against the Board of School Commissioners of Caroline County for a writ of mandamus. From an order sustaining a demurrer to the answer, respondent appeals. Order reversed, and petition dismissed.

Argued before BOYD, C. J., and BURKE, THOMAS, URNER, and STOCKBRIDGE, JJ.

Reuben Garey and Fred R. Owens, both of Denton, for appellant. Charles F. Harley, of Baltimore (T. Alan Goldsborough, of Denton, on the brief), for appellee.

BURKE, J. This is an appeal by the board of county school commissioners of Caroline county from an order of the circuit court of that county directing a writ of mandamus to issue commanding it to open for pupils on September 15, 1913, and keep open throughout the scholastic year, as in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



previous years and in the usual way, the Boonsboro school, in that county. The order appealed from was passed on October 13, 1913.

The petition for the writ was filed by George W. Morris, of Caroline county. It alleged that the appellant, claiming to act under the power conferred upon it by section 25 of article 77 of the Code, had resolved to consolidate the Boonsboro school with a school in the town of Ridgely in Caroline county, and not to open the Boonsboro school for the scholastic year 1913. The section of the Code above referred to, under which the appellant claimed the power to consolidate the schools, is as follows:

"25. The board of county school commissioners shall have the general supervision and control of all the schools in their respective counties; they shall build, repair and furnish schoolhouses; they shall purchase and distribute textbooks; they shall, after advising with the principal of the school to which the teacher is to be appointed, appoint all assistant teachers; they shall have authority to consolidate schools when, in their judgment, consolidation is practicable and desirable, and to arrange for and to pay charges of transporting pupils to and from such schools, and shall perform such other duties as may be necessary to secure an efficient administration of the public school system, subject to the provisions of this article."

The petition further alleged that the Boonsboro school had been established for more than 20 years, was located in a schoolhouse district established in accordance with article 77, § 27, of the Code, and was the only school in that schoolhouse district; that said school had always kept up its student attendance average well above ten pupils, as required by article 77, § 48, of the Code; that it was quite possible for said Boonsboro school to open on the 15th of September, 1913, when the schools in Caroline county would be opened, and to be kept open during the scholastic year as other schools. It further alleged that the patrons of the Boonsboro school, of which the petitioner was one, were opposed to its abandonment, and that there were no reasons for closing the school and depriving the people of said schoolhouse district of the convenient and satisfactory educational advantages that the said school had furnished for so many years, and would satisfactorily furnish them if kept open; that no provision had been made for closed, warm wagons for conveyance to and from Ridgely school; that the pupils would not be taken up from and put down at their own door, but at various points, in some cases as much as 1½ miles from the home of the pupil; that no provision was made for the arrival of the wagon at the various points designated at any particular time, so that the pupils would have to wait in the weather for the wagon to pass; that it would take from one hour to two hours for the wagon to make the trip one way; that the wagon would not leave Ridgely on the return trip until after 4 o'clock, so that pupils in primary grades would have to wait from half past 2 in or-

der to start home; that the appellant had approved section 124A of chapter 173 of the Laws of Maryland 1912, and appointed attendance officers for its enforcement as provided for by said chapter 173.

The court passed a nisi order upon the petition requiring the appellant to show cause why the writ should not be issued as prayed. The appellant demurred to the petition, and, its demurrer being overruled, it filed an answer. In the view we take of the case it is unnecessary to set forth fully the averments of the answer. It denied many of the allegations of the petition, but averred that the consolidation of the Boonsboro school, which it proposed to make, with a school in the town of Ridgely would furnish the patrons of the former school much greater educational advantages. It averred that:

"It believes that under the law it has the right to do what it proposes to do in the premises, and that it would be greatly to the advantage of the pupils concerned if it be permitted to fully carry out what it proposes to do respecting this school."

The petitioner demurred to the answer. The demurrer was sustained, and the order from which this appeal was taken was then passed.

Section 11, art. 77, of the Code provides that:

"The state board of education shall, to the best of their ability, cause the provisions of this article to be carried into effect, and may, if necessary, institute legal proceedings for that purpose with the direction and advice of the Attorney General; \* \* \* they shall explain the true intent and meaning of the law, and they shall decide without expense to the parties concerned all controversies and disputes that arise under it, and their decision shall be final."

One of the provisions of article 77, which it is the duty of the state board to cause to be carried into effect, is section 43, which reads as follows:

"In every schoolhouse district in each county, established as hereinafter provided, there shall be kept for ten months in each year, if possible, one or more schools, according to population, which shall be free to all white youths over six and under twenty-one years of age."

From the allegations of the petition it is obvious that the question involved in this case concerns the proper administration of the schools of Caroline county. In *Wiley v. School Commissioners*, 51 Md. 401, the power conferred upon state board of education by section 11 of article 77 was declared to be a "visitatorial power of the most comprehensive character," and one that is "in its nature summary and exclusive." Judge Alvey, speaking for the court in that case, further said:

"In delivering the judgment in *St. John's College v. Toddington*, 1 Burr. 159, 200, Lord Mansfield said that 'the visitatorial power, if properly exercised, without expense or delay, is useful and convenient to colleges; and it is now settled and established that the jurisdiction of a visitor is summary and without appeal from it.' And it may be added that such power is not more useful and convenient to colleges than

to other well-organized educational establishments. If every dispute or contention among those intrusted with the administration of the system, or between the functionaries and the patrons or pupils of the schools, offered an occasion for a resort to the courts for settlement, the working of the system would not only be greatly embarrassed and obstructed, but such contentions before the courts would necessarily be attended with great costs and delay, and likely generate such intestine heats and divisions as would, in a great degree, counteract the beneficent purposes of the law. It is to obviate these consequences that the visitatorial power is conferred; and wherever that power exists, and is comprehensive enough to deal with the questions involved in an existing controversy, as is the case here, courts of equity decline all interference, and leave the parties to abide the summary decisions of those clothed with the visitatorial authority."

The doctrine announced in that case has never been departed from or questioned. It was applied in the cases of *Shober v. Cochran*, 53 Md. 544; *Underwood v. School Board*, 103 Md. 181, 63 Atl. 221; and in the *Board of County School Commissioners of Prince Georges County v. Manning*, 90 Atl. 839, decided March 19, 1914. In each of these cases it was distinctly held that when the controversy or dispute is one involving the proper administration of the public school system of the state the court has no power to interfere, and that all such questions must be referred to and finally settled by the state board of education. In the last-cited case Judge Thomas, referring to disputes concerning the administration of the public school system, said:

"The determination of the state board in such cases is final, and the courts have no authority to pass upon the merits of the controversy for the purpose of affirming or reversing their decisions. The statute requires the state board to decide all controversies arising under the public school law without expense to the parties concerned, and the wisdom of that legislation is illustrated in this case. Such controversies in the courts, not only greatly embarrass the orderly and successful administration of the public school system, but impose heavy burdens and costs upon the parties interested."

When a purely legal question is involved, as in *Duer v. Dashiell*, 91 Md. 660, 47 Atl. 1040, and *School Commissioners v. Henkel*, 117 Md. 97, 83 Atl. 89, the court has power to determine it, but we know of no case involving, as this does, a question of school administration where the court has, under the

existing law, undertaken to decide it. The appellee relies upon section 43 of article 77 to support the jurisdiction of the lower court; but we do not regard that section as imposing a mandatory and imperative duty upon the appellant, under all circumstances, to keep the Boonsboro school open. Something is left to its judgment in respect to that matter. The state board, which is charged with the duty of explaining "the true intent and meaning of the law," has full power to advise the school board with respect to the proposed consolidation, and to correct any erroneous action it may take. The statutes under which the present school system of the state is organized have provided the mode and agency for settling all such questions as this without resort to the court (*Wiley's Case*, supra); and, while the dispute between the patrons of this school and the school board to be regretted, the allegations of the petition furnish no grounds for the interference of the court.

Being of opinion that the demurrer to the petition should have been sustained, the order appealed from will be reversed, and the petition dismissed.

Order reversed, and petition dismissed, with costs to the appellant.

(123 Md. 336)

#### BOARD OF SCHOOL COM'RS OF CAROLINE COUNTY v. ROE. (No. 7.)

(Court of Appeals of Maryland. June 25, 1914.)

Appeal from Circuit Court, Caroline County; Albert Constable, Wm. H. Adkins, and Philemon B. Hopper, Judges.

"To be officially reported."

Mandamus by Clayton Roe against the Board of School Commissioners of Caroline County. From an order granting relief, defendant appeals. Reversed, and petition dismissed.

Argued before **BOYD, C. J.**, and **BURKE, THOMAS, URNER**, and **STOCKBRIDGE, JJ.**

Reuben Garey and Fred R. Owens, both of Denton, for appellant. Charles F. Harley, of Baltimore (T. Alan Goldsborough, of Denton, on the brief), for appellee.

**BURKE, J.** For the reasons stated in the opinion filed in the case of the Board of County School Commissioners of Caroline County v. Morris, No. 6, 91 Atl. 718, the order appealed from is reversed, and the petition dismissed, with costs to the appellant.

(82 N. J. Eq. 655)

## CAMPBELL et al. v. MAGIE et al.

(Court of Errors and Appeals of New Jersey.  
March 16, 1914.)WILLS (§ 614\*)—CONSTRUCTION—DEVISE TO  
WIDOW—LIFE ESTATE.

Testator gave to his executors and trustees power to sell his real estate, provided that any property acquired by testator for a residence should not be sold without the consent of his widow. The next paragraph of his will declared that in case any residence should be so sold, or if he did not have such a residence at his death, his executors and trustees could, at the widow's request, purchase such residence for her out of the residue of his estate, directing them to pay out of the income of the estate all taxes, assessments, and expenses for insurance and ordinary repairs on any property used by the widow as a residence. By another clause testator devised the residue of his estate to his widow, with power of disposition of \$100,000, giving such sum in default of such disposition to the widow's heirs at law, then providing that on the widow's death, the "balance of said rest, residue, and remainder of his estate" should be held in trust for certain objects, directions being given as to specific trusts and legacies that they be paid out of the "balance of said rest, residue and remainder." Held, that since the provisions of such section made an express gift of the entire residue in which the widow had a life estate, with the exception only of the \$100,000, of which she had the testamentary disposition, property purchased by the executors and trustees for a residence for the widow under such prior provisions of the will passed to her for life only, and not in fee.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1393-1416; Dec. Dig. § 614.\*]

## Appeal from Court of Chancery.

Bill by Adam Campbell and others as executors, etc., of the will of Alexander Maitland, deceased, against Margaret McC. Magie and others. From a decree in favor of complainants, defendants appeal. Affirmed.

The following is the opinion of Edward M. Collie, Advisory Master:

This bill is filed to quiet the title of the complainants to property which they purchased pursuant to the eleventh section of the will of Alexander Maitland, as against the claim of the devisee under the will of Mary J. Maitland, the wife of said Alexander Maitland.

The tenth and eleventh sections of the will of Alexander Maitland are the provisions of the will particularly important. They are as follows:

"Tenth. I give and grant unto my said executors and trustees, and the survivor of them or the one who shall qualify, full power and authority to sell any and all real estate of which I may die seised, wherever the same may be situated, at public or private sale, and at such times and upon such terms as they may deem for the best interests of my estate, and to make, execute and deliver all necessary and proper deeds of conveyance thereof; provided, however, that any property acquired by me for a city or country residence shall not be sold without the consent of my said wife first had and obtained, and to be evidenced by her uniting in the deed of conveyance thereof.

"Eleventh. Should my residence in either the city or country be sold as above provided, or should I not own such residence at the time of my death, my executors and trustees are hereby expressly authorized and empowered, in their discretion, upon the request of my said

wife, to purchase such a residence for her out of the residue of my estate, and I direct my said executors and trustees to pay out of the income of my estate all taxes, assessments, water rents, and all charges and expenses for insurance and ordinary repairs, that may be laid, imposed or become necessary upon any property used by my said wife as a residence."

The defendant invokes the rule that the language of a will devising land to a wife is to be construed liberally.

The argument for the defendant is based upon the following propositions:

First. That the power of sale given in the tenth section of the will is limited to the property of which the testator died seised, and that therefore there is no power in the executors to make a sale of the property in question, and that this indicates the intent of the testator to give his wife the fee in this property. This seems to beg the question, for, if the purchase of a home for Mrs. Maitland was a mere conversion of a part of the residue, there would arise an implied power to reconvert. It also ignores the fact that, under the provisions for the ultimate disposition of Mr. Maitland's estate, the will requires the conversion of the residuary estate into money, and its investment and distribution as money, in which event, under well-settled rules, there would necessarily be an implied power of sale.

Second. That, coupled with the power of sale given the executors in relation to the property of which Mr. Maitland died seised, there is a proviso that any residence of which he died seised shall not be sold without the consent of his wife, and that, when he authorized them to purchase the residence in question, without giving them a power of sale subject to a like provision as to her consent, he indicated that he intended her to have the fee of the property so purchased. If we are right in concluding that the executors had an implied power of sale, this argument loses its force.

Third. That the language employed authorized the executors to purchase the residence "for her," and it is not by express terms declared to be "for her use." This language seems to ignore the force of the word "such," referring back to the residence, to which reference is made in section 10, in which Mrs. Maitland clearly had only a life estate.

Fourth. That the language used in section 11 is "to purchase such a residence for her out of the residue of my estate," so taking the residence "out of the residue" of his estate, and depleting the residue to the extent of the purchase price. The words "out of the residue" do not necessarily, and, under the provisions of this will, do not properly, imply anything more than the source from whence the consideration money is to be paid.

Fifth. That the testator provides that as to the residence purchased under the provisions of the eleventh section, his executors and trustees "shall pay out of the income of my estate all taxes, assessments, water rents and all charges and expenses for insurance and ordinary repairs that may be laid, imposed or become necessary upon any property used by my said wife as a residence," and that such express provision was necessary only on the supposition that Mrs. Maitland was the owner in fee of the property so purchased, inasmuch as the testator had, by the seventh section of his will, empowered the executors and trustees to take care of such charges out of the income of his estate by virtue of the direction therein that his wife was to receive the net rents, issues, and profits. Emphasis is laid upon the fact that this provision calls for the payment of insurance, which is not the ordinary duty of a life tenant, and the payment of assessments, which may be only partially the duty of a life tenant, and that these provisions are espe-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cially applicable in relation to the ownership of the fee. It is to be noted that the charges to be paid are to be paid out of the funds given to Mrs. Maitland by the will, "out of the income" of the estate, and that we are dealing with an express provision of the will, coupled with a gift made, and not with an ordinary situation. The one who takes the gift takes it subject to the conditions. The use of these words is entirely in harmony with a purpose on the part of Mr. Maitland to relieve his wife of the burden of these details, and naturally seems to indicate a purpose that the property purchased shall be properly kept up and kept free of incumbrances, and properly protected as to insurance. Further, the words used seem to imply that extraordinary repairs are to be paid out of the corpus of the estate, which would indicate that the property on which such expenditures of the corpus might be made was a part of the corpus. The argument seems to lose its force, when consideration is given to the use of the words "*any* property used by my wife as a residence." This seems to clearly indicate that the provision would apply as well to a residence of which Mr. Maitland died seised as to one acquired under the authority of the eleventh section of his will.

All these arguments seem to me to be persuasive, but not conclusive, in view of the other provisions of the will. A reading of the entire will indicates that the residence to be purchased under the eleventh section is substitutionary for any residence which Mr. Maitland may have owned in his lifetime, and which was sold either by him in his lifetime or subsequently by his executors under the power of sale. If that is so, then the conclusion must be that Mrs. Maitland has the same interest in the substituted residence that she would have had in the original residence, and no more. She admittedly would have only a life estate in any residence of which Mr. Maitland died seised.

An examination of the will shows that the donative provisions end with the seventh section, and that the remaining sections are directory and empowering sections, and the provisions on which the defendants rely are those found in this latter portion of the will.

It is not claimed that there is any express gift of the premises in question in explicit language to Mrs. Maitland. Substantially the argument is that there is necessarily an implied gift. The question is settled if there is an express gift of the entire residue to some one other than Mrs. Maitland at her death. The will makes such express gift in section 7. All the rest, residue, and remainder of the estate is there given to Mrs. Maitland for life, with power of testamentary disposition of \$100,000. In default thereof, a gift of that \$100,000 is made to the heirs at law of Mrs. Maitland. The will then makes a gift in the following language: "And upon her death, I give, devise and bequeath the *balance of said rest*, residue and remainder of my estate as follows." There are then given, by paragraphs (a) and (b) of that section, directions as to specific trusts to be set up and legacies to be paid out of the "*balance of said rest, residue and remainder.*"

Paragraph (c) provides: "And the remainder, and *said rest*, residue and remainder of my estate" shall be held in trust. It is subsequently fully and finally disposed of. The provisions of section 7 make an explicit gift of the entire residue in which Mrs. Maitland has the life estate, with the exception only of the \$100,000, of which she has the testamentary disposition, as stated. With this explicit gift in the will there can arise no implied gift.

I, therefore, conclude that Mrs. Maitland had only a life estate in the premises in question, and that complainants are entitled to a decree as prayed.

McCarter & English, of Newark, for appellants. Jerome D. Gedney, of East Orange, for appellees.

PER CURIAM. The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Advisory Master Collie.

(32 N. J. Eq. 229)

WITTEL et al. v. WITTEL et al.

(Court of Chancery of New Jersey. Aug. 21, 1913.)

(Syllabus by the Court.)

1. PARTITION (§ 21\*)—WHEN MAINTAINABLE.

A naked power of sale conferred upon executors is not a legal obstacle to partition of lands.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 72; Dec. Dig. § 21.\*]

2. WILLS (§ 627\*)—NATURE OF ESTATE—TENANCY IN COMMON.

A devise of the residuary estate to the testator's four children vests in them the fee in lands, as tenants in common, which they may partition.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1452-1459; Dec. Dig. § 627.\*]

3. PARTITION (§ 26\*) — GROUNDS OF OBJECTION.

Probable injury to the property, inconvenience or hardship, are no barriers to the right of partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 68-71, 75; Dec. Dig. § 26.\*]

4. PARTITION (§ 46\*)—NECESSARY PARTIES.

Personal representatives are not necessary parties to a bill for partition.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 114; Dec. Dig. § 46.\*]

Bill by Andrew P. Wittel and others against Herman Wittel and others. Motion to dismiss bill denied.

Samuel E. Ayers, of Newark, for the motion. Henry Carless, of Newark, opposed.

BACKES, V. C. John Wittel died, leaving a testament admitted to probate February 14, 1911, by the surrogate of Essex county, wherein, after directing the payment of his debts and eight money legacies, he bequeathed and devised as follows:

"Tenth. I give, devise and bequeath all the rest, and residue of my property, real, personal and mixed, whatsoever and wheresoever situate, to my children, Andrew P. Wittel, Herman Wittel, Helena Trunk and Christina Hompesch, share and share alike, to have and to hold unto them, their heirs and assigns forever.

"Eleventh. I hereby nominate, constitute and appoint my son, Herman Wittel and my daughter, Helena Trunk as the executor and executrix of this my last will and testament; and I hereby give my said executor and executrix and the survivor of them, full power and authority to sell and convey, rent, lease and mortgage all or any of my real estate and to continue my business of manufacture and sale of artificial stones and building blocks and general mason materialman, which I have been conducting at Mortimer Place, Irvington, New Jersey, if in their discretion and judgment they deem it beneficial and to the best interest of my

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

estate to do any or all of the above acts referred to, and for that purpose to make, execute and deliver good and sufficient deeds, mortgages, leases or other instruments in writing to carry out the powers and authority above referred to."

He died seised of six tracts of land, which the complainants (two of the devisees) seek to partition. The defendants, the remaining two children, who are also the executors under the will, resist partition and move to strike out the bill on the ground that: First, the executors have full power of sale; second, the complainants have not a vested estate and are not seised in fee as tenants in common, but have a residuary estate; third, material loss and injury to the parties in interest would result if the property were sold as prayed for in said bill; fourth, the executors are not made parties to the suit. The motion cannot prevail.

[1] First. A naked power of sale is not an obstacle to a partition of lands. *Cahill v. Cahill*, 62 N. J. Eq. (17 Dick.) 157, 49 Atl. 809.

[2] Second. By the operation of the tenth paragraph of the will, the fee in the lands is vested in the testator's four children, the parties to this action, as tenants in common. Its language permits of no other interpretation. The defendants' counsel assumes that by the power of sale the testator intended his lands to be converted into money, and as such to be divided. This is not a permissible view.

"If it is optional with the executor, whether to sell or not to sell, or if it is only an authority to sell, without any direction, then the land retains its character as land, until it is actually sold." *Cook v. Cook*, 20 N. J. Eq. (5 O. E. Green) 375.

[3] Third. Probable injury to the property, inconvenience, or hardship are not barriers to the right of partition. *Bentley v. Long Dock Co.*, 14 N. J. Eq. (1 McCart.) 480.

[4] Fourth. Personal representatives are not necessary parties to a bill for partition. *Speer v. Speer*, 14 N. J. Eq. (1 McCart.) 240. It does not appear that the personal estate is insufficient to pay the debts and legacies, and that recourse must be had to the realty for their satisfaction. No steps have been taken by the executors to avail themselves of the real estate, for that purpose, for over 2½ years, and it may be presumed that recourse to it is not necessary. If creditors or legatees complain, their rights in the event of a sale will be protected and may be adjusted in this suit. *Adams v. Beideman*, 33 N. J. Eq. (6 Stew.) 77.

It is charged, parenthetically, that the executors have failed to account for the personal estate, and that some of it has been invested in real estate, the title of which was taken in the name of one of the executors, and one of the prayers of the bill is that the executors account. This is inappropriate in this suit. The allegation and prayer may be

disregarded. Multifariousness is not assigned as a ground of this motion. Relief, as against the executors, must be had by separate action. *Field v. Field*, 61 N. J. Eq. (16 Dick.) 154, 47 Atl. 275.

The motion is denied, with costs.

(32 N. J. Eq. 481)

LE GRAND CO. v. RICHMAN et al.

(Court of Chancery of New Jersey. Dec. 20, 1913.)

(Syllabus by the Court.)

1. EVIDENCE (§ 418\*)—PAROL EVIDENCE.

The rule stated in *Higgins v. Senior*, 8 Mees. & W. 843, to the effect that a person not a party to a written contract may be shown to be a party by parol evidence, in the absence of ambiguity, fraud, mistake, or subsequent contract, has never been adopted by the courts of this state.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1722, 1906-1911; Dec. Dig. § 418.\*]

2. EVIDENCE (§ 459\*)—PAROL EVIDENCE—AUTHORITY OF AGENT.

In a suit for specific performance of a written contract for the sale of land, where no change of possession has occurred, a person cannot be shown to be a party by parol evidence. This does not, of course, deny the right of proving by parol evidence the authority of an agent who has executed a written contract in the name of his principal.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1722, 1906-1910, 2109-2114; Dec. Dig. § 459.\*]

3. SPECIFIC PERFORMANCE (§ 116\*) — SUFFICIENCY OF BILL—DEMURRER.

In a suit for the specific performance of a written contract for the sale of land a demurrer will be sustained where the demurrants are not parties to the written contract sued on, and there is no averment in the bill suggesting that the contract was not exactly as the parties to the contract intended it to be, or that complainant did not know that demurrants were the parties in the transaction, and that a party with whom complainant was contracting was simply acting as an agent of demurrants.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 374; Dec. Dig. § 116.\*]

Bill by the Le Grand Company against William Richman and others. Demurrer to bill sustained.

Theo. W. Schimpf and James M. Sheen, both of Atlantic City, for the complainant. French & Richards, of Camden, for demurrants.

LEAMING, V. C. [1,2] The rule stated in *Higgins v. Senior*, 8 Mees. & W. 843, to the effect that a person not a party to a written contract may be shown to be a party by parol evidence, in the absence of ambiguity, fraud, mistake or subsequent contract, has never been adopted by the courts of this state. In *Schenck v. Spring Lake Beach Improvement Co.*, 47 N. J. Eq. (2 Dick.) 44, 19 Atl. 881, that rule is given careful and thorough consideration and expressly repudiated; it is there held that in a suit for the

specific performance of a written contract for the sale of land, where no change of possession has occurred, a person not a party to the written contract cannot be shown to be a party by parol evidence. This does not, of course, deny the right of proving by parol evidence the authority of an agent who has executed a written contract in the name of his principal. *Schenck v. Spring Lake Beach Improvement Co.*, supra, has been recognized as an accurate exposition of the law on that subject, not only in this court, but in our Supreme Court and Court of Appeals. *Bowers v. Glucksman*, 68 N. J. Law (39 Vr.) 146, 52 Atl. 218; *Clement v. Young-McShea Amusement Co.*, 70 N. J. Eq. (4 Robb.) 677, 67 Atl. 82, 118 Am. St. Rep. 747; *Stengel v. Sergeant*, 74 N. J. Eq. (4 Buch.) 20, 68 Atl. 1106.

[3] The present case is essentially identical with the case of *Schenck v. Spring Lake Beach Improvement Co.*, supra. Demurrants are not parties to the written contract which is here made the foundation of the suit, and by the arguments in support of the bill it may be regarded as conceded that no written evidence exists establishing the agency of the party who executed the contract. No averment of the bill suggests that the contract was not exactly as the parties to the contract intended it to be, or that complainant did not know that demurrants were the principals in the transaction, and that the party with whom complainant was contracting was simply acting as an agent of demurrants. Under such circumstances an averment of the bill, to the effect that the principal who executed the contract as a principal was the agent of demurrants, must be deemed inadequate to support the relief sought by the bill as against demurrants; it is expressly so held in the *Schenck Case* above referred to.

I will advise an order sustaining the demurrer. Should complainant desire to amend the bill, 20 days from the date of service of the order overruling the demurrer may be allowed for that purpose.

(82 N. J. Eq. 140)

GOODBODY et al. v. DELANEY et al.  
(Court of Chancery of New Jersey. June 5, 1913.)

*(Syllabus by the Court.)*

1. CORPORATIONS (§ 307\*)—SUIT BY STOCKHOLDERS—LIABILITY ON AN ACCOUNTING.

Evidence examined in a suit brought by the stockholders of the Fisheries Company, a New Jersey corporation, against Ordener J. Delaney, to compel the restitution by him to the treasury of the company of the value of certain property alleged to have been abstracted from the company by him in the process of reorganizing it after its failure, and for the further purpose of compelling him to account for certain profits made by him in the years 1908 and 1909, by the use of the property of the Fisheries Company under leases made to himself or to a corporation of which he was the principal stockholder, he being a director, the gener-

al manager, and one of the receivers of the Fisheries Company when insolvency finally supervened, and held, that he is liable to account therefor upon the ground that he occupied a fiduciary position with relation to the Fisheries Company and its stockholders, and that he either concealed or did not disclose the extent to which he was making a profit out of the transactions.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1350, 1351; Dec. Dig. § 307.\*]

2. CORPORATIONS (§ 320\*)—ACTION BY STOCKHOLDERS—ESTOPPEL.

The defense of an estoppel because at a meeting of an independent board of directors of the company it was voted that it was not expedient for the company to bring suit against Delaney on account of the allegations against him is not available, for there was no release executed by the company to Delaney, and the company by a mere vote by its directors could not estop itself from rescinding its resolution and bringing suit the next day after the passing thereof. If there is an estoppel, it can only lie in facts which go to show that all parties acted upon the vote, and that it would be inequitable to allow it afterwards to be rescinded or disregarded.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.\*]

3. CORPORATIONS (§ 320\*)—ACTION BY STOCKHOLDERS—ESTOPPEL.

If estoppel is claimed by reason of any act of the company, the court will look into the bill in its entirety, and determine whether, under all the circumstances, the complainant has made such a showing of wrong on the part of the corporation or its officers, and injury to himself, as will justify the suit. If it be true, as alleged, that Delaney, trustee as he was, diverted several hundred thousand dollars worth of property from the company to himself by means of a manipulation of the reorganization scheme, and without notice to the stockholders of the company, a case has been made which gives the complainants an equity, and negatives any claim of estoppel which it might otherwise lie in his mouth to assert.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.\*]

4. CORPORATIONS (§ 320\*)—ACTION BY STOCKHOLDERS—LACHES.

The equitable defense of laches is not available to the defendant Delaney upon the ground that a certain party is dead, he having died only a few months after these transactions begun, and long before it had been discovered that Delaney was chargeable under the present state of facts.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1426-1431, 1433-1439; Dec. Dig. § 320.\*]

Bill by Marcus Goodbody and others against Ordener J. Delaney and others. Decree for complainants.

See, also, 80 N. J. Eq. 417, 83 Atl. 988.

Humphreys & Sumner, of Paterson, for complainants. Samuel H. Richards, of Camden, and Robert H. McCarter, of Newark, for defendants.

HOWELL, V. C. This suit is brought by stockholders of the Fisheries Company, New Jersey corporation, against Ordener J. Delaney, to compel the restitution by him to the treasury of the company of the value of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

certain property alleged to have been abstracted from the company by him in the process of reorganizing it after its failure, and for the further purpose of compelling him to account for certain profits made by him in the years 1908 and 1909 by the use of the property of the Fisheries Company under leases made to himself or to a corporation of which he was the principal stockholder. In other words, he is sought to be made liable personally for the diversion of funds of the company of which he was a director, the general manager, and one of its receivers when insolvency finally supervened.

The Fisheries Company was incorporated on May 25, 1900, for the purpose of engaging in the catching of fish in the ocean and the conversion thereof into commercial products, such as oil, fertilizers, etc. Its history from the date of its incorporation down to October 19, 1907, when it was declared insolvent, is not before the court. On the last-named day the United States Circuit Court for the District of New Jersey, on complaint made for that purpose, appointed two receivers for it, of whom the defendant Delaney was one. Steps were taken almost immediately looking toward a reorganization of the company, the satisfaction in some way of its debts and the restoration of its property to it. In order to force Heller, Hirsch & Co., a New York corporation, into compliance therewith, a suit was brought by the receivers against it, a bondholder of the Fisheries Company, to set aside its bond holdings on the ground of fraud. This bill was filed on January 15, 1908, a date which I consider important in the history of the transaction, as the beginning of the reorganizing proceedings. The filing of this bill seems to have had the desired effect. On January 21, 1908, six days after the filing of the bill, Heller, Hirsch & Co. entered into an agreement (page 58) with C. Monteith Gilpin and Benjamin Tuska, as trustees, in which it was recited that Heller, Hirsch & Co. were the owners of 267 of the first mortgage bonds of the Fisheries Company, of the par value of \$1,000 each, secured by a mortgage held by the Guaranty Trust Company, and that proceedings had been taken by the receivers of the Fisheries Company to invalidate a large number of their bonds. It was thereupon agreed that if that suit should be discontinued and proper releases made, Heller, Hirsch & Co. would assign, transfer, and set over to the said Gilpin and Tuska, trustees, 267 of the Fisheries Company's bonds, and 2,894 shares of its preferred stock, and that the said trustees should thereupon cause to be conveyed to Heller, Hirsch & Co., free and clear of all liens whatsoever, including the mortgage securing the said bonds, all the property contained in Schedule A thereunto annexed, and would likewise cause to be conveyed to the International Securities Corporation the property described in Schedule B thereunto annexed; and Heller, Hirsch & Co. authorized the said trustees in their own names, but as

trustees under that agreement, to make the offer therein contained to the Fisheries Company, or to its receivers, or to such reorganization or other committee as might thereafter undertake to act in the premises. Said trustees agreed that they would accept the terms of that agreement when the same might become effective.

There are three matters connected with that agreement which deserve mention at this point; One is that Gilpin and Tuska in their trust capacity were self-constituted, self-appointed, except in so far as Heller, Hirsch & Co. may have requested them to act, and that they held title to no property whatever. Another matter is that the so-called agreement contains nothing binding upon any of the parties to it. It looks forward to the making of a binding agreement, but is not such in present. The third and most important branch of it is that the Schedules A and B, therein referred to and thereto annexed, are schedules of property belonging to the Fisheries Company, and not to either Heller, Hirsch & Co. or Gilpin and Tuska, trustees. There is no explanation in the case of the reason why these gentlemen should be dealing with the property of the Fisheries Company and dividing it by schedules into two parts nor as to who made the division, or upon what principle it was made; but, for reasons which will hereafter appear, I think it safe to say, that the agreement in question, and the arrangement of the schedules thereto, was made upon the request and by the direction of Mr. Ordener J. Delaney, the defendant to this suit.

[1] On January 29, 1908, Tuska and Gilpin, "as trustees," wrote a letter to the reorganization committee of the Fisheries Company, in which they described themselves as trustees for certain bondholders of the Fisheries Company, and submitted a proposition which contemplated the delivery to the reorganization committee of 267 bonds of that company and about 2,894 shares of its preferred stock, provided the committee would cause to be conveyed and assigned to said trustees certain property which is described in the letter. There are two things concerning this letter which deserve mention at this point; one is that the letter was addressed to the reorganization committee of the Fisheries Company. As a matter of fact, there was at that time no reorganization committee of the Fisheries Company, and it may be doubtful whether any such committee was ever authorized to act. It does, however, appear that later on, and on February 15, 1908, such a committee was "self-constituted," consisting of J. B. MacAllister, an officer of the Franklin Bank of Philadelphia, E. H. Ferry, an officer of the Hanover Bank of New York, and Thomas B. Harned, a lawyer practicing in Philadelphia. The document in which this appears is Schedule No. 3 to the bill (page 64); it described the committee as a self-constituted bondhold-

ers, stockholders, and creditors committee of the Fisheries Company. This agreement deals wholly with the property and the indebtedness of the Fisheries Company, but does not appear to have been authorized by that company or any one on its behalf. The agreement provides that there shall be deposited with the committee, by Joseph Wharton, \$150,000 par value of the Fisheries bonds, 7,235 shares of its common stock, and 7,120 shares of its preferred stock, which should be contributed by Mr. Wharton for the purpose of satisfying creditors of the Fisheries Company, and that he should receive in return therefor no consideration except a complete release from all liability of every nature and character, whether as stockholder or otherwise, and in particular a full and complete release by the Hanover National Bank of New York of any suit then pending, or which might thereafter be brought against him by it by reason of his connection with the Fisheries Company, and that upon receipt of the said stock and bonds by the said committee they should duly receipt for the same, and as such committee agree to indemnify him against any liability whatever by reason of his connection with the said Fisheries Company. The agreement likewise provides for the deposit with the committee of the Heller, Hirsch & Co. bonds, aggregating \$267,000, and 2,894 shares of the company's preferred stock. And it proceeds thereafter to arrange for the disposition of the property of the Fisheries Company, the satisfaction of its debts, and the reorganization of its business. Three days later the court in which the above-mentioned suit was brought vacated all proceedings relating to the service of process on the defendants, and two days later than that ordered that in case the matters in dispute therein were adjusted, and agreements in relation thereto carried out, the receivers should discontinue the suit against Heller, Hirsch & Co. and execute proper instruments of settlement and release. Thereupon the suit against Heller, Hirsch & Co. came to an end. On February 25, 1908, an order was entered in the administration suit, discharging the receivers and turning the assets over to the company. This put the company back into the control of its own affairs, but with arrangements made which if carried out would eventually strip it of a large amount of its property. Two days after the company was reinvested with the title to its property an agreement was made between Delaney and Gilpin (page 169) dividing the stock of the company between them, and on the same day Delaney caused the New Jersey Fish Products Company to be incorporated. After that the events occurred rapidly. On March 2, 1908, there was a meeting of the board of directors to pass upon the reorganization plan, at which Mr. Wharton resigned as president, and Mr. Delaney was elected in his stead, and at which there was

provision made for calling a stockholders' meeting to act upon the reorganization proposition of the creditors' committee. Such meeting was held on March 16, 1908, and ratified the action of the committee. Then came the conveyance of the property known as Schedule B property. On March 14, 1908, it was conveyed by the Fisheries Company to Chester M. Headley, who, on the same day, conveyed the same to Gilpin and Tuska, trustees. On March 17, 1908, Gilpin and Tuska, trustees, conveyed it to the International Securities Corporation, and on the same day the International Securities Corporation conveyed the said property to the New Jersey Fish Products Company, which had been incorporated a month before. Upon the dissolution of the New Jersey Fish Products Company two years later the Schedule B property was transferred by it to the Menhaden Fishing Company, which was incorporated on May 28, 1908, of which Mr. Delaney was the principal stockholder. Mr. Delaney, at the time of the failure of the Fisheries Company, was its general manager; he continued in that capacity until March 2, 1908, when he was elected president, and in the meantime, for a short period, he had acted as one of the receivers appointed by the United States Circuit Court for the District of New Jersey. His position in each one of these three places was that of a trustee; he was bound to do the best he could for his cestui que trusts, to make full disclosure to them of all the affairs of the company which came within his authority, and not to betray them or permit any one else to do so, without giving them notice and an opportunity to litigate.

Down to this point the complainants allege that it fully appears that the property known as Schedule B property, which had a large value, had been taken from the company without any consideration whatever, and I am constrained to hold to that position. At the time the Fisheries Company transferred this property to Headley it is not claimed that any consideration passed. In the answer filed by Mr. Delaney it is alleged, and it likewise appears in one of the agreements, that Mr. Wharton deposited his bonds and stock with the committee upon condition that he should be released from all liability to the Hanover bank, the Franklin bank, and to the creditors; but it appears from the testimony that although the Hanover bank had brought suit against Mr. Wharton to compel him to pay the indebtedness of the Fisheries Company to that bank, the bank claimed only a moral obligation on his part, and it is not claimed that he was under any obligation of any sort to the Franklin bank, or to any of the other creditors. Neither does it appear that his liability as a stockholder was ever raised or insisted upon.

Mr. Delaney in his evidence attempts to justify the transaction concerning the Sched-



ule B property by saying that it was necessary to provide for compensation to Mr. Wharton for the delivery of his stock and bonds to the reorganization committee; but it does not appear that Mr. Delaney ever accounted to Mr. Wharton, or since his death, which occurred in November, 1908, to his personal representatives, but instead thereof he alleges that he retained control of the Schedule B property for the reason that Mr. Wharton owed him \$150,000 on another "deal," which he had never paid or satisfied. This statement seems to me to be disingenuous, and I think the mere reading of his deposition will convince an unprejudiced mind that the statement is untrue. But there are other reasons for such conviction. It does not appear that he ever settled with the Whartons in any way, and to show that it was a mere afterthought, it is necessary only to read his answer to the bill, which omits all reference to any such agreement between him and Mr. Wharton. In paragraph 22 of his answer he denies that he falsely or in any way represented to Gilpin that the provision in the agreement between the trustees and Heller, Hirsch & Co. in regard to the conveyance of the property mentioned in Schedule B, was for the benefit of Joseph Wharton, or that Joseph Wharton was to receive the Schedule B property. And further along in the same paragraph he says that he is unable to state how persons acquainted with the affairs of the Fisheries Company considered him as being the personal representative of Mr. Wharton, and denies that he was so considered, or that he made any such representations as are stated in the bill in that behalf, either to Mr. Wharton or to any other person, that he was acting as the agent of Wharton in obtaining shares of the stock of the New Jersey Fish Products Company; and he there denies that he made any statement or representation that the said shares of stock were to become the property of Wharton, or any similar statement or representations to Gilpin or to any other person. This is a position that is entirely inconsistent with the evidence that he gave on the final hearing. Delaney therefore, puts himself in this anomalous situation. He declares that the Schedule B property was reserved to satisfy Mr. Wharton for the deposit of his bonds and his stock and the clearance of his liability to the banks and to the creditors of the company, while in his answer he practically denies all connection between Mr. Wharton and the transaction, and then in his testimony attempts to cover up his ill-gotten gains by the statement that he retained the same because Mr. Wharton was indebted to him upon another transaction, concerning which he gives no details, nor is there to be found in the case any evidence whatever which will support and corroborate his statement in that behalf. The pleadings in the cause give no

intimation of any such state of facts. There is no mention thereof except by Mr. Delaney himself. It cannot be that so important a transaction as one involving \$150,000 could rest in the memories of the two parties to it without any writing whatever to preserve its memory. Yet no such writings are produced, nor is their existence hinted at. I am convinced that this whole defense is without foundation in fact, and was invented by Delaney at the last moment for the purpose of making at least a plausible defense to the strong case made against him by the complainants.

Again, the only real defense which Delaney has to the suit relates to Mr. Wharton's connection with the transaction. If Wharton was no party to it, and it would seem from some portions of the answer as if Delaney meant to say that he was not, then the whole defense fails. In my opinion it has so failed, and Delaney should account to the company for the value of the Schedule B property which was taken from the company, not only by his consent, but by his connivance and procurement.

The other cause of complaint consists in the allegation that Delaney obtained leases of the property remaining to the Fisheries Company for the years 1908 and 1909 to his company, the Menhaden Fishing Company, without disclosing to the directors that the leases were for the benefit of himself, or of a company of which he was the principal stockholder, or, in other words, that by concealment of his interest in the lease he obtained from the Fisheries Company a right out of which he made large profits. I find, as a matter of fact, that the allegation is true, and that Mr. Delaney has thus made himself liable to pay into the company whatever profits were made by him during the terms of the two leases.

The defendant Delaney is held liable upon the charges contained in the bill, upon the ground that he occupied a fiduciary position with relation to the Fisheries Company and its stockholders, and that he either concealed or did not disclose the extent to which he was making a profit out of the transactions. This question of disclosure was considered by me in the case of *Arnold v. Searing*, 78 N. J. Eq. (8 Buch.) 146, 78 Atl. 762. That was a case involving the question of promoter's profits. In this case I place Mr. Delaney in the position of a promoter. The case discloses the fact that the negotiations for the reorganization were begun long before anything was put in writing, and that they were begun by Mr. Delaney, who had long conferences with the parties in interest, and it is quite apparent that the whole thing was prearranged with great cunning, so that all the important transactions which led to the disposition of so much property and the rearrangement of so many securities and the transactions with so many men could be completed between January 15, 1908, and the

month of March of the same year. It is quite apparent to my mind that Mr. Delaney himself arranged for the abstraction of the Schedule B property from the company, and it is quite as apparent that neither he nor any one on his behalf ever made any disclosure to the board of directors or to the company that such abstraction was about to take place.

[2, 3] The defendant by way of defense objects to the inference to be drawn from the facts alleged in the bill and proved. But, in my opinion, the conclusion is irresistible, and unless it is borne down by the questions of law raised by the defendant, the complainant must prevail at all points. The legal defenses are two: First, that the company is estopped from any proceeding to collect from Mr. Delaney, because at a meeting of an independent board of directors it was voted that it was not expedient for the company to bring suit against Mr. Delaney on account of the allegations against him. It will be observed that there was no release executed by the company to Delaney, and I fail to see how the company by the mere vote of its directors could estop itself from rescinding their resolution and bringing suit the next day. The estoppel cannot lie in the resolution. If there is an estoppel, it can only lie in facts which go to show that all parties acted upon the vote, and that it would be inequitable to allow it afterwards to be rescinded or disregarded. I think the true rule governing this case is found in *Groel v. United Electric Co.*, 70 N. J. Eq. (4 Robb.) 616, 61 Atl. 1061, and in *Corbus v. Alaska Gold Mining Co.*, 187 U. S. 455, 23 Sup. Ct. 157, 47 L. Ed. 256, and *Siegman v. Kissel*, 71 N. J. Eq. (1 Buch.) 123, 62 Atl. 941, affirmed 72 N. J. Eq. (2 Buch.) 403, 65 Atl. 910. If, therefore, an estoppel is claimed by reason of any act of the company, the court will look into the bill in its entirety and determine whether under all the circumstances the complainant has made such a showing of wrong on the part of the corporation or its officers, and injury to himself, as will justify the suit. If it is true, as alleged, that Mr. Delaney, trustee as he was, diverted several hundred thousand dollars' worth of property from the company to himself by means of a manipulation of the reorganization scheme, and without notice to the stockholders of the company, in my opinion a case has been made which gives the complainants an equity, and negatives any claim of estoppel which it might otherwise lie in the mouth of Mr. Delaney to assert.

[4] Neither do I think that the defendant can avail himself of the equitable defense of laches. It is true that Mr. Wharton is dead, but he died only a few months after these transactions began (November, 1908), and long before it had been discovered that Mr. Delaney was chargeable under the present state of facts. This appears to be the only

ground of fact on which to base the defense of laches.

My conclusion, therefore, is that the defendant Delaney must account for the property and the profits so abstracted from the Fisheries Company before a master, to be appointed by the decree. On confirmation of the master's report provision will be made by appropriate decree for the disposition of the fund, counsel fees, costs, etc.

(82 N. J. Eq. 125)

BECKETT v. ANDORFER et al.

(Court of Chancery of New Jersey. Nov. 30, 1912.)

(Syllabus by the Court.)

1. FRAUDULENT CONVEYANCES (§ 273\*)—CONVEYANCE TO WIFE—EVIDENCE.

To justify a decree in a judgment creditor's suit to set aside a conveyance from the judgment debtor to a grantee for the use of the judgment debtor's wife, and to subject the lands so conveyed to the lien of the creditor's judgment, the evidence must warrant a finding of fact to the effect that, at the time the conveyance was made, there existed an actual intent to defraud subsequent creditors, if no creditors existed at the time the conveyance was made.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. § 805; Dec. Dig. § 273.\*]

2. FRAUDULENT CONVEYANCES (§ 104\*)—CONVEYANCE TO WIFE—EVIDENCE.

Whether an agreement between the judgment debtor and his wife, whereby she waived the wrongs her husband had committed and resumed cohabitation with him, affords such a consideration for the conveyance that it cannot be treated as voluntary is immaterial, for the reason that the acceptance of the fact that the conveyance was the result of such engagements of the parties, and that her purpose was to protect herself against being again deserted and left wholly destitute, renders it impossible to conclude that an intent to defraud future creditors entered into the transaction.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 337-344; Dec. Dig. § 104.\*]

3. FRAUDULENT CONVEYANCES (§ 104\*)—CONVEYANCE IN TRUST FOR WIFE.

The fact that no writing exists manifesting a trust title in the grantee for the benefit of the wife is immaterial, so far as the rights of complainant are concerned.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 337-344; Dec. Dig. § 104.\*]

Bill by Joseph R. Beckett against Ferdinand Andorfer and others. Bill dismissed. Decree affirmed by Court of Errors and Appeals (82 N. J. Eq. 368, 91 Atl. 729).

Austin H. Swackhamer, of Woodbury, for complainant. Samuel H. Richards, of Camden, for defendants.

LEAMING, V. C. [1] To justify a decree in this suit setting aside the conveyance from Andorfer to Keeley and subjecting the land so conveyed to the lien of complainant's judgment, the evidence must warrant a finding of fact, to the effect that at

the time the conveyance was made there existed an actual intent to defraud subsequent creditors; for no creditor existed at the time that conveyance was made.

[2] I am convinced that the evidence is insufficient to justify such a finding. It is impossible to doubt the truth of the testimony of Mrs. Andorfer to the effect that the conveyance was exacted by her as a prerequisite to her consent to resume cohabitation with her husband. I think it unnecessary to here consider whether the agreement between her and her husband, as disclosed by the testimony, whereby she waived the wrongs her husband had committed and resumed cohabitation with him, afforded such a consideration for the conveyance that it cannot be now treated as voluntary; for the acceptance of the fact that the conveyance was the result of such engagements of the parties, and that her purpose was to protect herself against the danger of again being deserted and left wholly destitute, renders it impossible to conclude that an intent to defraud future creditors entered into the transaction. The conveyance was promptly recorded, and any subsequent creditor could have easily ascertained the condition of the title before extending credit, and there is no evidence that Mrs. Andorfer ever knowingly gave encouragement to any one to believe that the property did not belong to her; her occupancy of the property with her husband cannot be properly regarded as inconsistent with her ownership. It may be, as urged in behalf of complainant, the conveyance in question was executed and accepted in anticipation of a future hazardous business enterprise on the part of Mr. Andorfer, and with an actual intent to defraud creditors of that enterprise; but the evidence does not, in my judgment, establish that fact or justify that affirmative finding. On the contrary, I am convinced that the conveyance was made in the manner and for the reasons state by Mrs. Andorfer, and without reference to or thought of possible dangers of future business enterprises or creditors of Mr. Andorfer, further than that element is contained in any transfer of property which is operative to divest a grantor of his title.

[3] It is urged in behalf of complainant that, as no writing exists manifesting a trust title in Mr. Keeley for Mrs. Andorfer, that trust cannot be established by parol. That question does not appear to me to be here involved. The material inquiry in this case is whether the conveyance was made with an actual intent to defraud future creditors of Mr. Andorfer. That inquiry involves the ascertainment of the real purpose of the parties. If the purpose to defraud was not present, it is immaterial to creditors whether Keeley has manifested his trust in writing in such manner as to enable Mrs. An-

dorfer to enforce it against him; such a trustee can at any time declare his trust in writing and satisfy the statute of frauds. Some testimony exists to the effect that Keeley and his cestui que trust have made settlement touching the trust property, but I think that immaterial, so far as the rights of creditors of Andorfer are concerned.

I will advise a decree dismissing the bill.

(82 N. J. Eq. 388)

### BECKETT v. ANDORFER et al.

(Court of Errors and Appeals of New Jersey. Oct. 16, 1913.)

Appeal from Court of Chancery.

Action between Joseph R. Beckett and Ferdinand Andorfer and others. From a decree of the Chancery Court in favor of the latter (82 N. J. Eq. 125, 91 Atl. 728), the former appeals. Affirmed.

Austin H. Swackhamer, of Woodbury, for appellant. French & Richards, of Camden, for respondents.

PER CURIAM. The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Leaming.

(82 N. J. Eq. 150)

### BAKER v. BAKER.

(Court of Chancery of New Jersey. July 11, 1913.)

(Syllabus by the Court.)

#### 1. LIFE ESTATES (§ 17\*)—REPAIR OF PREMISES—DUTIES.

A testator devised to his wife the use of his dwelling house and lot of land whereon the same was erected and directed, "that in case said house shall be destroyed by fire, wind or otherwise become untenable, I direct my executor to pay to my said wife thirty dollars (\$30) a month until said house is rebuilt or put in tenable condition and occupied." *Held*, that she is under the obligations of a life tenant and may not permit the premises to fall into a state of nonrepair and claim thirty dollars (\$30) per month until the repairs shall have been made by the executor, and that it is not his duty, but hers, to keep the premises in repair and to pay the taxes.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 37, 38, 42; Dec. Dig. § 17.\*]

#### 2. LIFE ESTATES (§ 17\*)—REPAIRS—"EJUSDEM GENERIS."

In the construction of the words "or otherwise become untenable" the doctrine ejusdem generis must be applied, which is to the effect that where general words follow particular ones the rule is to construe them as applicable to persons ejusdem generis.

[Ed. Note.—For other cases, see Life Estates, Cent. Dig. §§ 37, 38, 42; Dec. Dig. § 17.\*]

For other definitions, see Words and Phrases, vol. 3, p. 2328; vol. 8, p. 7647.]

#### 3. WILLS (§ 469\*)—CONSTRUCTION—"OTHER."

Where a statute or other document enumerates several classes of persons or things, and immediately following and classed with such enumeration the clause then embraces other persons or things, the word "other" will generally be read as "other such like," so that the persons or things therein comprised may be read as ejusdem generis and not with a quality peculiar

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

to or differing from those specifically enumerated.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. § 987; Dec. Dig. § 469.\*

For other definitions, see *Words and Phrases*, vol. 6, pp. 5070-5102; vol. 8, pp. 7741, 7743.]

#### 4. LIFE ESTATES (§ 17\*)—REPAIRS.

When the testator used the words "or otherwise become untenable," he had in mind the destruction of the building by some superior force or vis major, of the kind that fire and wind belong to, or in other words, destruction of the buildings by the elemental forces.

[Ed. Note.—For other cases, see *Life Estates*, Cent. Dig. §§ 37, 38, 42; Dec. Dig. § 17.\*]

Bill by Herbert P. Baker, executor, against E. Sophia Baker. Decree for complainant.

Sidney W. Eldridge and Clark McK. Whittemore, both of Elizabeth, for complainant. Patrick H. Gilhooly, of Elizabeth, for defendant.

HOWELL, V. C. The pleadings and proofs in this case show that on August 8, 1909, Abram P. Baker died seized of a tract of land in the city of Elizabeth, on a portion of which was a dwelling house, the remainder being occupied for other purposes. He left a will, dated March 10, 1900, and a codicil thereto, dated February 20, 1907, both of which were admitted to probate, and in and by which he made the following provisions:

"Fifth, I direct that my beloved wife, Sophia E. Baker, shall have the use of the house in which I now (1900) reside, together with the lot on which it stands, being thirty feet front and rear by one hundred and fifty feet deep, and adjoining the property of William C. Tubbs, for the term of her natural life, provided she does not again marry; in case of her remarriage all her rights under this bequest shall terminate and cease. After the death or marriage of my said wife I give and devise and bequeath the same to my son Herbert P. Baker, his heirs and assigns forever. The above bequests to my said wife are in lieu of dower or thirds in my estate."

"Second, In and by the fifth clause of my said will I did give and bequeath to my wife E. Sophia Baker the use of the house and lot on Cherry street in Elizabeth, N. J., in which I resided in the year nineteen hundred; I do now direct that in case said house shall be destroyed by fire, wind, or otherwise become untenable, I direct my executor to pay to my said wife thirty dollars a month until said house is rebuilt or put in tenantable condition and occupied."

These provisions were declared to be in lieu of dower. After the death of the testator his widow entered into possession of the property so devised to her and rented the same; she has been in receipt of the rents from his death hitherto, and has paid some of the charges incident to her possession of the premises as if she were a life tenant. She has permitted the property to fall into a condition of disrepair, so that the second floor of the house is not now rented. The first floor is rented for a very small amount, and not for a sum which it would rent for if the property was put in a tenantable condition. At the time of the death of the testator the

property was renting for \$30 a month. The executor now files his bill, alleging that the property is in a state of disrepair, and that it is the duty of the defendant as life tenant to keep the same in good condition and repair and pay all the taxes and other municipal charges levied against it; that she has allowed the premises to fall into disrepair to such an extent that they are hardly tenantable for the class of tenants which reside in the neighborhood, and he describes the condition of the building quite fully, and insists that the defendant is under obligation to keep the premises in repair and pay all the taxes assessed against them, and that she is obligated in the same manner as any other life tenant. She responds that she is excused from making repairs by the terms of the codicil, which provide that in case the said house should be destroyed by fire, wind, or otherwise become untenable, the executor should then pay to her \$30 a month until the house should be rebuilt or put in tenantable condition by him and occupied.

[1, 2] The difficulty arises out of the use of the words "or otherwise become untenable" in the second item of the codicil. The defendant insists that she is not under the obligations of a life tenant, and that she may permit the premises to fall into a state of nonrepair and claim \$30 per month until the repairs shall have been made by the executor, and that it is his duty, and not hers, to keep the premises in repair and to pay the taxes. In my opinion, in the construction of these words, the doctrine of *ejusdem generis* must be applied. That rule was well expressed by Lord Tenterden in *Sandiman v. Breach*, 7 B. & C. 99. He says:

"Where general words follow particular ones the rule is to construe them as applicable to persons *ejusdem generis*."

[3] It is therefore sometimes called Lord Tenterden's rule, which, as to the word "other," may perhaps be more fully stated thus:

"Where a statute or other document enumerates several classes of persons or things and, immediately following and classed with such enumeration, the clause then embraces other persons or things, the word 'other' will generally be read as 'other such like,' so that the persons or things therein comprised may be read as *ejusdem generis*, and not with a quality peculiar to or differing from those specifically enumerated."

The doctrine is well illustrated by the case of *Saner v. Bilton*, 7 C. D. 815; 47 L. J. Ch. 267. There the lease contained this provision:

"That in case the said warehouse and building or any part thereof respectively shall at any time during the said term be destroyed or damaged by fire, flood, storm, tempest or other inevitable accident, then the said yearly rent hereby reserved or a just proportion thereof shall cease or abate, so long as the premises shall continue wholly or partially untenable or unfit for use and occupation in consequence of such destruction or damage."

During the term a beam broke, the walls bulged, and other defects appeared in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

building. The landlord made repairs and sued the tenant for the amount thereof. Mr. Justice Fry held that the phrase "other inevitable accident" used in the lease was one of a kind to flood, fire, storm, or tempest referred to in the immediately preceding words, and that the injury sustained to the building was not inevitable accident, within the meaning of these words. Later on came the case of Manchester Bonding Warehouse Co. v. Carr, 5 C. P. D. 507, 49 L. J. C. P. 809. There a tenant covenanted to deliver up the leased premises at the end of the term, damage by fire, storm, or tempest or other inevitable accident and reasonable wear and tear only excepted. The building fell during the term, and the question was whether the phrase "other inevitable accident" included the fall of the building. It was held that it did not, and that the "inevitable accident" referred to meant mere accident ejusdem generis, and did not extend to the use of the property by the tenant. The case was decided upon the authority of *Saner v. Bilton*, supra. To the same effect is the case in *Re Richardson et al.*, 66 L. J. Q. B. 868. The American cases cited in the complainant's brief are generally on the same line. *Sims v. United States Trust Co.*, 103 N. Y. 472, 9 N. E. 605; *Donley v. Bank*, 40 Ohio St. 47.

[4] It is said that care must be taken in the application of the doctrine to the construction of wills, and that the best rule for the construction of such documents is that which takes the words to comprehend a subject that falls within their usual sense, unless there is something like a declaration plain to the contrary (*Parker v. Marchant*, 11 Y. & C. 290, 11 L. J. Ch. 223), the reason being that in the construction of a will the words should be held to their plain, common, ordinary meaning. While this must be true so far as the donative words of a will are concerned, yet when a construction is sought of testamentary words that are not purely donative, I see no reason why the doctrine should not be invoked. I am therefore of opinion that when the testator used the words "or otherwise become untenable," he had in mind the destruction of the building by some superior force or vis major, of the kind that fire and wind belong to, or, in other words, destruction of the buildings by the elemental forces.

Unless the meaning of the words in question can be confined within the limits above indicated, it would be possible for the defendant by her own act to permit spoliation and waste to such an extent as to make the premises untenable, and then as a result of her own act call upon the executor to pay the monthly stipend provided for by the codicil until he should rebuild the premises or put them in condition where they could be rented. I do not think that the testator meant to absolve his widow from the usual duties and obligations attending a life tenancy. If he had meant that, it would have been very

easy for him to have expressed it. He put her to her election whether she would take dower or the testamentary provision. If she had elected to take dower she would have been bound to pay taxes and keep the buildings in repair, and I am driven to the conclusion that the testator meant by the provisions of his will in her favor to put her under the same obligation. The result is that unless the widow shall put the premises in proper repair, a receiver of the rents will be appointed, according to the common practice.

(82 N. J. Eq. 581)

### COOPER v. COOPER.

(Court of Chancery of New Jersey. May 24, 1918.)

(*Syllabus by the Court.*)

#### DIVORCE (§ 129\*)—EVIDENCE—SUFFICIENCY.

Evidence held insufficient in a suit for divorce on the ground of adultery, brought by a husband against his wife.

[Ed. Note.—For other cases, see *Divorce*, Cent. Dig. §§ 411-441, 454; Dec. Dig. § 129.\*]

Bill by Frederick A. Cooper against Charlotte S. Cooper. Dismissed.

Decree affirmed by Court of Errors and Appeals, 82 N. J. Eq. 660, 91 Atl. 732.

Traverse A. Spraggins, of Jersey City, for petitioner. Wilfred B. Wolcott, of Camden, for defendant.

BACKES, V. O. Cooper, the petitioner charges his wife with adultery, naming one Bumstead as corespondent. Her conduct with the corespondent, as she admits, was highly indiscreet and venturesome, if not reckless. To some extent she was led in her indiscretion by an older female companion. The defendant admits the circumstances from which it is claimed guilt should be inferred, but she and the corespondent emphatically deny the commission of crime. A denial by the defendant and corespondent is, as a rule, entitled to very little weight, but I watched and carefully observed the defendant while testifying. She was absolutely frank in relating her conduct and in confessing her imprudence. Her deportment on the stand was simple and modest, and her testimony was given in a straightforward and impressive manner, especially in the denial of her guilt. She impressed me as a truth teller. She unhesitatingly admitted suspicious circumstances which she could as well have suppressed without fear of contradiction. She told and confessed all that could be used to build a story around her from which guilt might be deduced, even relating to matters which had not been brought out on the petitioner's case. She struck me as one who appreciated to its fullest the moral obligation of her oath. The indicia of honesty was written all over her story. I think her denial is entitled to serious consideration.

The testimony did not satisfy my mind

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that she went so far as to submit her body to the correspondent. While the appearances are against her, and the fact that she entertained him at her home, went out with him to public places, visited him at his office, and that he upon two occasions kissed her, may arouse suspicion that all was not right between the two, I am not convinced that she took the fatal step; that she broke her marriage vow; that she committed adultery. In fact, I believe she did not.

There is no testimony indicating that she was amorously inclined toward the correspondent and disposed to commit the crime charged against her. While the two had many opportunities to gratify a lustful desire, yet there is no evidence manifesting that the defendant had such desires towards Bumstead, the correspondent. There is no evidence of lust or of lewdness on the part of the defendant. She is not shown to be depraved. She was a flirt and a fool, but not a criminal.

There is testimony that she is chaste of speech and well-behaved. Even her bitter enemy, Mrs. Flower, testified that she was a good woman at the time of her marriage, and it is difficult to believe that she changed her moral code within so short a time as 2½ years thereafter.

I cannot, in the circumstances, although they quicken suspicion, denounce this young wife, the mother of two babies, as an adulteress. I will advise a decree dismissing this petition.

(82 N. J. Eq. 660)

#### COOPER v. COOPER.

(Court of Errors and Appeals of New Jersey. March 16, 1914.)

Appeal from Court of Chancery.

Bill by Frederick A. Cooper against Charlotte S. Cooper. From a decree for defendant (82 N. J. Eq. 581, 91 Atl. 731) complainant appeals. Affirmed.

Traverse A. Spraggins, of Jersey City, for appellant. Wilfred B. Wolcott, of Camden, for appellee.

PER CURIAM. The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Backes.

(82 N. J. Eq. 182)

#### KANTOR v. FRANCESCHELLO et al.

(Court of Chancery of New Jersey. July 1, 1913.)

(Syllabus by the Court.)

#### MORTGAGES (§ 86\*) — FORECLOSURE — FRAUD — EVIDENCE.

Evidence examined in a foreclosure suit, in which the mortgagor defendants set up by answer that they were induced to purchase a moving picture business and to execute the mortgage in question by fraudulent misrepresentations of the complainant in respect to the moving picture business, to the effect that at the time of their purchase of the same it was paying expenses, and that it had been highly profitable during the preceding spring and winter, and where the defendants also filed a cross-bill for the surrender and cancellation of

the bond and mortgage, and held, that the defendants had failed to sustain the burden of proof as to the fraudulent misrepresentations charged by them, and that the defendants did not rely on them, even if made.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1350, 1355, 1364; Dec. Dig. § 86.\*]

Bill by Samuel Kantor against Vincenzo Franceschello and others to foreclose. Decree for complainant.

Josiah Dudley and Clifford L. Newman, both of Paterson, for complainant. Addison P. Rosenkrans, of Paterson, for defendants.

LEWIS, V. C. This is a bill to foreclose a mortgage. The suit is brought by Samuel Kantor, who was the mortgagee named in the mortgage, against Vincenzo Franceschello, Mary A. Mott, and Joseph Mott, her husband. An additional name is in the mortgage, that of Arcangelo Franceschello, who was the wife of Vincenzo Franceschello, but she died prior to the institution of this suit, and as she and her husband held as tenants by the entirety, the survivor is now the owner of whatever title he and his wife had, so that there are now three defendants. The amount of the mortgage was \$2,316, less the sum of \$80, which the complainant claims has been paid. The mortgage was given by the defendants to secure a part of the purchase price of a moving picture show, conducted at No. 236 Main avenue, in the city of Passaic. The foreclosure of the mortgage in question is resisted by the defendants on the ground that they were induced to purchase the moving picture business and to execute this mortgage by fraudulent misrepresentations of the complainant, and that such fraudulent misrepresentations consisted in the statement that the moving picture business, at the time of their purchase of the same, was paying expenses, and that it had been highly profitable during the preceding spring and winter. The defendants have also filed a cross-bill for the surrender and cancellation of the bond and mortgage. The defendants admit the due execution and delivery of the bond and mortgage; and the burden of proof as to the fraudulent representations charged by them, rests upon them, before they can, respectively, defend the foreclosure bill or obtain affirmative relief upon their cross-bill.

It is conceded by both parties that the complainant did represent that the business, at the time of the sale, was paying expenses. The defendants claim that the complainant told them that during the preceding spring and winter he had made from \$60 to \$100 a week in profits. The complainant denies this, and says that he

"told them merely, that the place was running along nicely, but it was not on a money-making basis just now, but was making expenses, and that if somebody had that place and managed it properly, there was a nice profit to be made

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

there when the season comes along, but that time was no time to make any money."

The complainant further testified that he told them:

"Sometimes it pays \$40 or \$50 a week, and sometimes it is not paying anything; it all depends upon the weather."

It appears by the evidence that the complainant had owned the place for 5½ months.

The court is not satisfied that any fraudulent misrepresentations were made by the complainant to the defendants; certainly the defendants did not rely on them, even if made.

The court also is satisfied that the defendants elected to treat the property as their own by continuing to operate the business long after they claimed to have discovered the fraud, and they afterwards sold the goods and chattels.

I will advise a decree in favor of the complainant.

(82 N. J. Eq. 196)

### NORCROSS v. NORCROSS.

(Court of Chancery of New Jersey. May 24, 1913.)

#### (Syllabus by the Court.)

#### 1. DIVORCE (§ 133\*)—DESERTION—EVIDENCE.

In a husband's suit against his wife for desertion, evidence examined, and *held*, that it was not shown that the desertion was obstinate against the will of the petitioner.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 446-448; Dec. Dig. § 133.\*]

#### 2. DIVORCE (§ 133\*)—DESERTION BY WIFE—ADVANCES OF HUSBAND.

Although a wife may, without cause or justification, abandon her husband, the law imposes upon him a duty to use active efforts to terminate the separation by making such advances or concessions as might reasonably be expected to induce her to return to him, and he is excused from discharging this obligation only when it is manifest from the facts in the case that to do so would be unavailing.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 446-448; Dec. Dig. § 133.\*]

#### 3. DIVORCE (§ 133\*)—DESERTION—EVIDENCE.

Also *held* upon the evidence that the denial of the decree is further sustainable because of the charge of willfulness of the supposed desertion as supported only by the petitioner's evidence.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 446-448; Dec. Dig. § 133.\*]

Suit by Charles W. Norcross against Marian Pearl Norcross for divorce. On exceptions to master's report, in favor of a trial of the petition. Exceptions overruled, and master's report confirmed.

Francis V. Dobbins, of Jersey City, for petitioner.

BACKES, V. C. [1] The parties to this suit lived in Bergen county, and were married in 1901. They have one child. In 1910 they separated. The petitioner charges that at that time the defendant deserted him, and that her desertion was continued, willful, and

obstinate for a period of two years. The cause was uncontested. The master to whom it was referred reported adversely to the prayer of the petition, assigning the reason that it was not shown that the desertion was obstinate, against the will of the petitioner.

The petitioner's testimony is to the effect that his wife was fond of the gay and forbidden life, and because of frequent reproofs she expressed her determination of leaving him, and quickly put this into action, notwithstanding his pleas and protests. All during the two years of the supposed desertion the petitioner made absolutely no advances to induce his wife to return to him. Had he done so, had he been solicitous of a reconciliation, I am satisfied that the defendant would have yielded. By the testimony of a witness who crated some of the furniture preparatory to her departure it appears that the defendant requested him to collect for his services from the petitioner, which the latter paid. During her absence the defendant kept up a correspondence with her husband, and it seems that he, at least upon one occasion, wrote to her. It may fairly be gathered from the wife's letters that her separation was in a measure assented to and acquiesced in by the petitioner. Her letters to him indicate that the petitioner was not unwilling that his wife should live apart from him, and the impression they make upon me is that if he had made reasonable overtures to her she would have ended the separation. There is nothing in the conduct of the defendant which leads to the belief that had the petitioner solicited her, he would not have been successful in inducing his wife to rejoin him. The statement made by her to his solicitor that she did not see how she could live with her husband again does not manifest obduracy. The insinuation that the defendant found marital solace in the society of one Ackerman, and that from this it may be assumed that the petitioner's efforts would have been unsuccessful, finds no support in the record.

[2] Although a wife may, without cause or justification, abandon her husband, yet the law imposes upon him a duty to use active efforts to terminate the separation, by making such advances or concessions as might reasonably be expected to induce her to return to him. *Bowlby v. Bowlby*, 25 N. J. Eq. (10 C. E. Gr.) 406. And he is excused from discharging this obligation only when it is manifest from the facts in the case that to do so would be unavailing. *Hall v. Hall*, 65 N. J. Eq. (20 Dick.) 709, 55 Atl. 300.

[3] The denial of a decree of divorce is further sustainable because the charge of willfulness of the supposed desertion is supported only by the petitioner's evidence. There is corroborating testimony that the defendant separated from her husband but none that she deserted him. The expressman

and another who helped to move the furniture simply tell of her going. Her letters speak only that she left her husband, but what persuaded her to go, or that it was a willful abandonment on her part, does not appear other than from the lips of the petitioner.

The master's report is confirmed, and the exceptions are overruled.

(82 N. J. Eq. 513)

**BEAM v. PATERSON SAFE DEPOSIT & TRUST CO. et al.**

(Court of Chancery of New Jersey. Dec. 6, 1913.)

(Syllabus by the Court.)

**1. TRUSTS (§ 217\*)—DISCRETION OF TRUSTEE—CONTINUING INVESTMENTS—BURDEN OF PROOF.**

The burden of proof of the "exercise of good faith and reasonable discretion," within the meaning of the statute with respect to a trustee in continuing investments made by a decedent in his lifetime (P. L. 1899, p. 236), is cast upon the trustee, under the peculiar facts in this case.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 301-304, 306-309; Dec. Dig. § 217.\*]

**2. TRUSTS (§ 262\*)—DISCRETION OF TRUSTEE—INVESTMENTS—BURDEN OF PROOF.**

In a suit against a trustee (a trust company) for an accounting with respect to losses occasioned to a trust fund in the continuing such investments made by a testatrix in her lifetime, and where it appeared that the trustee, instead of insisting upon cash, accepted from the executors the securities in question, which then were considered by investors generally to be of the first quality, and about a year after the beginning of the trust the market values of such securities began to depreciate, and so continued thereafter to depreciate, until the commencement of this suit, evidence examined, and held that the trustee had not sustained the burden of proof cast upon it by the statute respecting the exercise of a "reasonable discretion," although there is no lack of the exercise of "good faith."

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 372; Dec. Dig. § 262.\*]

**3. TRUSTS (§ 217\*)—DISCRETION OF TRUSTEE—DOUBTFUL INVESTMENTS.**

There are probably no securities in which people invest their money which can be said to be safe at all events and under all circumstances. There is always some element of chance which time may develop. When, however, a security comes within the region of doubt it is the part of prudence and discretion to eliminate it from a trust fund at the earliest possible moment, and defendant trustee, having neglected to do so, in this case, is liable to the complainant upon this ground.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. §§ 301-304, 306-309; Dec. Dig. § 217.\*]

Bill by Carrie S. Beam against the Paterson Safe Deposit & Trust Company and others. Decree for complainant.

See, also, 81 N. J. Eq. 38, 88 Atl. 379.

Pierre F. Cook, of Jersey City, for complainant. Griggs & Harding, of Paterson, for defendants.

HOWELL, V. C. [1] The claim of the complainant in this case, and the facts upon which she relies, are fully stated in the opinion of Vice Chancellor Stevenson on the motion to strike out the bill of complaint herein (*Beam v. Paterson Safe Deposit Co.*, 81 N. J. Eq. [11 Buch.] 38, 88 Atl. 379), and in the same matter on appeal (81 N. J. Eq. [11 Buch.] 196, 86 Atl. 369). It was held by the Court of Errors and Appeals, on the allegations of the bill that the fact that securities which had come to the hands of a trustee, and which had steadily depreciated in value from the beginning of the trust until the shrinkage, amounting to nine-tenths of the value, made a prima facie case of lack of good faith, or a failure to exercise reasonable discretion on the part of the trustees, and that such a dealing with the trust funds called for an explanation by the trustees of their action in holding on to securities which were steadily declining until they had shrunk to one-tenth of the value which they had at the time they became part of the trust estate. The burden of proof of the "exercise of good faith and reasonable discretion," to use the words of the statute (P. L. 1899, p. 236) is thus thrown upon the trustee, and the only question now before the court is whether the trustee has met that burden. I am constrained to reach the conclusion that it has not. It appears that the securities in question were investments made by the testatrix in her lifetime, and that when the time came for the executors to transfer the fund in question to the trustee, the trustee, instead of insisting upon cash, accepted the securities in question without objection. This was in 1905. The securities at that time were considered by investors generally to be of the first quality. The market values began to depreciate about a year after the beginning of the trust, and continued thereafter to depreciate until the present time. The trustee watched the decline in value, consulted with investors in relation thereto, discussed the matter at meetings of its finance committee, procured the appointment of its president and a member of its finance committee as directors of one of the companies which issued some of the securities, and otherwise kept in view the declining values. It owned and held as an investment some of the same securities which it held in trust for the complainant, so that its treatment of the trust fund was the same as was accorded by it to its own property. It appears to have done everything that it could have done in the way of informing itself of the disasters which finally overtook and wrecked the securities, but failed to perceive the inevitable outcome which now appears to be so plain.

[2, 3] I, therefore, think that, as a matter of fact, there was no lack of good faith on the part of the trustee, nor do I find an affirmative averment which can be construed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Index



into such a charge. That leaves open the question of the exercise by it of a reasonable discretion in holding on to the securities after they had begun to decline. On this question the judgment must be for the complainant. It must have sufficiently appeared to the trustee from the early part of 1906 forward that the securities held by it were doubtful in character, else there would have been no need of the exercise of the great watchfulness and anxiety testified to on the part of the defendant. There are probably no securities in which people invest their money which can be said to be safe at all events and under all circumstances. There is always some element of chance which time may develop. When, however, a security comes within the region of doubt, in my opinion, it would be the part of prudence and discretion to eliminate it from a trust fund at the earliest possible moment. That the trustee neglected to do. It is upon this ground that I deem the defendant to be liable to the complainant.

For the purpose of ascertaining the amount with which the defendant should be charged, it will be necessary to fix the date at or about the time of which the securities should have been sold. As nearly as I can get at it, there was sufficient decline by August 1, 1906, to inform the trustee that a doubt about their value existed. Without having heard argument on this point, this date seems to me to be approximately correct. However, the point will be left open, and may be discussed at the time of settling the decree.

(82 N. J. Eq. 532)

MADDOCK v. CONNOLLY et al.

(Court of Chancery of New Jersey. June 5, 1913.)

*(Syllabus by the Court.)*

**1. LOST INSTRUMENTS (§§ 8, 23\*)—ACTIONS TO ESTABLISH—BURDEN OF PROOF.**

The rule that a party seeking to establish a lost instrument such as a deed of conveyance or a will, or to recover upon a lost instrument such as a mortgage or a promissory note, manifestly casts the burden of proof on the party claiming under the lost instrument, and it is consonant with reason that the burden of proof shall not only be sustained by him, but that the evidence as to the existence, execution, and delivery of the lost instrument should be clear and cogent.

[Ed. Note.—For other cases, see *Lost Instruments*, Cent. Dig. §§ 17, 51-57; Dec. Dig. §§ 8, 23.\*]

**2. LOST INSTRUMENTS (§ 23\*) — MORTGAGE—FORECLOSURE—EVIDENCE OF INDEBTEDNESS.**

Upon a bill for the foreclosure of a mortgage, assuming that the complainant has established the fact that an instrument of the sort mentioned in the bill once existed either (1) to secure a present loan, or (2) to secure future advances to be made under it, evidence examined, and held to fail to show that the mortgagor owed the mortgagee anything at all either at the time of the making of the mortgage, or that any money was advanced by the mortgagee to the mortgagor by way of a future advance

on the mortgage itself, and hence the burden of proof has not been met by the complainant.

[Ed. Note.—For other cases, see *Lost Instruments*, Cent. Dig. §§ 51-57; Dec. Dig. § 23.\*]

Bill by Frederick R. Maddock, administrator, against Marjorie Heath Connolly and others. Decree dismissing bill.

Decree affirmed by Court of Errors and Appeals, 90 Atl. 314.

Ralph E. Lum and Egbert J. Tamblyn, both of Newark, for complainant. Cortlandt Parker, of Newark, for defendant Marjorie Heath Connolly. Edward A. Day, of Newark, for defendant Carlotta Heath. Algeron T. Sweeney and John R. Hardin, both of Newark, for Bertha Baker Heath and other defendants.

HOWELL, V. C. [1] Whether a complainant seeks to establish a lost instrument such as a deed of conveyance or a will, or seeks to recover upon a lost instrument such as a mortgage or a promissory note, the burden is on him in the first instance to prove that a document of the sort alleged in the bill once existed, that it was properly executed and delivered, that it has been lost, and that proper search has been made for it; and, when these points shall have been proved, the court will then take secondary evidence as to its contents. This rule manifestly casts the burden of proof on the party claiming under the lost instrument, and it is quite consonant with reason that the burden of proof shall not only be sustained by him, but that the evidence as to the existence, execution, and delivery of the lost instrument should be clear and cogent. *Swaine v. Maryott*, 28 N. J. Eq. (1 Stew.) 589. The authorities on the point in this state are very meager, but the question has received attention elsewhere. *Connor v. Pushor*, 86 Me. 300, 29 Atl. 1083; *Moses v. Morse*, 74 Me. 472; *Day v. Philbrook*, 89 Me. 462, 36 Atl. 991; *Edwards v. Noyes*, 65 N. Y. 126; *Scurry v. Seattle*, 56 Wash. 1, 104 Pac. 1129, 134 Am. St. Rep. 1092; *Taylor v. Riggs*, 1 Pet. 591, 7 L. Ed. 275.

I am of opinion that the burden of proof, so resting upon the complainant in this case, has been fully met, and I shall assume, without further statement or argument, that the complainant has established the fact that an instrument of the sort mentioned in the bill once existed, and that it was of the tenor and effect therein set out. I base my conclusion as to this fact upon the testimony of Mr. Maddock and the introduction of the certified copy of the registry of the mortgage, which I think is evidential on this point.

[2] But in my opinion the complainant has wholly failed to prove that there was any consideration for the mortgage in question, or that there was ever any money advanced upon it. The mortgage was executed: Either (1) to secure a present loan; or (2) to

secure future advances to be made under it. There is no evidence whatever to the effect that the mortgagor owed the mortgagee anything at all at the time of the making of the mortgage; in fact, a searching investigation of the books of the parties made by a competent accountant fails to disclose any present indebtedness. In fact, the books rather show, if they show anything at all, that there was no indebtedness from the son to the father at the time the mortgage purports to have been made. Neither is there any evidence that any money was advanced by the mortgagee to the mortgagor by way of a future advance on the mortgage itself. The mortgage appears to have been dated on December 8, 1892, and to have been registered on July 16, 1900, after the death of the mortgagor. There is an account in the books of the firm, which was composed of the mortgagor and mortgagee, showing that on the day after the mortgage was dated the firm's check was drawn to the order of the mortgagor for \$1,750, and that this amount was charged on the firm's books to the mortgagee, indicating, possibly, that \$1,750 had been on that day taken from the assets of the firm by the mortgagor and charged against the mortgagee, from which I am asked to infer that there was created by that transaction an indebtedness from the mortgagor to the mortgagee. This course seems to have been continued, according to the books, from December 9, 1892, until April 5, 1893, up to which time this particular account reached an aggregate of \$32,132.16; but I do not think that I would be justified in assuming, without any evidence at all, that this account represents a transaction or a series of transactions connected in any way with the mortgage. It has always been held that future advances on a mortgage should not be encouraged because of the facility they afford for the commission of fraud, inasmuch as the proof of the advances generally lies wholly in parol, and this observation applies with much more force to a case in which a recovery for future advances on a lost instrument is sought to be had. The burden of proof on this point lies with the complainant, and it is quite apparent that the burden has not been met, and I must therefore advise a decree dismissing the bill.

(82 N. J. Eq. 521)

**MORRISTOWN TRUST CO. v. MAYOR AND BOARD OF ALDERMEN OF TOWN OF MORRISTOWN et al.**

(Court of Chancery of New Jersey. Dec. 20, 1913.)

*(Syllabus by the Court.)*

**1. CHARITIES (§ 10\*)—CHARITABLE BEQUESTS—WHAT CONSTITUTES.**

A bequest, appropriated for the erection of a bronze and granite base for the flagstaff in the Morristown park when the proper consent shall have been obtained for the erection of the same from the trustees of the park and from

the municipal authorities of Morristown, the same to bear an inscription that it was erected in memory of the testator's father, must fail and fall into the residuary estate because it does not come within any of the definitions of charitable uses, nor is it in any sense a devotion of the money therein mentioned to charitable purposes. It is a mere private trust, and is violative of the rule against perpetuities.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 34; Dec. Dig. § 10.\*]

**2. CHARITIES (§ 10\*)—“TRUSTS FOR CHARITABLE USES.”**

“Trusts for charitable uses” defined.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 34; Dec. Dig. § 10.\*]

For other definitions, see *Words and Phrases*, vol. 2, p. 1074.]

**3. CHARITIES (§ 38\*) — CONDITIONS — CONSTRUCTION—IMPOSSIBILITY OF PERFORMANCE.**

The impossibility of procuring the consent of the trustees of the Morristown green or park, and of the municipality, to the erection of the structure provided for in this bequest, is another reason why such bequest must fail; the consent of the trustees being made one of the conditions upon which the validity of the bequest depends, without which the physical construction could not be carried on.

[Ed. Note.—For other cases, see *Charities*, Cent. Dig. § 66; Dec. Dig. § 38.\*]

**4. WILLS (§ 852\*)—REJECTION OF LEGACY.**

Another legacy under the same will to the Society for Providing Medical Attendance to the Worthy Poor of the Township of Morris must likewise fail and fall into the residuary estate, it appearing that there was a voluntary association of the residents of Morristown and vicinity called by the name of the intended legatee, which existed from January 14, 1839, until January 9, 1911, when it disbanded and thereby became dissolved; the dissolution occurred after the testator's will was executed and after his death, but without any attempt to collect this legacy.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2167, 2168; Dec. Dig. § 852.\*]

**5. WILLS (§ 858\*)—CHARITABLE BEQUESTS—FAILURE OF PURPOSE—RESIDUARY ESTATE.**

There is a distinction, well settled by the authorities, between the class of cases in which there is a gift of charity generally, indicative of a general charitable purpose, and pointing out the mode of carrying it into effect, and another class of cases which the testator shows an intention, not of general charity, but to give to some particular institution, and then if it fails because there is no such institution the gift does not go to charity generally, and this last bequest is not a bequest to charity generally, but as one to the particular legatee, which terminated its own existence within a year after the testator's death and before the legacy became due and payable according to law.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 2173-2183; Dec. Dig. § 858.\*]

Bill by the Morrison Trust Company, executor, against the Mayor and Board of Aldermen of the Town of Morristown and others to construe a will. Decree rendered.

Willard W. Cutler, of Morristown, for complainant. Stephen H. Little, of Morristown, for residuary legatees. Carl V. Vogt, of Morristown, for town of Morristown.

HOWELL, V. C. [1] The two legacies in question, under the will of Augustus L. Revere,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

must fail, and the amounts thereof must revert to the residuary fund. The first legacy appropriates \$5,000 for the erection of a bronze and granite base for the flagstaff in the Morristown park when the proper consent shall have been obtained for the erection of the same from the trustees of the park and from the municipal authorities of Morristown; the same to bear an inscription that it was erected in memory of the testator's father. This bequest must fail because it does not come within any of the definitions of charitable uses, nor is it in any sense a devotion of the money therein mentioned to charitable purposes. It is a mere private trust, and is violative of the rule against perpetuities. Mr. Justice Gray, of the Massachusetts Supreme Court, in *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, defines a charity as follows:

"A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable in its nature."

[2] This definition was approved by our Court of Errors and Appeals in *MacKenzie v. Trustees*, 67 N. J. Eq. (1 Robb.) 652, 61 Atl. 1027, 3 L. R. A. (N. S.) 227. Lord Macnaghten, in *Commissioners of Income Tax v. Pemsell* (1891), A. C. 531, 61 L. J. Q. B. 290, defines trusts for charitable purposes as follows: (1) Trusts for the relief of poverty; (2) trusts for the advancement of education; (3) trusts for the advancement of religion; (4) trusts for other purposes beneficial to the community not falling under any of the preceding heads and not being for the purpose merely of sport or hospitality. It is quite apparent that this bequest does not fall within either of the above definitions.

[3] There is another reason, however, which must be looked at, and that is the impossibility of procuring the consent of the trustees of the Morristown green or park, and of the municipality to the erection of the structure provided for. The facts are that the consent of the trustees was sought; that they entertained an application for permission to make the construction in accordance with the terms of the will; that the same was considered and discussed by them, and was finally refused. This state of facts brings the case within *Teale v. Bishop of Derry*, 168 Mass. 341, 47 N. E. 422, 38 L. R. A. 629, 60 Am. St. Rep. 401, where a legacy failed, very largely because the bishop of the diocese refused to assist in maintaining a chapel or supporting a priest, and that without his help the people could do neither. That situation is analogous to the one now in hand, for the reason that the consent of

the trustees is made one of the conditions upon which the validity of the legacy depends, besides which the physical construction could not be carried on without their consent. Their refusal, therefore, operates as a rejection of the legacy. If there were no other reason for its invalidity, this makes it impossible of enforcement, and for this reason also it must fail.

[4] The other legacy to the Society for Providing Medical Attendance to the Worthy Poor of the Township of Morris must likewise fail, but for a different reason. It appears by the allegations of the pleadings that there was at one time a voluntary association, composed of residents of Morristown and vicinity, called the Society for Providing Medical Attendance to the Worthy Poor of the Township of Morris, which existed from January 14, 1889, until January 9, 1911, when it disbanded, and thereby became dissolved. This dissolution occurred after the testator's will was executed and after his death, but without any attempt to collect the legacy.

In *Brown v. Condit*, 70 N. J. Eq. (4 Robb.) 440, 61 Atl. 1055, Vice Chancellor Stevenson dealt with bequests to legatees who were not in existence either at the date of the will or at the date of the testator's death, and held that in either of those two cases the legacy, even though charitable, would lapse, and the amount thereof would fall into the residue. In the case at bar, the legatee did not go out of existence until about eight months after the testator's death; the members then having full knowledge of the bequest, voluntarily dissolved, although it might possibly have continued its existence and in some way have taken advantage of the bequest.

[5] This action of the legatee seems to have the effect of a rejection of the legacy, and, if so, is the fund to be administered *cy pres*, or does it fall into the residue? The solution of this question involves a consideration of the intention of the testator; the point is well illustrated by the opinion of Vice Chancellor Kindersley in *Clark v. Taylor*, 1 Drew. 642. There the testator bequeathed a legacy of 50 pounds to the treasurer for the time being of the female orphan school in Greenwich, patronized by Mrs. Enderby, for the benefit of that charity. The will was made in March, 1839; he died in October, 1840. Mrs. Enderby continued to carry on her school until November, 1846. The bequest not having been paid, the question was whether it failed, and whether it was dedicated to charity and was to be disposed of *cy pres*. The vice chancellor held that the bequest failed entirely, and that it became part of the residue. He says:

"The question is whether the gift in this will is to be considered as a gift intended for charitable purposes generally, or whether it was simply intended for the benefit of a particular private charity. Now, there is a distinction well settled by the authorities. There is one class of cases in which there is a gift to charity generally, indicative of a general charitable pur-

pose, and pointing out the mode of carrying it into effect. If that mode fails, the court says the general purpose of the charity shall be carried out. There is another class in which the testator shows an intention, not of general charity, but to give to some particular institution, and then if it fails because there is no such institution, the gift does not go to charity generally. That distinction is clearly recognized, and it cannot be said that wherever a gift for any charitable purpose fails it is nevertheless to go to charity."

The vice chancellor then holds from the particular words of the gift that there was no contemplation of a charitable purpose generally, but that a benefit to the particular school mentioned was intended. And so I read the bequest in question in this case, not a bequest to charity generally, but as one to the particular legatee, which terminated its own existence within a year after the testator's death, and before the legacy became due and payable according to law. In *re University of London* (1909) 2 Ch. 1.

It has been said that *Clark v. Taylor* (1853) *supra*, was in opposition to the decision of Sir John Leach, Master of the Rolls, in *Hayter v. Trego*, 5 Russ. 113, in which, on similar facts, the Master of the Rolls administered the fund *cy pres*; but it will be found upon careful reading of the cases that in *Hayter v. Trego* there was a general charitable intention expressed by the will, which would be sufficient to control the decision. *Clark v. Taylor*, *supra*, was followed by *In re Ovey*, *Broadbent v. Barrow*, 29 C. D. 560, 54 L. J. Ch. 752, and by *In re Rymer v. Stanfield* (1896); 1 Ch. 19; 64 L. J. Ch. 86, in the Court of Appeals.

Again, there is no scheme furnished by the testator for the administration of the fund, provided it were held valid. There is no use defined nor any term fixed within which the money shall be expended, nor any establishment of an endowment to the extent of the gift, and thus the purposes of the gift are indefinite and uncertain and could not be effectuated without the formulation of a scheme by the court for the administration of the fund. While this would not be an insuperable objection, it is one which presses itself upon my attention.

The trustee under the will of the deceased will be instructed accordingly.

(82 N. J. Eq. 43)

**PUBLIC SERVICE CORPORATION OF  
NEW JERSEY v. TOWN OF  
WESTFIELD.**

(Court of Chancery of New Jersey. July 13, 1913.)

(*Syllabus by the Court.*)

**1. EQUITY (§ 39\*)—JURISDICTION.**

Where the jurisdiction of this court was invoked by complainant's bill expressly on the ground of irreparable injury, and the legal rights of complainant were submitted for decision to the court at final hearing upon the basis that if they existed the complainant was entitled to protection against this irreparable in-

jury, and the complainant itself did not by its bill or at the hearing ask that this be settled at law, nor did the defendant insist on any right to have a settlement at law, the circumstances of irreparable injury gave it undoubted jurisdiction of the case, and a right, so far as the question is one of jurisdiction, to proceed to the final determination of the cause.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.\*]

**2. INJUNCTION (§ 163\*)—GROUNDS FOR CONTINUING—ESTABLISHING TITLE AT LAW.**

Where the complainant can settle the legal title by action at law, and the injury complained of is not irreparable, the court of equity, even at final hearing, and when the parties have tried and submitted the question of title to the court without objection or request for trial at law, should not ordinarily settle the title and protect it by final decree, but retain the bill until complainant had reasonable opportunity to establish its title at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 357-371; Dec. Dig. § 163.\*]

**3. EQUITY (§ 39\*)—JURISDICTION—DETERMINATION OF TITLE.**

The rule is established that where the jurisdiction of the court to protect complainant's legal title is based on the ground of irreparable damage, and the defendant, without proper objection by its answer or otherwise, goes to hearing on the merits, any right to a settlement of title at law may be considered as waived, and the court has, as a matter of jurisdiction, the right to settle the title at final hearing, and on the question of exercising this right, instead of holding the case for settlement at law, will consider all the circumstances of the case.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 104-114; Dec. Dig. § 39.\*]

Memorandum on form of decree.

For former opinion, see 80 N. J. Eq. 295, 84 Atl. 718.

Decree affirmed by Court of Errors and Appeals, 82 N. J. Eq. 662, 91 Atl. 740.

EMERY, V. C. [1] In making the suggestion at the close of my opinion filed in this case (*Public Service Corporation v. Westfield*, 80 N. J. Eq. [10 Buch.] 295, 304, 84 Atl. 718) that if the complainant would file a stipulation to appear to any suit brought by defendant on its legal rights, I would consider an application to continue an injunction pending the trial of the suit at law, and in announcing my decision at the close of the hearing on the application, I had in mind the general course which seemed to be indicated in the late opinion of the Court of Errors and Appeals, which was decided after the hearing in this suit (*Imperial Realty Co. v. West Jersey, etc., Railroad Co.*, 79 N. J. Eq. [9 Buch.] 168, 81 Atl. 837, decided November 20, 1911). In that case an injunction was granted on final hearing, in this case, to restrain interference with complainant's right of way over an alley on defendant's land, and it was held, on appeal, that the aid of a court of equity in the enforcement of a legal right, the existence or extent of which is disputed, cannot be invoked until the right is settled at law, and, there being a substantial dispute as to the extent of complainant's alleged right, the decree below was reversed. Inasmuch as the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

complainant in the present suit is in possession, and therefore could not bring an action at law to settle the title of the land occupied by the poles, the only method of settling the title at law would be by defendant bringing the action and requiring the complainant to stipulate to appear in such action. Where the defendant is thus required to bring the suit as the only party who can raise the question of title at law, the method of enforcing such suit at law is to direct that the injunction be made permanent unless such action be brought in a reasonable time. 1 Pom. Eq. Rem. § 506, citing *Echelkamp v. Schrader*, 45 Mo. 505.

On further consideration, and before signing any order on the application, the question arose whether there is not a jurisdiction in equity to settle the legal title on its own final decree in this case upon the ground that its jurisdiction on the original bill is really based on the question of irreparable injury, a clearly settled ground for jurisdiction. This would seem to be the distinction which is drawn in the previous decisions of the appellate court which were relied on in the *Imperial Realty Co. Case* as settling the law. These cases were *Todd v. Staats*, 60 N. J. Eq. (15 Dick.) 507, 46 Atl. 645; *Borough of South Amboy v. Pennsylvania Railroad*, 77 N. J. Eq. (7 Buch.) 242, 76 Atl. 1038; *Mason v. Ross* (1910) 77 N. J. Eq. (7 Buch.) 527, 77 Atl. 44. In *Mason v. Ross* the decision of the court in *Hart v. Leonard*, 42 N. J. Eq. (15 Stew.) 416, 7 Atl. 865, was referred to as specifying the exceptional classes of cases in which equity had power to entertain jurisdiction over legal rights and enforce them. Among these classes are (at page 420):

"6. Cases where the object of the bill is to prevent an injury which will be destructive of the inheritance, or which equity deems irreparable, i. e., one for which the damages which may be recovered according to legal rules do not afford adequate compensation."

The wrongful removal of poles in actual use for the purpose of supplying electric light or telephone and telegraph service, belongs to this class considered as irreparable injuries. *American Union Telegraph Co. v. Town of Harrison* (Vice Chancellor Van Fleet, 1879) 31 N. J. Eq. (4 Stew.) 627 (at p. 629).

[2] The jurisdiction in this suit was invoked by complainant's bill expressly on this ground of irreparable injury, and the legal rights of complainant were submitted for decision to the court at final hearing upon the basis that if they existed the complainant was entitled to protection against this irreparable injury. The complainant itself did not, either by its bill or at the hearing, ask that this be settled at law, nor did the defendant insist on any right to have a settlement at law. The question, therefore, is whether the court of equity has not, in cases of this character, where the circumstances of irreparable injury gave it undoubted original jurisdiction of the case, a right, so far

as the question is one of jurisdiction, to proceed to the final determination of the cause. Where the complainant can settle the legal title by action at law, and the injury complained of is not irreparable, the court of equity, even at final hearing, and when the parties have tried and submitted the question of title to the court without objection or request for trial at law, should not ordinarily settle the title and protect it by final decree, but retain the bill until complainant had reasonable opportunity to establish its title at law. *Todd v. Staats*, 60 N. J. Eq. (15 Dick.) 507, 46 Atl. 645; *Delaware, Lackawanna & Western Railroad Co. v. Breckenridge*, 55 N. J. Eq. (10 Dick.) 141, 150, 35 Atl. 756, affirmed *Delaware, Lackawanna & Western Railroad Co. v. Breckenridge*, 55 N. J. Eq. 593, 39 Atl. 1113 (1897).

[3] As bearing upon this question of jurisdiction in equity to settle disputed legal title at final hearing, I have examined all of the cases cited by Mr. Justice Dixon in *Hart v. Leonard*, under class 6, cases of destruction to the inheritance or "irreparable injury," and find that, with one exception (*Zinc Company v. Franklinite Company*, 13 N. J. Eq. [2 Beas.] 322, and 15 N. J. Eq. [2 McCart.] 418), every decision was rendered on an application relating to preliminary injunction, and these decisions, applied strictly as precedents, may undoubtedly be placed on the auxiliary jurisdiction for protection of property pending the establishment of the legal title. But in none of these preliminary injunction applications does the application seem to have been put specially on the ground of protection pending settlement of title at law, or upon any ground other than that relating to the legal title of the respective parties as a matter to be determined either upon the motion itself or upon final hearing in the court of equity. In four of the cases referred to, the Court of Chancery, after granting preliminary injunctions, settled on final hearing the disputed legal title (*Zinc Co. v. Franklinite Co.* [Chancellor Green, 1861] 13 N. J. Eq. [2 Beas.] 322, 850; *Johnston v. Hyde* [Chancellor Runyon, 1880] 32 N. J. Eq. [5 Stew.] 446; *Fulton v. Greacen* [Vice Chancellor Van Fleet, 1886] 44 N. J. Eq. [17 Stew.] 444, 15 Atl. 827; *Lord v. Carbon Iron Co.* [Vice Chancellor Van Fleet, 1886] 42 N. J. Eq. [15 Stew.] 157, 6 Atl. 812), and in two of these the Court of Errors and Appeals also established the legal title on appeal (*Zinc Co. v. Franklinite Co.* [1862] 15 N. J. Eq. [2 McCart.] 418; *Johnston v. Hyde* [1881] 33 N. J. Eq. [6 Stew.] 632). In the appellate court the *Zinc Co. Case*, however, was decided as one involving the equitable as well as legal title. 15 N. J. Eq. (2 McCart.) 436.

The jurisdiction of the court of equity in cases of irreparable injury, to establish at final hearing the legal title where the right to its establishment at law is not asserted by the answer, is confirmed by the earlier deci-

sions of the Court of Errors and Appeals (Holmes v. Jersey City [Court of Errors and Appeals, 1857] 12 N. J. Eq. [1 Beas.] 299), where the question of legal title, involving as it did a mere question of law (at page 310), was finally decided upon the application for a preliminary injunction which was made permanent, and the decree of the chancellor dissolving the injunction was reversed. In Morris Canal & Banking Co. v. Jersey City (Chancellor Williamson, 1859) 12 N. J. Eq. (1 Beas.) 253, irreparable damage was expressly relied on (at page 263) as an exception to the general rule that the court would not settle questions of legal title, and the failure of the defendant to assert in the answer an objection to the jurisdiction on this ground and coming to hearing on the merits was held to be a waiver of any objection to jurisdiction, following on this point Holmes v. Jersey City, supra. The chancellor established complainant's legal title on final hearing, and on the appeal the Court of Errors and Appeals (12 N. J. Eq. [1 Beas.] 547 [1859]) reversed the decree, and dismissed the bill, on the merits of the case, considering and settling the legal title. Chancellor Green, in Zinc Co. v. Franklinton Co., 13 N. J. Eq. (2 Beas.) 322, 350, after stating that the course most consistent with the practice and inclination of the court where an injunction (to protect against irreparable damage) was granted, was to have the right tried at law, held that on account of the peculiar circumstances of the case, the question of legal title should be decided at final hearing, and the chancellor and the Court of Errors and Appeals on appeal did settle the legal title, as well as the equitable title, which was also involved. These decisions of the Court of Errors and Appeals, earlier than Hart v. Leonard (a case not involving irreparable damage), seem to establish the rule that where the jurisdiction of the court to protect complainant's legal title is based on the ground of irreparable damage, and the defendant, without proper objection by its answer or otherwise, goes to hearing on the merits, any right to a settlement of title at law may be considered as waived, and the court has, as a matter of jurisdiction, the right to settle the title at final hearing, and on the question of exercising this right, instead of holding the case for settlement at law, will consider all the circumstances of the case. With these qualifications, the exception as stated in class 6 in Hart v. Leonard is applicable to the exercise of the jurisdiction on final hearing. In the later cases above referred to in its opinion (Imperial Realty Co. v. West Jersey Railroad Co.), the Court of Errors and Appeals, of its own motion and without regard to the waiver or consent of the parties in going to final hearing or other special circumstances in the cases, declined to exercise jurisdiction as at final hearing on appeal, and either dismissed the bill where the jurisdiction in equity had been

objected to, or held the cause for settlement of title at law where objection had not been made below. But in none of these cases was the prevention of irreparable damage the object of the suit, and therefore it should not be considered that any of these later decisions overruled, or was intended to overrule, the practice previously established in this class of cases. The view generally taken in other states is that the court of equity, having taken jurisdiction to protect against irreparable injury, has the right to do complete justice and settle the conflicting title. 1 Pom. Eq. Rem. § 506.

The application (which was made pursuant to the original suggestion of the court) should be denied. In view of the nature of the questions involved, which are purely matters of law, there can be no question, I think, that the ends of justice would be better sustained by an immediate settlement of the disputed questions here, and on appeal from the chancery decree, than by a delayed settlement through another action at law, with a final appeal to the same appellate court.

The application will therefore be denied and decree will be advised dismissing complainant's bill on the merits of the case.

(32 N. J. Eq. 662)

**PUBLIC SERVICE CORPORATION OF  
NEW JERSEY et al. v. TOWN OF  
WESTFIELD.**

(Court of Errors and Appeals of New Jersey.  
Jan. 29, 1914.)

Bill by the Public Service Corporation of New Jersey and others against the Town of Westfield. On appeal from a decree (80 N. J. Eq. 295, 84 Atl. 718; 82 N. J. Eq. 43, 91 Atl. 738), complainants appeal. Affirmed.

Frank Bergen, of Newark, for appellants.  
Paul Q. Oliver, of Westfield, for respondent.

PER CURIAM. The order appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Emery.

(33 N. J. Eq. 641)

**ROE v. MAYOR AND ALDERMEN OF  
JERSEY CITY.**

(Court of Errors and Appeals of New Jersey.  
Nov. 26, 1913.)

**TAXATION (§ 799\*)—TAX DEED—COLLATERAL  
ATTACK.**

A tax deed taken under the Martin act cannot be attacked collaterally, as by bill to remove cloud.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 302; Dec. Dig. § 799.\*]

Appeal from Court of Chancery.

Bill by Annie D. Roe against the Mayor and Aldermen of Jersey City. From the decree, advised by Charles J. Roe, advisory master, dismissing the bill, complainant appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The opinion of Charles J. Roe, advisory master, is as follows:

The bill in this case is filed for the purpose of removing a cloud on the title of complainant's land. The allegation is that the complainant bought the land in question in 1887 and is in peaceful possession of the same; that her title is clouded by three deeds made by the collector of Jersey City to Jersey City, and dated August 30, 1912, and recorded in the Hudson county register's office; that these deeds are based upon a pretended tax sale made in 1895, under an alleged adjusment made by commissioners under the Martin act, and she insists that the proceedings of these commissioners were irregular and void, there being no record of the appointment of the commissioners, of the application for the appointment of commissioners, no record of the sale, no proof of the surrender of the certificate.

The difficulty that I find in this case arises from the fact that the complainant, in 1906, filed a bill against the defendant in this case, alleging substantially the same facts as contained in the present bill, and praying that these proceedings may be declared null and void, and asking that, if any deed or deeds for the said land have been executed, the same might be decreed null and void and delivered up to be canceled, and that all other proceedings had or taken thereunder should be adjudged null and void, and that the defendants be restrained from taking any steps toward perfecting any supposed claim or title to said land and premises.

This case was heard in the Court of Chancery on pleadings and proof, and a decree made by the court dismissing the bill. This decree was affirmed by the Court of Errors and Appeals, and the opinion reported in 79 N. J. Eq. 645, 82 Atl. 873, that the reason given by the Court of Errors and Appeals for the dismissal of said bill was that the relief sought by the complainant was not one which the court of equity could grant; assuming it to be true that the proceedings which were attacked were invalid, her sole remedy was to apply for certiorari to the Supreme Court, and the fact that the complainant had waited so long before applying to the courts of law as to be barred from her relief by certiorari could not vest in the Court of Chancery the jurisdiction to grant her relief which she sought. The deeds which she now complains of as a cloud upon her title are the deeds delivered under that proceeding after the decree dismissing the bill for the complainant was entered.

This adjudication places the case before us squarely within the principles established in *Jersey City v. Lembeck*, 31 N. J. Eq. (4 Stew.) 255, which held that the act of 1870 to "quiet title" was not meant to be operative when a party in possession of lands has the means by the ordinary proceedings at law of testing the adverse claim that he wished to have settled.

That the complainant's mode of relief was by certiorari by which he can get adequate relief at law, and, in the language of the court, "if a party in possession of land can throw the hostile claim into a course of law, and thus get rid of a cloud overhanging his estate, why should he not do it? and what reason is there to say that this act was designed to help a party who was in no strait but of his own choosing?"

Under the principles enunciated by this decision the court of equity is without power to adjudicate on any of the questions leading up to the delivery of the deeds which are now complained of by the complainant as being clouds upon her title, unless it be that the court of equity should acquire a jurisdiction independent of these considerations.

In this case the application of this prin-

ciple is further emphasized by the provisions of the act under which the proceedings resulting in these deeds were had (Comp. Stat. p. 5213, § 312), where it is expressly enacted that: "The title shall not fail or be defeated by reason of any irregularity or formal defect in the procedure taken under this act, upon which the sale shall have been made or the title conveyed as aforesaid, or by reason of any illegality in fixing and adjusting the tax assessment and lien to enforce which said sale was made or in the proceeding for collecting the same."

In view of the fact that no attack has been made upon the deeds as such, but only upon the facts leading up to the making of the deeds, I fail to see any equitable grounds for invoking the aid of this court. In other words, there is no independent equitable relief sought other than the state of facts already adjudicated upon by the Court of Errors and Appeals, in which they decided that it was out of the power of a court of equity to give relief.

If the proceedings complained of had been decided by a court of law to be void and irregular, the deeds now complained of would have been nullities, and I think a court of equity could then have given relief by clearing the complainant's title of deeds that had been executed and recorded under such illegal proceedings, under the principle laid down in *Bogert v. City of Elizabeth*, 27 N. J. Eq. (12 C. E. Gr.) 569, but not until the proceedings which are now alleged to be illegal were adjudged to be so by a court of law.

The deeds of the defendant now complained of must be considered evidences of title as against the complainant for lack of jurisdiction in this court to adjudge upon the legality of the proceedings upon which they are found.

In view of these considerations, I shall advise a decree dismissing the bill.

Wilbur A. Helsley, of Newark, for appellant. James J. Murphy, of Jersey City, for respondents.

**PER CURIAM.** The decree under review will be affirmed. The case is controlled by *Walton v. American Baptist Publication Society*, 78 N. J. Eq. (8 Buch.) 263, 79 Atl. 435, *Walton v. Taylor*, 78 N. J. Eq. (8 Buch.) 266, 79 Atl. 437, and our earlier decision between the same parties, reported in 79 N. J. Eq. (9 Buch.), at page 645, 82 Atl., at page 873.

(82 N. J. Eq. 281)

**HUDSPETH et al. v. DENTON et al.**

(Court of Chancery of New Jersey. May 17, 1912.)

(Syllabus by the Court.)

**BANKS AND BANKING (§§ 40, 179\*)—TRANSFER OF STOCK—LOAN BY BANK—COLLATERAL SECURITY.**

In the month of April, 1900, defendant H. was owner of 100 shares of stock of complainant banking company, and defendant D. was owner of property covered by the mortgage hereinafter mentioned, and by an agreement between the parties then made, H. in form sold to D. said shares, and received from D. two promissory notes for \$12,000 each, with the understanding that, as collateral security for the payment of the indebtedness evidenced by said notes, D. would, amongst other things, mortgage said property to H., and subsequently, and in the month of July, 1900, by an agreement between D. and H., a note for \$24,000, made by de-



defendant S. to H., was given to him in place of said two \$12,000 notes, and subsequently, and in pursuance of the original agreement between D. and H., D. and wife made to H. a mortgage dated September 1, 1900, securing the payment of a bond of like date for \$12,000 payable on demand, the obligee and mortgagee being H. The note of S. was used by H. at the complainant bank for H.'s benefit, and during the time this original indebtedness existed, and so long as it was continued, by successive renewals of notes subsequently given the bank was entitled to recover on said mortgage as collateral security the whole, or such part thereof, as still remained unpaid to it, of the original indebtedness. Subsequently, and beginning in the month of August, 1901, D. availed himself of said stock and used the same as collateral security for moneys advanced to him by various banking institutions, and H. subsequently paid off said notes thus made by D. to the banking institutions where said stock was collateral, and regained possession of said collateral, and H. subsequently, and in the year 1905 by arrangement between himself and complainant bank, secured the return to himself of the S. notes to which said mortgage was collateral, and thereafter repledged the same to the said bank for whom the complainant is trustee in this behalf, and said bank is entitled to recover in the person of the trustee, upon said mortgage whatever sum of money, if any, there may be found due from D. to H., or now due to said bank on account of moneys received by D. upon promissory notes made by him and discounted by banking institutions with said stock as collateral and which note or notes have been paid off by H. with his own funds with the purpose of regaining possession of the stock, and for which sums so found to be due H., the said H. has not been repaid by D. The transaction between H. and D. in April, 1900, was not a sale of the stock then owned by H. to D., but was a mutual exchange of securities for the purpose of enabling each to borrow upon the securities of the other, thus transferring from one to the other, and results in finding indebtedness from one to the other to such an extent only as either of the parties availed himself of the securities of the other, to borrow money upon, without repaying the same or restoring the securities unincumbered. The question whether anything is due upon this mortgage and collectible by the complainant depends upon whether or not an accounting shall disclose any sum realized by D. by the use of H.'s stock, which sum was not repaid by D. to H., and which sum H. had to pay to the person from whom D. borrowed, so as to regain his (H.'s) stock. In a suit by H. as trustee, and the said bank for which he is alleged to be trustee, against D. and wife, S. and H., to foreclose said mortgage, the complainant is entitled to have the benefit of the mortgage in suit to the extent, if any, that it may be found, upon an accounting, that D. owed to H. money realized by him upon the stock of the complainant bank owned by the said H., and transferred and loaned by him to the said D., and that for the purpose of ascertaining the facts with respect thereto this matter should be referred to one of the masters of this court to take the said account and report the same.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 49, 51-54, 667-683; Dec. Dig. §§ 40, 179.\*]

Action by Robert S. Hudspeth as trustee and others against Henry M. Denton and others to foreclose a certain mortgage. On final hearing on pleadings and proof. Referred to a master for an accounting between defend-

ants Denton and Hogencamp. Decree affirmed by Court of Errors and Appeals, 91 Atl. 753.

Merritt Lane, of Jersey City, for complainants. Vredenburg, Wall & Carey, of Jersey City, for defendants.

GARRISON, V. C. This is an action by Robert S. Hudspeth, trustee, and the Second National Bank of Jersey City, for which he is alleged to be trustee, against Henry M. Denton and his wife, Robert L. Shaw, and William Hogencamp. It is a suit to foreclose a mortgage upon lands at Lakewood, N. J. The bond and mortgage in suit were executed by Denton (and wife) on the 1st day of September, 1900, the bond being payable on demand and being for \$12,000, the obligee and mortgagee being William Hogencamp.

Since it is conceded that this is not the ordinary case of an advance of money by the mortgagee to the mortgagor, it became necessary for the complainants to allege and prove facts which entitled them to enforce the payment of the bond and mortgage in suit.

Very briefly stated, they allege that the bond and mortgage in suit were pledged with the Second National Bank to secure the payment to it of an indebtedness of Robert L. Shaw, and that such indebtedness has never been paid, and that therefore they, the complainants, are entitled to enforce this collateral security to that debt.

Unfortunately, the circumstances are such that the court cannot make a concise finding of fact, but must, at some length, state the reasons which lead to the conclusions reached.

Henry M. Denton, one of the defendants, prior to the year 1900 and thereafter, was engaged in building operations in the city of New York. These operations were upon a much larger scale than the amount of capital possessed by him warranted. He interested William Hogencamp, who was, and for many years prior to the year 1900 had been, president of the Second National Bank of Jersey City. All the proofs in the case concerning the bank's method of doing business lead to the conclusion that Hogencamp practically did as he pleased in managing the bank. From the year 1900, down through all of the period that is material in this case, the dealings and relationships between Hogencamp, Denton, and the bank are so numerous, intricate, and confused that it is impossible for the parties themselves (and, of course, more so for the court or any third person) to define and explain them.

Beginning with the year 1900, Denton began receiving large sums of money through Hogencamp. Denton knew the bank in those transactions only inferentially, or secondarily. He dealt solely with Hogencamp; and, while it is undoubtedly the fact that in most instances Denton's notes were discounted by or loaned upon by the bank, in others money



was furnished by Hogencamp's borrowing from the bank and advancing the money to Denton.

Just what interest Hogencamp had at the commencement of the relationships between him and Denton in those large real estate operations of Denton it is impossible to determine. After awhile all proceeds thereof went to Hogencamp, Denton retaining therefrom only \$25 a week for his personal living expenses.

On the 2d of April, 1900, Denton, by a payment of something over \$57,000, discharged all of his indebtedness to the Second National Bank then due. Mr. Hogencamp at this time had in his physical possession the deed by which Denton had acquired title to the Lakewood property (subsequently mortgaged), and also a mortgage made by one Hanford to Denton for \$12,000 secured upon the "Rink Stable Property" in Jersey City. This last-named mortgage was upon an undivided one-half interest in said property which Hanford had owned. It hardly seems possible that these papers could have been in Hogencamp's possession for any other purpose than safe-keeping, although the parties may have thought that some equitable rights could be created in Hogencamp by his having physical possession of these papers. I should not refer to the matter were it not that in the testimony these papers were often adverted to.

On the 23d day of April, 1900, Denton gave to William Hogencamp two promissory notes, each for \$12,000, at three months each, drawn by Denton either to his own order or to Hogencamp's order. The testimony of the only two witnesses who are shown to have any knowledge concerning this transaction is absolutely contradictory each of the other. Hogencamp testifies that Denton was desirous of becoming a stockholder in the Second National Bank; that Hogencamp had large amounts of the stock of that bank; that upon the date in question he sold 100 shares of his stock at a valuation of \$240 per share to Denton for the gross sum of \$24,000, and that Denton thereupon and therefor gave to him, Hogencamp, in payment for the stock his two promissory notes of \$12,000 each. Hogencamp further testifies that upon that date he physically handed over to Denton the 100 shares of stock in question, and that Denton physically handed the same back to Hogencamp, to be held by him as collateral for the payment of the notes just mentioned. He further testifies that Denton then agreed to assign to him, Hogencamp, the Hanford mortgage upon the Rink Stable property in Jersey City, and also to make a mortgage upon the Lakewood property to Hogencamp, which two securities could then be held by Hogencamp as further collateral for the payment of the notes just mentioned.

Denton testifies that upon the date in question Hogencamp told him that he, Hogencamp, was unable to use the stock which he owned in the Second National Bank as col-

lateral for loans obtained from that bank, and that if Denton would allow Hogencamp to apparently sell to him 100 shares of the stock of the Second National Bank for the apparent consideration of \$24,000, and should give his notes to Hogencamp for that sum, and would give to Hogencamp as security for the payment of the notes the Hanford mortgage upon his Lakewood property, Hogencamp would be able thereby to obtain money upon all of these securities; that is, through Denton's using the stock as collateral to Denton's notes elsewhere, money could be obtained therefrom, while Hogencamp could use Denton's notes with the mortgages as security in the Second National Bank, and in this way money could be obtained on loans on all of these securities as collateral. Denton absolutely denies that any stock of the bank was then shown him, let alone passed to him and passed back by him to Hogencamp.

Since it will be necessary, in the more or less chronological statement which I purpose making, to refer, in their proper order, to other facts bearing upon this matter, I shall not dilate thereon at this point.

On the same day on which Hogencamp procured from Denton the two \$12,000 promissory notes above referred to, Denton, through Hogencamp, secured \$18,000 from the Second National Bank upon a note. On the 23d day of July, 1900 (which it will be observed is just three months after the date of the Denton notes), Robert L. Shaw, who is the brother-in-law of Denton, and who previously had been engaged in the livery stable business with Denton, and who was a depositor in the Second National Bank, gave to William Hogencamp his note, payable on demand, for the sum of \$24,000. It is conceded by every one in the case that Shaw obtained no money whatever upon this note, and no benefit whatever from having given it, and that it was solely, to the knowledge of both Hogencamp and Denton, an accommodation by Shaw.

Hogencamp says that at the time in question Denton's affairs with the Second National Bank were in such condition that he could not use Denton's two \$12,000 notes to borrow money on from that bank, and that therefore he requested Denton to obtain, in substitution of his two \$12,000 notes, a note from Shaw for \$24,000 upon which Hogencamp would be able to borrow. This is not seriously disputed by Denton. Shaw does not appear at all, and Denton does not have any clear recollection of what happened at the time the Shaw note of \$24,000 was given to Hogencamp, but, as before stated, it is unquestioned that Hogencamp got it from Shaw without consideration and solely because of the relations between Denton and Hogencamp, and to be used for their benefit or the benefit of one of them.

On the 23d day of July, 1900, Hogencamp procured the Second National Bank to loan on the Shaw \$24,000 note the sum of \$24,000.

He says that upon that date he, Hogencamp, was responsible to the bank upon notes of one Littell for the sum of \$25,056.25, and that with the money procured upon the Shaw note, and \$1,056.25 of other money which he furnished, he paid off to the bank the Littell notes.

Hogencamp further says that at the time of procuring the loan from the bank upon the Shaw note he gave to the bank as collateral thereto the 100 shares of stock of the Second National Bank, which he says he had sold to Denton on the 23d of April, 1900, and which he says Denton left with him as collateral for the payment of the purchase price to him. This alleged transfer of collateral was entirely a mental operation, there not being any physical thing done with respect thereto, the stock remaining as before in the possession of Hogencamp. He also says that the mortgage on Denton's Lakewood property and the Hanford mortgage, which was owned by Denton, were also to be held by him as collateral to the Shaw note. It will be recalled that the mortgage on the Lakewood property was not yet in existence, and that the Hanford mortgage, which ran to Denton, had not yet been assigned to Hogencamp.

On the 1st of September, 1900, Denton made to Hogencamp the mortgage on the Lakewood property for \$12,000. (This is the mortgage in suit.) And also he made a written assignment upon that date to Hogencamp of the Hanford mortgage. On the 12th day of August, 1901, Hogencamp transferred on the books of the Second National Bank three certificates of stock to Henry M. Denton, 347-A for 40 shares, 348-A for 50 shares, and 349-A for 10 shares. Just before this time Denton was being very severely pressed by a New York lawyer named McKelvey, who represented the New York & Batavia Wood Working Company, a judgment creditor in New York of Denton's. Application was made to Hogencamp to advance to Denton the two thousand odd dollars which McKelvey then demanded as consideration for refraining from pressing Denton upon the balance of the judgment at that time. Hogencamp was not in a position to respond with cash at that time, but offered to loan Denton 50 shares of stock in the Second National Bank which Denton could use to raise money upon to satisfy McKelvey.

On the 15th day of August, 1901, Hogencamp gave to Denton and his New York lawyer O'Callaghan certificate No. 348-A for 50 shares. It will be observed that this is one of the certificates which were issued to Denton under the transfer from Hogencamp on the 12th of August, 1901. Denton took the certificate for 50 shares and his note for \$6,000 to McKelvey, who had the same discounted at the Chase National Bank, and retained the amount then agreed to be paid to him, namely, two thousand and odd dollars, gave to Denton the balance, some three thousand and odd dollars, which was brought back

by Denton to Hogencamp, and was by Hogencamp deposited in an account in the Second National Bank which he carried under the title of William Hogencamp, trustee.

At the same time Hogencamp demanded and received from Denton a mortgage for \$7,500 upon a property which Denton owned in New York, which mortgage the testimony shows was by Hogencamp subsequently assigned to some third person, and presumably he received a consideration equivalent to the amount of the mortgage. This mortgage the testimony shows was given to him to secure him for having loaned to Denton the 50 shares of stock of the Second National Bank.

On the 20th day of August, 1901, Hogencamp wrote a letter upon the letter head of the Second National Bank, addressed to himself as president, requesting him to deliver to Henry M. Denton the 100 shares of stock of the Second National Bank, and cause the same to be signed by Robert L. Shaw. On the 22d day of August, 1901, Hogencamp caused Denton's mortgage on the Lakewood property (the mortgage in suit) and the assignment of the Hanford mortgage to him to be recorded.

On the 23d day of August, 1901, Hogencamp gave to Denton the two certificates heretofore adverted to, one for 40 and one for 10 shares, of stock of the Second National Bank, which Denton then took to the Commercial Trust Company in Jersey City and pledged as collateral to Denton's note for \$6,000, which \$6,000 Denton brought back to Hogencamp, who deposited it in the account heretofore referred to, entitled, "William Hogencamp, trustee."

On the 16th day of November, 1901, Hogencamp wrote two letters, one of which he signed himself, and the other of which he caused Mr. Hasking, the cashier of the Second National Bank, to sign. Just before this time Denton's note in the Chase National Bank of New York, which he had given to McKelvey, and with which the 50 shares of stock which Hogencamp gave to Denton on the 15th day of August, 1901, were pledged as collateral, became due and was unpaid, and McKelvey had taken the note and collateral out of the bank. McKelvey was threatening to hold the stock to satisfy not only the \$6,000 represented by the note with which it had been pledged as collateral, but also for a balance due upon the judgment against Denton which his client, the wood working company, held.

At the date before mentioned, November, 16, 1901, Hogencamp wrote the letters before mentioned, one of which was to Honeck, an officer of the wood working company, and in that letter Hogencamp informed him that he had transferred 50 shares to Denton on August 12, 1901, by certificate 348-A, and that before that time Denton was not a stockholder in the bank. In the other letter, which was addressed to McKelvey, the attorney for the wood working company, Hogencamp tells

him that he had loaned, on August 12, 1901, 50 shares to Denton to borrow on, and that now Hogencamp has to redeem it. He also says in that letter that Denton never owned the stock, that it was "my [Hogencamp's] property."

The subsequent happenings, with respect to this matter, were these: On May 1, 1902, Denton drew his check on the Second National Bank to John J. McKelvey for \$7,255, which was the amount necessary to satisfy McKelvey for the note, interest, etc., and to release the 50 shares of stock which he held; and on the same date Denton drew his check to the Commercial Trust Company for \$6,067, which was the amount necessary to satisfy that institution for the note of Denton's that it held, for which he also held 50 shares of stock as collateral, and Denton thereupon received from each of these parties the respective 50 shares which, on the next day, May 2, 1902, he took to the Hudson Trust Company in Hoboken and pledged to it for a loan of \$13,500, which he thereupon procured upon his note, and this money was brought back and deposited in his account to make good the two checks just above mentioned, one to the Commercial Trust Company and one to McKelvey.

On the 24th day of July, 1902, Hogencamp procured the Second National Bank to loan \$25,000 upon two notes of Robert L. Shaw, made to the order of himself and by him indorsed, one for \$12,000, dated June 30, 1902, and one for \$13,000 dated July 23, or 24, 1902. One thousand dollars of this was a personal matter of Shaw's, and is not in any way involved in this suit. Shaw at this time gave a mortgage to Hogencamp upon the Rink Stable property before mentioned. He and Hanford had owned this property, and Hanford had mortgaged his undivided one-half to Denton, who had assigned the mortgage on September 1, 1901, to Hogencamp. Shaw subsequently purchased the whole property, and this last-named mortgage of his for \$13,000 to Hogencamp was upon the whole property. This mortgage was the subject-matter of the suit of Leonard Richards v. Robert L. Shaw, which is so often referred to in the trial of the suit at bar.

By checks which Hogencamp caused Shaw to sign \$24,000 of the money advanced by the bank on the \$12,000 and \$13,000 Shaw notes aforesaid, was paid back to the bank to take up the \$24,000 note of Shaw therefore loaned on by the bank, dated July 23, 1900. No explanation is made by any one as to why these two Shaw notes bore different dates; the \$12,000 one being dated June 30, 1902, and the \$13,000 one being dated July 23, or 24, 1902.

In the latter part of the year 1904 the bank examiners of the United States government were busied with the affairs of the Second National Bank. They objected to a large number of loans which appeared in

the demand loan account and which, for one reason or another, Hogencamp, the president of the bank, was charged with the responsibility for. Upon the demand of the bank examiners many of these items were taken out of the demand loan account and were carried to an account called "Suspended Debt," for which account Hogencamp was by the bank, in one way or another, held responsible. I cannot determine from the testimony whether the claim was that he was legally liable for all of these various items, or whether, by reason of his conduct as president of the bank, he was charged with responsibility concerning them, and in that way was looked to as responsible. However, this is really immaterial, because he seems to have assumed the responsibility concerning them.

On the 7th day of September, 1905, Hogencamp sold for something over \$125,000 all of the stock which he held in the Second National Bank, and incidentally he sold the 100 shares which he says belonged to Denton. On that date, September 7, 1905, he paid to the credit of this suspended debt account a large sum of money, something over \$38,000. He testifies that this was for other items than the Shaw indebtedness, and that after this payment he still was responsible to the suspended debt account for \$35,000, which he says was made up of the two Shaw notes, aggregating \$25,000 and \$10,000, remaining due upon an indebtedness in that account of Pratt & Wellman.

With respect to the sale on the 7th of September, 1905, of the stock which Hogencamp testifies that he had sold to Denton, Hogencamp says that he sold this stock for \$19,000; that from this sum (the \$19,000) he deducted \$10,000 which he had contributed to pay Denton's note at the Hudson Trust Company at the time that Denton's \$13,000 note there was taken up, and some other items due him by Denton, leaving a balance due Denton of \$7,652.80, which he credited upon a demand note dated July 19, 1901, made by Denton to Hogencamp for \$13,000, with interest. Hogencamp admits that he did not communicate with Denton concerning the sale or the disposition of the proceeds, and that Denton had no knowledge concerning them. Hogencamp claims the right to thus deal with the stock because he asserts that when the loan was paid off at the Hudson Trust Company, and the 100 shares was received by Denton, he, Hogencamp, had contributed the \$10,000 just referred to to be used as part of that payment, and was handed the stock by Denton, to be held by him as security for the repayment thereof.

The bank continued to press Hogencamp to take up and pay off the balance for which he was responsible of the suspended debt account, which, as before stated, amounted to \$35,000, and which Hogencamp says was made up of the two Shaw notes, aggregating \$25,000, and an item of Pratt & Wellman

amounting to \$10,000. For the purpose of complying with the Bank's demand in this respect Hogenkamp arranged with Dwight S. Harding, a citizen of New York, to obtain the \$35,000. His understanding with Mr. Harding was as follows: Hogenkamp was to give his note for \$35,000 to Mr. Harding, and was to give to Harding as security that the note would be paid the following things: A mortgage upon Hogenkamp's property at Deal, N. J., for \$35,000, a mortgage upon Hogenkamp's residence at Paterson, N. J., for \$10,000, and after the \$35,000 had been paid to the bank and they had given up the two Shaw notes and the Shaw mortgage for \$13,000 and the Denton Lakewood mortgage (the one in suit) for \$12,000, all of those were to be pledged with Mr. Harding for the same purpose.

For some undisclosed reason the transaction with Harding fell through; but the undisputed testimony is (and the only testimony on the point) that the bank (Hogenkamp being no longer connected in any way with the bank) offered to take Harding's place and do exactly what would have been done had Harding carried out the transaction, and that this was done. As a result, what then happened was that Hogenkamp gave his note to the bank for \$35,000, and they gave credit to the suspended debt account for \$35,000. This was done on the 24th day of March, 1906. Since Hogenkamp had already made the mortgages to Harding, they were, by appropriate instruments, assigned by Harding to the bank or its trustee, Hudspeth.

After this transaction, therefore, the situation was that the bank held the obligation of Hogenkamp for \$35,000, and as security therefor they held a mortgage from Hogenkamp to Harding, assigned to Hudspeth, trustee, for \$35,000 on Hogenkamp's Deal property, and a mortgage similarly made and assigned for \$10,000 upon Hogenkamp's Paterson property, and they also held the Shaw notes and the Shaw mortgage for \$13,000 and the Denton \$12,000 mortgage on the Lakewood property, the one in suit. The last-named securities were, of course, what can be termed a "repledge"; that is to say, they were not put up by Hogenkamp with the bank at the time that he got the \$35,000 credit, which went to the suspended debt account, but were put up by him with the bank after that period. In other words, the transaction was this: Hogenkamp, being responsible to the bank, or being held by the bank to be responsible to it, for the \$35,000 owed to the suspended debt account, the items of which were the two Shaw notes of \$12,000 and \$13,000, aggregating \$25,000, and the \$10,000 balance of the Pratt & Wellman note, the bank obtains from Hogenkamp his note for \$35,000, and credits the suspended debt account with that sum on account of "Bills Discounted," the "Bills Discounted" unquestionably being the note

for \$35,000 just mentioned. The bank received at that time, as security for the payment of the \$35,000, Hogenkamp's note, the \$35,000 Deal mortgage, and the \$10,000 Paterson mortgage. The \$35,000 was credited to the suspended debt account for the purpose of taking up and out of that account the remaining items therein for which Hogenkamp was held responsible, namely the Shaw notes aggregating \$25,000 and the Pratt & Wellman \$10,000. Afterwards Hogenkamp repledged these notes, and the collateral which had been held for their payment, namely, the Shaw mortgage and the Denton mortgage on the Lakewood property, to the bank as additional security.

It would be absolutely impossible, within the limits of any permissible expression of the court's finding, to do more than advert generally to the great mass of testimony concerning the personal dealings between Denton, Hogenkamp, and the bank from the year 1900, when we are first concerned with them, down to 1906, when they practically ceased. For a period of ten days witnesses have been giving evidence concerning these matters and the items are on hundreds of pages of books, checks, contracts and other instruments of proof.

Generally speaking, the following is a résumé of the proofs: Beginning as early as 1900, some of the rents from Denton's New York property reached Hogenkamp, and after a period beginning in 1901 all of the proceeds of Denton's New York property reached Hogenkamp; and in addition to such proceeds, which consisted not only of rents but the products of sales of the property, Hogenkamp had made to him numerous mortgages upon these properties, and in many instances received the moneys upon such mortgages. Down to December, 1912, Denton had a personal account in the Second National Bank. William Hogenkamp, throughout the entire time involved, had a personal account; and, in addition thereto, had three accounts. "William Hogenkamp, Trustee," began on the 14th day of November, 1901, and the last item is in August of 1902. Through this account there passed something in excess of \$68,000. "William Hogenkamp, Attorney," began on the 20th of January, 1903, and the last item is January 4, 1904. Through this account there passed more than \$26,000. "William Hogenkamp, Rent," began November 20, 1903, and the last item is January 5, 1906. Through this account there passed more than \$126,000.

William Hogenkamp, with the designation to determine out of which account it should be taken, constantly drew checks against each of these three last-named accounts; and in many instances, at a time when Denton had no personal account whatever in the bank, he, Denton, drew checks upon the Second National Bank, which Hogenkamp caus-

ed to be cashed out of one or the other of these three accounts.

It is practically undisputed that, beginning about 1901, all Denton's real estate speculations in New York were carried on jointly by Hogencamp and Denton; whether there was to be any joint participation in profits and losses does not appear, and does not have to be decided.

It does appear that Hogencamp personally participated in directing what should be done concerning these properties, to whom and for what price they should be sold, and that the purchase price coming to Denton after payment of incumbrances in each instance passed to Hogencamp, and in addition there passed to Hogencamp the money represented in numerous mortgages upon the properties which Denton was acquiring and was selling in the city of New York. In addition to this, loans were made from the bank to Hogencamp and to Denton, the proceeds of which were used in these New York operations; and, beginning some time, I think, in 1903, Denton took out of the proceeds of his New York speculations only \$25 a week for living expenses, and all the balance went to Hogencamp, and Hogencamp seemed to have assumed the personal direction, if not responsibility, of finishing the uncompleted buildings then in process of erection upon Denton's property, and of selling the properties when completely constructed.

Hogencamp contends, with respect to all of these transactions and to the entire course of dealings between him and Denton, that he passed through one of these three accounts, or through his own and Denton's account, all moneys which came to his hands in such a way that Denton got the benefit of them. He did not attempt to demonstrate this, and it only could be demonstrated after an accounting which would require a vast amount of time to take.

Denton is practically ignorant of the result of his dealings with Hogencamp and the bank, and is not shown to have any records, books, or the like which would enable him to determine how he stood. Hogencamp kept no books of any use, and it is only by the most laborious tracing of items through the bank's books that any result can be reached concerning them.

If, in any aspect of the case, the right of the complainants to foreclose this mortgage depends upon a finding that Denton is indebted to Hogencamp, there will have to be a reference to a master to take proofs as to the accounting and to report a conclusion as to the result of such proofs. To avoid any such necessity as that last suggested, the complainants put forward the first of their two theories. That theory may be fairly set forth as follows: Denton, on the 23d of April, 1900, gave to Hogencamp his notes for \$24,000. We may leave aside, in discussing this present theory, whether the transaction with respect to the stock upon that occasion was a

bona fide sale, or was merely an illusory proceeding, because, on the 23d of July, 1900, it is admitted that Shaw gave his note to Hogencamp for \$24,000, as an accommodation to take the place of the two Denton notes, aggregating \$24,000 previously given. The bank having loaned \$24,000 on the Shaw note, dated July 23, 1900, and the Denton mortgage having been agreed to be given as collateral for this indebtedness (although not actually executed until September 1, 1900), was, when executed and delivered, held as collateral for this loan by the bank on the Shaw note. The bank still holds the Shaw note and the collateral, to wit, the mortgage in suit; and, since the Shaw note has not been paid, the bank has the right to foreclose the Denton mortgage which was held as collateral to it. I think this is a fair statement of the position taken by the counsel for the complainants with respect to this first theory.

So far as any one can express himself with assurance in a case that is so involved as this one, I am prepared, in considering this theory, to accede to the conclusion if the premises upon which it is rested are correct in fact. I do not find, however, that the precedent factors exist to justify the conclusion. It must be recalled in the first instance that there is no documentary or other proof of any description, excepting Hogencamp's testimony, that the Denton mortgage of \$12,000, dated September 1, 1900, was to be held by the bank, or by any one. At the time that the mortgage was given by Denton, on the 1st of September, 1900, Shaw's note of \$24,000 was in the bank, having been loaned upon by the bank on the 23d day of July, 1900, the day of its date. At the same time that Denton gave the mortgage upon his Lakewood property he assigned to Hogencamp the \$12,000 mortgage which had been made by Hanford to Denton upon the undivided interest of Hanford in the Rink Stable property in Jersey City. There is nothing on the books of the bank nor elsewhere to show that these titles thus vested in Hogencamp (one to the mortgage on Denton's Lakewood property, and one to the mortgage which Denton had of Hanford's) were as collateral to any transactions whatever with the bank, or, in fact, with Hogencamp. The books of the bank with respect to other transactions do show mortgages that were held by the bank and upon which money had been loaned—the money, presumably, of course, was loaned upon notes to which the mortgages were security.

Passing this question, however, and assuming in favor of the complainants that their contention is correct that these securities when created were intended to be, and, after being created actually were, held by the bank as collateral to the Shaw notes, we next come to the transaction of July 24, 1902, when the Shaw note of \$24,000 was taken out of the bank.

There is no testimony of any value, if there is any at all, which shows that at that time

there was any agreement between the parties and the bank that the mortgages of Hanford to Denton assigned to Hogencamp, and of Denton directly to Hogencamp (the latter on the Lakewood property) were to be collateral to the two notes which Shaw then gave, one of \$12,000 and one of \$13,000. It may very well be argued on behalf of Denton that, assuming the previous point which has just been dealt with to be decided against him, and that the mortgage on his Lakewood property was given by him to Hogencamp in order that he might turn it over to the bank as security for the \$24,000 Shaw note of July 23, 1900, it does not at all follow that, when that \$24,000 note was taken up, as it was, and new notes were secured from Shaw, the collateral which was obtained for the loan of July 23, 1900, should still be held for the new loans.

Passing this, in turn, and deciding, for the purpose of the further discussion of the point, that the result of the transaction of July 24, 1902, when the bank loaned \$25,000 upon Shaw's notes of \$12,000 and \$13,000, respectively, was to vest them still with the Denton mortgage as security for the payment of those loans, there is no evidence that any agreement of the parties split up the collateral with respect to any part of the indebtedness that day arising; that is to say, on that day, July 24, 1902, two notes of Shaw were loaned upon by the bank. The item appears in the bank's books as one transaction; that is, on that day, in the demand loan account, the only place where the item appears, Shaw is charged with \$25,000. This, the proofs show, was upon two notes of Shaw's, one dated June 30, 1902, and the other dated July 23, or 24, 1902; that the first note was for \$12,000 and the latter for \$13,000. There is not the slightest evidence to show that the parties then, or at any other time, agreed that the Denton mortgage of \$12,000 upon the Lakewood property was to be held as collateral for any part of this indebtedness. If the complainants obtain the benefit of all their debatable points so far considered, the utmost that they could claim would be that Denton's \$12,000 mortgage was collateral for the entire indebtedness and not for any specific part of it.

This is important in one aspect, at least, of the case, because if the entire indebtedness were reduced, or if their other collateral, the right of the holder of the indebtedness against the owner of the collateral would be affected by those incidents, not to the extent of relieving the collateral holder from paying what might be due upon the entire indebtedness or having his collateral sold for that purpose, but because such circumstances would entitle the owner of the collateral to the use for his own benefit of whatever had been paid and whatever had been received by way of other collateral if and when he was called upon to pay the balance.

Assuming, however, that it is further de-

cided in favor of the complainants that the circumstance just adverted to does not prevent them from asserting their right to foreclose the Denton mortgage in suit if they can establish the validity and nonpayment of the Shaw note of \$12,000, we next come to the most important and determinative feature:

Here, it should be recalled and firmly fixed in the memory, that it is admitted by all concerned that Shaw was an accommodation maker, and that his original \$24,000 note, and his two subsequent notes, of \$12,000 and \$13,000, respectively (leaving out of account \$1,000 represented by the last two notes, with which we are not at all concerned in this case), were executed by him solely to accommodate Denton and Hogencamp, and that as to each of the last two-named persons no obligation arose by reason of the execution by Shaw of the notes in question; and no liability to those two persons arose as against Shaw by reason of the notes signed by Shaw. It is only when these notes, or any of them, passed into the hands of bona fide holders for value that Shaw can be held liable. Of course, if Shaw cannot be held liable upon his notes, or, in the particular case before this court, on his \$12,000 note to which the Denton mortgage is asserted to be collateral, then the collateral may not be utilized by the holder. That is to say, the only right which the complainants here can assert as against Denton must rest upon their right to assert a valid claim against Shaw upon his \$12,000 note; they cannot foreclose the \$12,000 mortgage upon the Denton Lakewood property unless they prove that the note of Shaw of \$12,000, to which this mortgage was collateral, was valid and enforceable against Shaw.

In my view the proofs do not establish this last-mentioned contention. In my view the proofs show that on March 24, 1906, Hogencamp paid off to the Second National Bank the Shaw notes and became vested with title to such notes and to the collateral which had been held by the bank for their payment. It will be recalled that in the previous portion of this opinion I have briefly referred to the testimony of Hogencamp concerning the transaction with Harding and the bank at the time that he got the loan of \$35,000 from the bank on March 24, 1906, which was credited to the suspended debt account to take out of it the Shaw notes and the remaining \$10,000 of the Pratt & Wellman note. Hogencamp's own oral testimony is to the effect that I have just referred to, and the entries in the books of the bank and the other documentary proofs bear him out.

From all of this the following undisputed facts appear: In December of 1904 various items from "Demand Loans" were ordered to be taken therefrom and charged against an account entitled "Suspended Debt." All of these items were those which the bank then held Hogencamp either personally or indirectly responsible for. Among these items were the Shaw notes, aggregating \$25,000. One

of such notes, namely, the one dated June 30, 1902, is the note which the bank loaned upon on the 24th day of July, 1902, and to which the Denton mortgage in suit is said by Hogencamp to have been collateral. Subsequently, and on the 7th of September, 1905, Hogencamp paid off on the suspended debt account something over \$38,000. In the trial of *Richards v. Shaw* he testified, as is shown in the present suit, that by that payment then made he took up the Shaw notes, and, of course, the collateral that was deposited therewith, among which was the Denton mortgage in suit. In the present suit he denies the truthfulness of that testimony previously given, and asserts that he was mistaken. There is nothing from the books of the bank by which it can be determined what particular items of the suspended debt account were taken up and out of that account by the payment by Hogencamp on September 7, 1905, of the thirty-eight odd thousand dollars.

Assuming, however, in favor of the complainants, that they may have the benefit of Hogencamp's present testimony, which is in direct contradiction of his testimony in the previous case, we next come to the transactions of March, 1906. According to Hogencamp, at that time he was being held responsible by the bank for \$35,000 balance due on the suspended debt account. That \$35,000, he says, was made up of the \$25,000 of Shaw notes and the \$10,000 balance of the Pratt & Wellman notes. At that time he arranged with Dwight S. Harding to obtain a loan from Mr. Harding of \$35,000, for which he was to give Mr. Harding his note for that amount. He was to secure the payment of that note by a mortgage upon his Deal property for \$35,000, a mortgage on his property for \$10,000, and after the Shaw notes were by the payment of the \$35,000 taken out of the suspended debt account and delivered by the bank to Hogencamp, he was to transfer those with their attendant collateral (among which it will be remembered is the Denton mortgage in suit) to Harding.

When Harding refused to advance the money the bank undertook to take Harding's place and to do just what Harding had agreed to do. This is Hogencamp's own testimony concerning this transaction, and is uncontradicted and is borne out by what next happened. What next happened was the giving by Hogencamp to the bank of his note for \$35,000, the crediting of this note under the head of "Bills Discounted" to the suspended debt account, the transfer to the bank by Hogencamp, through Harding, of the \$35,000 mortgage on the Hogencamp Deal property and the \$10,000 mortgage on Hogencamp's property, and the leaving with the bank by Hogencamp of the Shaw notes and the attendant collateral which his payment of \$35,000 just mentioned had taken out of the suspended debt account.

It will be observed in analyzing this transaction that so soon as the bank received Hogencamp's \$35,000 note and passed the credit by bills discounted of \$35,000 to the suspended debt account, Hogencamp became thereby vested with title to the Shaw notes and the attendant collateral, among which was the Denton mortgage in question. By then leaving those with the bank as additional collateral to his \$35,000 note, the situation just alluded is not altered. At the instant of time when Hogencamp became vested with title to the Shaw notes and the Denton mortgage, those notes and that mortgage were unenforceable in his hands. This, I do not think, can be seriously, if at all, disputed. As respects Hogencamp, Shaw was an accommodation maker of the note in question, that is, the \$12,000 note. Denton's mortgage, Hogencamp says, was collateral to this note. The only consideration which Hogencamp or any one else can attribute to the Denton mortgage arises out of the Shaw note. The Shaw note, as against Shaw, and as a consideration for the Denton mortgage, can therefore only be good in the hands of an innocent third person who had advanced money thereon; when Hogencamp got back the title to the Shaw note for \$12,000 and the attendant collateral, the Denton mortgage, he could not, of course, enforce any liability as against Shaw or any rights with respect to the mortgage that was collateral to the Shaw notes. If when he so got them back, that was the fact, he could not, by leaving them with the bank, create any greater right in the bank than he had, because it will be observed that no new consideration moved from the bank on the note in question, that is, the Shaw note. By the transactions upon that date, March 24, 1906, which were designed, as Hogencamp says, to put a live asset in the bank in place of the moribund Shaw asset, the bank loaned money to Hogencamp upon his \$35,000 note secured by his mortgages on his Deal and Paterson properties; and the only consideration which passed from the bank to Hogencamp was the release to Hogencamp of these items out of the suspended debt account. There was no other possible reason for the transaction of March 24, 1906, than to take out of the suspended debt account the \$35,000 of balance which remained there.

If we were to attempt to follow the complainants in their argument made to review these apparent facts, we are utterly unable to do so. The complainants attempt to waive aside all effect of this transaction of March 24, 1906, and Hogencamp's testimony with respect to the antecedent facts, but do not, in my judgment, effectively do so, and do not, in the attempt to do so, explain away the effect of the testimony and of each of the pieces of documentary proof.

The note of \$35,000 which Hogencamp then gave to the bank admittedly was not



used for any other purpose than to be discounted in favor of the suspended debt account. That is, the bank at that time held Hogenkamp on his \$35,000 note, and, instead of giving him the proceeds (that is, the consideration which proceeded from the bank for its receipt of the note), passed those proceeds to the credit of the suspended debt account, for which account it had been holding Hogenkamp responsible. The instant that they did this they carried out the purpose of the transaction, which was to hold Hogenkamp and take out of the suspended debt account the moribund items which had theretofore been in it. The instant that these items were thus taken out they passed to Hogenkamp, and the instant they passed to Hogenkamp they became invalid as against parties to this suit. That is, the note became invalid as against Shaw. It was an accommodation note; Hogenkamp was the accommodation receiver of it, and certainly could not enforce it against the accommodation maker. With the note, as has been previously pointed out, of course, the right to recover on the collateral that had been deposited with it also ceased. If this is not so, then, of course, the bank could not hold Hogenkamp upon the \$35,000; and it is inconceivable that they went through all of this transaction for no purpose; that they took his note, and, by the item of bill discounted, passed it to the credit of suspended debt account and took from him mortgages aggregating \$45,000, all for no consideration—all, therefore, in its, the bank's, hands invalid. It is quite obvious from all of the testimony that they did not do any such futile thing as this. They took from Hogenkamp a valid security secured by collateral of a large amount for a valid purpose and consideration. That valid consideration was the taking out of the suspended debt account of the Shaw notes and other items for which the bank, with Hogenkamp's assent, was holding Hogenkamp liable.

When they did, by this transaction, thus take those items out of that account, and those notes (the Shaw notes and the Pratt & Wellman notes) passed to Hogenkamp, they became, as has been heretofore pointed out, invalid in Hogenkamp's hands so far as Shaw was concerned on his \$12,000 note; and Denton's mortgage, which was collateral thereto, likewise became invalid to Hogenkamp.

By what I have termed his "repledge" of these notes to the bank, the bank cannot, certainly in my view of the facts and of the law, acquire any right to hold Shaw or Denton—Shaw on his note, or Denton on his mortgage. The only aspect of the case in which the bank could successfully assert any such right would be if they had advanced any new consideration at the time of reacquiring title to the note and its attendant collateral. They did not, as has just been pointed out, do any such thing. The consideration which they

advanced was the giving up of this very note to Hogenkamp in consideration of which Hogenkamp gave them his note for \$35,000 and the \$45,000 of attendant collateral. The repledging with or the retaining by the bank of the Shaw notes was therefore ineffective as vesting them with any valid right as against Shaw on the note or Denton on the collateral.

There is evidence in the case strongly confirmatory of the finding of facts just set forth, which unfortunately is somewhat complicated and requires a detailed explanation. The note of \$12,000 of Shaw which was originally loaned upon on the 24th day of July, 1902, was dated June 30, 1902. Why it did not bear the same date as the \$13,000 note nobody explains. That note was introduced in evidence in the case of *Richards v. Shaw*, and was inspected by me. It has since been mislaid or lost. Upon the back of the \$13,000 note, which, it will be recalled, was loaned upon by the bank on the same date, there now appears in Hogenkamp's handwriting an indorsement as follows: "Pay to William Hogenkamp or order"—under which Shaw had written his signature. Then, in Hogenkamp's handwriting, "Without recourse, William Hogenkamp." Hogenkamp in this suit testifies that he placed this writing upon that note of \$13,000 to relieve himself of the responsibility as an indorser. He testifies in this suit that he does not recollect whether he made the same indorsement on the \$12,000 note. There is no conceivable reason why he should not have made the same indorsement upon both notes, since the whole transaction was one and undivided, and whatever he did with respect to one, he, undoubtedly, in my judgment, did with respect to the other. Since he, or the parties who claim through him, are chargeable with the custody, and therefore with the consequences of the loss of this note, it is proper to assume, as against them, that upon the back of the \$12,000 note was the same indorsement by Hogenkamp.

In the case of *Richards v. Shaw*, as is shown by the testimony in this present case, Hogenkamp testified that he made the indorsement quoted above on that \$13,000 note when he took the note up from the bank, which he then said was in 1905. It will therefore be assumed that he did the same thing at the same time with respect to the \$12,000 note. He now testifies in this suit that he was mistaken when he testified in that suit that he had taken the notes up. I find, as above set forth, that he was not mistaken; that he did take the notes up, if not in 1905, then in 1906; and I have no doubt, from the testimony to which what I have just alluded is additional confirmation, that at the time that he put these notes back in the bank—repledged them, as I have termed it—he wrote upon the back of each of them this indorsement.

There was no other occasion when he should have done any such thing. Up to the time that the notes were put into the sus-



pended debt account they were always in the custody of the bank; Hogencamp had nothing whatever to do with them, was not legally held responsible with respect to them, and there would have been no occasion for him to have put any writing whatever upon them. After he made the arrangement with the bank which he first attempted to make with Harding by which the notes passed directly to him and became his property, he having paid to the bank the \$35,000 to take them up, and it was understood that he was to repledge them with the bank, there was opportunity and occasion for him to make them payable to his order and to indorse them "without recourse." That he did this appears from the remaining note which has not been lost, by the inference which I think should necessarily be made in this case with respect to the note that has been lost, and here is strong evidence in favor of the finding that he did take these notes up and repledge them in 1906, as above set forth.

The result of this analysis of the case under this first theory advanced by the complainants is that the bank, the complainants, cannot hold Shaw upon the note, and therefore cannot hold Denton upon the mortgage suit, if it be settled that there is nothing due upon the Shaw \$12,000 note, that is, nothing due to the bank as a third person who initially cashed the note, or nothing due to Hogencamp, to whom the note was originally given by Shaw, and who reacquired it in the manner above set forth and repledged it as aforesaid.

And this brings us to the second contention of the complainants. That contention, broadly stated, is: First, that the stock transaction of the 23d of April, 1900, between Hogencamp and Denton, was a bona fide sale by the former to the latter for \$24,000, and that the full consideration has never been paid by Denton to Hogencamp, and Shaw's note was given to represent that indebtedness, and while Shaw was an accommodation maker of the note, he and Denton must each be held (Shaw on the note, and Denton on the mortgage collateral to the note) until the full amount of the said consideration has been paid, or satisfied, to Hogencamp; and, second, that even if the transaction was not a bona fide sale, but was of such a nature that Hogencamp can hold Shaw and Denton for whatever benefit Denton got out of the use of the stock by borrowing upon it, Hogencamp or the bank may recover as against Shaw and Denton such amount—that is, the amount which it may be determined that Denton benefited by the use of Hogencamp's stock.

Dealing, first, with the stock transaction of the 23d of April, 1900, it is extremely difficult to follow to a conclusion, reviewing the various relevant proofs, either version without being confronted by contradictory circumstances which interfere with a clear determination; that is to say, neither Hogencamp's version nor Denton's version stands the test

of comparison with the other facts in the case.

Hogencamp, it will be recalled, testifies positively that on the date in question there was a simple sale by him of the stock for \$24,000, and that he handed the stock to Denton and had it handed back to him as collateral, and that Denton gave his notes therefor. In contradiction of this we find, first, that he never caused any stock to be transferred to Denton until August 12, 1901, that he loaned to Denton 50 shares of this very stock on the 15th of August, 1901, to be used by Denton in arranging with one of Denton's creditors in New York. This is the McKelvey transaction: That at that time Hogencamp took from Denton a \$7,500 mortgage to secure Hogencamp for having loaned Denton these 50 shares of stock. We further find that on the 16th day of November, 1901, Hogencamp writes to the people who had these 50 shares of stock that he, Hogencamp, was the owner of it, that Denton never owned it, and that he had simply loaned the stock to Denton to enable Denton to borrow money upon it. We further find that Hogencamp always had the stock in his possession, excepting when it was pledged for loans. He only identifies three dividend checks during all of the ensuing years which in any way went to Denton's benefit. The testimony shows that large dividends were declared twice a year upon the stock of the Second National Bank during all of the period from 1900, when this transaction is said to have taken place, down to 1905, when we lose interest in it. Hogencamp does not attempt to trace any of these dividends to Denton, or to Denton's benefit, excepting that he produces three checks for 18 months of dividends which were all deposited at one time in one of the three accounts heretofore adverted to, which Hogencamp was carrying in the bank, and in which he says he was depositing Denton's moneys. He does not pretend that Denton knew anything about these three checks, or about the receipt for his benefit of any moneys from dividends. Denton denies that he ever knew anything about any dividends, or received any dividends, or inquired for any dividends. He says that he gave a proxy to Hogencamp for the stock after the stock was transferred to him on the 12th of August, 1901, and thereafter never concerned himself with it.

Hogencamp also refers, in furtherance of his version, to the letter which he wrote and caused Shaw to sign on the 20th of August, 1901. That letter, it will be recalled, was addressed to Hogencamp, president, and requested him to deliver to Denton the 100 shares of stock, and was signed, as just stated, by Shaw. At that very time 50 shares of the 100 had already, without consulting Shaw in any way, been loaned by Hogencamp to Denton to take to McKelvey in New York, to be loaned upon for Denton's benefit, and partially for Hogencamp's benefit, in that he re-

ceived over \$3,000 of the proceeds of that loan.

In passing, it must be stated that he says that this money went to Denton's benefit in one of the three accounts containing Denton's moneys which Hogencamp says he was keeping in the bank.

When the stock was finally obtained from the Hudson Trust Company, where the last loan was made upon it, it went back to Hogencamp, and he retained it in his possession down to the 7th of September, 1905, when he sold it, together with all of the other stock which he owned in the bank. A question has arisen, in my mind, which the recital of this fact revives, whether, as against Shaw, and also as respects Denton, the \$19,000 which Hogencamp says he received from this stock at that time must not be credited on this indebtedness—perhaps, I had better say “alleged indebtedness”—of \$24,000?

Passing this for the moment, however, we find that when he sold the stock on the date just given, he gave no notice of any sort to Denton, and did with the proceeds what he willed. What he chose to do, he says, was to credit Denton with \$10,000, which he says he paid for Denton at the Hudson Trust Company at the time that the loan there, to which the 100 shares was held as collateral, was paid off, and with some items of interest, and the balance he credited on an old note of Denton's for \$13,000, which was dated July 19, 1901. The balance credited on this note was \$7,652.80. It will thus be seen that it is very difficult to believe Hogencamp's version of this transaction, and to find that there was a bona fide sale of this stock to Denton. There is no earthly reason suggested why Denton, who was at that time heavily engaged in real estate operations in New York, and who was so affiliated with Hogencamp that through Hogencamp he was then receiving, and hopeful in the future of receiving, large sums of money, should want to become a stockholder in the bank. Denton says that he had no such desire, and that it never occurred to him, and that he knew nothing about the stock or its value, and never purchased it, and only participated in the transaction at Hogencamp's suggestion. I am inclined to think and to find that the truth lies between the two versions.

What I find from the facts in evidence is that upon the date in question, April 23, 1900, Denton and Hogencamp made an arrangement of the following nature: They each wished to do whatever would enable them to obtain the largest amount of loans from banking institutions. Hogencamp, as a stockholder in the bank, could not obtain loans from that bank upon its own stock. Other institutions probably would loan with this stock as collateral. Denton could not, upon his own mortgages, obtain loans upon his own notes. If Denton gave mortgages to Hogencamp, and also notes which Hogencamp would indorse, money could have been

obtained upon those notes with the mortgages as collateral. If, in turn, Hogencamp put title to some of his stock in Denton, and took from him as apparent consideration notes, those notes would be used with the mortgages, as just stated, and Denton could take the stock and borrow at other institutions upon notes which he would give with the stock as collateral. I do not therefore find that there was any sale from Hogencamp to Denton, and this, I think, squares itself with all the facts.

I do find, however, that the transaction was about as above outlined, and that to the extent that Denton benefited by loans obtained upon Hogencamp's stock, he must make good to Hogencamp such amounts; that is to say, if he borrowed upon Hogencamp's stock, and Hogencamp subsequently paid off the amounts thus borrowed, Denton, to the extent that he got the benefit of the original loans, must repay Hogencamp.

Whether Denton owes money to Hogencamp on the stock must depend upon the broad question of whether Denton owes Hogencamp any money. As has heretofore been pointed out, the dealings between these parties involves thousands upon thousands of dollars, and concerns innumerable items; and if, as a result of an accounting, it should appear that Hogencamp has had more money from Denton than equals all that Denton owes him, or as much money as equals what he advanced to Denton, he cannot hold Denton for anything more. Since this stock transaction was only one of a great number of these transactions between the parties, it cannot be segregated and dealt with as if it were a separate severable item; and whether or not Denton has paid Hogencamp for the stock, or for the use of the stock, as above suggested, can only be determined after an accounting has taken place which shows as a result of it whether Denton owes any money to Hogencamp as the result of their dealings with each other.

To the extent that Denton may owe money to Hogencamp in all of their dealings, I am inclined to think that, under the facts in this case, Hogencamp would be justified in holding this Shaw note and the mortgage which is collateral to it for such amount.

Since there is nothing to show that Denton ever specifically repaid to Hogencamp the sums of money which Hogencamp proves that he paid on Denton's account to get back the stock from those from whom Denton had borrowed money with the stock as collateral, it is impossible to separate this item from the others; and if, as a result of an accounting between Denton and Hogencamp, it be shown that Denton still owes Hogencamp money, Hogencamp, or the bank as the repledgee of the note with the mortgage as collateral, can attribute the payments to other things and still hold this debt open and enforceable.

In any attempt to follow Denton's version

that the entire transaction concerning the stock was for Hogenkamp's benefit, we are immediately met by circumstances entirely inconsistent with this explanation. A large part, if not all, of the money borrowed at various times and places upon the stock went to Denton's benefit. From his own bank account, or from accounts in which he was interested, he made payments upon loans where the stock was held as collateral, both on principal and interest. It is very difficult to escape from the conclusion, which the court thinks is the true one, that both the stock and the mortgages were conceived and used for the mutual benefit of Denton and Hogenkamp.

My final conclusion, therefore, is that there must be an accounting between Denton and Hogenkamp, and that the final decree must abide the result of that accounting.

(32 N. J. Eq. 363)

### HUDSPETH et al. v. DENTON et al.

(Court of Errors and Appeals of New Jersey. Oct. 16, 1913.)

Appeal from Court of Chancery.

Bill by Robert S. Hudspeth, Trustee, and others against Henry M. Denton and others. From a decree (91 Atl. 741) for respondents, complainants appeal. Affirmed.

Hudspeth, Rysdyk & Garrison, of Jersey City, for appellants. Vredenburgh, Wall & Carey, of Jersey City, for the respondents.

PER CURIAM. The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Garrison.

GARRISON, PARKER, WHITE, and HEP-PENHEIMER, JJ., dissent.

(124 Md. 130)

### SHOOP v. FIDELITY & DEPOSIT CO. OF MARYLAND.

FIDELITY & DEPOSIT CO. OF MARYLAND v. SHOOP.

(Nos. 48, 60.)

(Court of Appeals of Maryland. June 26, 1914.)

#### 1. PLEADING (§ 426\*)—RULINGS ON MOTIONS—OBJECTIONS—WAIVER.

Plaintiff, by replying to a new plea supported by affidavit and certificate under the Baltimore City Practice Act, and by proceeding to trial, waived her right of appeal from the action of the court in permitting the withdrawal of the former pleas.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1425-1427; Dec. Dig. § 426.\*]

#### 2. APPEAL AND ERROR (§ 1039\*)—HARMLESS ERROR—RULINGS AS TO PLEADINGS.

Error of the court in permitting defendant to withdraw its pleas and file a new plea supported by affidavit and certificate is harmless, where the case has proceeded to trial, and verdict has been rendered in favor of plaintiff for the full amount claimed by her.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.\*]

#### 3. TRIAL (§ 25\*)—RIGHT TO OPEN AND CLOSE.

In an action on an accident policy, in which defendant by its plea did not expressly deny plaintiff's right to recover, but alleged that the accident occurred while insured was engaged in an extrahazardous occupation, so that by the terms of the policy plaintiff was entitled to recover only six-elevenths of the amount of the policy, defendant was not entitled to open and close, not having admitted the plaintiff's prima facie right of recovery, but in effect denying it as to five-elevenths of the face of the policy.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.\*]

#### 4. TRIAL (§ 25\*)—RIGHT TO OPEN AND CLOSE—STATE OF PLEADINGS.

In determining which party has the affirmative of the issue, and hence is entitled to open and close, regard is had to the substance and effect of the pleadings, rather than to their form.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 44-75; Dec. Dig. § 25.\*]

#### 5. EVIDENCE (§ 450\*) — PAROL EVIDENCE — MEANING OF TERMS.

A warranty, in an application for accident insurance, that insured's connection with certain machinery was as "supervising" agent only is not so definite in its meaning as to exclude parol evidence to show what were the duties of a supervising agent.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2066-2082, 2084; Dec. Dig. § 450.\*]

#### 6. EVIDENCE (§ 540\*)—QUALIFICATIONS OF EXPERT WITNESS.

A witness, who had been employed for 27 years in the selling of gas engines for boats, was competent to testify as to the duties of such agents in respect to the supervision of the installation of engines sold.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2353; Dec. Dig. § 540.\*]

#### 7. INSURANCE (§ 377\*)—WARRANTIES—NOTION IMPARTED.

A statement in the schedule of warranties in an accident policy that insured, a sales agent, had "supervising duties, not setting up or testing machinery," was sufficient to put the insurer on inquiry as to the nature of insured's supervision of the installation of gas engines sold by him, and having made no inquiry, it was precluded from claiming, after an accident, that his employment was extrahazardous.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 942, 966, 967, 975-997; Dec. Dig. § 377.\*]

#### 8. INTEREST (§ 50\*)—ADMISSION OF AMOUNT DUE—NECESSITY OF TENDER.

Though defendant does not deny plaintiff's right to recover a certain amount, it is discretionary with the jury to add interest in computing its verdict, unless defendant has made a tender of an amount equal to or greater than the verdict.

[Ed. Note.—For other cases, see Interest, Cent. Dig. § 114; Dec. Dig. § 50.\*]

#### 9. INSURANCE (§ 665\*) — EVIDENCE — SUFFICIENCY—INSTRUCTIONS.

In an action on an accident policy, a request by defendant for an instruction that the jury must be satisfied, "beyond a reasonable doubt," of enumerated facts before they could find for plaintiff was properly refused.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.\*]

**10. TRIAL (§ 253\*)—REQUEST FOR INSTRUCTION—CONFORMITY TO ISSUES.**

Where defendant insurance company, under the issues, admitted its liability on the policy for an amount less than its face, an instruction requested by it, which ignored the admitted liability, was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

**11. TRIAL (§ 260\*)—INSTRUCTIONS—REPETITION.**

The refusal of an instruction covered by the charge as given is not available error.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 651-659; Dec. § 260.\*]

Appeals from Baltimore Court of Common Pleas; John J. Dobler, Judge.

"To be officially reported."

Action by Nettie J. Shoop against Fidelity & Deposit Company of Maryland. From an order permitting defendant to withdraw its pleas and file a new plea, plaintiff appeals, and from the judgment on the main issues in favor of plaintiff, defendant appeals. Appeal of plaintiff dismissed, and judgment against defendant affirmed.

Argued before BOYD, C. J., and BURKE, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Charles W. Main and William W. Varney, both of Baltimore, for plaintiff. Karl Singewald and Washington Bowie, Jr., both of Baltimore, for defendant.

STOCKBRIDGE, J. [1, 2] The record in the above-entitled case contains two appeals, one appearing on the docket of this court as No. 48, being the appeal of Nettie J. Shoop against the Fidelity & Deposit Company of Maryland, and the other being No. 60, an appeal of the Fidelity & Deposit Company from a judgment rendered against it in favor of Nettie J. Shoop. A motion has been filed to dismiss the first appeal, and that motion must prevail. The suit in this case was one instituted under what is known as the Practice Act of Baltimore City, to recover for the death of Frank J. Shoop, husband of Nettie J. Shoop, upon an accident policy issued by the Fidelity Company in June, 1911. To the suit so brought the defendant at first filed five pleas, within the time required by the statute, and on February 18, 1914, by leave of the court in writing withdrew all of the pleas theretofore filed on its behalf, and filed in lieu a new plea supported by affidavit and certificate. This ruling of the court in permitting the defendant to withdraw the pleas as originally filed constituted the ground of Mrs. Shoop's appeal. The order for the appeal states that it is also from the ruling of the court overruling the motion of the plaintiff for a judgment, but no such motion appears in the record. On the same day that the pleas were withdrawn and the new plea filed, the plaintiff filed a replication thereto, a jury was impaneled for the trial of the case, and on the next day a verdict was returned in favor of the plaintiff for \$2,887.50 the full

amount claimed. There are two obvious reasons why the motion to dismiss must prevail. In the first place by the filing of replication and proceeding to trial the plaintiff waived her right to raise, on appeal, the correctness of the ruling of the court. The proper course to have pursued, if it was desired to call in question the correctness of that ruling, would have been to decline to reply and suffer a judgment by default to be entered against her, and appeal from such judgment. Not having done so, she is now precluded from raising the question. *Traber v. Traber*, 50 Md. 1. In the second place even if the ruling of the court had been incorrect, and she could raise that question on her appeal in this case, she was nevertheless not injured by the ruling of the court because the verdict returned, and upon which judgment was entered, was for the full amount of her claim. *Coates v. Mackey*, 56 Md. 420; *Baer v. Robbins*, 117 Md. 213, 83 Atl. 341.

Turning now to case No. 60, the appeal of the Fidelity & Deposit Company against Shoop, the case presented is briefly as follows: Mr. Shoop was the agent of the Mianus Motor Works. On the 5th of June, 1911, he took out what is commonly known as an accident policy of insurance with the defendant company, for the sum of \$2,500. The policy contained a provision that, in addition to the sum named, the same should be augmented by an accumulative amount, such as would increase the sum specified in the said policy by 10 per cent. upon an annual renewal of the policy. The policy was renewed in June, 1912. On the 20th of November in the same year Mr. and Mrs. Shoop separated about half past 8 in the morning, she going to the store or office on Market Space in the city of Baltimore, and he to the shipyard of which he was the tenant, at or near the foot of Stevenson street. A little after 12 o'clock Mr. Shoop telephoned his wife. Not far from the same hour, he was seen by a witness, Crispens, standing with another man at the engine room door in the shipyard. About an hour later as this witness, Crispens, passed the shipyard he saw a man lying underneath a boat which had been hauled up on the shipyard railway, and going over there found that the man so prostrate was Mr. Shoop, who was lying under the boat dead. Under this state of facts the plea which was filed by the defendant company to the suit brought on the policy was as follows:

"This policy constituted the entire contract of insurance, except that if the insured sustains injury, fatally or otherwise, or contracts disease while exposed to the hazard of an occupation classed by the company as more hazardous than that stated in the schedule of warranties, except ordinary duties about residence or while engaged in recreation, the company will pay such proportion of the indemnities provided in the policy as the premium paid by the insured will purchase at the rate but within the limits fixed by the company for such more hazardous occupation."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

That said Frank J. Shoop was, at the time he sustained the injury set out in the declaration, exposed to the hazard of an occupation classed by the company as more hazardous than that stated in the schedule of warranties, to wit, "that of machinist or ship carpenter or shipwright, and that the proportion of the indemnities provided in said policy which the premium paid by the insured will purchase at the rate fixed by the company for such occupation of machinist or ship carpenter or shipwright is six-elevenths, so that the plaintiff is entitled to recover in this action the sum of \$1,500 and no more."

[3, 4] When the case was reached for trial and the jury had been sworn, the defendant moved the court to grant to it the right to open and close the case, which motion the court refused, and this ruling constitutes the first bill of exceptions. The theory of the defendant upon this motion is substantially this: That by its plea it admitted the prima facie right of the plaintiff to recover, and that it had tendered the only issue in the case, and therefore had assumed the burden of proof; that, having assumed the burden of proof, it followed as a matter of right that it was entitled to the opening and closing of the case, and that the denial of this right operated to the prejudice of the defendant, and forms a sufficient ground for reversal. Many cases were cited to sustain this view, and in fact if the cases as presented corresponded with the theory announced by the defendant, the vast weight of authorities is in favor of the position contended for. In the federal courts, and in some cases in the state courts, it has been held that the conduct of the trial and the ruling of the trial court upon a matter of this nature is within the discretion of the court, and that from the exercise of such discretion no appeal will lie. In some states there are procedural rules which regulate the matter, but independent of those the general principle is that stated in 15 Ency. Plead. & Prac. 183, 184, and adopted in this state in the case of *Baltimore City v. Hurlock*, 113 Md. 674, 78 Atl. 558, that:

"The test is that the right belongs to the party against whom judgment would be rendered if no evidence were introduced on either side."

Many other cases might be cited which lay down the same rule, but a careful examination of these cases shows the essential point of difference between them and the case at bar. This suit was instituted by the plaintiff for the recovery of \$2,500, together with a 10 per cent. accumulation, making \$2,750. The plea of the defendant did not concede the right of the plaintiff prima facie to recover such sum, but affirmatively set up the defense appearing in the plea, limiting, or seeking to limit, the right of recovery of the plaintiff to \$1,500. This amounted to a denial of the plaintiff's claim to the extent of \$1,250, and therefore required the plaintiff to adduce evidence in order to sustain her claim for the full amount. The case is similar, therefore, to the case of *Cilley v. Pre-*

*ferred Accident Ins. Co.*, 187 N. Y. 517, 79 N. E. 1102, in which the answer to the suit on an accident insurance policy set up the defense that the death of the insured did not result wholly from an accidental cause, but was in part the result of the intoxication of the insured, and this was held to be in effect a denial of a material allegation which the plaintiff was required to prove in order to recover, and that the defendant, therefore, was not entitled to open and close. In all such cases, in determining who has the affirmative of an issue, regard is had to the substance and effect of the issue, rather than the form. *McLees v. Felt*, 11 Ind. 218, and the rule stated is one not infrequently applied in suits arising otherwise than on contracts of insurance. In *Grand Rapids R. R. Co. v. Horn*, 41 Ind. 479, it was held that where the only question submitted to the jury was the amount of the damages, the right to open and close the case was properly given to the party claiming the damages. To the same effect is the case of *Filby v. Turner*, 9 Colo. App. 202, 47 Pac. 1037. No error, therefore, can be imputed to the trial court for the ruling upon this motion.

[5] The second exception arose during the examination of Edwin D. Loane, who was asked as to what the supervising duties of an agent were, in the line of business pursued by the insured. In the schedule of warranties constituting a part of the policy the insured had defined his occupation in his capacity of agent, as "having traveling and supervising duties, not setting up or testing machinery." It is insisted on behalf of the defendant that the word "supervise" or "supervising" has a clear, distinct, definite meaning, and therefore was not a subject upon which extraneous, parol evidence was permissible. With this contention this court cannot agree. A word may be shown to have a special meaning in a certain trade or occupation. *Susquehanna Fertz. Co. v. White*, 66 Md. 444, 7 Atl. 802, 59 Am. Rep. 186. This was well illustrated in the case of *Pinckney v. Dambmann*, 72 Md. 173, 19 Atl. 450, where it was held that it was competent to show by parol, in the case of a sale of three "cargoes" of phosphate, that a certain number of tons formed the average cargo in that trade. And the following cases sufficiently show that the word "supervising" is one which may require definition or elaboration: In *Schmidt v. Mutual Accident Assurance Co.*, 96 Wis. 304, 71 N. W. 601, it was held that supervising means taking part in the work, and that hence where an insured had stated that he was a confectioner, and that his duties were supervising, the insurance company would be liable on the policy, although the policy classified him as a proprietor, not working, and his death was caused while working; and in the *National Accident Society of N. Y. v. Taylor*, 42 Ill. App. 97, the term "supervising farmer" was a subject-matter of construction, and the court said:

"We think that the supervision of a farm includes in its care and oversight the doing of such incidental things as may be required for keeping it in order, and does not mean absolute idleness so far as physical labor is concerned."

The action of the trial court upon this exception will, therefore, be sustained.

[8] At the close of Mr. Loane's testimony the defendant moved to strike out the testimony or some portions of it, exactly how much is not entirely clear, upon the ground that the witness was not sufficiently qualified. We must agree with the learned judge who tried the case that the motion was not well founded. The witness had been engaged for 27 years in the selling as agent of gas engines, particularly for use in boats, during which time he had represented a number of different concerns and knew from his own experience what was required of an agent, and in a general way that all agents followed substantially the same course of action in the discharge of their duties. The evidence given by him was therefore admissible, for as was said in *Davis v. State*, 38 Md. 15: Expert witnesses "who from study or experience have acquired a peculiar knowledge in regard" to the matter in dispute "are permitted to testify, not only as to facts, but also to give their opinions, based upon facts within their own knowledge or upon facts proved by other witnesses. The weight" of the evidence is a matter "for the consideration of the jury." We find no error, therefore, in the ruling set out in the third bill of exceptions.

[7] The fourth bill arises from the refusal of the court to grant a special prayer offered by the defendant at the close of the plaintiff's case. That prayer was as follows:

"The court instructs the jury that the statement of duties of Frank J. Shoop contained in the schedule of warranties, that is, 'having traveling and supervising duties, not setting up or testing machinery,' did not notify the defendant that he would be exposed to the hazard and dangers incident to inspecting the sides and bottoms of boats while on marine railways, and the undisputed evidence in this case is that said Frank J. Shoop met his death while exposed to the dangers of an occupation as above described, and under the pleadings in this case their verdict must be for the pro rata part of the policy sued on, to wit, the sum of \$1,500."

This prayer was properly refused. In the schedule of warranties the insured had stated that he had supervising duties; the defendant had assumed to know of what those duties consisted; if it was in doubt, or desired further or fuller information with regard thereto, it could readily have ascertained by inquiry, which there is no pretense that it ever made, and it cannot now after loss take advantage of its own inaction as a ground of defense.

The fifth exception deals with the ruling of the court upon the prayers, two having been granted at the instance of the plaintiff, and of the nine offered by the defendant five were granted and four refused.

The defendant's first prayer was to direct a verdict upon the theory set out in the defendant's plea, and is not supported by the evidence, and was therefore properly refused.

[8] The defendant's second prayer, which is marked third, denied the right of the plaintiff to recover interest, in case the jury should render a verdict for the sum of \$1,500 only. Interest is ordinarily a matter which rests in the discretion of the jury, but a plaintiff may debar himself from a right to demand interest where a tender of an amount has been made and refused, and the amount of the verdict, exclusive of interest, does not exceed the amount tendered. There was no tender in this case, and it was within the province of the jury either to find for the plaintiff for the full amount of the claim, or for the plaintiff only for the proportionate amount of the sum named in the policy, and in either event in the absence of tender the allowance of interest was a matter for the exercise of the discretion of the jury.

[9] The defendant's fourth prayer was palpably wrong; it required the jury, as in a criminal case, to be satisfied "beyond a reasonable doubt" of certain enumerated facts, whereas, in a proceeding of this character all that could be required was that the jury should be satisfied by a preponderance of the evidence.

[10] The defendant's eighth prayer reads as follows:

"The jury are instructed that it is not necessary for them to find that Shoop was actually working upon the boat at the time he met his death in order to justify a verdict for the proportionate amount of said policy; that if they find that he was inspecting said boat, its position or injuries at the time of his death, then their verdict must be for the proportionate amount of said policy"

—and was properly refused. It required the jury to find in effect that the inspection of the vessel must defeat the plaintiff's claim for the full amount of the policy, and this in the face of the evidence that the inspection was a usual and customary part of the supervision.

[11] The seventh prayer of the defendant, which was granted, was more favorable to it than it was in strictness entitled to, as it left to the jury to find a condition of fact which there was no evidence contained in the record sufficient to support, but if that were eliminated, when taken in connection with the defendant's fifth and sixth prayers, and the first prayer of the plaintiff, the case was fairly presented to the jury, and no reversible error can be ascribed to the lower court in its several rulings upon the prayers.

The judgment below will accordingly be affirmed in No. 60.

Appeal in No. 48 dismissed.

Judgment in No. 60 affirmed; the Fidelity and Deposit Company of Maryland to pay the costs.

(128 Md. 458)

**TITLE GUARANTY & TRUST CO. et al. v. WHEATFIELD et al. (No. 11.)**

(Court of Appeals of Maryland. June 24, 1914.)

**1. USURY (§ 131\*)—WHO MAY RAISE QUESTION—SECOND MORTGAGEE.**

On foreclosure of a second mortgage, a third mortgagee may except to the payment in full of the second mortgage on the ground that it was usurious, where such mortgagee has not assumed payment of the pre-existing debt.

[Ed. Note.—For other cases, see Usury, Cent. Dig. § 392; Dec. Dig. § 131.\*]

**2. USURY (§ 55\*)—WHAT CONSTITUTES.**

That a mortgagee was interested in an estate which held a part of the stock of a trust company in whose name the mortgage was taken, and which received commissions from the mortgagor, is too indirect a benefit for payment of commissions to render the mortgage usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 119-121; Dec. Dig. § 55.\*]

**3. PRINCIPAL AND AGENT (§ 23\*)—EVIDENCE.**

Where it was contended that complainant's mortgage was usurious because a commission was paid to the agent who effected the mortgage, evidence held to show that the agent was acting for the mortgagor instead of the mortgagee.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 41; Dec. Dig. § 23.\*]

**4. USURY (§ 57\*)—COMMISSIONS—PAYMENT.**

Where a borrower employs an agent to procure a loan, his payment for the agent's services does not render the loan usurious.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 128, 129; Dec. Dig. § 57.\*]

**5. USURY (§ 55\*)—WHAT CONSTITUTES.**

That a trust company took a mortgage in its own name, assuming to act as the nominal mortgagee, will not render the mortgage usurious on account of commissions received by the trust company, where the real mortgagee was a third person, and the mortgagor, from the trust company's previous refusal to make the mortgage and its subsequent undertaking to place the loan, must have known that the trust company was not the real party in interest.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 119-121; Dec. Dig. § 55.\*]

Appeal from Circuit Court of Baltimore City; Carroll T. Bond, Judge.

"To be officially reported."

Foreclosure by the Title Guaranty & Trust Company, for the use of Moses Hecht and others, against Jacob Wheatfield, in which a third mortgagee intervened. From an order deducting a sum provided in the audit for the satisfaction of the third mortgage, complainant appeals. Order reversed, and cause remanded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.

Enos S. Stockbridge and Myer Rosenbush, both of Baltimore (Benjamin Rosenheim, of Baltimore, on the brief, for appellant. Eugene O'Dunne and Randolph Barton, Jr., both of Baltimore, for appellees.

URNER, J. The appellee is the holder of a third mortgage on certain real estate in

Baltimore city, and the foreclosure of the second mortgage having produced a fund insufficient for the satisfaction of both claims, the exceptions before us were filed by the appellee in opposition to the payment in full of the preceding lien, upon the ground that the loan it secured was usurious.

[1] A preliminary issue has been raised as to the right of the third mortgagee to dispute the amount of the second mortgage indebtedness. The principle, however, is settled in this state that, in the absence of an agreement on the part of a subsequent purchaser or incumbrancer to assume the payment of the debt secured by the pre-existing lien, he is at liberty to make such an objection as the one here interposed. *Carter v. Dennison*, 7 Gill, 157; *Gaither v. Clarke*, 67 Md. 28, 8 Atl. 740; *Andrews v. Poe*, 30 Md. 485; *Fulford v. Keerl*, 71 Md. 404, 18 Atl. 663; *Hough v. Horsey*, 36 Md. 181, 11 Am. Rep. 484.

According to the proof the essential facts are as follows: In the early part of 1911 Jacob Wheatfield, the owner of the property in question, which was already subject to a mortgage for \$45,000, applied through his attorney, Louis N. Frank, Esq., to the Title Guaranty & Trust Company, of Baltimore city, for a loan of \$10,000 upon the same real estate. This application was refused by the company on the ground that it did not lend money on second mortgage. After a number of unavailing efforts had been made to obtain the money elsewhere, and after negotiations had been conducted without success for the sale of the property for \$72,000 to the owners of adjacent premises, Mr. Wheatfield instructed his attorney to borrow \$20,000 for him on second mortgage, and authorized him to pay commissions to any one who could procure the loan. In pursuance of this direction Mr. Frank submitted the proposition to a number of persons, and finally applied again to the Title Guaranty & Trust Company, through Mr. John H. Duncan, its vice president and secretary. Mr. Duncan said there was a possibility that he might be able to place the loan, and a few days later he notified Mr. Frank that the matter would be consummated. The money was obtained by the company from Moses Hecht of J. and Nathan I. Hecht, the persons to whom the property had been offered for sale; their checks for the full amount of the investment being delivered to the company prior to the execution of the mortgage. The company procured the loan from the Messrs. Hecht with the aid of Benjamin Rosenheim, Esq., who had been acting as their counsel. The real lenders did not come in contact with the borrower, and, while their identity was suspected by his attorney, it was not actually disclosed. At their request the mortgage was taken in the name of the Title Guaranty & Trust Company. When Mr. Duncan reported to Mr. Frank that the loan could be placed, it was stated by the former

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

that the commissions to be paid by Mr. Wheatfield for such a service ought to be \$2,000, in view of the fact that the amount being obtained for him on second mortgage nearly equaled the value of the equity in the property. Upon objection by Mr. Wheatfield the commissions were reduced first to \$1,500 and then to \$1,250. This sum he agreed to pay, and it was deducted by the company from the \$20,000 fund received for his use upon the security of the second mortgage. In accordance with an understanding previously reached the company paid \$250 of the commissions to Mr. Frank, and divided equally the remaining \$1,000 with Mr. Rosenheim for his aid in procuring the loan and in consideration of his guaranteeing the company against loss on account of the mortgage being taken in its name. The investment was not treated as an asset of the company, and did not appear on its records except in the form of a memorandum in reference to the collection of the interest and its transmission to the persons entitled. An agreement in writing between the company and Messrs. Hecht, made the day following the execution of the mortgage, declared the latter to be the actual owners of the investment.

[2] There is testimony to the effect that when the application for the loan was made to Moses Hecht he said that he would be willing to lend the amount asked for, provided the trust company and Mr. Rosenheim were compensated by Mr. Wheatfield for their trouble. It is in evidence, also, that Mr. Hecht suggested \$2,000 as the proper amount to be paid for that purpose. The proof shows, however, that the lenders of the money received no part of the commission nor anything in excess of the legal interest on the exact sum advanced. They were interested in an estate which held about one-eighth of the capital stock of the trust company, but the benefit they thus derived from the commission paid the company was too indirect to be considered as a controlling factor in the determination of the question here presented. *Keagy v. Trout*, 85 Va. 390, 7 S. E. 329; *West v. Equitable Mortgage Co.*, 112 Ga. 377, 37 S. E. 357, 81 Am. St. Rep. 59.

[3] Upon the theory that the trust company was acting as the agent of the lenders in conducting the negotiations for which the commissions were paid, the court below held that the retention of the commissions by the company was usurious, except as to the sum of \$250, paid to the attorney of the borrower. As against the remaining \$1,000, a credit of \$62.50 was allowed on account of a charge to that amount, which the evidence showed the company might have made for examination of the title, and the balance of \$937.50 thus produced was directed to be deducted from the sum provided in the audit for the satisfaction of the second mortgage.

After a careful consideration of the facts we have stated, as to which there is no prac-

tical dispute, we are unable to agree with the conclusion of the learned judge, who ruled upon the exceptions below, that the Title Guaranty & Trust Company was the agent of the lenders with respect to the transaction under inquiry. In our view of the case the services for which the commissions were paid, according to agreement, were rendered by the trust company exclusively at the instance of the borrower. There was no agency existing between the company and the eventual mortgagees when the application for the loan was made, and the company's acceptance of the employment thus proffered was the sole originating cause of its action in opening negotiations with the lenders. The case is not one in which a borrower has been required to pay for services rendered the lender by an agent employed by him to procure a suitable investment, and there is no occasion to discuss on this appeal the scope and effect of the law against usury as applicable to such conditions. The present record shows conclusively that the trust company accepted no agency and rendered no service for the lenders until the negotiations for the loan had been consummated, when the company consented to take the mortgage in its own name at the request of the persons furnishing the money. In view of the fact that the compensation received by the trust company was paid by the mortgagor for services actually rendered at his request and for his benefit in procuring the loan he desired, the statement of one of the lenders that the investment would be made provided the borrower paid the company and Mr. Rosenheim for their trouble can have no effect upon the rights of the parties. The "trouble" to which this remark appears to have referred was that which had been incurred at the instance of the prospective mortgagor in placing the loan, and the commissions in which the intermediaries shared were those which were charged and paid in pursuance of the borrower's own proposal. While Mr. Rosenheim had served in the capacity of counsel for Messrs. Hecht, the record does not suggest that he was their agent for making investments. He was engaged as the assistant of the trust company in the effort to obtain the loan for which the borrower had made application. The suggestion offered by Mr. Hecht as to the amount of the commissions was not accepted by Mr. Wheatfield, and there is no evidence in the record to show that his voluntary agreement to pay \$1,250 for the procurement of a mortgage loan of \$20,000 on a property valued at \$72,000, already subject to a \$45,000 lien, involved an oppressive exaction by the agency employed in the negotiations.

[4] It is a reasonable and well-settled rule, as expressed in 39 Cyc. 978, that:

"When the borrower employs an agent to procure a loan, he is justly obligated to pay for that agent's services, and such payments can in no case render a loan usurious."



The text of 29 Am. & Eng. Enc. Law (2d Ed.) 501, is to the same general effect. This principle has been uniformly applied in numerous cases, including *Goodwin v. Bishop*, 145 Ill. 421, 34 N. E. 47; *Thomas v. Miller*, 39 Minn. 339, 40 N. W. 358; *Baldwin v. Doying*, 114 N. Y. 452, 21 N. E. 1007; *George v. New Eng. Mortgage Security Co.*, 109 Ala. 548, 20 South. 331; *Pitts v. Maier*, 115 Ga. 281, 41 S. E. 570; *Polk County Savings Bank v. Harding*, 113 Iowa, 511, 85 N. W. 775; *Graham v. Fitts*, 53 Fla. 1046, 43 South. 512, 18 Ann. Cas. 149; *Cornwell v. McCoy*, 6 Idaho, 219, 55 Pac. 240; *Stuart v. Tenison Bros. Saddlery Co.*, 21 Tex. Civ. App. 530, 53 S. W. 83; *Smith v. Mack*, 105 Ark. 653, 151 S. W. 431; *Pass v. N. E. Mortgage Security Co.*, 66 Miss. 366, 6 South. 239; *Davis v. Sloan*, 27 Neb. 877, 44 N. W. 41; *Secor v. Patterson*, 114 Mich. 37, 72 N. W. 9; *Grant v. Insurance Co.*, 121 U. S. 105, 7 Sup. Ct. 841, 30 L. Ed. 905.

The cases upon which the appellee relies were concerned in each instance with payments by the borrower, in excess of legal interest, for services rendered by one who was shown or conceded to have sustained the relation and performed the duties of an agent for the lender. It is evident that decisions dealing with such a state of facts admit of very different considerations from those which are appropriate to cases like the present, where the agency receiving the compensation acted by virtue of an employment by the borrower in procuring the loan.

[5] The theory was advanced in argument that, inasmuch as the trust company assumed to act as the nominal mortgagee and did not disclose the source from which the money for the loan was obtained, it should be treated as the real lender for the purposes of the issue now before us, and should accordingly be held amenable to the charge of usury as to the commissions it received on account of the investment. In *Call v. Palmer*, 116 U. S. 102, 6 Sup. Ct. 301, 29 L. Ed. 559, where a bonus exacted by an agent of the lender, without the knowledge of the latter, was held not to make the loan usurious, it was said to be an immaterial circumstance that the agent professed to be acting for himself, and did not disclose his agency in his negotiations with the borrower. The facts of the case at bar, however, as already shown, make it apparent that the borrower could have had no doubt that the trust company, while acting as the nominal mortgagee, had really procured the loan from a third party. It had declined to make a smaller loan on the same security for its own account upon the distinct ground that it would not invest in a second mortgage. When it undertook to "place" a loan for double the amount originally proposed, the borrower had every reason to understand that the money was being obtained from another source. This was a service for which compensation could

be legitimately paid by the person in whose behalf it was rendered, and the performance of the agreement to make such a payment is not, in our judgment, a sufficient reason for declaring the transaction to be in violation of the statute against usury and for requiring the lenders, who have never received anything beyond the legal interest on the loan, to lose a part of the sum they actually invested.

Order reversed, with costs, and cause remanded.

(134 Md. 38)

KENNEDY v. KENNEDY. (No. 49.)

(Court of Appeals of Maryland. June 26, 1914.)

1. TRIAL (§ 252\*)—ABSTRACT INSTRUCTIONS.

There being no sufficient or competent evidence to support plaintiff's prayer, on the issue of undue influence, though it states a correct legal proposition, it should not be granted, over a special exception.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 505, 596-612; Dec. Dig. § 252.\*]

2. WILLS (§ 155\*)—"UNDUE INFLUENCE."

To constitute undue influence, vitiating a will, the influence must have been such as, when testator was making disposition of his property, dominated his will, took away his free agency, and prevented the exercise of judgment and choice by him.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 375-381; Dec. Dig. § 155.\*]

For other definitions, see Words and Phrases, vol. 8, pp. 7166-7172, 7823, 7824.]

3. WILLS (§ 166\*)—CONTEST—UNDUE INFLUENCE—EVIDENCE.

Evidence on a will contest held insufficient to show undue influence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 421-437; Dec. Dig. § 166.\*]

4. WITNESSES (§ 37\*)—COMPETENCY—KNOWLEDGE AND OPINIONS OF OTHERS.

A witness is not competent to testify of what other persons knew, or their opinions, of testator's habit of making wills.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 80-87; Dec. Dig. § 37.\*]

5. WILLS (§ 164\*)—UNDUE INFLUENCE—EVIDENCE.

Admission of a letter from one to the other of the parties containing nothing relevant to the issue, of undue influence of testator, is error.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.\*]

6. TRIAL (§ 174\*)—INSTRUCTIONS—APPLICABILITY TO EVIDENCE.

The prayer of caveat, after her evidence, as well as that of caveator, is in, should not be that caveator has offered no evidence legally sufficient to show that the will was procured by undue influence, but should comprehend the whole evidence.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 398; Dec. Dig. § 174.\*]

Appeal from Baltimore Court of Common Pleas; John J. Dobler, Judge.

"To be officially reported."

Caveat by Eugene S. Kennedy against Beta A. H. Kennedy, executrix. Verdict for caveator, and caveatee appeals. Reversed and remanded.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, URNER, STOCK-BRIDGE, and CONSTABLE, JJ.

Karl A. M. Scholtz and W. Harry Holmes, both of Baltimore, for appellant. John R. M. Staum and W. W. Parker, both of Baltimore, for appellee.

BRISCOE, J. On the 21st day of October, 1913, at the instance of the caveator, Eugene S. Kennedy, five issues were directed by the orphans' court of Baltimore city to be sent to the court of common pleas of that city to be tried by a jury, upon a caveat to the will of David D. Kennedy, the deceased father of the appellee.

The issues as set out in the record are as follows:

(1) Was the paper writing dated the 14th day of December, 1911, purporting to be the last will and testament of the said David D. Kennedy, signed by him or by some other person in his presence, or by his express direction, and subscribed in his presence by two credible witnesses?

(2) Were the contents of the paper writing, dated the 14th day of December, 1911, purporting to be the last will and testament of David D. Kennedy, read to, or by him, or known to him, at or before the time of its alleged execution thereof?

(3) Was the execution by said David D. Kennedy of said paper writing, dated the 14th day of December, 1911, and purporting to be the last will and testament of said David D. Kennedy procured by undue influence exercised and practiced upon him?

(4) Was the said paper writing, dated the 14th day of December, 1911, and purporting to be the last will and testament of said David D. Kennedy, executed by him when he was of sound and disposing mind and capable of executing a valid deed or contract?

(5) Was the said David D. Kennedy induced to make said paper writing, dated the 14th day of December, 1911, and purporting to be his last will and testament, by fraud practiced upon him?

The verdict of the jury, at the conclusion of the plaintiff's testimony appears from the record to have been rendered, under instructions of the court, in favor of the caveatee on the first, second, fourth, and fifth issues. The caveatee's third prayer, asking the court to direct a verdict for the defendant on the third issue, was rejected, and after a trial, upon that issue, the verdict of the jury was in favor of the caveator, to wit, that the execution of the will was procured by undue influence exercised and practiced upon him.

There were four bills of exception reserved at the trial. Three present the rulings of the court on questions of evidence and the fourth to the overruling of a special exception to the caveator's second prayer, to the granting of this prayer, and to the refusal of the caveatee's first prayer offered at the conclusion of the whole testimony. This last-

named prayer was a renewal of the caveatee's rejected third prayer, at the conclusion of the caveator's testimony, and was to the effect that the caveator had offered no evidence legally sufficient to show that the bill was procured by the undue influence of any person or persons, and that the verdict of the jury must be for the defendant on the third issue.

[1] The caveator's (plaintiff) second prayer was, in substance, a copy of the plaintiff's first prayer approved by this court, in *Hiss v. Weik*, 78 Md. 439, 28 Atl. 400, defining undue influence. In that case, where the chief question raised was whether there was legally sufficient evidence offered by the caveator to justify the submission of the case to the jury, the court said:

"The appellee's instruction accurately defined undue influence as understood in its legal sense, and left to the jury to find from the evidence the existence of the facts necessary to constitute such an influence. The appellants' first and second prayers asked the court to withdraw the case from the jury upon the ground that there was no sufficient evidence that the will had been procured by undue influence. If the appellee's instruction was properly granted, there was no error committed in rejecting the appellants' first and second prayers; but if there was error in rejecting these latter, there was of necessity error in granting that of the appellee. So, as already suggested, the controlling inquiry is, Was there legally sufficient evidence, that is competent evidence, tending to prove the issues which ought to have gone to the jury?"

In *Hiss v. Weik*, *supra*, the court granted the plaintiff's first prayer, because after a full review of the testimony it held that the evidence was legally sufficient from which the jury could properly find, if they believed it to be true, that the will had been procured by undue influence.

In the case now before us, we are of opinion that there was no legally sufficient or competent evidence to support the plaintiff's second prayer, upon the issue of undue influence, and for this reason, even conceding the correctness of the legal proposition contained therein, the prayer should have been refused and rejected. For this reason there was error in overruling the defendant's special exception to this prayer and in granting the prayer. *Farmers' Bank v. Hunter*, 97 Md. 148, 54 Atl. 650.

The facts of the case are these: David D. Kennedy, the testator, died on the 30th of April, 1912, in the fifty-sixth year of his age, leaving two sons by a former marriage and a second wife, the appellant. The oldest son, the caveator, was about 27 years of age and the other son about 15 years of age at the time of his death. The will is dated the 14th of December, 1911, and is as follows:

"I, David D. Kennedy, being of sound mind and body, do hereby constitute this my last will and testament.

"I devise and bequeath to my wife Beta A. H. Kennedy, all my real and personal property which shall remain after paying one hundred dollars each to my sons Eugene S. and David D., Jr.

"It is my desire that the said Beta A. N. Kennedy shall serve without bond.  
"All former wills or bequests are hereby canceled."

The value of the entire estate left by the testator amounted to about \$7,214.95 consisting of a lot appraised at \$1,300 and proceeds of an insurance policy and certain death benefit funds.

At the time of his death the testator was employed as chief clerk of the passenger division of the Baltimore & Ohio Railroad Company, and had served as a member of the board of school commissioners of Baltimore city. The will was prepared by the testator himself, and executed at his office in Baltimore city. It was witnessed by three of the clerks employed with him in the office of the Baltimore & Ohio Railroad Company. The will was executed about one year after his second marriage.

[2, 3] There were 9 witnesses produced and examined on behalf of the caveator and 12 on behalf of the caveatee, and a careful examination of the testimony of each witness fails to disclose a particle of evidence tending to support the charge of undue influence, or that the will was the result of such an influence.

In *Somers v. McCready*, 96 Md. 439, 53 Atl. 1117, it is said:

"From what thus appears to be the rule of law by which we are to be guided in the inquiry as to the sufficiency of evidence to support a charge of undue influence in the procuring of a will, it is not sufficient to condemn and avoid the will to find that there was influence which affected the testator's disposition of his property; but it must be, to vitiate his act, such influence as, at the time he was making such disposition, dominated his will, took away his free agency, and prevented the exercise of judgment and choice by him."

In *Saxton v. Krumm*, 107 Md. 399, 68 Atl. 1056, 17 L. R. A. (N. S.) 477, 126 Am. St. Rep. 393, it is said:

"Upon this issue the burden of proof was upon the plaintiff, and she was obliged to offer evidence tending to show that the will was the product of an influence exerted upon the testator to such a degree as to amount to force or coercion, or by importunities which he could not resist, so that the motive was tantamount to force or fear."

In *Dudderar v. Dudderar*, 116 Md. 618, 82 Atl. 453, it is said:

"This court has consistently adhered to the principle that the only influence which will be held to be undue and to be sufficient to invalidate a will which it has affected is that which is urged to such a degree as to amount to force and coercion and to destroy the testator's free agency."

There is no evidence upon the part of the caveator in this case to answer the rule established by the cases cited to show undue influence. Nor do the facts of the case bring it within the requirements of the cases of *Hiss v. Welk*, 78 Md. 439,<sup>1</sup> and *Moore v. McDonald*, 68 Md. 340, 12 Atl. 117, relied upon by the appellee, where the court held that the evidence was legally sufficient to submit the question of undue influence to the jury. There is no competent evidence that the ca-

veatee at any time influenced the testator or attempted to exercise any improper influence over him in the preparation or in the making of the will. She was not present when the will was made, and testified that there was an understanding between them that each was to make a will and to leave to the other what they had, but there was no definite time ever stated when they would make their wills. She further testified that she never suggested to him how he should make his will. There is no evidence tending to contradict her testimony. On the contrary, it is supported by the other evidence in the case. In our opinion, the evidence in this case was legally insufficient to support the issue of undue influence, and the court should have sustained the defendant's exception to the plaintiff's second prayer.

[4] There were three exceptions to the admissibility of testimony, and there was error upon the first and third of these rulings.

The first exception was taken to permitting the witness Taggart to answer the following question over the objection of the defendant:

"Q. Were or not those in official contact and relationship with him in subordinate capacities familiar with this peculiarity?"

The witness had previously stated that he did not know to what extent this habit of making wills was known to other persons in the office, but it was commented on slightly. The witness was not competent to speak of what other persons knew or their opinion of the testator's habit in making wills. If admissible at all, it could only be shown by the witnesses themselves.

Mr. Jones in his work on Evidence, § 359, says:

"There is no more familiar principle in the law of evidence than that the opinions of witnesses are in general irrelevant. Even when witnesses are limited in their statements to facts within their own knowledge, their bias, ignorance, and disregard of the truth are obstacles which too often hinder in the investigation of the truth. If it were a general rule of procedure that witnesses might be allowed to state not only those matters of facts about which they are supposed to have knowledge, but also the opinions they might entertain about the facts in issue, the administration of justice would become little less than a farce." *Kelly v. Kelly*, 103 Md. 548, 63 Atl. 1082.

[5] The third exception relates to the admission in evidence of a letter written by appellant to appellee after the death of the testator. The letter itself does not reflect in any way upon the issue of undue influence, and there is nothing in the letter that could furnish any ground for the conclusion that undue influence had been used by the appellant. It contained nothing that was relevant to the issue, and there was error in admitting it.

All of the testimony which formed the basis of the court's rulings on evidence was admitted, and we hold it to be legally insufficient, even if considered as properly admitted, to establish the caveator's case.

[6] The caveatee's first prayer should have

<sup>1</sup> 28 Atl. 400.

comprehended the whole evidence instead of being confined to that offered by the caveator alone. While there was no evidence offered upon either side that was legally sufficient to prove undue influence, the form of the prayer is open to criticism. *Pa. R. R. Co. v. Cecil*, 111 Md. 288, 73 Atl. 820. This was doubtless an oversight upon the part of the defendant, and can be cured upon a new trial.

For the errors indicated, the rulings will be reversed and a new trial granted.

Rulings reversed and cause remanded.

(124 Md. 116)

MICHAEL v. SMITH. (No. 59.)

(Court of Appeals of Maryland. June 26, 1914.)

1. APPEAL AND ERROR (§ 1058\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Error in excluding testimony as to a fact is not reversible where the witness thereafter testified fully as to such fact without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4196, 4200-4204, 4206; Dec. Dig. § 1058.\*]

2. WILLS (§ 164\*)—UNDUE INFLUENCE—EVIDENCE.

While testimony as to the relations between the proponent of a will and testatrix is admissible on the issue of undue influence, the relations between proponent and the husband of testatrix are not admissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.\*]

3. WILLS (§ 164\*)—UNDUE INFLUENCE—EVIDENCE.

In a contest of a will by the daughter of testatrix on the ground of undue influence of contestant's brother, evidence as to the execution of a deed to contestant by her father 20 years before the execution of the will had no tendency to prove the issue, and was properly excluded.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.\*]

4. WILLS (§ 165\*)—UNDUE INFLUENCE—EVIDENCE.

In a will contest on the ground of undue influence, statements by testatrix and proponent more than two years after the execution of the will were inadmissible.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 415-420; Dec. Dig. § 165.\*]

5. APPEAL AND ERROR (§ 1033\*)—ERROR FAVORABLE TO PARTY COMPLAINING.

The exclusion of evidence more favorable to the adverse party than to appellant is not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

6. APPEAL AND ERROR (§ 1057\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.

Exclusion of evidence of a fact, the truth of which was confessed on the trial by appellee's counsel, is not ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4194-4199, 4205; Dec. Dig. § 1057.\*]

7. EVIDENCE (§ 271\*) — DECLARATIONS IN PLEADINGS.

A party, to prove a controverted fact, cannot offer in evidence a petition presented by

him in another proceeding alleging the existence of such fact.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1068-1079, 1081-1104; Dec. Dig. § 271.\*]

8. WILLS (§ 164\*)—UNDUE INFLUENCE—EVIDENCE.

Since contestant of a will was not concluded by an accounting made by proponent as administrator pendente lite of testatrix's estate, under Code Pub. Civ. Laws, art. 93, §§ 68, 69, testimony, offered by her on the issue of undue influence, that she objected to the account, was properly excluded as immaterial.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.\*]

9. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Error in the admission of evidence is not ground for reversal, where other witnesses of the appellee testified to the same fact without objection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

10. WILLS (§ 164\*)—FRAUD AND UNDUE INFLUENCE—EVIDENCE.

Where fraud and undue influence are alleged, great latitude is allowed in the introduction of evidence.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 403-414; Dec. Dig. § 164.\*]

Appeal from Circuit Court, Howard County; Wm. Henry Forsythe, Jr., Judge.

"To be officially reported."

Proceedings by William A. Smith for the probate of the will of Harriet E. Smith, to which Annie F. Michael filed a caveat. Judgment for proponent, and contestant appeals. Affirmed and remanded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Thomas H. Robinson and S. A. Williams, both of Bel Air (Edward M. Hammond, of Baltimore, on the brief), for appellant. John L. G. Lee, of Baltimore, and Joseph L. Donovan, of Ellicott City (Bonsal & Lee, of Baltimore, on the brief), for appellee.

THOMAS, J. Mrs. Harriet E. Smith, of Harford county, Md., widow of James Smith, died on the 28th of November, 1912, leaving one son, William A. Smith, and one daughter, Annie F. Michael, her only next of kin and heirs at law. She left a will, dated the 31st of May, 1909, by which she gave \$1,000 to her daughter, \$500 to Martha E. Michael, the child of said daughter, and bequeathed all the rest and residue of her estate to her son, who was appointed executor. After her death the will was offered for probate in the orphans' court of said county, a caveat there-to was filed by the daughter, and issues involving the execution of the will, testamentary capacity, undue influence, fraud, duress, and knowledge of the contents of the will were sent to the circuit court for Harford county for trial. The case was subsequently removed to the circuit court for Howard

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

county, and during the trial in that court, which resulted in a verdict for the defendant, caveat, on all the issues, the plaintiff reserved 18 exceptions, the first 17 being to the rulings of the court on the evidence, and the eighteenth to its action on the prayers. At the conclusion of the plaintiff's testimony the court directed a verdict for the defendant on all the issues except the issues of undue influence, fraud, and duress, and in this court the exceptions to the action of the court below on the prayers and to the rulings on the evidence referred to in the fourth, seventh, ninth, tenth, and fifteenth exceptions are abandoned.

[1] The plaintiff, Mrs. Michael, testified that she was married in 1888, and thereafter lived at Oakington, in the neighborhood of Aberdeen, Harford county, where her father and mother resided; that her father, James Smith, owned a farm called the Swan Creek farm, which was located across the road from the farm on which he resided; that he made a will about 1885, in which, in order to give her and her brother "an equal amount of land," he added one of the fields of the Swan Creek farm to the home place which he gave her; that her mother told her of the provisions of said will and of her father's purpose to divide his property so that each child would get one-half of it; that her mother also told her that her brother said that he ought to have the whole of the Swan Creek farm, and that he was not pleased with the will; that after that "the relations between her and her brother were not good, he didn't speak to her; she would meet him on the road and look at him to speak, and he would pass her by; if she went into the house where he was, he would get up and go out, disappear; they never had any words, but he just seemed to shun her;" that her father made his last will in 1895, and died in 1905, and that her brother did not speak to her until the morning after her father died, when "he just said 'good morning.'" It appears that a few years after the execution of the first will James Smith conveyed the Swan Creek farm to his son, and conveyed another farm, called Purgatory, to his daughter, and it also appears from the report of the case of *Smith v. Michael* in 118 Md. 10, 77 Atl. 282, to which, by agreement contained in this record, reference may be made, that by his last will, executed in 1895, he left his home farm to his wife for life, and after her death to his daughter, and that of the rest and residue of his estate (not including the personal property on his farm, which he gave to his wife) he gave one-third to his wife, and directed that the remaining two-thirds should be held and invested by his executors, his wife and son, the income therefrom to be paid to his wife during her life, and the corpus to be divided, after her death, equally between his son and daughter. In 1908 Mrs. Michael filed a bill in equity to compel her mother and brother to give bond and to render an ac-

count of her father's estate. Mrs. Michael further testified that for two or three years after her father's death she never heard anything about his estate; that her brother never referred to it, and that she asked her mother to ask him about it, and she said that she would rather she, Mrs. Michael, would ask him; that she told her mother that she knew that she, witness, could not ask him because he would "fly into a rage," and that she thought her mother ought to find out; that she also told her mother that witness thought he "was transferring property in his own individual name," and that she knew that he "did not have any property of his own"; that she only wanted what was hers at the proper time, and wanted to know something about the estate, and that her mother replied that she knew that the witness did not want anything but her own; that Mr. Lee had told him that "it was lawful for him" to so transfer the property, "and that it would not give her any trouble"; that she, witness, told her that she would be better satisfied if it was done in his name as executor, and that she did not see how that would give her any trouble. The witness was then asked the following question: "You have said that you asked your mother for information about your father's estate and you have explained what she said, how frequently did you do that?" and she replied: "I asked her three or four times before I took counsel; I told mother that if brother would not"—The defendant objected to her proceeding further with her answer, and the first exception is to the ruling of the court sustaining the objection. In the next question she was asked what her mother said to her on the three or four occasions that she applied for information, and she replied: "I told her that I could not talk to brother, and that she would have to be the go-between, and that I wanted to know something the next time I came home. I told her that I would not take counsel without notifying her." The witness was then asked, "What did she say to you?" and replied, "'I can't tell you anything, Anue,' and I told her I would not do anything that I thought wrong, but I wanted what was mine, and I wanted them to give me an accounting of my father's estate, and I told her if they didn't do it I was going to take counsel." In reply to the next question she said she did take counsel, and subsequently brought suit, meaning the suit to which we have referred. It is evident from this testimony that the plaintiff secured, without objection, the evidence that was excluded by the court, viz., that if she did not get the information she wanted she would consult counsel, and that the plaintiff was not prejudiced by the court's ruling. The plaintiff was asked if she remembered anything about a tax suit against her father's estate, and, having said she did, she was then asked what her mother said to her about the suit, and what her mother told her her brother said about it, and she replied:

"My mother told me that while she was in Aberdeen on one occasion, she met Mr. Wells, the county treasurer, and was told about the taxes being due on the property. My brother was in the store, or at least he came from some place and used some very foul language to Mr. Wells. He told her not to pay it, as they could not make her pay it. Afterwards a suit was brought against them, and they had to pay it. She told me herself that she would have paid the taxes, but brother would not let her pay them."

Then follows the following questions and answers:

"Q. What did he tell her about the outcome of the suit? A. He told her he never had to pay it. Q. With reference to the outcome of that suit and the payment of the costs did she make any statement to you about what her son had told her, and, if so, what was it? A. She told me if she had paid the tax bill at first, it would not have cost so much, that it was more than double what the tax bill was at first. Q. Did your mother tell you anything about that case in the Court of Appeals? A. No, sir. Q. That your brother had told her the case was going to the Court of Appeals? A. No, sir. Q. What did she say about it? A. She said she found out about it going to the Court of Appeals. Q. Did she tell you anything that your brother had told her about the case in the Court of Appeals, whether it had cost her anything and if he had lost it or not? Q. Mrs. Michael, will you please tell the court and jury whether or not your mother told you your brother said anything to her about this case in the Court of Appeals, whether he had won it or lost it?"

To the last two questions the defendant objected, and the refusal of the court to permit the questions to be answered is the subject of the second and third exceptions. The tax suit referred to was in reference to the property and estate of the plaintiff's father, and the evidence does not show when the suit was brought. The questions were asked for the purpose of showing the relations between the defendant and his mother, that he ignored her in the management of his father's estate, and that he deceived her in regard to the outcome of the suit. Assuming, without deciding, that the evidence elicited was admissible, it is apparent that the answers of the witness to these questions could not have added any weight to her previous testimony, for she had already said that her mother told her that her son had deceived her about it, that she would have paid the bill if he had not told her not to do so, and that the suit resulted in their having to pay double the amount of the original bill.

Plaintiff's counsel offered to show that shortly after the plaintiff's father executed his first will, about 1885, the defendant had a talk with his father in the presence of the witness, Mr. Michael, and complained that the Swan Creek farm had not been conveyed to him, and "used severe language" to his father, and that shortly after that talk his father and mother deeded the farm to the defendant and deeded the farm called Purgatory to the plaintiff, and then asked said witness the following question, referred to in the fifth exception:

"I want you to tell us, so far as you observed, the conduct of William A. Smith, the defendant, towards his father, James Smith, in his lifetime."

[2] The farm in question, which was conveyed to the defendant in 1888, belonged to the defendant's father, and there was no evidence to show that the defendant's mother knew of or was induced to join in the conveyance by the "severe language" the defendant used to his father. But even if it be assumed that because his mother united in the deed it was proper to show the conduct of the defendant towards his father on the occasion referred to, the question was very much broader, and would have allowed the witness to testify to any conduct of the defendant towards his father, however remote or disconnected with any transaction to which the defendant's mother was a party, and regardless of whether or not it reflected upon the relations of the defendant and his mother. Where a party is charged with having procured the execution of a will by fraud or undue influence, his situation towards the person who executed it and *their* antecedent relations to and dealings with each other are proper subjects of inquiry (*Hiss v. Weik*, 78 Md. 439, 28 Atl. 400), but his conduct towards *others*, wholly apart from and not connected with any dealings with or his relation to the alleged victim of his influence or fraud, can shed no light upon such issues, unless undue influence may be inferred from the mere fact that the party charged exerted it in another and entirely different transaction, and we know of no case supporting such a rule. In addition to what we have said, it had already been shown that the defendant was not satisfied with the provisions of his father's first will, in which one of the fields of the Swan Creek farm was added to the home place, which was to go to the plaintiff, and that the Swan Creek farm, including the field referred to, was subsequently conveyed to the defendant. The plaintiff, therefore, had the benefit of that evidence and any inference that could be properly drawn from it, and she could not have been prejudiced by the exclusion of the evidence of the "severe language" of the defendant to his father.

[3] The sixth exception is to the refusal of the court to permit plaintiff's counsel to ask her husband the following question:

"Mrs. Michael, the plaintiff here, has been cross-examined about the deed to Purgatory farm made to her by her father and mother. Do you know how that came about?"

Counsel did not state what he proposed to show by the answer to this question, and the question does not appear to be relevant or material. The deed referred to was made more than 20 years before the execution of the will in question, and was a conveyance to the plaintiff from her *father*. If he gave her the farm because he deeded the Swan Creek farm to her brother, we do not see how that would reflect upon any of the is-

sues in the case. If the question was asked for the purpose of showing the relations then existing between the plaintiff and her father and mother, the plaintiff was not injured by the ruling of the court, for it is abundantly shown by the evidence in the case, if not conceded, that the relations between her and her mother at that time were of a friendly character. We do not see how the answer to the question could tend to show the relations of the defendant and his mother, and it is not denied that the relations of the defendant and plaintiff were not very cordial and friendly.

The eighth exception is to the refusal of the court to permit the witness, plaintiff's husband, to answer the following question:

"Now, Mr. Michael, did you ever hear any conversation between the defendant here and his father about the division of the father's property between his wife and children: and, if so, what was said in that connection, and when was it?"

What we have said in regard to the two exceptions last referred to applies to this, and, assuming that the plaintiff was entitled to show that the defendant attempted to influence his father in the disposition of his estate, she had the benefit of the evidence to which we have already alluded, and could not have been seriously prejudiced by the action of the court.

[4] In the eleventh exception the plaintiff offered to prove by the witness Thomas P. Mitchell:

"That in the early summer or late spring of 1911 he was at the house of Mrs. Harriet E. Smith, and while there he talked with her and her son, William A. Smith. That the witness mentioned to them a visit he had paid shortly before to John M. Michael's fishing shore, and what a successful fishing season said Michael was having, and how glad the witness was of his success. That Mrs. Smith then said, 'Please do not mention the Michaels to us; we would rather not hear about them,' and the defendant then spoke up and said, 'I don't care whether Johnny Michael catches fish or does not catch them; I don't want to hear about them.'"

[5] The will in question was made in May, 1909, more than two years before the statements referred to, and there is not the slightest suggestion in the evidence that Mrs. Smith was not of sound and disposing mind at the time of its execution. But apart from the consideration of the admissibility of her statement, as to which we do not express an opinion (*Griffith v. Diffenderfer*, 50 Md. 466; *Hoppe v. Byers*, 60 Md. 381), it is obvious that the plaintiff could not have been injured by the rejection of this evidence. The theory of the plaintiff, which the evidence adduced by her tended to support, was that after she instituted suit against her mother and brother in 1908 her brother became very angry with and bitter towards her, but that the suit did not arouse any resentment on the part of her mother, or cause any change in her feelings towards the plaintiff, and that when her brother was not present her mother spoke to her as she had al-

ways done. On the other hand the testimony produced by the defense was to the effect that Mrs. Smith was greatly incensed by the action of the plaintiff in bringing the suit and bitterly resented it. The evidence referred to in this exception, so far as Mrs. Smith's statement is concerned, therefore tended rather to support the defendant's case, and it is not denied that after the suit of 1908 the relations of the plaintiff and her brother were not friendly.

[6-8] The plaintiff closed the testimony offered on her behalf by offering in evidence a copy of an account presented to the orphans' court by the defendant as administrator pendente lite, designated his "First and Final Account," and a copy of the exceptions of the plaintiff thereto, which, upon objection by the defendant, were rejected by the court. The account charges the defendant with the amount of the inventory of goods and chattels, cash in bank and in the house, and with a mortgage, aggregating \$3,191.00, and credited him with allowances to the amount of \$801.56, leaving a balance of \$2,389.44 in his hands subject to the order of the court. In the petition filed by the plaintiff the account was excepted to because it did not "fully show" the condition of the estate, and because it did not account for money and securities, amounting to \$8,000, owned by the deceased prior to the death of her husband and bequeathed to her by his will. By the will in question \$1,000 was given to the plaintiff, \$500 to her daughter, and the residue to the defendant. The caveat charges that the will was procured by the fraud and undue influence of the defendant, and the plaintiff had a right to show the amount of the estate, and that under the terms of the will she would receive but a small portion of it. So far as the record in this case discloses the evidence shows that Mrs. Smith had at one time one railroad bond and two "government bonds," the amount of which was not stated. The papers and proceedings in the case of *Michael v. Smith* were offered in evidence, and, according to the report of that case (113 Md. 10) they show that Mrs. Smith received under the will of her husband over \$8,000, but the record in this case does not contain the proceedings in that case, or show that they were read to the jury at the trial. But, assuming that they were, and that the jury were thereby informed that Mrs. Smith, after the death of her husband, received over \$8,000 from his estate, the only inference to be drawn in favor of the plaintiff from the account offered in evidence was that the defendant procured from Mrs. Smith during her life a large part of her estate, or that he was concealing it. The object, therefore, of this evidence was to show that he had presented an account in which he charged himself, as administrator pendente lite, with only \$3,191, and the question to be determined is, was the plaintiff injured by its rejection? We think the record clearly shows that she

was not. Counsel for the plaintiff in offering the evidence stated to the court below:

"As matter of fact the record shows that an estate of \$10,000 or \$12,000, belonging to the testatrix, was dissipated during the latter years of her life, mostly during the three or four years that the daughter had been kept from the testatrix; it was during that period the depreciation took place. The first account of the administrator shows that there is only an estate of about \$3,000. *In addition to that, may it please the court, our brother in his opening statement undertook to state very much what was in this account.*"

And in their brief in this court counsel for the appellant say:

"The appellee's counsel in the opening statement had laid stress upon this account and the small amount involved in the estate."

The jury, therefore, had the *confession* of the defendant that he had presented the account, and as to the amount of it, and the plaintiff had the full benefit of any inferences that might be properly drawn from those facts. So far as the plaintiff's petition or exception to the account is concerned, we see no reason for its admission. She could not offer her own statements in the petition to prove the matters therein alleged. It is the duty of an administrator pendente lite to collect and preserve the estate pending the contest over the validity of the will. His letters are revoked by the granting of letters testamentary or of administration, and he is then required to state an account and turn over all the estate in his possession to the executor or administrator, who is authorized, upon his failure to do so, to put his bond in suit. Code of 1912, art. 93, §§ 68, 69. There is not a suggestion in the record that the plaintiff acquiesced in the account presented by the defendant, as administrator pendente lite, to the orphans' court, she was not bound by it, and under the circumstances no unfavorable inference could have been drawn from her failure to show that she had objected to it.

A witness having testified that she had known Mrs. Smith and the defendant for 17 years, often visited her, and was with her for nine weeks during her last illness, was asked by counsel for the defendant the following questions:

"I want you to please describe the manner and conduct of William A. Smith towards his mother as you saw it while you were a member of that household." "I want you to describe what duties he performed in the house during that period."

The thirteenth and fourteenth exceptions are to the action of the court in overruling plaintiff's objections to these questions. In answer to the questions the witness stated that she would call on him any hour of the day or night, and that he was always there to do whatever she wanted done, was kind

and gentle and never got out of patience, and that when she, witness, took her rest he would "wash the dishes, straighten up, and do anything in the house that needed to be done." The plaintiff introduced evidence to show the relations of Mrs. Smith and the defendant and his conduct towards her after the execution of the will, and a number of the defendant's witnesses testified without objection to the same effect as the evidence sought to be excluded by these exceptions. Under such circumstances we do not see how it could be held that the plaintiff was injured by this evidence to the extent of warranting a reversal of the action of the court, even if we were to hold that the evidence was not admissible. *Eckles v. Cornell Economizer Co.*, 119 Md. 113, 86 Atl. 38; *Dolby v. Laramore*, 121 Md. 621, 622, 89 Atl. 442.

Mr. Lee, counsel for the defendant, prepared Mrs. Smith's will, and the defendant having testified, in answer to a question of plaintiff's counsel, that he employed Mr. Lee in the case of Michael v. Smith, referred to above, but that he did not employ him "all the time," was asked by counsel how long Mr. Lee had been his counsel, and he replied, "As I had a lawsuit I would employ Mr. Lee." He was then asked, "You employed Mr. Lee in all your lawsuits, didn't you?" and he said, "No, sir; I have had Mr. Davis—no, sir; I did not." Counsel then asked him when he began to employ Mr. Lee, and if he did not employ him as early as 1901 and 1902, and when he replied, "No, sir," he was asked the following questions: "Who did you employ in the John S. Young suit against you?" "Was he your counsel in 1901 in your divorce suit, and in 1902 in the John S. Young suit against you?" To the last two questions the defendant objected, and the sixteenth and seventeenth exceptions are to the refusal of the court to permit the questions to be answered. The plaintiff secured the evidence that Mr. Lee had been counsel for the defendant, and that he employed him when he had a lawsuit, and it is not probable that she was injured by the refusal of the court to permit her to show that Mr. Lee acted as the defendant's counsel in the particular cases referred to.

[10] In cases where fraud and undue influence are alleged, great latitude is allowed in the introduction of evidence (*Griffith v. Diffenderfer*, supra; *Hoppe v. Byers*, supra; *Hiss v. Welk*, supra), and the record shows that that rule was followed by the court and counsel in this case.

After a careful examination of the record we do not find in the exceptions of the plaintiff any error that would justify a reversal of the rulings.

Rulings affirmed, and case remanded.



(124 Md 22)

BOOTH et al. v. EBERLY et al. (No. 46.)  
(Court of Appeals of Maryland. June 26,  
1914.)

**1. WILLS (§ 634\*)—REMAINDERS—LIMITATION  
OVER—TIME OF REMAINDERMAN'S DEATH.**

Under a will placing the residuary estate in trust for the equal benefit of testator's husband and son for the life of the husband, and directing that "from and after" the husband's death the trust estate as a whole shall go to her son, but "if he should die without leaving issue living at the time of his death, then, subject to the life interest in the income payable" to the husband, the estate shall go to her nephews and nieces, the death of the son before that of the husband, but not necessarily before that of testatrix, is the contingency on which the limitation over is dependent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.\*]

**2. PARTITION (§ 21\*)—SALE FOR PARTITION—  
CONCURRENCE OF INTERESTS OF PARTIES.**

The right of a tenant in common in land to maintain a bill under Code Pub. Civ. Laws, art. 16, § 137, for its sale, because not susceptible of partition, is not affected by the fact that the devisor of the other interest therein had given his executor a naked power to sell and convey; the residuary legatees, holders of the legal title and entitled to the proceeds, as well as the executor, being made parties, so that the requirement of the act, that the interests of the parties be concurrent is satisfied.

[Ed. Note.—For other cases, see Partition, Cent. Dig. § 72; Dec. Dig. § 21.\*]

Appeal from Circuit Court, Washington County, in Equity; M. L. Keedy, Judge.

Suit between Harriet Booth and others and Charles A. Eberly and others for sale of land. From the order confirming the sale, the purchasers appeal. Affirmed.

J. A. Mason, of Hagerstown, for appellants. Elias B. Hartle, of Hagerstown (Hartle & Wolfinger, of Hagerstown, J. R. Ruthrauff, of Chambersburg, Pa., and H. H. Spangler, of Mercersburg, on the brief), for appellees.

URNER, J. This is a proceeding, under article 16, § 137, of the Code, for the sale of real estate and division of the proceeds among the owners, on the ground that it is not susceptible of partition without loss and injury. The property consists of a valuable farm in Washington county which was formerly owned to the extent of an undivided six-sevenths interest by Andrew R. Schnebly, and to the extent of one-seventh by Harriet Schnebly, his wife. Both have died testate, and all the persons who may be entitled, under the respective wills, to interests in the real estate are parties to the present suit. A decree having been passed for the sale of the property, it was purchased by several of the parties to the cause, and their exceptions to the ratification of the sale have raised the question we are to consider.

[1] The will of Harriet Schnebly, who died in 1888, devised her interest in the farm, as part of the residue of her estate, to her executor in trust to pay one half of the income

therefrom to her husband for life and the other half to her son, Daniel Hoke Schnebly, and disposed of the remainder as follows:

"From and after the death of my beloved husband all of said trust estate to go to my said son, Daniel Hoke; but if my said son, Daniel, should die without leaving issue living at the time of his death, then subject to the life interest in the income payable to my husband, I give, devise and bequeath the said residuary estate to my nephews and nieces,—the children of my sisters, including those of my half-sisters, and should any of my nephews and nieces be dead, leaving children to survive them, such child or children shall take its deceased parent's share."

Andrew R. Schnebly survived his wife until 1913 when he died, leaving a will by which he devised and bequeathed his property, after a life interest, which has expired, and certain specific bequests, to four designated persons in equal shares absolutely. In the interval between the deaths of the husband and wife their son Daniel died intestate, unmarried and without issue, and leaving no brothers or sisters either of the whole or half blood. The bill was filed by a nephew and a grandnephew of Harriet Schnebly, and the parties defendant include the other persons belonging to the class of contingent remaindermen described in the residuary clause of her will, and also the devisees under the will of her husband, some of whom have since become the purchasers of the property decreed to be sold. The objection urged to the sale is that the plaintiffs who filed the bill have no interest in the subject-matter of the suit, and that the court was therefore without jurisdiction to pass the decree. It is contended that upon a proper construction of the will of Harriet Schnebly the event upon which the contingent remainder to her nephews and nieces or their children depends was the death of the son Daniel without issue in the lifetime of the testatrix, and that as he lived beyond that period, the estate devised to him became indefeasibly vested in him, and upon his death intestate, unmarried, and without leaving issue, brothers or sisters, his interest in the property was inherited by his surviving father, and passed under the will of the latter to his devisees. The court below overruled the exceptions and ratified the sale on the theory that, according to the intention of the testatrix, as plainly shown by the terms of her will, the residuary estate was to vest in remainder in the nephews and nieces, or their children, in the event of the death of Daniel Schnebly at any time prior to the expiration of the preceding life estate of his father. With this view we fully agree.

The language of the will is not obscure or ambiguous, and the intention of the testatrix is capable of being readily ascertained. After placing the residuary estate in trust for the equal benefit of her husband and son during the life of the former, she directs that "from and after" the husband's death the trust estate as a whole shall go to the son; but "if he should die without leaving

issue living at the time of his death, then, subject to the life interest in the income payable" to the husband, the estate shall go to the nephews and nieces, and should any of the latter "be dead leaving children to survive them," the children shall take the "deceased parent's share." It was the evident purpose of these dispositions that the estate in remainder should vest in possession in the son only *from and after* the death of the father, and that if the son should, in the meantime, die without issue, the estate should pass to the ultimate remaindermen. In other words, it is clear that the testatrix intended the nephews and nieces, or their children, to have the trust estate if, at the time fixed for its distribution, her son was dead, leaving no issue. There is no rule of interpretation which forbids that this expressed intention shall be gratified. On the contrary, there is a well-recognized principle which supports and favors the construction we have adopted. It is stated by Chief Judge Alvey in *Engel v. Geiger*, 65 Md. 544, 5 Atl. 249, as follows:

"As a general rule it is certainly true that in the case of an *immediate* gift, with a bequest over in the event of the death of the first or preceding legatee, the event of death is referable to the lifetime of the testator. But it is explicitly laid down as text law that this construction is only made *ex necessitate rei*, from the absence of any other period to which the words denoting the event of death can be referred. Consequently, where there is another point of time to which such dying may be referred, as in the case when the bequest is to take effect in possession after a life estate, or at any period subsequent to the testator's death, the words may be considered as extending to the event of the legatee dying in the interval between the testator's death and the period of vesting in possession, or the time of actual distribution, as will best promote the intention of the testator, to be gathered from the context of the will. 3 Jarm. on Wills, 611."

Among the cases in which this doctrine has been stated and applied are: *Straus v. Rost*, 67 Md. 476, 10 Atl. 74; *Hammett v. Hammett*, 43 Md. 307; *Wilson v. Bull*, 97 Md. 137, 54 Atl. 629; *Hutchins v. Pearce*, 80 Md. 445, 31 Atl. 501; *Mercantile Trust & Deposit Co. v. Brown*, 71 Md. 169, 17 Atl. 937; *Bailey v. Love*, 67 Md. 592, 11 Atl. 280; *Small v. Marburg*, 77 Md. 19, 25 Atl. 920. In the present case the disposition in remainder is distinctly made to take effect in possession at a period subsequent to the death of the testatrix, and her real and evident wishes can be given effect only by referring to this later point of time the contingency upon which the limitation over is dependent. The case is therefore clearly subject to the general rule of construction we have quoted.

The appellants, in support of their contention, invoke the principle that the law favors the early vesting of estates. In *Poultney v. Tiffany*, 112 Md. 633, 77 Atl. 117, it was said, in the opinion by Judge Pearce, that:

"\* \* \* Notwithstanding the preference of the law for early vesting, the testator or donor has the absolute right to fix the period of vest-

ing at his pleasure, 'and to make it depend upon a contingency, and when he has done this with reasonable certainty, his wishes will prevail, and the estate will not vest until the happening of the contingency'" (citing *Larmour v. Rich*, 71 Md. 369, 18 Atl. 702).

This right of disposition is, of course, subject to the rule against remoteness. A statement similar in effect to the one just quoted is contained in the opinion by Judge Schmucker, in *Lumpkin v. Lumpkin*, 108 Md. 496, 70 Atl. 238, 25 L. R. A. (N. S.) 1063. In *Bailey v. Love*, supra, this court said:

"We cannot hold that the law favors the vesting of estates to the extent of defeating the testator's intention."

This expression is appropriate to the case now under consideration.

[2] A separate objection, raised by the purchasers to the jurisdiction of the court to decree the sale, is that by the will of Andrew R. Schnebly his executor was empowered to sell and distribute the proceeds of the undivided six-sevenths interest of which the testator died seised, and that hence the estates of the parties are not concurrent as they are required to be in such a proceeding. Code, art. 16, § 137; *Roche v. Waters*, 72 Md. 269, 19 Atl. 535, 7 L. R. A. 533; *Gill v. Wells*, 59 Md. 499. It appears that the will referred to did not devise the property to the executor, but merely conferred upon him a naked power to sell and convey. The residuary devisees were the holders of the legal title (*Small v. Marburg*, 77 Md. 20, 25 Atl. 920), and entitled to the proceeds of the sale. They and the executor are parties to the suit, and they represent the entire six-sevenths interest which passed under the will. The bill is filed by some of the owners of the remaining one-seventh in order to realize their interests by a sale of the estate as a whole, on the ground that it is not susceptible of being divided without loss and injury to those entitled. The right given them by statute to pursue this course is not affected by the mere fact that the deviser of the other six-sevenths interest has made the disposition in question. The interests of the parties to the bill are concurrent within the meaning of the act and for the purposes of such a proceeding as the present.

Order affirmed with costs.

(124 Md. 141)

NORTHERN CENTRAL RY. CO. v. LAIRD  
et al. (No. 57.)

(Court of Appeals of Maryland. June 26,  
1914.)

1. RAILROADS (§ 9\*)—REVIEW OF ORDERS OF PUBLIC SERVICE COMMISSION — "UNLAWFUL."

Under Laws 1910, c. 180, §§ 11, 43, providing that a railroad company aggrieved by an order of the Public Service Commission may institute proceedings to set aside such order on the ground that it is unreasonable or unlawful, an unreasonable order is an unlawful one, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

it is the duty of the court to consider its reasonableness.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 12-19; Dec. Dig. § 9.\*

For other definitions, see *Words and Phrases*, vol. 8, pp. 7186, 7187.]

**2. RAILROADS (§ 227\*)—TRAIN SERVICE—REASONABLENESS OF ORDER OF PUBLIC SERVICE COMMISSION.**

An order of the Public Service Commission, forbidding a railroad company to delay local trains to permit the passage of delayed through trains, is unreasonable, where the evidence shows that the local trains are never delayed more than 10 minutes and, unless they are so delayed, the through trains are delayed more than half an hour.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. § 741; Dec. Dig. § 227.\*]

Appeal from Circuit Court of Baltimore City; Henry Duffy, Judge.

"To be officially reported."

Suit by Northern Central Railway Company against Philip D. Laird and others, constituting the Public Service Commission. Decree for defendants, and plaintiff appeals. Reversed and remanded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Shirley Carter and John J. Donaldson, both of Baltimore, for appellant. W. Cabell Bruce, of Baltimore, for appellees.

**PATTISON, J.** The appellant is a corporation, incorporated under the laws of the state of Maryland and the commonwealth of Pennsylvania, owning a line of railroad within said states and operating other lines in said states and in the state of New York. Included within the lines owned and operated by it is the road from Baltimore, Md., to Harrisburg, Pa., known as the Baltimore Division. A large number of trains are operated upon this road, many of which are interstate trains carrying passengers, freight, and United States mails between Maryland and other states of the Union. These trains carry Washington and Baltimore passengers to and from Chicago, St. Louis, and other points in the west, southwest, and northwest, as far as the Pacific Coast, and to and from Buffalo and points north, not only in the United States, but in Canada, and many of said trains take through cars to and from Chicago, St. Louis, Buffalo, and Niagara Falls. On April 1, 1913, Albert M. Griffin and others residing between Cockeysville and Parkton, stations on the appellant's road in Baltimore county, Md., filed their complaint with the appellees, alleging that the local service they were receiving from the appellant company was inadequate. At such time the early morning service from Parkton consisted of train No. 200, scheduled to leave Parkton at 6:50 and to arrive in Baltimore at 8:16, and No. 70, scheduled to leave Parkton at 7:32 and to arrive in Baltimore at 8:45. The last return trains were those leaving

Baltimore at 7:20 and 11:54 p. m. The petition of Griffin and others alleged that the patrons from Cockeysville to Baltimore have excellent service, and in their petition complained of the discrimination in favor of those located between said points, and suggested that Parkton be made the terminus for all local trains instead of Cockeysville, but asked, if good reasons be assigned by the appellant company for its refusal to do so, that it be compelled to make the following changes in the schedule:

"(1) Start train No. 100 from Parkton, arriving at Calvert Station at about 6:45 a. m.

"(2) Start No. 104 from Parkton, arriving at Calvert Station at about 7:45 a. m.

"(3) Make the milk train No. 200 express from Cockeysville to Baltimore, putting off at Cockeysville passengers for intermediate points.

"(4) Make No. 205 express to Cockeysville, and then local to Parkton.

"(5) Add one additional accommodation train to Parkton, leaving Baltimore about 9:30 p. m."

Upon notice of such complaint being served upon the appellant, it answered, saying that the changes in service asked for "are of such a character that they could not be made without such interference with the passenger service on its lines, both through and local, as would cripple that service and do great injustice, not only to its through traffic, but to its local traffic to stations other than those between Cockeysville and Parkton, referred to in the complaint aforesaid, besides involving a great expense in addition to that of its present service, which would not be justified by any possible return from the service demanded." Thereafter, on March 13, 1913, a hearing was had upon the complaint filed, at which the parties appeared and testimony was taken. Thereafter the appellant filed with the Commission what is termed in the proceedings before it "an offer of satisfaction." This offer, however, was not filed, as stated in the opinion of the Commission, until the Commission had reached its conclusion upon which it thereafter passed its order of April 7th. The offer was addressed to the Public Service Commission, and in it the appellant stated that since the above-mentioned complaint was filed the company's officers had endeavored to work out a plan that would give additional accommodations to travelers to and from Baltimore city using stations between Parkton and Cockeysville with due regard to local travel at Cockeysville and points south, and to through travel over the company's lines and its freight traffic; and had found the following to be the only practicable changes that could be made in the schedule:

"(1) Southward. Start train No. 100 from Parkton (instead of from Cockeysville) at 5:30 a. m., stopping at points between Parkton and Cockeysville and running from Cockeysville to Baltimore on its present schedule, reaching Calvert Station at 6:45 a. m.

"(2) Run train No. 121 (which now ends its run at Cockeysville) to Parkton, leaving Balti-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 91 A.—49

more at about 10 p. m. and reaching Parkton at about 11:30 p. m., stopping at stations between Cockeysville and Parkton.

"(3) Such changes to be made at the time of the general spring change of schedule toward the latter part of May in order to avoid the great expense of issuance of new time-tables in the short interval, and the difficulties attending a mere partial readjustment of train services during said interval.

"(4) That this company accordingly now undertakes by way of satisfaction of said complaint to make the changes in the last paragraph mentioned at the time therein set forth.

"(5) That these are the only changes that this company can make in the premises with a due regard to its duties as a common carrier towards its passengers generally, both through and local, and its shipper through and local."

Thereafter, by its order of April 7, 1913, above mentioned, the Commission ordered:

"First. That the Northern Central Railway Company start its train No. 100 from Parkton (instead of from Cockeysville as at present operated) at 5:30 a. m., stopping at stations between Parkton and Cockeysville, and running from Cockeysville to Baltimore on its present schedule, reaching Calvert Station at 5:45 a. m.

"Second. That said Northern Central Railway Company run its train No. 121 (which now ends its run at Cockeysville) to Parkton, leaving Baltimore at 10 p. m. and reaching Parkton at about 11:30 p. m., stopping at stations between Cockeysville and Parkton.

"Third. That the foregoing changes in the operation of train No. 100 and train No. 121 be put into effect at the time of the general spring change of schedule in the month of May, 1913.

"Fourth. That said Northern Central Railway Company be, and it is hereby, required to operate its train No. 200 from Parkton to Baltimore (said train leaving Parkton at 6:50 a. m. and scheduled to arrive in Baltimore at 8:20 a. m.) on its published schedule time, and said company is further ordered to cease and desist from placing said train No. 200 on a side track or otherwise detaining it when running on its own schedule time, and from holding it back at point of origin in order to give right of way to through or interstate trains which have been delayed at points beyond the run of train No. 200, and which, by reason of such delay, can only be run to destination by displacing train No. 200 and depriving it of the time allotted to it by said published schedule.

"Fifth. That the rule of operation of train No. 200, contained in paragraph 4 of this order, shall apply generally to local trains operated by said company."

The appellant approved of the passage of so much of the order as is embraced in the first, second, and third paragraphs, the changes in the service therein made being those suggested by it in its offer of satisfaction made to the Commission. But as to the fourth and fifth paragraphs of the order, the appellant filed its petition with the Commission asking that such paragraphs be rescinded. A hearing was given the appellants upon their petition, which resulted in the Commission dismissing it and refusing to rescind the fourth and fifth paragraphs of the order. The appellant then filed its bill in the circuit court of Baltimore city, alleging substantially the facts as we have stated them, and asked: (1) That the court declare void paragraphs 4 and 5 of the order passed by the appellee; (2) that the said appellees be enjoined and restrained from attempting to

enforce said paragraphs; and (3) that a preliminary injunction be granted restraining and enjoining the appellees from attempting to enforce said paragraphs of said order until a hearing could be had. An answer was filed thereto and testimony heard, whereupon the court dismissed the bill. It is from that order that this appeal is taken.

The power and authority of the Commission is derived exclusively from the statute (chapter 180, Acts of 1910) that created it and the amendments thereto. It has no other or greater authority than that which is conferred upon it by statute.

Section 24 of the aforesaid act provides:

"That if, in the judgment of the Commission, any common carrier, railroad corporation, or street railroad corporation, does not run trains enough or cars enough, or possess or operate motive power enough, reasonably to accommodate the traffic, passenger and freight, transported by or offered for transportation to it, or does not run its trains or cars with sufficient frequency, or at a reasonable or proper time, having regard to safety, or does not run any train or trains, car or cars, upon a reasonable time schedule for the run, the Commission shall, after hearing either on its own motion or after complaint, have power to make an order directing any such railroad corporation, or street railroad corporation, to increase the number of its trains, or of its motive power, or to change the time for starting its trains or cars, or to change the time schedule for the run of any train or car, or make any other suitable order that the Commission may determine *reasonably necessary* to accommodate and transport the traffic, passenger or freight, transported or offered for transportation."

It was under the above quoted section of the act, we take it, that the order containing the aforesaid fourth and fifth paragraphs was passed.

Sections 11 and 43 of said act confers upon any corporation subject to its provisions, or any person or persons in interest, that may be dissatisfied with any order of the Commission, the right to institute proceedings in the courts therein named, to vacate, set aside, or have modified such order on the ground that "it is *unreasonable or unlawful*."

It was under the authority of the last mentioned sections of the act that the jurisdiction of the court below was invoked by the appellant company.

[1] If the aforesaid fourth and fifth paragraphs of the order were unreasonable, then the order to that extent was unlawful under the statute. Therefore one of the questions that should have been considered by the lower court, and which is now before this court on appeal, is, Were the aforesaid paragraphs of the order reasonable, when considered in the light of all the facts, circumstances, and conditions here shown to have existed, in relation to the operation of the appellant's road at the time of the passage of said order? It is conceded on all sides that no precedent can be found for the passage of the order now under consideration. No case has been cited to us, and we have not been able to find one, in which the Interstate Commerce Commission or any of the Public Service

Commissions of the various states of the Union have passed a similar order.

[2] The fourth paragraph requires the appellant company "to operate its train No. 200 from Parkton to Baltimore (said train leaving Parkton at 6:50 and scheduled to arrive in Baltimore at 8:20) *on its published schedule time*, and it was also ordered to cease and desist from placing said train No. 200 *on a side track or otherwise detain it* when running on its own schedule time, *and from holding it back* at point of origin in order to give the right of way to through or interstate trains which have been delayed at points beyond the run of No. 200," etc.

The fifth paragraph makes the rule for the operation of train No. 200, contained in paragraph 4 of the order, apply generally to local trains operated by the appellant company.

It was disclosed in the investigation before the Commission that train No. 200 was frequently late in its arrival at Baltimore, and it was conceded that these delays were caused by the delays occurring with the two interstate express trains Nos. 38 and 60, which should have reached Parkton, if on time, a short while before No. 200 was scheduled to leave that station. There appears in the record a statement showing that in December, 1912, train No. 200 was late in arriving at Baltimore on 18 occasions, the aggregate time of such delays amounting to 94 minutes, making the average delay on each occasion less than 6 minutes. As it is not controverted we will assume that the record of delays kept for December corresponds with the delays at other times throughout the year.

There were no complaints as to the delays occurring with other trains except No. 3. Some of the witnesses before the Commission said it at times was late in leaving Baltimore.

Train No. 200 was scheduled to leave Parkton daily (except Sunday) at 6:50 a. m. It stopped at each of the 26 stations between Parkton and Baltimore, a distance of 28 miles, arriving in Baltimore at 8:16 when on time. It was purely a local train carrying passengers and milk, and 1 hour and 26 minutes were required to make its run from Parkton to Baltimore.

Train No. 28 is a fast express train, and as testified to by Mr. Hess, passenger trainmaster of the appellant company, "is made up of 1 steel baggage car, and from 9 to 12 steel Pullmans, sleeping cars. These sleepers come from all points in the West, St. Louis, Chicago, Cincinnati, Detroit, Cleveland, and Pittsburg, and is made up of one or more cars from these points, according to the conditions of travel. They drain all the travel from the Far West as far as the Pacific Coast. Train No. 60 is made up of a sleeper from Buffalo, one from Rochester, and one from Oil City, which drains the northern or the Canadian territory, and, coming to us at Harrisburg, they follow each other very closely,

and they arrive at Washington, when on time, 8:26 and 8:40, respectively, and at that point they connect with the Southern Railroad, train No. 35. This Southern Railroad, train No. 35, has through Pullmans and coaches to New Orleans, and as a matter of course making connections for all intermediate points, and as this train No. 60 is due at Washington at 8:40, which is the later train of the two, this Southern train is due to leave at 8:50, so any amount of time either of these trains lose in arriving at Washington later than 8:40 involves that much delay to the Southern train and its entire route to New Orleans."

The chief complaint made by Griffin and others as to the service they received was the need of an earlier morning train and an additional evening train leaving Baltimore about 10 o'clock. Both of these trains were supplied by the order of the Commission. The only reference made in the complaint to delays occurring in the operation of appellant's trains was that the train due to arrive in Baltimore at 8:20 a. m. "is seldom, if ever, on time, making it very unreliable and unsatisfactory." The Commission, in their opinion, speaking of the demands of the petitioners, said: "The Commission, after careful consideration, is of the opinion that to grant all of the changes asked for would disarrange the present schedule to an extent that the traffic on the Cockeysville-Parkton section of the road would not justify," and that the only changes it found practicable were those they granted in the order of April 7th. It was to correct the delays in the arrival of train No. 200 at Baltimore that the fourth paragraph of the order was passed. It is unquestionably true that at times inconveniences follow such delays, especially so when they prevent the prompt arrival of passengers at their places of business, which is complained of in this case. And we know, too, that it is tiresome and unpleasant to be side-tracked or detained at the station after the time of the departure of the train, in order that a delayed train may pass, but it seems that such delays, here complained of, cannot be avoided by the appellant company, unless much greater and much more serious inconveniences are imposed on passengers upon other trains of the appellant company, who are entitled to equal consideration in the management and operation of its road. The company has attempted to avoid these delays without success and the Commission in its opinion has said that the changes in the company's schedule made by it in its order of April 7, 1913, were the only ones it found practicable to make.

Mr. Latrobe, General Agent of the appellant company at Baltimore testified that local train No. 200 was never held back at Parkton longer than 10 minutes awaiting the arrival of either of the express trains No. 38 or 60. If those trains had not then arrived the local train was permitted to start upon

its run, and was never "held back at any other point than Sparks, which is 50 minutes out of Baltimore." He also stated that if the local train was not held back or side-tracked for the express that the latter train would be delayed 30 minutes in reaching Baltimore. It was to save the 30 minutes to the express passengers that 6 minutes' delay was imposed upon the passengers of the local train. But this delay the Commission contends should not be imposed upon the passengers of such local trains. In its opinion it says:

"In our judgment, where this condition exists, Nos. 38 and 60 have lost their right to occupy the track between Parkton and Baltimore, during the time when the track has been assigned to the local train."

There is a duty owing by the company to the passengers of the express train, as well as to the passengers of the local train, and its duty to the express passenger has not ended because his train is late and not on schedule time. The fact that the train is late calls for greater efforts on the part of the company in advancing such train, although such delay may not have occurred upon its line, so as to enable it, as far as possible, to recover the time it has lost and to make its important connection at Washington with the Southern Railroad for points in the South. It should not, we think, be so indifferently treated, because so delayed and not on schedule time, as to be side-tracked and required to remain there until its run can be made without interfering with the schedule of some other train, as provided in the order of the Commission. This restriction placed upon it might require it to be held for hours awaiting such opportunity. There are many trains upon the road running upon schedule time, and by the order the delayed train is to await until the track is clear, and is not to interfere with the schedule time of any other local train; but, if it could immediately follow at a safe distance No. 200 it would then consume at least 1 hour and 30 minutes in making the run from Parkton to Baltimore when at any other time, when not trailing the local train, the run is made in 42 minutes. The order of the Commission gives the right of way to the local train even though the express is only a few minutes late, and when no time would be lost to either train in reaching the city of Baltimore if the local was held for such time for the express to pass it. In such cases, and even in cases of emergency, no discretion is lodged in the company by the order of the Commission, but it is to be complied with, if not, the company is liable to heavy penalties for its failure to do so. The company is not permitted by the rule in case of delays to consider the welfare of both classes of passengers and to adopt such measures that will to some extent relieve both the local and express passengers. Other illustrations could be given

showing that the requirements of the order are in our opinion unreasonable, but we think it unnecessary to do so. The effect of the order is to deprive the railroad company of all discretion in respect to the operation of its trains at the time of such delays, which discretion, we think, is absolutely essential to the proper and efficient management and operation of the road and to the safety and general welfare of its passengers; and to the extent that the company is deprived of such discretion the Commission has, by its general order, attempted to operate the appellant's road, and in doing this we think it has exceeded the powers conferred upon it by the statute.

"The Commission was given extensive powers, but they should not be extended by implication beyond what may be necessary for their just and reasonable execution. They are not without limits, when directed against the management, or the operations, of railroads, and the Commission cannot enforce a provision of law unless the authority to do so can be found in the statute." *N. Y., N. H. & H. R. R. v. Willcox*, 200 N. Y. 431, 94 N. E. 212. See, also, *Lord v. Equitable Life*, 194 N. Y. 212, 87 N. E. 443; *Binghamton, L. H. & P. Co. v. Stevens*, 203 N. Y. 7, 96 N. E. 114; *Laird v. B. & O. R. R.*, 121 Md. 179, 88 Atl. 347, 348, 47 L. R. A. (N. S.) 1167.

We will not discuss the fifth paragraph of the order, for what we have said as to the fourth applies with even greater force to it. Nor will we express any opinion as to the other ground upon which the order is assailed, as it is unnecessary, inasmuch as we declare the aforesaid fourth and fifth paragraphs of the order void for the reasons stated. We will therefore reverse the order of the lower court, dismissing the bill of the appellant.

Order reversed and case remanded, to the end that a decree may be passed in conformity with this opinion. The appellee to pay the costs.

(124 Md. 111)

GEFHART et al. v. SPRIGG. (No 58.)

(Court of Appeals of Maryland. June 26, 1914.)

1. LIMITATION OF ACTIONS (§ 57\*)—RECEIVERS (§ 61\*)—DISCHARGE—EFFECT OF ORDER—MATURING CLAIMS.

The effect of an order, discharging and releasing, on his petition therefor, one of two receivers from further execution of the receivership, and directing the execution of a release by his successor and the other receiver, acquitting and discharging him from all claims and demands which could be brought against him, is, at least, to mature immediately all claims against him arising out of the receivership, so that claims made after 15 years are stale and barred by limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 155, 312-323; Dec. Dig. § 57; \* Receivers, Cent. Dig. § 108; Dec. Dig. § 61.\*]

2. LIMITATION OF ACTIONS (§ 180\*)—PLEADING—DEMURRER.

The defense of limitations may be availed of under a general demurrer to a petition, where from the face of the petition it can be seen that the bar applies, and no facts are stat-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed sufficient to relieve it from the operation of the statute.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 670-675, 681; Dec. Dig. § 180.\*]

**8. APPEAL AND ERROR (§ 141\*)—RIGHT OF REVIEW—PARTIES OF RECORD.**

Receivers may appeal from the dismissal of their petition, filed on behalf of certain creditors against a former receiver to enforce an alleged liability growing out of his administration of the receivership.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 908-913; Dec. Dig. § 141.\*]

Appeal from Circuit Court No. 2 of Baltimore City; James M. Ambler, Judge.

"To be officially reported."

Petition by W. Starr Gephart and another, receivers of Charles W. Lord & Co., against Thomas F. Sprigg. Petition dismissed, and petitioners appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

W. H. De C. Wright and George Whitelock, both of Baltimore, for appellants. Washington Bowle, Jr., of Baltimore, for appellee.

BRISCOE, J. This is an appeal from an order of circuit court No. 2, of Baltimore city, sustaining a demurrer, and dismissing the petition of the appellants, as receivers of the firm of Charles W. Lord & Co. The petition is filed on behalf of certain creditors, against the appellee, a former receiver of the firm, and seeks to enforce an alleged liability by him to the copartnership firm of Charles W. Lord & Co., growing out of the administration of the receivership. The petition was filed on the 4th of December, 1913, in the equity cause of Lord v. Sprigg, in circuit court No. 2 of Baltimore city, and the contentions of the appellants appear from the several averments of the petition. The early proceedings in the case are set out in the case of Diamond Match Company v. Taylor, 83 Md. 394, 34 Atl. 1015, and need not be more fully recited here. The prayer of the petition is: First, that the application, made by the receiver Taylor, on the 31st day of October, 1895, for a rehearing in respect to the refusal of the court to allow him more than 40 per cent. of the amount of claims of attaching creditors which he had paid as such receiver, may be dismissed; second, that the court shall determine the question of the first receiver's (Taylor) liability for his commissions; and, third, that special counsel be designated by the court to represent the receivers in these proceedings. To this petition the appellee Taylor demurred, and for cause of demurrer, assigned the following reasons: (1) That the receivers have not stated in their petition such a case as entitles them to any relief in equity against him; (2) that the claim against him sought to be established in this petition is barred because it did not accrue within 12

years before the petition was filed; (3) that the proceedings herein, as well as the petition of the receivers, show that he was discharged from all liability and responsibility herein; (4) because it appears that he has been released from all claims and demands which could or might possibly be brought against him; (5) because it appears that the petitioners, the receivers herein, are estopped from attempting to assert any claim or demand against him because of their laches. It appears that on the 2d day of June, 1893, the partnership of C. W. Lord & Co. was dissolved, and that the appellee Winfield J. Taylor was on the same day appointed its receiver, with power to continue the business of the firm until the further order of the court. Subsequently, on or about the 14th of January, 1895, a coreceiver was appointed, the property was ordered to be sold, and the assets were directed to be distributed among the creditors of the firm. A number of auditor's reports and accounts were made and stated in the cause, wherein commissions were allowed the original receiver, and wherein he was credited with the total sums paid by him in settlement of certain attachment suits. Some of these accounts were ratified and confirmed, and some of them were rejected, upon exceptions. The controversy between the different classes of the receivership creditors was settled by this court, in Diamond Match Co. v. Taylor, 83 Md., supra. The questions now raised, as to whether the receiver, Taylor, should be allowed any commissions, and whether he should be credited with the sums which he paid in excess of 40 per cent. to the attaching creditors, were not determined, on the appeal in 83 Md., supra. It was there held that, as the court below had reserved these questions for future action, they were not properly before the court, on that appeal. The same questions are now presented on this appeal, after a lapse of more than 20 years from the date of the appointment of the original receiver, the appellee here, and more than 15 years after the release and discharge of the appellee from the further execution of the receivership and the appointment of one of the appellants as receiver in his place and stead. It also appears that on the petition of the appellee, filed on the 31st of May, 1898, to be discharged as receiver, the auditor stated account No. 14 filed on the 2d day of December, 1898, which was the last and final account of the administration of the receivership by the appellee. This account shows a balance of \$276.87 in the hands of the receivers, and was duly ratified by the court on the 13th day of December, 1898. There was no reservation of any matters in dispute under the former accounts, and it appears to have been a final adjudication of the amount with which the appellee, as receiver, was chargeable. Subsequently, on the 16th day of December, 1898, the appellee was



released and discharged from the further execution of the receivership. The order of circuit court No. 2 of Baltimore city, passed therein, is as follows:

"The report and account of the auditor filed in these proceedings December 1, 1898, having been finally ratified and confirmed on December 13, 1898, no cause to the contrary having been shown, it is ordered by the circuit court No. 2 of Baltimore city, this 16th day of December, 1898, on the petition filed in this case and upon careful consideration of the proceedings therein, that the said Winfield J. Taylor, coreceiver and petitioner in said proceedings, be and he is hereby released and discharged from the further execution of said receivership, and that W. Starr Gephart be and he is hereby appointed coreceiver in his place and stead. And it is further ordered that, upon the said W. Starr Gephart duly qualifying as such coreceiver in the penalty of \$10,000 to be approved by the clerk of this court, the said W. Starr Gephart and Samuel D. Schmucker, the remaining coreceiver, shall execute a release, acquitting and discharging the said Winfield J. Taylor from all claims and demands which could or might possibly be brought against him, the said Winfield J. Taylor, by any of the parties interested for or on account of said sum of money in said account ascertained to be due and payable to all parties therein interested, thereby declaring said parties fully satisfied, contented, and paid."

[1] This brings us to the main question in the case, and that is, What is the legal effect and operation of the order of court passed on the 16th of December, 1898, and set out herein? The court below held as one of the grounds for sustaining the demurrer that the effect of the order was at least to mature immediately all claims against the appellee, arising out of the receivership, so that all such claims are now stale and antiquated, as well as barred by the statute of limitations. We think the court below was entirely right in so holding; and as this conclusion disposes of the case, apart from any other consideration, we do not deem it necessary to discuss the other questions raised on the record.

There is nothing stated in the petition that prevents the running of the statute, or that would remove the case from the application of the doctrine of laches and lapse of time. *Munnikhuyzen v. Magraw et al.*, 58 Md. 558; *Preston v. Horwitz*, 85 Md. 171, 36 Atl. 710; *Hawkins v. Chapman*, 36 Md. 99; *Warburton v. Davis*, 123 Md. 225, 91 Atl. 163.

[2] In *Blays v. Roberts*, 68 Md. 511, 13 Atl. 368, it is said that the defense of limitations may be availed of under a general demurrer, where from the face of the bill it can be seen that the bar applies, and where no facts are stated sufficient to relieve it from the operation of the statute. *Noble v. Turner*, 69 Md. 519, 16 Atl. 124; *Smith v. Davis*, 49 Md. 470; *Meyer v. Saul*, 82 Md. 463, 33 Atl. 539.

[3] The motion to dismiss the appeal will be overruled. The right of the receivers to take the appeal is established by the cases of *Knabe v. Johnson*, 107 Md. 616, 69 Atl. 420; *Bellman v. Poe*, 120 Md. 444, 88 Atl. 131; and *Thomas v. Farmers' Bank*, 46 Md. 43.

For the reasons stated, the order of court, dated the 19th day of February, 1914, sustaining the demurrer and dismissing the appellants' petition, will be affirmed.

Order affirmed, with costs.

(124 Md. 28)

**McLAUGHLIN et al. v. FLEMING.** (No. 47.)  
(Court of Appeals of Maryland. June 26, 1914.)

**1. WILLS (§ 693\*) — POWER OF SALE — CONSTRUCTION.**

Testatrix devised her entire estate to her husband for life, remainder to her children, and appointed the husband executor. A codicil conferred on the husband power to sell "any or all of the estate \* \* \* devised to him" for life, to invest the proceeds and use for his own benefit the income thereof, or to convey any of the property to the children. The codicil further provided that if the husband did not dispose of the property, he might, by will, distribute the same among the children, and in the event of failure to make such will the remaining property should pass to the children. *Held*, that the power of sale was not limited to the husband's life estate, but enabled him to convey the entire estate in the property, and that such power was personal to the husband, and not in his capacity as executor, and hence sales could be made by him without the confirmation of the orphans' court.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1655-1661; Dec. Dig. § 693.\*]

**2. WILLS (§ 693\*) — POWER OF SALE — DUTIES OF PURCHASERS AS TO APPLICATION OF PROCEEDS.**

As the husband, in such case, was not required to make immediate application of the proceeds of sales, but was directed by the will to invest the same, the purchasers were not called upon to see that the proceeds were applied in the manner contemplated by the will.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1655-1661; Dec. Dig. § 693.\*]

Appeal from Circuit Court, Washington County; M. L. Keedy, Judge.

"To be officially reported."

Suit by H. B. McLaughlin and others against Edward E. Fleming, to construe the will of Cora A. Fleming, deceased. From the decree an appeal was taken. Affirmed.

Argued before **BOYD, C. J.**, and **BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE**, and **CONSTABLE, JJ.**

**Buchanan Schley, Abraham C. Strite, and Otho V. Middlekauff**, all of Hagerstown, for appellants. **J. A. Mason**, of Hagerstown, for appellee.

**PATTISON, J.** This case is before us on appeal from a decree of the circuit court for Washington county passed upon the facts in a case stated under rule 47 of the equity rules promulgated by this court. The facts agreed upon and stated in the record are as follows: Cora A. Fleming, late of Washington county, deceased, departed this life on or about the 1st day of February, 1912, leaving no indebtedness, but seised and possessed of real and personal property in said Washington county and in Franklin county, Pa.,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



and leaving a last will and codicil, which have been duly admitted to probate by the orphans' court of Washington county aforesaid, and letters testamentary have been issued thereon out of said court to her husband, Edward E. Fleming. By her will, executed the 24th day of September, 1909, she disposed of her property as follows:

"First. I will, give, bequeath and devise unto my husband, Edward E. Fleming, of said county and state (Washington county, Maryland), for and during the term of his natural life, all of my estate and property, real, personal and mixed. \* \* \* He to have the full use, enjoyment, benefit and income and production thereof and therefrom, for and during the term of his natural life; and from and after the death of my said husband, then to my children or child then living, and to the issue, then living, of any child or children of mine which may then be deceased, as tenants in common," etc.

"Second. I do hereby nominate, constitute and appoint my said husband, Edward E. Fleming, to be the sole executor of this my last will and testament, and will and direct that no bond shall be required of him as such, nor shall any bond be required of him for the preservation of the estate herein and hereby willed, given, bequeathed and devised to him for the term of his natural life."

In the codicil to her will executed on the 20th day of September, 1911, are found the following provisions:

"First. I do hereby will and direct that my said husband, Edward E. Fleming, whenever in his own judgment and discretion may desire to do so, is hereby given full power and authority to sell in any manner he sees fit, the lands or property, or any part thereof, or any or all of the estate given, bequeathed and devised to him for and during the term of his natural life, and to convey, transfer or assign the same to the purchaser or purchasers thereof, and that the proceeds arising from any such sale or sales shall be invested and reinvested by him from time to time, he to have absolutely the income thereof and therefrom during the term of his natural life, but and provided, however, that my said husband, if he so desires, to take effect in his life time, may give, convey or assign to any or all of my children, or the issue of them or any of them, any part or portion of the lands, estate, corpus or principal thereof given, bequeathed and devised to him for life, in such manner and amount or portions as he may deem proper, with power to create any trust for the benefit and use of my children or any of them, or the issue of them or any of them.

"Second. I do further will and direct that if my said husband shall not have disposed of the estate and property amongst my children, or the issue of them or any of them as in the preceding paragraph provided, that he shall, by last will and testament, dispose of the same amongst my children, or the issue of them or any of them, in such manner and amounts as he may think right and just, with power to create any trust he deems prudent, for my children or any of them, or the issue of them, or any of them, and in the event of my said husband not executing the power or powers given to him in and by this codicil to dispose of the estate, or any part or portion thereof amongst my children or any of them, or the issue of them or any of them, that the estate remaining after the termination of the life estate to my said husband, shall pass and take effect as provided in my said last will and testament."

After the death of the testatrix and after Edward E. Fleming had become seised and

possessed of her estate and property under and by virtue of said will and codicil thereto, he sold unto each of the appellants, Lewis E. Smith, H. B. McLaughlin, and Jonas Eschleman, a part of said lands lying and being in Washington county, Md., and as it is alleged in the statement of facts the said appellants (plaintiffs in the court below) "are ready, willing, and able to perform their contracts of purchase on their respective parts according to the terms and provisions of the respective contracts of purchase entered into by each of them with the said Edward E. Fleming, but certain doubts upon the part of the complainants have arisen as to the proper interpretation and construction of the will of Cora A. Fleming, which relate to the sufficiency of the title which your purchasers would take from Edward E. Fleming, as to a proper application of the purchase money and of the duty of your respective petitioners on their respective parts to see to the application thereof." Whereupon the court below was asked to construe the will and codicil in respect to the points raised and questions presented in the case stated, and to pass a decree in conformity therewith. The questions so presented are as follows, to wit:

"(1) Whether Edward E. Fleming under the terms of said will and codicil has the right to sell and can make marketable title to said lands.

"(2) Whether Edward E. Fleming, under a proper construction and interpretation of said will, is not required to sell said lands as executor and report his sales to the orphans' court and have them ratified by said court, according to the provisions of the Code of Public General Laws of Maryland for such cases made and provided.

"(3) Whether it is the duty, under the proper construction and interpretation of said will and codicil, for your complainants to see to a proper application of the purchase money when paid by them."

The court below construed the will and codicil in respect to the questions presented, and held that an affirmative answer should be given to the first question, while the second and third questions should be answered in the negative, and passed its order or decree of March 6, 1914, in conformity with such decision, declaring:

"First. That the said Edward E. Fleming under the terms of the will and codicil of his wife, Cora A. Fleming, has the right and power to sell and convey the lands of the said testatrix as has been done by him, as shown by Exhibit 2 filed in this cause (which is a copy of the contract of sale made in writing by and between the said Edward E. Fleming and the appellant Lewis E. Smith, by which a part of said lands of the said testatrix were sold by Edward E. Fleming, as an individual and not as an executor, unto the said Lewis E. Smith), and that the said Edward E. Fleming can grant and convey a marketable title to said lands in fee; Second. That the said Edward E. Fleming, under a proper construction and interpretation of said will and codicil, is not required to sell said lands as executor and report his sales to the orphans' court of Washington county for ratification, as is generally required in cases of sales of real estate made by executors; And, third, that it is not the duty, under the

provisions of said will and codicil, for the complainant, or any of the purchasers of said land, to see to the application of the purchase moneys paid by them, or by any of them, or the land conveyed to them, respectively, by the said Edward E. Fleming, under the power and authority conferred upon him by the testatrix in said will and codicil relative thereto."

It is from the above decree of the lower court that this appeal is taken.

In deciding this appeal we are called upon to construe the will and codicil only to the extent of determining whether or not the court below, by its decree appealed from, properly answered the aforesaid questions.

"In this, as in every other case in which a will is to be construed, the great object is to ascertain, from the face of the paper, the intention and design of the testator, which is to be carried into effect, unless opposed by some principle of positive law. The will and the codicil constitute one instrument; and the codicil revoking, in terms, a portion of the will, has the effect to republish the will as of the date of the codicil, in respect to all parts of the will not revoked by the codicil either in express terms or by a bequest or devise so entirely inconsistent with the terms of the will as to make it impossible to give effect to both." *Jones v. Earle*, 1 Gill, 400.

[1] In reviewing the decision of the lower court we will consider together the first and second questions presented. These questions are: (1) Can Edward E. Fleming, under the terms of the will and codicil, sell and convey a marketable title to the lands of the testatrix mentioned and described therein? and (2) if so, is he required to sell such lands as executor and report the sale or sales thereof to the orphans' court of Washington county to be ratified by it? The codicil of the will confers upon Edward E. Fleming, in the exercise of his judgment and discretion, "full power and authority to sell in any manner he sees fit the lands or property, or any part thereof, or any or all of the estate given, bequeathed and devised to him for and during the term of his natural life, and to convey, transfer or assign the same to the purchaser or purchasers thereof." The contention of the plaintiff is that by the use of the above language of the codicil no power or authority is conferred upon Fleming to sell and to convey, transfer, or assign to the purchaser or purchasers thereof more than his life estate in the lands and property so devised and bequeathed to him. This certainly could not have been the meaning of the testatrix as shown by the will and codicil. The codicil further provides:

"The proceeds arising from any such sale or sales shall be invested and reinvested by him from time to time, he to have absolutely the income thereof and therefrom during the term of his natural life," etc.

By the will a life estate in all the lands and property of the testatrix was devised and bequeathed to Edward E. Fleming, and it required no express authority therein to enable him to sell and to convey, transfer or assign such *life estate* to the purchaser or purchasers thereof, and when sold the proceeds of sale of such life estate would be his ab-

solute property and estate. There was no need of any power or authority being conferred upon him by the codicil enabling him to sell and dispose of such life estate; this right, as we have said, he had without any such express power or authority. Therefore, to give the language of the codicil the meaning claimed for it by the plaintiffs, it would have the effect of restricting Fleming in the full benefit and enjoyment of his life estate, for should he sell it, the proceeds are not to be his absolutely, but are to be invested, he to receive only the profit and income from such investment; and it would have the effect, in the event of such sale, of lessening the estate so devised and bequeathed to him, under the *will*, in the land and property of the testatrix. Such a meaning placed upon the language of the codicil would be altogether inconsistent with the additional confidence reposed in the husband by her codicil to the will. The codicil further provides that the husband, "if he so desires, to take effect in his lifetime, may give, transfer and assign to any or all of my children, or the issue of them or any of them, *any part or portion of the lands, estate, corpus or principal thereof, given, bequeathed and devised to him for life*, in such manner and amount or portion as he may deem proper." It certainly cannot be successfully contended that it is only his life estate that he is authorized to convey and assign to those named in the codicil, but if the contentions of the plaintiffs were adopted, we, to be consistent, would be required to so hold, for the language used in describing the property and estate that he is authorized to convey and assign to such person is practically the same when considered in determining the question before us, as the language used in describing the property and estate that Fleming is authorized to sell and to reinvest the proceeds thereof. The property or estate that he was authorized to sell is the same property or estate that he is authorized to convey and assign to those mentioned in the codicil. Therefore if any doubt existed as to the meaning of the testatrix in the use of the above-quoted language, it is certainly removed when in the succeeding item of the codicil it is provided "that if my said husband shall not have disposed of the estate and property amongst my children, or the issue of them or any of them, *as in the preceding paragraph provided*, he shall by last will and testament dispose of the same," etc. It surely will not be contended that the property he was authorized to dispose of by last will and testament was only his life estate in the lands and property that were devised and bequeathed to him, for this he could not have disposed of by will, as such estate terminated at his death. The above italicized words "given, bequeathed and devised to him for and during the term of his natural life," or "given, bequeathed and devised to him for life," are not used to limit the estate that he is to sell, or that he is to

convey or assign to those named in the codicil, but they are merely descriptive of the lands and property that he is authorized either to sell and invest the proceeds thereof, or to convey and assign to those named in the codicil. In other words, he is authorized to sell all or any part of the land and property of the testatrix in which an estate was "given, devised and bequeathed to him for his natural life," and as such an estate was given, devised, and bequeathed to him in all the property and land of the testatrix, he is authorized to sell all or any part of her estate, and such authority was not, in our opinion, conferred upon him as executor. Consequently no report of any sale or sales was to be made by him as executor to the orphans' court of Washington county for ratification by it. Looking both to the will and codicil, we find no expressions which indicate an intention on the part of the testatrix to confer the power of sale upon Fleming as executor. No power of sale is found in the will; it is only in the codicil that we find such power, and no reference is therein made to Fleming as executor, and there is no language used therein that may be construed as conferring such power upon him as executor by implication. It was not upon him as executor that the power was conferred. *Porterfield v. Porterfield*, 85 Md. 665, 37 Atl. 358.

[2] As to the last question presented, that is, whether it is the duty of the plaintiffs to see that a proper application of the purchase money is made by Fleming when the same is paid to him, the rule applicable thereto, as stated in *Van Bokkelen v. Tinges*, 58 Md. 53, and followed in the later case of *Keister v. Scott*, 61 Md. 507, is that where the disposition of the proceeds depends in any material particular upon the discretion of the trustee, or where an interval must or may properly elapse between the sale and the application of the purchase money, the purchaser will be freed from liability by payment to the trustee, and will not be responsible for a subsequent misappropriation by the latter. And it is further added that where a trustee is required to sell and reinvest for the same trusts or purposes, the purchaser will be discharged from responsibility for the application of money paid by him to the trustee. And therefore, under this rule, which is applicable in this case, the appellants, purchasers as aforesaid, are not required to see that a proper application of the purchase money is made by Fleming.

The order of the court, therefore, will be affirmed, and as such order required each of the parties to pay his own costs in the court below, we will here simply dispose of the costs in this court, or the costs of this appeal, by requiring the appellants to pay such costs.

Order affirmed, with costs of this appeal to be paid by the appellants.

(124 Md. 85)

## BAVINGTON v. ROBINSON. (No. 51.)

(Court of Appeals of Maryland. June 26, 1914.)

## 1. LIBEL AND SLANDER (§ 51\*)—PRIVILEGE—PROOF OF MALICE.

The only effect of privilege on slanderous words is to require plaintiff to prove malice.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. § 149; Dec. Dig. § 51.\*]

## 2. LIBEL AND SLANDER (§ 123\*)—PRIVILEGE—PROVINCE OF COURT AND JURY.

While it is for the court to say whether words are privileged, assuming they were spoken in good faith, the question of express malice, there being any evidence thereof, is for the jury.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 356-364; Dec. Dig. § 123.\*]

## 3. LIBEL AND SLANDER (§ 41\*)—PRIVILEGE.

Statement by the defendant to plaintiff: "Don't you know you are stealing my corn? Don't you know you are criminally liable? You are"—made when plaintiff, who by instrument in form of a bill of sale had mortgaged his corn to defendant, and been directed to sell it, being asked for the money received for the part he had sold, said he had not the weights with him, and could not say how much he had received, was privileged.

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 127-129; Dec. Dig. § 41.\*]

## 4. LIBEL AND SLANDER (§ 123\*)—PRIVILEGE—MALICE—QUESTION FOR JURY.

Evidence, in an action for slander, held to make a question for the jury of express malice, that is, whether defendant believed his accusation true, when he said to plaintiff, relative to corn, which plaintiff had mortgaged to defendant, and defendant had authorized him to sell: "Don't you know you are stealing my corn? You are."

[Ed. Note.—For other cases, see *Libel and Slander*, Cent. Dig. §§ 356-364; Dec. Dig. § 123.\*]

Appeal from Circuit Court, Baltimore County: Frank I. Duncan, Judge.

"To be officially reported."

Action by Walter P. Bavington against William E. Robinson. Judgment for defendant, and plaintiff appeals. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, UERNER, STOCKBRIDGE, and CONSTABLE, JJ.

Harry S. Carver, of Bel Air, and John Ensor, of Towson (John S. Young, of Bel Air, on the brief), for appellant. Thos. H. Robinson, of Bel Air, and Carville D. Benson, of Baltimore (Benson & Karr, of Baltimore, on the brief), for appellee.

CONSTABLE, J. This is an action of slander, in which, under the instructions of the court below, a verdict was rendered for the defendant, and from the judgment entered thereon the plaintiff appealed.

The declaration contained five counts. The alleged defamatory words set forth in the first count were: "Don't you [meaning the plaintiff] know you are stealing my corn? Well, you are"; in the second count: "Don't

you know you are criminally liable? You are"; in the third count: "I [meaning the defendant] am going to see the state's attorney, you [meaning the plaintiff] have been robbing me long enough." The fourth and fifth counts restated the same charges. The defendant pleaded the general issue, and filed a special plea of justification to the second count. At the conclusion of the testimony for the plaintiff the court directed a verdict for the defendant, on the ground that the alleged slanderous words were privileged and the plaintiff had failed to offer any proof of express malice; and it is from that ruling that the only question in this appeal arises; the several exceptions to the testimony having been abandoned by the appellant.

From the testimony it appears that the appellant is a young man engaged in farming, and has canned tomatoes since 1906 in his home county, Harford, and on the eastern shore. The appellee is a canner and canned goods broker. The canning operations of the appellant had been financed since their beginning by the appellee until the difficulty which gave rise to this suit. The business of the appellant did not prosper to any considerable degree, and, in 1908, he gave to the appellee a bill of sale to cover his indebtedness to him of \$2,000. On the 8th day of November, 1909, the appellant gave another bill of sale to the appellee for \$1,050 for a further indebtedness. The property under this bill of sale included 250 barrels of corn, then in the field unhusked, the number of barrels being estimated, as well as a lot of farming machinery and some live stock, all of which remained in the possession of the appellant. On the 18th of December, 1909, the appellee loaned the appellant \$700 on the joint note of the appellant and his father, payable two months after date. The appellant agreed with the appellee at this time that the corn that was covered by the bill of sale should be hauled and sold by him and the proceeds therefrom applied to the payment of the note. It was not agreed, however, that it should be hauled at once, but in several conversations it was agreed that it should be held until it advanced to \$4 a barrel. On February 21, 1910, the appellant was standing in the corridor of the Bel Air courthouse, talking with some people, when the appellee called to him. After the appellant had walked over to him the appellee said to him: "How about that corn, have you hauled any of it out?" Appellant told him he had hauled out about 35 barrels. Upon the appellee demanding the money the appellant told him he had part of it to his credit in bank, a part his father, with whom he lived, had, and a part of the corn had not been paid for, and that since he had not the weights with him he could not tell how much he had received, and, therefore, could not pay him that day. Whereupon, shaking his finger at him, the appellee in a loud voice spoke the words set out in the declaration.

Several persons, who were in the corridor of the courthouse, testified as to the use of these words and the manner of the appellee.

[1, 2] The only question presented, is, should the court have ruled, upon this state of facts, that the appellee was entitled to the protection of a privileged communication? The law upon the subject of privilege is too well settled to admit of serious controversy. The statement of the testimony shows that if this is to be classed as a privileged communication, it is of course a qualified privilege. Malice is the essential of the action of slander, but it is not necessary that it be proved; when once the slanderous words are proved, malice is presumed. However, when the words alleged to be slanderous are embraced in the class of privileged communications, the plaintiff is bound to prove the existence of malice as the real motive of the defendant's language. *Beeler v. Jackson*, 64 Md. 589, 2 Atl. 916.

"A privileged communication is one made, in good faith, upon any subject-matter in which the party communicating has an interest or in reference to which he has, or honestly believes he has, a duty, to a person having a corresponding interest or duty, and which contains matter which, without the occasion upon which it is made, would be defamatory and actionable." *Newell on Defamation*, 388.

In *Garrett v. Dickerson*, 19 Md. 418, it was said:

"The only effect of privilege on actionable words is to rebut the legal inference or presumption of malice, and to that extent constitute a good defense in an action upon them. The question, whether words sufficient in themselves to raise the legal presumption of malice are privileged is one of law, determinable from the circumstances leading to and attending their utterance. It is to be observed that words ascertained to be privileged as matter of law still involve the element or fact of good faith in speaking them, and that in general evidence of any act or circumstance tending to show the want of good faith may be offered to remove the protection of privilege, and show the existence of malice."

It is a question for the court to decide, in the first instance, whether words alleged to have been slanderous were privileged by the occasion, assuming them to have been spoken in good faith, without malice, and in the belief that they were true; and, if so privileged, then the plaintiff must show express malice in order to recover. And if there is any evidence tending to prove express malice, that question should be submitted to the jury. *Brow v. Hathaway*, 18 Allen (Mass.) 239; *Fresh v. Cutter*, 73 Md. 87, 20 Atl. 774, 10 L. R. A. 67, 25 Am. St. Rep. 575. But it is proper for the court, where the facts are controverted, to instruct the jury as to what facts amount to privilege, and leave it to the jury to determine whether those facts are proved. *Brinsfield v. Howeth*, 107 Md. 278, 68 Atl. 566, 24 L. R. A. (N. S.) 583.

"But the plaintiff has the right, notwithstanding the privileged character of the communication, to go to the jury, if there be evidence tending to show actual malice, as when the words unreasonably impute crime, or the occasion of their utterance is such as to indicate,

by its unnecessary publicity or otherwise, a purpose wrongfully to defame the plaintiff. \* \* \* Expressions in excess of what the occasion warrants do not per se take away the privilege, but such excess may be evidence of malice." *Fresh v. Cutter*, supra.

[3, 4] Applying the above principles to the facts of the present case, it is plain that the occasion of the utterance of the slanderous words was such as to throw upon the appellant the burden of showing express malice. We are also of the opinion that the court was in error in ruling that there was no evidence tending to show the existence of malice.

Could the appellee have believed, from the facts known to him, that the appellant was guilty of crime? It is true he had a bill of sale upon the corn, but from the testimony it was a bill of sale in form only. It was clearly a mortgage. The only evidence in the case shows he had directed the appellant to sell the corn. When the appellant was in the act of carrying out this direction he was accused of a crime. Therefore, if the jury should find from the evidence that the accuser did not believe the accusation he had made was true, there would be a fact from which they could infer malice. The use of the words, "You have been robbing me long enough," might also tend to show malice, if the jury should think they were in excess of what the occasion demanded. Did not the facts tend to show, in the light of the knowledge the appellant had, that it was an unreasonable imputation of crime? If, then, the jury could have found from them malice, it was not for the court to pass its judgment upon them, but to have left that question to be determined by the jury, with proper instructions from the court.

Judgment reversed, and new trial awarded, with costs to the appellant.

(124 Md. 93)

SCHNEIDER v. YELLOTT. (No. 52.)

(Court of Appeals of Maryland. June 26, 1914.)

1. MONEY RECEIVED (§ 18\*) — PLEADING — NARR.

As only the one having legal title to the money can maintain an action for money had and received, the count of the narr., "for money had and received by defendant, for the use of the state," in an action by an individual as taxpayer, for the use of the state, cannot be sustained.

[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 40; Dec. Dig. § 13.\*]

2. STATES (§ 168½\*)—ACTION—TAXPAYER SUIING FOR STATE.

A taxpayer, as such, has no right to maintain an action at law, for the use of the state, for money which defendant received as county treasurer for fees and failed to turn over to the state, as required by Const. art. 15, § 1; powers in reference to such matters being vested by the Constitution and Code in various officers.

[Ed. Note.—For other cases, see States, Dec. Dig. § 168½.\*]

Appeal from Circuit Court of Baltimore County; Frank I. Duncan, Judge.

Action by Frederick J. Schneider against George W. Yellott. From an adverse judgment, plaintiff appeals. Affirmed.

Argued before BOYD, C. J., and BRISCOE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

John Holt Richardson, of Baltimore (George Washington Williams, of Baltimore, on the brief), for appellant. John I. Yellott, of Towson, for appellee.

BOYD, C. J. A demurrer to the narr. filed in this case was sustained, and, the plaintiff having declined to amend, judgment for the defendant for costs was entered. From that judgment this appeal was taken by the appellant, the plaintiff below. The narr. is as follows:

"Frederick J. Schneider, a resident and taxpayer of Baltimore county and state of Maryland for more than 25 years past, for the use of the state of Maryland, sues George W. Yellott for money payable by the defendant to the state of Maryland: (1) For money had and received by the defendant, for the use of the state of Maryland; (2) and for that the defendant, George W. Yellott, was duly elected and qualified as treasurer of Baltimore county, for the terms from December 1, 1889, to November 30, 1891, and from December 1, 1895, to November 30, 1897, an office created by and existing under the Constitution and laws of the state of Maryland, and that as such treasurer he received into his hands and appropriated to his own use divers sums of money arising from fees and other emoluments of said office, and failed and neglected to account for the same to the state of Maryland, as required by the Constitution of the state of Maryland. And the plaintiff claims \$30,000."

[1] We do not understand upon what principle the first count could be sustained. The form of the count in the Code is, "Money received by the defendant *for the use of the plaintiff*" (article 75, § 24, subsec. 6), while the count in the narr. is, "For money had and received by the defendant *for the use of the state of Maryland*," and both counts of the narr. are preceded by the statement "for money payable by the defendant to the state of Maryland." In speaking of persons entitled to sue for money had and received, the general principle is thus stated in 27 Cyc. 868:

"It is only one having the legal title to the money in whose favor the law raises a promise to pay, and who may maintain an action for money had and received; the fact that the money belongs to plaintiff is the theory on which such action is maintainable."

[2] The demurrer was to the whole narr., and not to each count, and as it is clear that the plaintiff could not recover on the first count, we will consider the second, which is a special one, setting out more particularly the plaintiff's alleged cause of action.

We will not stop to determine whether the second count is technically defective in presenting the appellant's contention, as we understand what that is from the oral argument

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

and the brief of his attorney. He contends that the appellee as treasurer of Baltimore county was subject to the provisions of section 1 of article 15 of the Constitution, and was consequently required to pay over to the state treasurer all sums of money received by him from fees and other emoluments in excess of \$3,000 and the expenses of his office. As we gather from the argument, the appellant intended by his narr. to allege that the appellee had received such excess, but had not paid it over, although, strictly speaking, it might only mean that the appellee failed and neglected to file his account with the comptroller, as required by that section of the Constitution, whether there was an excess or not. But assuming that it means that the appellee did receive such excess, and did not pay it over, the principal question to be determined is whether the plaintiff as a taxpayer has the right to maintain an action at law for such excess, for the use of the state of Maryland.

It cannot be denied that there is no precedent in this state to support such an action. The appellant has cited such cases as *Holland v. Baltimore*, 11 Md. 186, 69 Am. Dec. 195; *Baltimore v. Gill*, 31 Md. 375; *Baltimore v. Keyser*, 72 Md. 106, 19 Atl. 706; *Packard v. Hayes*, 94 Md. 233, 51 Atl. 32, as well as some others in this state and quite a number from elsewhere, but regardless of the dissimilarity between those cases and this one in other respects, every one of those in this state cited by him was in equity, as were all of those cited from out of the state, unless perhaps in a few instances where they were brought under the Code system, or under some special statute. Of course it does not necessarily follow that because there is no precedent for a suit it cannot be maintained, but the total lack of precedents in suits at law, and the fact that all cases in which the subject-matter was even in a remote degree analogous to that under consideration were brought in equity, would at least be very suggestive of a concurrence of opinion on the part of the bar that an action at law would not lie. Many reasons might be suggested why such an one as this would not be, and could not be, permitted under our system. In the first place, the plaintiff has no more right to sue than any other taxpayer in the state of Maryland, resident or nonresident, corporate or individual. Hence, if the appellee owes the state of Maryland and the plaintiff can sue in his own name for the use of the state, every other taxpayer can do so, and, instead of there being one, there might be many such suits against a public officer, even if eventually he could show there was no merit in them. Such suits might be instituted for the purpose of discrediting the defendant as a candidate for some office at an election to be held by the people, on account of some personal animosity to him or for other equally unmeritorious cause.

Again, if a taxpayer has a right to sue, he

has the right to control his suit. One might docket a case and then continue it as long as he and the defendant saw proper, unless it could be disposed of under some rule or practice of the court. He might sue for the purpose of inducing the representatives of the state not to sue until his case was determined. But if he could get judgment, who would collect it, who would enter it satisfied, if paid? Is the taxpayer, or the taxpayer's attorney, to be permitted to collect the state's money? If so, the state would have no security for it, other than the personal liability of the one collecting it. The state's attorney, state treasurer, comptroller, and other officers handling the state's funds are required to give bond, but if the theory of the appellant be correct, that might be rendered useless in such cases by having a taxpayer institute the suit.

The bond of an officer owing the state money under these provisions of the Constitution is liable (*Vansant v. State*, 96 Md. 110, 53 Atl. 711), but can it be possible that a taxpayer can, as such, institute and prosecute a suit on the bond? If suit is brought on the bond, it must be in the name of the state, as it is given to the state. If every taxpayer in the state had the right to sue the bond, regardless of his motive in suing, it would probably materially increase the cost of bonds, if corporate security be given, and cause individuals to hesitate to go on them. But it cannot be contended that a taxpayer would have the right to use the name of the state and sue on the bond, and yet the officer owing the state might be financially worthless.

But if he cannot sue on the bond, how can he sue the officer in assumpsit? The rule of law in such an action is that the money is due the plaintiff. When a suit is brought by A. to the use of B., it is because there is something claimed to be due, or which was due, A. by the defendant. If A. transfers a debt due him to B., B. can sue in A.'s name for use of B., or, if assigned as required by the statute, he can sue in his own name, but in this case there was nothing due the appellant by the appellee, and yet he sued in his own name for the use of the state. A stockholder of a private corporation could as well sue at law in his own name to recover a debt due the corporation, and for his right to sue rely on the fact that he had entered the case to the use of the corporation. The debtor could undoubtedly defeat such an action on the ground that he never owed the legal plaintiff. There is nothing expressly or impliedly due the appellant by the appellee, so far as this narr. discloses, and if the appellant could sue on the theory that he as taxpayer had sustained some loss, and he sued for that, as the money is due the state every taxpayer in the state would likewise be entitled to his portion. That would not only require an accounting which would be tedious and expensive, but, unless the amount due was a very large sum, and the plaintiff an exceedingly

large taxpayer, the circuit court would not have jurisdiction, as the portion he would be entitled to would in all probability, not to say certainly, be less than the amount required to give that court jurisdiction.

Other reasons might be given to show why it would not be wise or desirable to permit such suits to be brought, but regardless of any question of expediency or inconvenience, we need only determine in this case whether the allegations of the narr. show any right in the plaintiff for which he can sue. That they do not can admit of no question, as the simple but decisive answer is, that they show no right in the plaintiff to the funds in question, and he has no authority to collect them for the use of the state or for any other purpose. The section of the Constitution relied on by the appellant in terms provides that "such officer shall be subject to suit by the state for the amount that ought to be paid into the treasury." Section 2 of article 6 of the Constitution provides that the comptroller shall "superintend and enforce the prompt collection of all taxes and revenue; adjust and settle, on terms prescribed by law, with delinquent collectors and receivers of taxes and state revenue." By section 37 of article 19 of the Code the comptroller is authorized and empowered to adjust and settle the claims of the state against collectors or receivers of public money and their sureties, and against corporations and individuals who may be indebted to the state in all cases where said claims accrued prior to and including the year 1910 (as amended by chapter 574 of Laws of 1912) on the terms therein named, and by subsequent sections of that article of the Code he is authorized to employ an attorney or attorneys in settlement of such claims. Section 12 of article 5 of the Constitution provides that:

"The state's attorney in each county, and the city of Baltimore, shall have authority to collect, and give receipt, in the name of the state, for such sums of money as may be collected by him, and forthwith make return of and pay over the same to the proper accounting officer."

Amongst other duties of the Attorney General section 3 of article 5 provides that:

"He shall aid any state's attorney in prosecuting any suit or action brought by the state in any court of this state, and he shall commence and prosecute or defend any suit or action in any of said courts, on the part of the state, which the General Assembly, or the Governor, acting according to law, shall direct to be commenced, prosecuted or defended."

Section 9 of article 2 provides that the Governor "shall take care that the laws are faithfully executed," and by section 1 of article 15 he is authorized to declare the office vacant if any officer subject to its provisions fails to comply with them for the period of 30 days after the expiration of each and every year of his term. The Legislature has large powers in reference to settlements and collections of claims due the state. It would be a reflection on these officers of the state of

Maryland to permit private parties to come into court and undertake to perform their duties; certainly unless there was some ground shown for such action. There could therefore not be the reason even in courts of equity for permitting taxpayers to interpose in matters in which the state is interested that there may be in cases of municipalities. The theory on which courts of equity have acted in cases against municipalities is very similar to that which has caused them to give relief to stockholders in private corporations. If the action of either directors or stockholders is ultra vires, fraudulent, or illegal, courts of equity may give relief to a stockholder on the ground that the directors or majority of stockholders were parties to such unlawful action, or that the circumstances are such that it was apparent that they would not do their duty to the minority. So it may be with the governing boards or officers of cities, towns, or counties, if they are guilty of such conduct—especially if for their own benefit—and courts of equity may give taxpayers relief, to prevent the consummation of ultra vires, fraudulent or illegal acts, or it may be under some circumstances to recover funds misappropriated or illegally retained. In such a case it would be proper, and certainly in most, if not all, cases necessary to make the corporation, public or private, a party to the bill, and that of itself is sufficient to suggest the impropriety of private parties proceeding where the state is concerned, as of course the state cannot be sued without its consent. The Legislature could give its consent to such suit, but it would be simpler and more effective for it to appoint special attorneys to collect, adjust, or settle such claims, if there was any necessity for such action.

But there can be no possible reason why the officers of the state, in whom such powers are vested in reference to such matters as are above referred to, should be interfered with. They are fully capable of taking care of the state's interests, and it is not suggested that they have, in any way, been parties to or profited by the appellee's failure to return the excess, if there was any. It would require even a court of equity to go much further than that court has yet gone in this state, or elsewhere, so far as brought to our notice, if taxpayers be permitted to sue for the recovery of such funds as are now under consideration. There is still more reason why such an action at law as this cannot be maintained.

We have not thought it necessary to pass on the question argued by the appellant—whether an act of the assembly passed in 1914, attempting to release the appellee and others from the claims of the state is valid—as we are satisfied that the plaintiff has no standing in court to sue, regardless of that act, and we have not been furnished with a copy of it, but the objection to the validity of the act urged in argument only shows how much safer it is to leave such matters in



charge of those to whom the Constitution and laws of the state give control over them, rather than permit others to interfere. If the Governor approved the act spoken of, it would be extremely technical to hold that it was invalid merely because it did not appear on the face of it, either that the release was recommended by the Governor or officers of the Treasury Department, or that such recommendation should be obtained before the release would take effect. The Constitution does not require the fact of the recommendation to appear on the face of the act, and if it be permissible to provide (as is indicated in *Montague v. State*, 54 Md. 489) that such a recommendation be obtained before the release shall take effect, if the Governor approves the act, it would be a useless proceeding for him to then sign a recommendation. His approval of the act ought to be enough.

In order that there be no misapprehension as to that, we will add that in referring above to motives that might influence taxpayers, we did not intend to apply what is said to the appellant, and of course not to his attorney. We have no knowledge of their motives, and have nothing to do with them in this case, but we said what we did to show what might be the result if any taxpayer could prosecute such a suit. The judgment will be affirmed.

Judgment affirmed; the appellant to pay the costs.

(124 Md. 77)

**HART v. LEITCH. (No. 54.)**

(Court of Appeals of Maryland. June 26, 1914.)

**1. MALICIOUS PROSECUTION (§ 71\*) — PROBABLE CAUSE—QUESTION FOR JURY.**

In an action for malicious prosecution evidence held to require submission of the question of probable cause, and therefore plaintiff's right to recover, to the jury.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 160-167; Dec. Dig. § 71.\*]

**2. APPEAL AND ERROR (§ 1033\*) — INSTRUCTIONS—PREJUDICE.**

Where, in an action for malicious prosecution, one count of plaintiff's declaration alleged that after hearing of the charge before a magistrate and the dismissal thereof, defendant went before the grand jury and tried there to have plaintiff indicted for the same offense, defendant was not prejudiced by an instruction for plaintiff, declaring that if the jury found that defendant charged plaintiff with larceny, procured his arrest, etc., and, after his discharge went before the grand jury as alleged, etc., the verdict should be for plaintiff, in that defendant's appearance before the grand jury was no part of the prosecution, since such provision at most placed on plaintiff a greater burden than he was required to bear.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4052-4062; Dec. Dig. § 1033.\*]

**3. TRIAL (§ 253\*) — REQUESTED CHARGE—ELEMENTS OF CAUSE OF ACTION.**

Where a prayer instructs that plaintiff is entitled to recover if certain facts are found to exist, its effect is to withdraw from the jury all facts other than those specified, and

the instruction will be held erroneous if the facts excluded admit of a conclusion different from the one to which it is directed.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 613-623; Dec. Dig. § 253.\*]

**4. MALICIOUS PROSECUTION (§ 60\*) — MALICE — EVIDENCE.**

In a suit for malicious prosecution, plaintiff was entitled to have the jury consider, on the question of malice, evidence that after plaintiff had been discharged by a committing magistrate defendant further continued the prosecution by going before the grand jury and attempting to have plaintiff indicted.

[Ed. Note.—For other cases, see *Malicious Prosecution*, Cent. Dig. §§ 138-145; Dec. Dig. § 60.\*]

Appeal from Baltimore Court of Common Pleas; John J. Dobler, Judge.

Action by Joseph A. Leitch against Walter H. Hart. Judgment for plaintiff, and defendant appeals. Affirmed.

Argued before BOYD, C. J., and BURKE, THOMAS, URNER, and STOCKBRIDGE, JJ.

William L. Rawls, of Baltimore (Robert Moss, of Annapolis, on the brief), for appellant. A. Theodore Brady, of Annapolis (William B. Smith, of Baltimore, on the brief), for appellee.

URNER, J. The appeal in this case is from a judgment recovered by the appellee against the appellant in a suit for malicious prosecution. It was alleged in the declaration that the appellant procured the appellee's arrest by charging him on oath before a justice of the peace with the larceny of certain building material, valued in the affidavit at the sum of \$5, and that after the charge had been heard and dismissed by the magistrate an unsuccessful effort was made by the appellant to secure action by the grand jury on the same accusation. The principal conflict in the evidence was in reference to the question as to whether there was probable cause for the prosecution. A house belonging to the appellant was being remodeled and some weatherboarding had been removed from an outbuilding with a view to its being used elsewhere in the course of the work. Most of this material disappeared overnight. The appellant testified that he found some of it in the appellee's yard, which adjoined the lot occupied by the house being repaired. This was denied by the appellee, who insisted that nothing had been brought to his yard from the appellant's premises except some broken and useless pieces of wood, which had been given him by the contractor in charge. There was no claim that any of the weatherboarding was included in the gift. It was in good condition, and could be readily identified. The disputed issue of fact was whether a part of it had been found on the appellee's premises. Upon this question the parties and their respective witnesses were in absolute contradiction. As to the other features of the case there was practically no controversy in the evidence. It was proven that the ap-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



pellant, before swearing out the warrant, had consulted his counsel, who advised such a course of action. The proof further shows that after the magistrate had dismissed the case the appellant reported that result to his counsel, who told him to lay the matter before the state's attorney, as it was still open for investigation. This advice was followed, and the appellant subsequently appeared and testified before the grand jury in response to its summons. The consideration by that body of the evidence presented led to a second dismissal of the charge.

[1] At the close of the trial instructions were granted at the request of the defendant, declaring the burden of proof to be on the plaintiff to show that there was an absence of probable cause for the prosecution, and that the defendant acted with malice, and directing a verdict for the defendant if the jury should find that he did not act maliciously in the premises, but under the advice of counsel, after making to the latter a full disclosure of all the material facts, or if the prosecution was instituted under such circumstances as would have induced a reasonable and dispassionate man to have undertaken it from public motives. There was also an instruction, at the defendant's instance, that if the jury should find from the evidence that the defendant found in the plaintiff's yard building material which the defendant had learned from his contractor had been taken or removed by some unknown person from the premises of the defendant on the preceding night, then there was probable cause for the prosecution, and, further, that to constitute probable cause, it was not necessary that the plaintiff should have been in fact guilty of the alleged crime, but it was enough for the defendant's justification if the jury should find that he had reasonable ground to believe that the plaintiff was guilty of the offense charged. The court below had no alternative, under the evidence, but to refuse prayers offered for the purpose of having the case withdrawn from the jury. The instructions, however, to which we have just referred were as full and favorable as could be reasonably proposed for the submission of the theories advanced by the defense.

[2] The only question we are asked to determine is raised by the defendant's exception to the granting of the plaintiff's first prayer which was to the effect that if the jury should find from the evidence that the defendant swore out a warrant before a justice of the peace, charging the plaintiff with the crime of larceny, and further find that on such warrant the plaintiff was arrested and placed under his personal recognizance for his appearance at the time set for the hearing, and that he appeared before the justice of the peace at the time so fixed, and that after a hearing the charge was dismissed for want of sufficient evidence to hold him for the action of the grand jury, and if they should further find that the defendant "ap-

peared before the grand jury of Anne Arundel county and tried there to have the plaintiff indicted for the same offense for which he, the plaintiff, was exonerated by the said justice of the peace," and should further find that the defendant aided in procuring the arrest and prosecution of the plaintiff under such circumstances as would not have induced a reasonable and dispassionate man to have undertaken it from public motives, then there was no probable cause for the prosecution, and the jury could infer, in the absence of sufficient proof to satisfy them to the contrary, that such prosecution was malicious in law, and their verdict might be for the plaintiff. This prayer is said to be objectionable because it includes the clause we have italicized. The theory of the objection is that the appearance of the defendant before the grand jury cannot be properly treated as the basis of a suit for malicious prosecution. It is argued that the testimony of the defendant before the grand jury could not be regarded as a continuation of the prosecution he had set in motion before the magistrate, because that proceeding had been finally terminated by a dismissal of the charge. It was then urged that, in view of the failure of the grand jury to indict, and of the fact that the plaintiff was not arrested pending its investigation, the preferment of the charge to that body was not the commencement of a new prosecution for which he could be held liable. The decisions are not in accord as to what are the essential elements of a prosecution within the meaning of the law pertaining to actions of this nature. The diversity of judicial opinion on the subject is illustrated by the citations in 26 Cyc. 10, and in the case note to *Mitchell v. Donanski*, 9 L. R. A. (N. S.), 171. In *Bartlett v. Christliff*, 69 Md. 231, 14 Atl. 518, it was held that an action for the malicious abuse of civil process could not be maintained "where there has been no wrongful deprivation of liberty or no illegal seizure of property." But we do not find it necessary to decide in this case whether the same principle is applicable to a suit for a malicious prosecution based upon a charge of crime. If we assume for the purposes of the decision that the proceeding before the grand jury did not amount to a prosecution to such an extent as to make the defendant amenable to suit on account of his participation, even if he acted with malice and without probable cause, we are nevertheless unable to hold that the reference to this feature of the case in the plaintiff's first prayer was reversible error.

[3] The clause of which the defendant complains was apparently inserted to make it conform to a count in the declaration which included a similar statement. A separate granted prayer, in conformity with the theory of another count, omitted any allusion to the appearance of the defendant before the grand jury, and made a verdict for the plaintiff depend upon the finding of a malicious and unsuccessful prosecution before the justice of

the peace. The expression to which objection is made could have been omitted without any impairment of the completeness and efficacy of the instruction as a basis of recovery. The question we have to decide, however, is not whether the disputed reference was essential to the plaintiff's case, but whether it was erroneous and prejudicial to the defense. Its practical effect was simply to impose an additional and possibly unnecessary condition upon the plaintiff's right to a verdict by making it dependent upon a finding that the defendant had tried without success to procure an indictment by the grand jury. The elimination of this portion of the prayer would not have placed the defendant in a better position to resist the plaintiff's recovery. There is in the instruction no segregation of facts to the exclusion of others upon which the defendant might have relied for a verdict in his favor. Where a prayer instructs the jury that the plaintiff is entitled to recover if certain facts are found to exist, its effect is to withdraw from the consideration of the jury all facts other than those specified, and the rule is that the prayer is erroneous if the facts which it excludes admit of a conclusion different from the one to which it is directed. *Dolby v. Laramore*, 121 Md. 624, 89 Atl. 442; *Singer Co. v. Lee*, 105 Md. 663, 66 Atl. 628; *Corbett v. Wolford*, 84 Md. 426, 35 Atl. 1088. There is no conflict in the evidence as to the nature and extent of the plaintiff's efforts to further the prosecution, and the prayer did not disregard any conditions which might have affected that issue. Upon the undisputed proof the jury could not avoid finding that the defendant appeared and testified before the grand jury for the purpose indicated. The only practical controversy in the case related to the question as to whether there was probable cause for the prosecution, and the allusion in the prayer to another feature of the case, as to which there was no contradiction, while it may have been superfluous, could not injure the defendant on the single issue as to the right of recovery with which the prayer was concerned.

[4] It is earnestly argued, however, that the part of the plaintiff's first prayer under consideration was prejudicial to the defendant because, in effect, it incorporated the grand jury episode in the plaintiff's cause of action, and thereby enlarged the basis upon which damages could be awarded under his

third prayer which instructed the jury that if they should find for the plaintiff, they were "at liberty to take into consideration all the circumstances of the case and award such damages as will not only compensate the plaintiff for the wrong and indignity he has sustained in consequence of the defendant's wrongful act, but may also award exemplary and punitive damages as punishment to the defendant for such wrongful act." The plaintiff was entitled to have the jury consider, as reflecting upon the question of malice, other evidence of the defendant's interest in the prosecution, independent of the particular conduct upon which a valid cause of action could be predicated. *Mertens v. Mueller*, 119 Md. 525, 87 Atl. 501. The prayer, which was in the usual form and unobjectionable, permits the jury to take into consideration all the circumstances of the case in determining upon the amount of the verdict. There was such a close relation, in point of time and otherwise, between the defendant's action before the justice of the peace and his appearance before the grand jury, that the latter occurrence, even if it had not been referred to in the plaintiff's first prayer, was certain to be considered as one of the circumstances of the case in the award of damages, provided the jury adopted the view that the prosecution was without probable cause. The verdict as rendered was for \$2,500, but upon a motion for a new trial this amount was reduced by the court to \$1,000. It has already been noted that the theory of the defense was submitted to the jury under instructions of the most favorable character. The case was carefully tried by the learned judge below, and while there are various exceptions in the record, none have been pressed except the one we have discussed. If it were conceded that the clause to which objection is made was erroneously inserted in the plaintiff's prayer, we are entirely satisfied, in view of all the conditions we have mentioned, that there has been no resulting injury to the defendant which would justify us in reversing the judgment and remanding the case for a new trial.

The other exceptions, which were not argued either orally or in the brief on behalf of the appellant, have been given due consideration, but we have found no error in any of the rulings to which they relate.

Judgment affirmed with costs.

(112 Me. 557)

**NATIONAL FURNITURE CO. v. PRUSSIAN NAT. INS. CO.**

(Supreme Judicial Court of Maine. Aug. 27, 1914.)

**1. TRIAL (§ 261\*)—INSTRUCTIONS—REQUESTS.**

A requested instruction, not sound as an entirety, is properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 484, 660, 671, 673, 675; Dec. Dig. § 261.\*]

**2. INSURANCE (§ 567\*)—REFERENCE AS TO LOSS—WAIVER OF DEFENSE.**

No waiver by an insurance company of the right to later raise the question of its liability can arise from its not doing so before the referees, on reference to determine the amount of damage; that question not being open before them.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1420, 1421; Dec. Dig. § 567.\*]

**3. INSURANCE (§ 668\*)—WAIVER—QUESTION FOR JURY.**

The question of an insurance company waiving by its acts the right to raise the question of its liability is for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1556, 1732-1770; Dec. Dig. § 668.\*]

Exceptions and Motion from Supreme Judicial Court, Cumberland County, at Law.

Action by the National Furniture Company against the Prussian National Insurance Company. There was a verdict for defendant, and plaintiff brings exceptions and moves for a new trial. Overruled.

Argued before SAVAGE, C. J., and BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Jacob H. Berman, Woodman & Whitehouse, and Hinckley & Hinckley, all of Portland, for plaintiff. William H. Gulliver, of Portland, for defendant.

**PER CURIAM.** This is an action upon a policy of insurance against loss by fire. The jury found for defendant, and the plaintiff excepts to the ruling of the court and moves, upon the usual grounds, for a new trial.

The following instruction was requested and denied and is the only ground of exception: That the acts of the defendant, after it had all the information it now possesses in regard to the cause of the fire, and had in its possession the proof of loss containing complete schedule of property, together with their value, and all information concerning amount of damaged goods and their value, which it now has, in negotiating with the plaintiff as it did with no mention of disclaiming liability on account of matters contained in special pleadings and appearing before the referees without raising any question as to their liability for whatever the referees might determine the damage to be, were a waiver of its right to come into court later, and defend under the special pleadings filed by defendant.

[1-3] The court is of the opinion that the requested instruction was properly refused

as unsound as an entirety. York v. Athens, 99 Me. 82, 58 Atl. 418. Calling attention to one instance only, the reference having been agreed upon, no waiver could arise from a failure on the part of defendant to raise the question of its liability before the referees as this matter is not open before them. Dunton v. Insurance Co., 104 Me. 372, 376, 378, 71 Atl. 1037, 20 L. R. A. (N. S.) 1058. But the request is fatally defective, in that it takes the question of waiver from the jury. Upon this point Robinson v. Insurance Co., 90 Me. 385, 389, 390, 392, 394, 38 Atl. 320, is conclusive. See, also, Seed v. Lord, 66 Me. 580, 581; Stewart v. Leonard, 103 Me. 128, 68 Atl. 638; Libby v. Haley, 91 Me. 331, 333, 39 Atl. 1004.

In regard to the motion for new trial, it is sufficient to say that a careful reading of the evidence discloses no reason for disturbing the verdict.

Exceptions and motion overruled.

(112 Me. 559)

**QUINT et al. v. FOSS et al.**

(Supreme Judicial Court of Maine. Sept. 1, 1914.)

**APPEAL AND ERROR (§ 1002\*)—JURY QUESTIONS—CONFLICTING EVIDENCE.**

The question of the credibility of witnesses and the weight of evidence being for the jury, a verdict on conflicting evidence will not be disturbed, where there was sufficient evidence to warrant the jury's finding.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935-3937; Dec. Dig. § 1002.\*]

On Motion from Supreme Judicial Court, Penobscot County, at Law.

Assumpsit by George M. Quint and another against George L. Foss and trustee. There was a verdict for plaintiffs, and defendant moves for a new trial. Motion overruled.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

A. Weatherbee, of Lincoln, for the motion. G. E. Thompson, of Bangor, opposed. John Wilson, of Bangor, for trustee.

**PER CURIAM.** This is an action of assumpsit to recover a balance upon an account annexed, the principal items of which are potatoes, alleged by plaintiff to have been sold to defendant at agreed prices. The defendant disputed the quantities, prices, and other terms of the contract of sale. The verdict of the jury was given the plaintiff for the full amount claimed, with interest, and defendant asks a new trial upon the usual grounds.

The evidence was conflicting.

The credibility of the witnesses and the weight of evidence was for the determination of the jury. While the court might possibly have come to a different conclusion, it thinks there was sufficient evidence, if believed, to

warrant the verdict and to negative any impropriety or misunderstanding on the part of the jury.

The motion must be overruled.

(112 Me. 178)

ELIE v. LEWISTON, A. & W. ST. RY.

(Supreme Judicial Court of Maine. Sept. 1, 1914.)

**1. NEGLIGENCE (§ 32\*)—INVITATION—IMPLIED INVITATION.**

There is no implied invitation for a person to come upon the premises of another, unless the visitor comes for a business connected with the business in which the occupant is engaged or which he permits to be carried on there; a mutuality of interests being necessary before an implied invitation can arise.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 32.\*]

**2. CARRIERS (§ 282\*)—LICENSEES—WHO ARE—CHILDREN STEALING RIDES.**

The mere fact that older boys made it a practice to steal rides on street cars and jump off while they were in motion does not, in view of the fact that such acts are criminal, warrant other children in assuming that the street car company consented to the practice, so that they would be licensees when also stealing rides.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1103, 1107, 1108, 1115, 1116; Dec. Dig. § 282.\*]

**3. CARRIERS (§ 282\*)—INVITATION—IMPLIED INVITATION—CHILDREN.**

While the owner of premises may be held liable to persons as invitees, where the use of the premises has been so long continued as to induce the public to believe that the owner invited it, the long-continued practice of boys stealing rides on moving street cars affords no basis for recovery by one injured when so riding on the theory of an implied invitation by the street railway company.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1103, 1107, 1108, 1115, 1116; Dec. Dig. § 282.\*]

**4. CARRIERS (§ 282\*)—TRESPASSERS—DUTY TO CHILDREN.**

A boy stealing a ride on a street car, being a mere trespasser, cannot recover for injuries received, except where they were the result of wanton or willful negligence of the street railway company's servants.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1103, 1107, 1108, 1115, 1116; Dec. Dig. § 282.\*]

**5. NEGLIGENCE (§ 32\*)—RIGHTS OF TRESPASSERS—CHILDREN.**

An infant trespasser has no greater rights than an adult.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 42-44; Dec. Dig. § 32.\*]

On Motion from Supreme Judicial Court, Androscoggin County, at Law.

Action by Romeo Elie, by his next friend, against the Lewiston, Augusta & Waterville Street Railway. There was a verdict for plaintiff, and defendant moved for a new trial. Motion granted, and new trial directed.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Newell & Skelton, of Lewiston, for the motion. McGillicuddy & Morey, of Lewiston, opposed.

BIRD, J. An action on the case to recover damages for injuries sustained by plaintiff, a child of the age of four years, in alighting from a moving car of defendant. The verdict was for plaintiff, and the defendant files its general motion for new trial.

[1] The declaration alleges that the plaintiff was riding upon the platform of the car by the permission and invitation of the defendant. There was no pretense that plaintiff had paid his fare or intended to do so, and the contrary may be legitimately inferred from the evidence. Express invitation there was none. And it has been recently held by this court that:

"To come under an implied invitation as distinguished from mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant." *Stanwood v. Clancey*, 106 Me. 72, 75, 75 Atl. 293, 294.

The rule has been otherwise stated as follows: The principle appears to be that invitation is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it. *Bennett v. Railroad Co.*, 102 U. S. 577, 584, 585, 26 L. Ed. 235.

[2] In the case before us there was no express permission, or license. Nor do we think an implied license is shown. There was evidence tending to show that other boys, of greater age, however, had stolen rides upon other cars of the defendant, going upon the platform at the time the car started on its return trip and jumping from the car while in motion at a point some 200 feet distant. But such acts were criminal (R. S. c. 52, § 7), and we should more than hesitate to hold that such acts on the part of others, even if brought to the knowledge of plaintiff, could be held such an inducement or holding out on the part of defendant as to give the plaintiff the rights either of one upon the cars by invitation, or of a licensee even. *Barney v. Hannibal & St. Joseph R. R. Co.*, 126 Mo. 372, 392, 28 S. W. 1069, 26 L. R. A. 847; *Chicago, etc., Ry. Co. v. Eininger*, 114 Ill. 79, 85, 29 N. E. 196.

[3] While it is true that, when a use has been so long continued as to induce the public to believe that the owner invited such a use, a liability has been held to arise as from an implied invitation, in this case, assuming the requisite continuance, there could have been no such belief entertained by the public. See *Nolan v. New York, etc., R. R. Co.*, 53 Conn. 461, 474, 4 Atl. 106; *Hughes v. B. &*

M. R. R., 71 N. H. 279, 51 Atl. 1070, 93 Am. St. Rep. 518.

[4, 5] The plaintiff was a mere trespasser. As such, he was protected only against the wanton or willful or reckless injury of defendant. *Russell v. M. C. R. R. Co.*, 100 Me. 406, 408, 61 Atl. 899. See, also, *Reardon v. Thompson*, 149 Mass. 267, 268, 21 N. E. 369. It is contended by plaintiff that he alighted from the car while in motion in obedience to a gesture of the conductor. A careful reading of the testimony in this regard leads us to conclude that this is not supported by the weight of evidence, but that by far the greater weight of evidence indicates that there was no willful nor negligent act upon the part of the servants of the defendant.

In the absence of wanton or recklessly careless conduct on the part of defendant, the plaintiff, although a child of tender years, if a trespasser, occupies no better position and has no greater rights than an adult. In *McGuinness v. Butler*, 159 Mass. 233, 236, 34 N. E. 259, 261 (38 Am. St. Rep. 412), it is said:

"If a child trespasses on the premises of the defendant, and is injured by something that he does while trespassing, he cannot recover, unless the injury was wantonly inflicted by, or was due to the recklessly careless conduct of, the defendant."

In full accord are *Hughes v. B. & M. R. R.*, 71 N. H. 279, 285, 51 Atl. 1070, 93 Am. St. Rep. 518; *Barney v. Hannibal & St. Joseph R. R. Co.*, supra; *Chicago Railway Co. v. Eininger*, supra; *Central, etc., R. Co. v. Henigh*, 23 Kan. 347, 38 Am. Rep. 167. And see *Gulf, etc., Railway Co. v. Dawkins*, 77 Tex. 228, 231, 232, 13 S. W. 982. See, also, *Johnson v. B. & M. R. R.*, 125 Mass. 75.

The motion must be sustained.

Motion granted.

Verdict set aside.

New trial ordered.

(112 Me. 558)

#### STATE v. GRAY.

(Supreme Judicial Court of Maine. Sept. 1, 1914.)

#### CRIMINAL LAW (§ 1090\*)—APPEAL—EXCEPTIONS, BILL OF—NECESSITY.

No exceptions can be considered by the Supreme Court unless the matter objected to be presented in a bill of exceptions duly reserved and allowed.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2653, 2789, 2803-2822, 2825-2827, 2927, 2928, 2948, 3204; Dec. Dig. § 1090.\*]

On Motion for Arrest of Judgment and Exceptions from Supreme Judicial Court, Waldo County, at Law.

Alvin S. Gray was convicted of keeping a liquor nuisance, and he moved in arrest of judgment and excepted. Motion and exceptions dismissed.

Eben F. Littlefield, County Atty., of Belfast, for the state. H. C. Buzzell, of Belfast, for respondent.

PER CURIAM. The respondent was tried and found guilty of keeping a liquor nuisance. Thereupon he filed a motion in arrest of judgment which was overruled, and he now comes before the law court seeking to have that ruling reversed. But he has presented to this court no bill of exceptions of any kind as required by statute, and therefore his case is not properly before the law court, and cannot be considered by it.

No exceptions can be considered by the law court unless they are presented by a bill of exceptions signed by the aggrieved party or his counsel, and allowed and signed by the justice whose ruling is the subject of the exceptions, and, in case such justice refuses or neglects to allow the exceptions, their truth may be otherwise established on petition to the law court as provided by the statute and rule of court.

The entry in this case must therefore be: Dismissed from the law docket.

(124 Md. 1)

#### WASHINGTON COUNTY HOSPITAL ASS'N et al. v. HAGERSTOWN TRUST CO. (No. 45.)

(Court of Appeals of Maryland. June 26, 1914.)

#### 1. WILLS (§ 684\*)—TESTAMENTARY TRUSTS — CONSTRUCTION—INCOME OR CAPITAL.

Testator gave the residue of his estate, including stock in certain lumbering corporations, to a trustee to hold and collect the income and pay over the net amount thereof to his widow, and on her death to pay the whole corpus to certain corporations. *Held*, that dividends declared and paid to the trustee by such corporations during the life of the widow and subsequent to testator's death, derived from the cutting, manufacture, and sale of the corporations' timber, constituted income belonging to the estate of the life tenant and not capital.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1614-1628; Dec. Dig. § 684.\*]

#### 2. TRUSTS (§ 191\*)—TRUST PROPERTY — MANAGEMENT—STOCKS—DUTY TO SELL.

Where testator bequeathed the residue of his estate, including corporate stocks, to a trustee to collect and pay the income to his widow for life, and then to distribute the corpus of the fund to certain others, it was not the duty of the trustee to sell the stocks on acquiring possession and invest the proceeds in other property, allowing the life tenant only a reasonable rate of interest on the value thereof, but the trustee was authorized to hold the stocks in kind and pay to the life tenant the ordinary dividends declared thereon.

[Ed. Note.—For other cases, see *Trusts*, Cent. Dig. § 243; Dec. Dig. § 191.\*]

Appeal from Circuit Court, Washington County; M. L. Keedy, Judge.

"To be officially reported."

Action between the Washington County Hospital Association and another and the Hagerstown Trust Company, as trustee under the will of Edward W. Mealey, deceased, to determine the right to certain dividends paid to the trustee as a part of the estate. From a judgment declaring that the dividends were income payable to the personal representative

of the life tenant, the Washington County Hospital Association and another appeal. Affirmed.

Argued before BOYD, C. J., and BURKE, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

C. A. Little and Frank G. Wagaman, both of Hagerstown, for appellants. Shirley Carter, of Baltimore (J. A. Mason, of Hagerstown, of counsel), for appellee.

BURKE, J. The question presented by this appeal is whether the sum of \$22,200, paid to the estate of Edward W. Mealey, as dividends on stock held by him in his lifetime in two West Virginia lumber companies is to be treated as *corpus* and paid to the appellants, the legatees in remainder under Mr. Mealey's will, or as *income* payable to the appellee, who is the administrator c. t. a. of Mrs. Adelaide Savage Mealey, the life tenant under her husband's will. Mr. Mealey died on the 28th day of April, 1911. The seventh, or residuary clause of his will, which was dated on the 12th day of May, 1908, and admitted to probate by the orphans' court for Washington county on May 12, 1911, is as follows:

"All the rest, residue and remainder of my estate, real, personal and mixed and wheresoever situate, I give, devise and bequeath to the Hagerstown Trust Company of Hagerstown, Maryland, trustee, to hold the same and collect the income therefrom, and pay over the net amount thereof, to my wife Adelaide Savage Mealey in semiannual installments, and upon her death I direct that the whole corpus or principal of the trust estate held under this clause of my will be passed over and delivered by my said trustee as follows: Two-thirds thereof to the Washington County Hospital Association, a body corporate, duly incorporated under the laws of the state of Maryland; and the remaining one-third thereof to the Washington County Free Library, a body corporate, duly incorporated under the laws of the state of Maryland."

Mrs. Mealey, the widow of the testator, died on the 28th of March, 1912, and the dividends, over which the controversy in this case arose, were declared and paid over between the date of the death of Mr. Mealey and that of his wife. The Washington County Hospital and the Washington County Free Library, the two corporations to which the estate was devised and bequeathed in remainder, claim these dividends as a part of the *corpus* of the estate. This claim is resisted by the appellee, who insists that, since the dividends were declared in the ordinary course of business of the companies, and distributed in the time intervening between the date of Mr. Mealey's death and that of his wife, they are *income* and not *corpus* and belonged to her, and are payable to her estate. The lower court sustained the appellee's contention, and further allowed him as interest the sum of \$647.50; that being the amount of interest received by the trustee upon the amount of the dividends. In a carefully prepared opinion Judge Keedy reviewed fully the

facts and law applicable to the case, and signed a decree giving effect to the conclusion that he had reached, and from the decree this appeal was taken.

The facts that need be stated are these: The two corporations in which Mr. Mealey held stock at the time of his death, and which paid the dividends involved in this case, were: First, the Taggarts River Lumber Company, incorporated in April, 1902; and secondly, the Gladly Fork Lumber Company, incorporated in February, 1906. The objects and purposes of the first-named company, as stated in its charter were:

"To acquire (by purchase or otherwise), hold, transfer, assign, lease, sell and convey lands, timber rights, timber, lumber, railroads, tramroads, logging roads and other real and personal property, whether located in Randolph county, or elsewhere in the state of West Virginia; to construct, maintain, operate and remove sawmills, tramroads, railroads, logging roads, telephone, telegraph and electric light plants, roads, lines and appliances, camps, dwelling houses, and any other buildings, yards, equipments and appliances which may be necessary or convenient for the purposes of its incorporation; to cut, haul, manufacture, sell, transport and remove all sorts of timber, and to deliver the same to points within or without the state of West Virginia; to cut, peel, haul, load and deliver, to points within or without the state of West Virginia, bark, pulpwood and any and all other timber by-products, and to sell the same; and generally to exercise such other functions and to enjoy such other privileges as usually appertain and rightfully belong to corporations organized for similar purposes."

The powers and purposes of the second company were:

"To buy and sell timber lands; to manufacture timber into lumber; to buy and sell lumber and lumber products; to manufacture lumber into lumber products of all kinds; to build houses; to purchase, erect and equip sawmill or sawmills, and to manufacture thereon lumber into lumber products of all kinds; to build and equip in connection with said sawmill or sawmills, electric plant or plants to light said mill or mills; to build tram or logging railroads in connection with said lumber operation; and to do any and all other things necessary or convenient to carry on a general lumber business, and to manufacture the same into lumber products, and to sell the same at either wholesale or retail, and to carry on and operate in connection therewith a general store."

The property of the Taggarts River Lumber Company, in which its capital stock has been invested, consisted, as stated by Mr. E. M. Allen, "of a sawmill plant and the necessary equipment, consisting of houses, store buildings, and things of that sort which the company owned in fee, and the land on which they were situated, and my recollection is we owned about 1,500 acres in fee in mountain land, upon which there was some timber, and probably 15,000 acres upon which we had timber rights. \* \* \* The 1,500-acre tract was bought for a right of way for the railroad; there was very little timber on that." The capital of the company was used to pay for the timber, for building a railroad, a mill, and was put in by the company for the manufacture of lumber. The company owned

only the timber rights of the greater part of the timber. Practically the same situation existed with reference to the Gladly Fork Lumber Company. The business carried on by both companies was the cutting of the timber from the lands, hauling it to the mill, sawing it, or manufacturing the lumber into timber, beams, boards, and selling the lumber, collecting the money, and dividing it among the stockholders as it was earned. This was the usual and ordinary course of the business and methods of the companies, and were the objects for which they were organized.

Nineteen thousand dollars in dividends upon the stock held by Mr. Mealey in the Taggarts River Lumber Company were paid in the period intervening between his death and that of his widow. Testifying as to the source from which that money was derived, Mr. J. A. G. Allen said it was derived from the products of the company, from the manufacture and sale of lumber. In the same period \$3,200 in dividends were paid upon the stock held by the testator in the Gladly Fork Lumber Company. These dividends were derived from the manufacture and sale of lumber taken between April 28, 1911 (the date of Mr. Mealey's death), and March 8, 1912 (the date of Mrs. Mealey's death), from tracts in which the company owned the timber rights.

[1] It is clear from the evidence that the money from which the dividends were paid was derived from the conversion of the standing timber in which the capital of the companies had been invested, into lumber, and the sale of the manufactured lumber, and it was therefore derived from the prosecution of the very business the companies were organized to carry on. It is obvious that the prosecution of the companies' business necessarily resulted in the cutting, manufacturing, and selling the property in which the capital was invested, and that was the only possible way by which the stockholders could hope to realize on their investment. While it might be that a portion of the lumber from which the dividends on the stock of the Gladly Lumber Company were derived was "sawed, cut out," as stated by Mr. J. A. G. Allen, the lumber had not been sold and the proceeds received by the company at the time of Mr. Mealey's death, and therefore it cannot be held that the proceeds of such lumber, if any there was, were earned in the lifetime of Mr. Mealey.

This court had before it the residuary clause of Mr. Mealey's will and the question of the proper distribution of these dividends in the case of Hagerstown Trust Company, Executor of Mealey, 119 Md. 224, 86 Atl. 982, but in the condition of the record in that case the court found it impossible to say whether those sums of money constituted a portion of the *corpus* of the estate or should have been treated as *income*. Judge Stockbridge, speaking for the court, said:

"The principles for the determination of this question have been frequently laid down by this court. See the cases of *Thomas v. Gregg*, 78 Md. 556, 28 Atl. 565, 44 Am. St. Rep. 810; *Smith v. Hooper*, 95 Md. 16, 51 Atl. 844, 54 Atl. 95; *Robinson v. Bonaparte*, 102 Md. 63, 61 Atl. 212; *Atlantic Coast Line Case*, 102 Md. 73, 61 Atl. 295; *Ex parte Humbird*, 114 Md. 627, 80 Atl. 209. But there are no facts before this court by which it can say definitely whether that portion of the order of the orphans' court appealed from was correct or incorrect. \* \* \* Under the second clause of Mr. Mealey's will, his widow was to receive in semiannual installments the net income from his estate, but as no dates appear in the account to show when this item of income was received, whether before or after her death, it is impossible for this court to say from the condition of the record whether the allowance so asked for by the executor was correct or not. Mrs. Mealey was entitled under her husband's will to receive the net income, as in the will provided, and if there was income due her which had not been paid at the time of her death, it was manifestly a part of her estate and would pass to her personal representatives."

The question of the apportionment of dividends between a life tenant and a remainderman was considered in the recent case of *Virginia Lee Foard v. Safe Deposit & Trust Company of Baltimore, Trustee*, 122 Md. 476, 89 Atl. 724, decided January 14, 1914, in which it was said:

"While the modern English rule corresponds closely with what is now known as the Massachusetts rule, by which, if the dividend be in cash, it is allotted to the life tenant, but if in stock, it is added to the *corpus*, this is a simple but an arbitrary rule, and calculated to work injustice in many cases. As opposed to this is what is generally known as the Pennsylvania rule, or as designated by Mr. Cook in his work on *Stock and Stockholders*, section 554, as the American rule. It is also sometimes designated as the apportionment rule, and is thus stated in *Smith's Estate*, 140 Pa. 344, 21 Atl. 438, 23 Am. St. Rep. 237; 'It is well settled in this state that, when the stock of a corporation is by the will of a decedent given in trust, and the income thereof for the use of a beneficiary for life, with remainder over, the surplus profits, which have accumulated in the lifetime of the testator, but which are not divided until after his death, belong to the *corpus* of his estate, whilst the dividends of earnings made after his death are *income*, and are payable to the life tenant, no matter whether the dividends be in cash, or scrip, or stock.' This statement of the rule is the substance of the doctrine as laid down in *Earp's Appeal*, 28 Pa. 368, one of the earliest and leading cases upon the subject in this country. It was argued that the doctrine of *Earp's Appeal* had been shaken, if not modified, by the decision in *Boyer's Appeal*, 224 Pa. 144, 73 Atl. 820, but any such idea is effectually dispelled by the very recent case, *In re Stokes' Estate*, 240 Pa. 277, 87 Atl. 974, in which the rule adopted in *Earp's Appeal* is distinctly reaffirmed. The cases in this state are in full accord with the Pennsylvania rule."

In *Ex parte Humbird*, 114 Md. 627, 80 Atl. 209, it appeared that Jacob Humbird by his will provided that the residue of his estate should be held by trustees, who were directed to manage, control, invest, and reinvest said property in a careful and prudent manner, and pay over or distribute annually to each of his children "the interest and earnings" of the estate so devised. The

will further provided that the trust should "last during the lifetime of each of said children, and after their respective deaths said bequests should go to their heirs."

The trustees held an undivided one-sixth equitable interest in 20,000 acres of land, in which \$29,039.35 of the *corpus* of the estate had been invested. No income had ever been derived from this property. *This undivided interest was sold for \$85,549.69.* Another investment of the *corpus* of the trust which came into the hands of the trustees were certain shares of stock of a lumber and manufacturing company, upon which the testator had paid \$111,149.91. The trustees held the stock, and made certain payments on it out of the *corpus* of the trust, amounting, with those made by the testator, to \$195,999.91. Prior to 1910 the company had paid only three dividends on its stock. In February, 1910, a dividend of \$15 per share was declared, and in July following a further dividend of \$276 per share. *These dividends were paid out of funds realized from the sale of 52,000 acres of the company's timber land.* The amount of the dividend involved in that case on the shares of the trust was \$876,000. This was claimed by the life tenants as *income*, while the remainderman asserted that it should be treated as *corpus*. Upon these facts two questions were presented for decision: First, did the whole of the proceeds realized from the sale of the undivided one-sixth equitable interest in the 20,000 acres of land held directly by the trustees belong to the *corpus* of the trust, or should the difference between the purchase and the selling price of the land be treated as *income*? Second, was the dividend declared out of the proceeds of the sale of the corporate real estate *corpus* or *income*? The lower court decided that the money received by the trustees from both sources constituted a part of the *corpus* of the trust, and this court affirmed the decree upon the general principle stated in Taylor on Private Corporations (4th Ed.) § 799, and other cases cited in the opinion:

"When after the testator's death the company sells a portion of its property or franchises and distributes the proceeds in the shape of a cash dividend, that, too, is a part of the principal and is not income to be paid over to the life tenant."

After holding that the facts of that case brought it within the general rule, Judge Urner in his opinion proceeds to state the principle which, in our opinion, should be applied to this case:

"The exceptions to the general rule we have thus stated and illustrated are confined, as indicated in the note in 12 L. R. A. (N. S.) 789, from which we have quoted, to cases in which the earnings of the company necessarily involve the conversion of its capital."

In Taylor on Private Corporations (4th Ed.) 899, the exception is thus defined:

"Moneys arising from the sale of corporate property and distributed as a cash dividend are

income if they arise from the sale of property made by the corporation in the ordinary course of its business when it sells only such property as its regular business is to sell."

In 2 Clark and Marshall on Private Corporations 621, the rule is said not to apply "where the nature of the corporation is such that its ordinary business is to sell property in which its capital is invested, and distribute the proceeds among its stockholders."

The facts of this case bring it clearly within the exception to the general rule, and requires us to hold that the dividends in controversy are *income* and are payable to the appellee as decided by the lower court.

[2] We do not agree with the contention made by the appellants that it was the duty of the trustee to have sold the stocks and invested the proceeds in other securities, and that since this was not in fact done, the court of equity will now treat them as converted from the date of Mr. Mealey's death, "and will allow the life tenant such a sum as will represent a fair interest upon the value of the securities at the time at which they are to be considered as converted." There is certainly no rule of Maryland law to support this contention. It is not supported by Evans v. Iglehart, 6 G. & J. 171, and Wooten v. Burch, 2 Md. Ch. 200, cited to sustain it, and is contrary to the doctrine announced in Heighe v. Littig, 63 Md. 301, 52 Am. Rep. 510.

The decree appealed from will be affirmed.

Decree affirmed, the costs to be paid out of the trust estate.

(124 Md. 46)

HARFORD NAT. BANK OF BEL AIR v. RUTLEDGE et ux. (No. 50.)

(Court of Appeals of Maryland. June 26, 1914.)

# 1. WITNESSES (§ 126\*)—COMPETENCY—TRANS-ACTION WITH DECEDENT—GOVERNING STATUTE.

The question of competency of the maker of a note, sued thereon by one claiming it as pledgee of the deceased payee, to testify to transactions with deceased, the action being commenced in 1897, and the trial being in 1913, is governed by Laws 1902, c. 495, which, without excepting pending cases from its operation, made a radical change in the existing law, enacted by Laws 1888, c. 315, so as to permit a party to a contract to testify where the other party is dead, except in actions by or against executors or administrators in which judgments or decree may be rendered against them; and Laws 1904, c. 661, amending said act of 1902, excepting pending cases from its operation.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 551; Dec. Dig. § 126.\*]

# 2. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

The testimony of the maker of a note, sued thereon by its pledgee, as to how he was engaged in the canning business, given after his proper testimony, that he was engaged in that business, was harmless.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



**3. EVIDENCE (§ 448\*)—PAROL EVIDENCE—CIRCUMSTANCES OF EXECUTION OF NOTE.**

The maker of a note sued thereon by its pledgee, and claiming it was paid, may give evidence of the circumstances under which it was made, provided plaintiff had notice of them before it acquired title, and to explain the writing on the face of the note: "Secured by bill of sale."

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2068-2082, 2084; Dec. Dig. § 448.\*]

**4. EVIDENCE (§ 425\*)—PAROL EVIDENCE—PAYMENT.**

The maker of a note, sued thereon by its pledgee, having testified it was secured by a bill of sale, could show what property was included in the bill of sale, especially where his defense was that that property was subsequently sold and the proceeds applied to payment of the note.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1862; Dec. Dig. § 425.\*]

**5. BILLS AND NOTES (§ 511\*)—ACTION BY TRANSFEREE—EVIDENCE—PAYMENT.**

Defendant, the maker of a note, discounted by plaintiff bank for H., the payee, and afterwards, as claimed by plaintiff, taken up by H., before its maturity, and pledged to plaintiff, having testified that before he signed the note, understanding it was to be discounted by plaintiff, he went to it and had an understanding with W., its president, that goods covered by a bill of sale given by him to H. as security for the note, were to be shipped, that sight drafts were to be attached to the bill of lading, and collected through plaintiff, and that plaintiff would see that the amount of the drafts when collected was applied to payment of the note, he could, as important to his defense, show how the goods were shipped; that is, that they were in the names of himself and H. jointly.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1760-1770; Dec. Dig. § 511.\*]

**6. EVIDENCE (§ 266\*)—HEARSAY—EXCEPTIONS TO RULE.**

While in an action on a note against the maker by the bank which discounted it for H. the payee, the statement of H. to defendant that it was paid is not admissible as truth of that statement, the fact that he made the statement is admissible as reflecting on and explaining defendant's conduct in doing nothing in regard to getting the note; his defense being payment in accordance with an arrangement between him, H., and the bank, before the note was given, that he was to ship goods, with draft for the price, payable to H. attached to the bill of lading, to be collected through and by the bank, and by it applied to payment of the note.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1051, 1052, 1054-1056, 1058-1060; Dec. Dig. § 266.\*]

**7. BILLS AND NOTES (§ 511\*)—ACTION BY TRANSFEREE—EVIDENCE—PAYMENT.**

The maker of a note, sued thereon by the bank, which discounted it for H., the payee, claiming that before it was given it was arranged between the three that he was to ship goods with draft for the price, payable to H., attached to the bill of lading, which was to be collected through and by the bank, and by it applied to payment of the note, could show how the goods were shipped, what was done with the bill of lading, and that the goods sold for enough to pay the note, to show what he did in compliance with that arrangement, and that the result of the arrangement relieved him of liability.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1760-1770; Dec. Dig. § 511.\*]

**8. BILLS AND NOTES (§ 511\*)—ACTION BY TRANSFEREE—EVIDENCE—PAYMENT.**

The defense of the maker of a note, sued thereon by a bank which discounted it for H., the payee, being that it was arranged between the three, before the note was made, that defendant should ship goods, with draft for price attached to the bill of lading, which should be collected by and through the bank, and by it applied to payment of the note, evidence that after the goods were shipped and sold he had a settlement with H., and H. paid him the excess, over the amount of the note, of the proceeds of the sale, is admissible, as tending to support the defense, as well as to explain defendant's conduct in not seeking to get the note.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1760-1770; Dec. Dig. § 511.\*]

**9. EVIDENCE (§ 273\*)—HEARSAY—EXCEPTIONS TO RULE.**

As explaining why the maker of a note sued thereon by the bank, which discounted it for H., the payee, had not demanded it of the bank, though not to show that it was in H.'s safe deposit box, he having testified that he had a settlement with H., and that the bank told him it was paid, he could testify that H. told him it was in his possession, in his safety deposit box.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1108-1120; Dec. Dig. § 273.\*]

**10. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

There being nothing in the record to indicate or suggest that witness knew of any other notice to defendant that his note was not paid, than that testified to, a notice that the note was about due, plaintiff could not be injured by the exclusion of the part of witness' answer that defendant had been notified that the note had not been paid.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

**11. APPEAL AND ERROR (§ 1056\*)—HARMLESS ERROR—EXCLUSION OF EVIDENCE.**

Witness for plaintiff in an action by a bank against the maker of a note, which it claimed H., the payee, one of its directors, had pledged to it, having fully explained how the note was held by it, and that the amount of H.'s liability to it was within the requirements of the law, and was made up of direct loans to him, and commercial paper on which he was liable as indorser, as showing there was nothing unusual in its transaction in regard to the note, exclusion of his direct testimony, that this was not at all unusual, was not prejudicial, as it could give no additional weight to his testimony.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

**12. BILLS AND NOTES (§ 527\*)—PAYMENT—EVIDENCE.**

Testimony of defendant, maker of a note, in an action thereon by a bank, that after he had shipped goods he went to see if the drafts for the price had come back, and if the note had been paid, and that plaintiff's president told him the note had been settled by H., the payee, that it had been settled by the drafts for the goods, is sufficient evidence that it had been paid.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1847-1855; Dec. Dig. § 527.\*]

Appeal from Circuit Court, Baltimore County; Frank I. Duncan, Judge.

Action by the Harford National Bank of

Bel Air against Charles A. Rutledge and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Defendants' second and third granted prayers are as follows:

(2) The defendants pray the court to instruct the jury that if they find from the evidence in this case that before the notes sued on were discounted by the plaintiff it was notified that they were to be paid out of the proceeds of the sale of certain canned goods, the property of the defendants, and it agreed that said notes should be paid out of such proceeds, and that said goods were sold and out of the proceeds thereof the amount due on said notes was paid to the said plaintiff by the payee named in said notes, who had indorsed the same to the plaintiff, that then the obligation of the defendants under said notes was satisfied and discharged by such payment, and their verdict must be for the defendants, even though they find that the plaintiff held said notes after such payment, if they find the same and pledged by the payee as security for other indebtedness of the said payee to it.

(3) The defendants pray the court to instruct the jury that if they find from the evidence in this case that the notes sued on were given by the defendants to the payee, Hoffman, and that they executed a bill of sale on certain canned goods to the said Hoffman to secure the payments of said notes, and that it was agreed between the defendants and the said Hoffman that said notes should be paid from the sale of the canned goods covered by said bill of sale, and that the plaintiff was notified that said notes were secured by said bill of sale and were to be paid out of the proceeds of the sale of the goods covered by it, and that after being so notified the said plaintiff discounted said notes and agreed that it would see that said notes were paid from the proceeds of the sale of the goods covered by said bill of sale, and that thereafter said goods were sold and shipped with a sight draft attached to the bill of lading payable to the said Hoffman, and that the proceeds of said sale were paid with the consent of the plaintiff to the said Hoffman, and that he paid therefrom the amount due on said notes to the plaintiff, then their verdict may be for the defendants, even though they find that after said payment said notes were left with the plaintiff to secure other indebtedness of said Hoffman.

D. G. McIntosh, of Towson (S. A. Williams, of Bel Air, on the brief), for appellant. John S. Young, of Bel Air (T. Scott Offutt, of Towson, on the brief) for appellees.

THOMAS, J. In 1896 the appellees, Charles A. Rutledge and Elizabeth W. Rutledge, his wife, of Harford county, executed two promissory notes in favor of Allen Hoffman, of that county, one dated Rocks, Md., February 19, 1896, for \$544.50, payable three months after date, with interest, and the other dated Rocks, Md., March 14, 1896, for \$1,082.26, payable two months after date, with interest from date, and shortly thereafter the notes were discounted by the Harford National Bank of Bel Air for the payee.

Mr. Williams, the president of the bank, states that about the 6th of May, 1896, a short time before the notes matured, the payee, Allen Hoffman, came to him with the note of H. C. Campen or H. C. Campen & Company, who were canned goods brokers in Bel Air, and wanted the note discounted by the bank; that he made some investigation

about the note, and, being satisfied with it, he had it discounted for him and the proceeds placed to his credit; that Mr. Hoffman afterwards drew his check and paid the Rutledge notes; and that after they were paid he (Mr. Williams) required him to leave them with the bank as collateral for Mr. Hoffman's other obligations at the bank, and delivered them to the cashier, who filed them away; and that they have "remained in possession of the bank ever since"; that on the 17th of October of the same year "a petition in insolvency was filed" against Mr. Hoffman, whose liabilities to the bank at that time amounted to over \$18,000; and that suit was brought in the circuit court for Harford county on the Rutledge notes on the 29th of January, 1897.

The record shows that Charles A. Rutledge was summoned to the February term, 1897, and that, the writ having been returned "non est" as to Mrs. Rutledge, it was renewed from term to term until she was summoned to the May term, 1899. In the meantime the case against Dr. Rutledge had under the rules of court been carried to the stet docket, but after the appearance of Mrs. Rutledge it was reinstated on the trial docket; the cases were consolidated, and on the 11th of September, 1900, upon the suggestion and affidavit of the defendants, the court directed the record to be sent to the circuit court for Baltimore county for trial. The record was not transmitted to the circuit court for Baltimore county until the 7th of September, 1910, and on the 19th of the same month that court entered a judgment by default in favor of the plaintiff, and the judgment was extended for \$3,025.66, with interest from date. The judgment was subsequently stricken out, and the case was tried in December, 1913, upon issues joined on the pleas of "never promised," etc., and "not indebted," etc.

Mr. Williams further states that after the suggestion and affidavit for a removal was filed in the circuit court for Harford county he took for granted that the defendants would have the record sent to Baltimore county, and that he lost sight of the case until the spring of 1910; that there remains of Mr. Hoffman's indebtedness to the bank, as of the last of December, 1902, \$3,000; that Mr. Hoffman resigned as a director of the bank on the 14th of October, 1896; and that he died on the 26th of January, 1897; and that the date, 20th of May, 1896, on the back of the notes, is the date of notice sent to the defendants that the bank held the notes and desired payment.

Mr. Finney, who was cashier of the bank at the time the Rutledge notes were paid by Mr. Hoffman, says that Mr. Williams handed him the notes and told him to hold them as collateral; that he placed them in an envelope upon which he indorsed the amount of the notes; and that the date stamped on the back of the notes is the date of the notice he sent to the makers that the notes were due or

overdue; that he was cashier of the bank for four or five years and left it in 1899; that Mr. Hoffman was an active director of the bank, who sometimes missed meetings of the directors, like other directors, but that he did not think he missed many; and that Mr. Hoffman's office "at one time was across the way from the bank, and at another time was in the next building."

Dr. Rutledge, one of the defendants, who was 73 years of age at the time of the trial, testified that in 1896 and 1897 his principal business was canning corn and tomatoes, and that he owned a large farm on which he raised most of his "canned goods"; that Mr. Hoffman, who was a canned goods broker and a director of the Harford National Bank, rendered him financial assistance in his business, and had been doing so for ten years; that he had given Mr. Hoffman a bill of sale of the tomatoes and corn canned by him in 1895, which was stored in a warehouse at Rocks, to secure such amounts as he owed him; that before he and his wife executed the notes in this case, which he understood were to be discounted at the Harford National Bank, he went to the bank and told Mr. Williams, the president, that the understanding between him and Mr. Hoffman was that the notes were to be secured by the bill of sale he had given Mr. Hoffman, and were to be paid out of the proceeds of sales of the canned goods mentioned in the bill of sale; that when the goods were sold a sight draft would be attached to the bill of lading, and that he wanted the bank to see that the proceeds of the sales of the goods and of the drafts were applied to the payment of the notes, and that Mr. Williams promised that he would do so; that he and his wife signed the notes, and that when he sold and shipped the goods in May, 1896, he took the bills of lading to Mr. Hoffman, and that sight drafts on the consignees for the amount of the sales, with the bills of lading attached, were collected through the bank; that some time after the goods were shipped he had a settlement with Mr. Hoffman; that Mr. Hoffman told him the notes had been paid and paid him the difference between the amount for which the goods sold and the amount the witness owed him, and told him that the notes were in his bank box; that, in order to feel certain that the notes had been paid according to the understanding with the bank and Mr. Hoffman, he went to the bank to see about it, and that Mr. Williams told him that the notes had been paid, but that he did not at that time get the notes from the bank because Mr. Hoffman had told him that they were in his bank box; that the goods sold for more than enough to pay the notes; and that, after he went to the bank and Mr. Williams told him that the notes had been paid, he never heard anything further of them until he was summoned in this case, after Mr. Hoffman's death.

During the trial, which resulted in a ver-

dict and judgment in favor of the defendants, from which the plaintiff has appealed, the plaintiff reserved 23 exceptions, the first 22 of which relate to rulings of the court on the evidence, and the twenty-third is to the action of the court on the prayers.

[1] The first exception was to the competency of Dr. Rutledge as a witness for the defendants, and it is insisted by the appellant that as the suit was instituted in 1897 that question must be determined by the provisions of the act of 1888, c. 315, which was then in force. It is not claimed that Dr. Rutledge was not a competent witness under the act of 1902, c. 495; but the contention of the learned counsel is that, notwithstanding that act did not except from its operation pending cases, it could not apply to them, and they rely upon the cases of *Dashiell v. Baltimore*, 45 Md. 615, and *Gable v. Scott*, 56 Md. 176. In *Dashiell's Case* the court held that where a statute repeals and re-enacts a prior act, and the repealing act contains substantially the same provisions as the law repealed, the latter continues in force; Judge Miller saying:

"The repealing and enacting part of the act of 1874 take effect at the same time, and the enacting part substantially re-enacts the provisions of the first statute. There is high authority for the position that where a repealing law contains a substantial re-enactment of the previous law, the operation of the latter continues uninterrupted."

In *Gable v. Scott*, *supra*, the court followed the rule announced by Judge Miller in *Dashiell's Case*. The act of 1902, however, did not re-enact the provisions of the act of 1888, but made a very radical change in the law, by which a party to a contract is permitted to testify where the other party is dead, except in actions or proceedings by or against executors or administrators in which judgments or decrees may be rendered against them, and in the cases of *Duckworth v. Duckworth*, 98 Md. 98, 56 Atl. 490, and *Justis v. Justis*, 99 Md. 81, 57 Atl. 23, where the proceedings were begun prior to the passage of the act of 1902 and the testimony was given after that act went into effect, this court held that the surviving parties to the transactions there involved were competent witnesses under the provisions of that act. The act of 1902 was amended by the act of 1904, c. 661 (section 3 of article 35, Code of 1912), which also provided that it should not apply to pending cases, etc., as to which the provisions of the act of 1902 were continued in force.

[2, 3] Dr. Rutledge having stated that he was engaged in the canning business in the years 1895, 1896, and 1897, he was asked by his counsel how he was engaged in the canning business during those years, and, the court having overruled the plaintiff's objection to the question, he replied that he was "engaged in canning, raising fruit for canning," and that he had a large farm and raised most of his canned goods, and the

court overruled plaintiff's motion to strike out his answer. The witness stated that the last goods he canned at Rocks was in 1895, and was then asked by his counsel who assisted him in the canning business in 1895, and, the court having overruled the plaintiff's objection to the question, the witness replied, "I suppose you mean financial assistance?" and when counsel said, "Yes," he said, "Allen Hoffman had been doing it for the last ten years." He stated further that Allen Hoffman was a canned goods broker and a director of the Harford National Bank and lived in Bel Air. The words, "Secured by bill of sale," were written on the face of the note for \$1,082.26, and, after the witness had testified as we have stated, his counsel called his attention to the reference on the note to a bill of sale and asked him what the bill of sale covered, to which question the plaintiff objected, and, after the court overruled the objection, the witness answered, "The bill of sale on canned goods that I had back in 1895," and the plaintiff then moved to strike out the answer, which motion the court overruled. After the plaintiff took its exception to the ruling, the court said, "All of this is going in with the understanding that it is subject to a motion to strike out," and, when counsel for the plaintiff asked the court if that meant that they were to be precluded from taking their exceptions at the time, the court replied, "No," and that unless the evidence was followed up by bringing "notice home to the bank" he would exclude the testimony on motion to strike it out. Counsel for the defendants then asked Dr. Rutledge the following question: "You say there was a canned goods bill of sale to secure those notes?"—and he replied, "Yes, sir." Plaintiff's counsel then stated that he "made objection to both question and answer," and the court then said: "If it was to the answer I overrule it; if it was to the question, it comes too late." Whereupon the plaintiff excepted to the ruling of the court, which ruling and the other rulings to which we have referred constitute the grounds of the second, third, fourth, fifth, sixth, and seventh exceptions. There was no reversible error in either of these rulings. The answer of the witness in the third exception to the question in the second could not have injured the plaintiff, and it was entirely proper for the defendants to introduce the evidence mentioned in the other exceptions for the purpose of showing the circumstances under which the notes were given, provided, of course, that the bank had notice of them before it acquired title to the notes, and to explain the reference on the note to a bill of sale.

One of the notes was signed by Dr. Rutledge as agent, and the eighth exception is to the action of the court in allowing him to state why he signed it as agent. We see no objection to the question, and the exception is not pressed in the brief of counsel.

[4] In the ninth exception Dr. Rutledge was asked what goods were included in the bill of sale, where they were "at the time," and where they were afterwards, and he stated that they were canned corn and canned tomatoes. Having stated that the notes were secured by a bill of sale, there was no reason why the witness could not show what property was included in the bill of sale, particularly as his defense was that that property was subsequently sold and that the proceeds of sales were applied to the payment of the notes.

[5] In answer to further questions the same witness testified that the property remained in the warehouse until "we shipped" them sometime in May, 1896; and he was then asked to state in whose name they were shipped, to which he replied that they were shipped in his own name and Mr. Hoffman's name jointly "because there were more goods there than to pay those notes." The tenth and eleventh exceptions are to the action of the court in overruling the objection to the question and the motion to strike out the answer of the witness. It appears that the court afterwards struck out the last part of the answer, and we see no objection to the rest of the answer or to the question. As we have said, the witness testified that before he signed the notes he went to the bank and had an understanding with Mr. Williams that the canned goods included in the bill of sale were to be shipped; that sight drafts were to be attached to the bills of lading and collected through the bank; and that the bank would see that the amount of the drafts, when collected, was applied to the payment of the notes, and it was therefore important for him to show as a part of his defense how the goods were shipped.

[6] The witness further testified that the drafts for the amounts of the several shipments of the goods went through the bank with the bills of lading attached, and that the president of the bank told him so; that at the time this suit was brought he and his wife were living at Rocks, in Harford county; that after the maturity of the notes he never had any notice from the bank that the notes had not been paid; and that on the contrary, he was told by the president of the bank that they had been paid. When asked if he had been told by anybody else that the notes had been paid, he said, "Yes, sir." He was then asked, "Who was that?" and he replied that he was told by Mr. Hoffman, and in answer to the question, "What Mr. Hoffman was that?" he said, "Mr. Allen Hoffman who was a director of the Harford National Bank at the time." The twelfth and thirteenth exceptions are to the rulings of the court overruling plaintiff's objection to the question and refusing to strike out the answer. Counsel for the appellant in support of these exceptions rely upon the rule excluding hearsay evidence. But does this testimony fall within that rule? Leaving out of view the

effect, if any, that should be given to the fact that Mr. Hoffman was an active director of the bank, the defense relied on is that the notes were secured by a bill of sale; that the bank and Mr. Hoffman, who held the bill of sale, agreed that the drafts for the proceeds of sales of the goods should be collected by the bank and applied to the payment of the notes; that relying upon that understanding, the notes were signed and the goods were shipped accordingly, and after he was assured by the bank, or its president, and by Mr. Hoffman, that the notes had been paid, he had a settlement with Mr. Hoffman, and never took up the notes or made any further inquiry about them or knew that the notes had not been paid until the suit was brought after Mr. Hoffman's death. If no such arrangement as he states ever existed, and no such assurances of the payment of the notes had been made, there would be no reasonable explanation of his failure to make some inquiry at the bank about the notes except an utter disregard of his obligations. We think therefore that, while the statement of Mr. Hoffman that the notes had been paid may not be admissible to prove the truth of that statement, the fact that he made the statement is admissible as reflecting upon and explaining the conduct of the defendant in reference to the notes, and that it falls within one of the well-recognized exceptions to the rule in regard to hearsay evidence. In the case of *Eareckson v. Rogers*, 112 Md. 160, 75 Atl. 513, Judge Pearce said:

"Dr. Eareckson was a competent witness in the case under section 3 of article 35 of the Code of Public General Laws, and the fact that his agreement of purchase with Judge Jones only required him to assume the interest on this mortgage from October, 1899, when he took possession of the property, and that Judge Jones was to pay it up to that time, and had assured him it had been paid and adjusted, was a material fact influencing the conduct of Dr. Eareckson, and therefore within the exception to the rule against hearsay evidence as stated in 1 *Greenleaf on Evidence*, § 123, where the fact that the declaration was made, and not its truth or falsity, is the point in question."

And the exception to the rule is more broadly stated in 1 *Greenleaf on Ev.* (16th Ed.) § 101, as follows:

"And generally, where the question is, where the party acted prudently, wisely, or in good faith, the information on which he acted, whether true or false, is original and material evidence."

[7.] After the witness had stated that the goods were shipped by him, and that he got the bills of lading from the railroad company, he was asked what he did with the bills of lading, and, while he was answering the question and was saying that he took them to Mr. Hoffman with the consent of the "bank officers," he was interrupted by an objection of the plaintiff to the answer, which the court overruled. He was then asked what was done with the consent of the bank when he took the bills of lading to Mr. Hoffman, and, after the court had over-

ruled an objection to the question, he replied that the goods were shipped out and when the money came back Mr. Williams, the president of the bank, told him the notes were paid. His counsel then asked him, "My question was, what was done with the bills of lading when you took them to Mr. Hoffman as you have testified?" and he said the drafts were attached to the bills of lading and went with them to the parties who bought the goods. The plaintiff objected to the question and answer, and, the court having overruled the objection, the witness further stated that the drafts were made payable to Mr. Hoffman and went through the bank with the understanding with the bank and Mr. Hoffman, at the time, that the bank would see that the proceeds were applied to the payment of the notes; that the goods referred to were the goods included in the bill of sale to Mr. Hoffman; and that the witness shipped them to pay the notes in question; and that the notes were paid with the proceeds of the drafts. The witness was then asked by his counsel if he had a settlement with Mr. Hoffman after the goods were shipped, etc., and when the plaintiff objected to the question the court told the witness he could answer the question, "Yes," or, "No," and he replied, "I did." In answer to further questions by his counsel the witness stated that he had the settlement with Mr. Hoffman some time in May, 1896, after the goods were shipped, but that he did not get the notes from Mr. Hoffman at the time he made the settlement, and when he was asked why he did not get them, and what Mr. Hoffman said to him, counsel for the plaintiff objected, and the court stated that the objection was sustained as to anything that Mr. Hoffman said to the witness. The witness then said that after he had the settlement with Mr. Hoffman, in order to be certain that the notes were paid, he went to the bank to inquire about it, and that the president of the bank told him that they had been paid. Counsel for the defendants then asked him if the goods sold for enough to pay the notes, and he answered: "Yes, sir, more than enough." The court overruled the objection of plaintiff to the question and answer, and the witness further testified that but for his misfortune in having his house burned he would have been able to produce the statement of the settlement with Mr. Hoffman, according to which Mr. Hoffman paid him the difference, and when asked by his counsel, "The difference between what?" he replied, "The goods shipped and the notes," to which answer the plaintiff objected and the court below overruled its objection. The several rulings to which we have just referred are the grounds of the fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth exceptions. In view of the agreement between the defendants, Mr. Hoffman, and the bank, relied upon

by the defendants, the defendants had a right to show how the goods were shipped, what was done with the bills of lading, and that the goods sold for enough to pay the notes, in order to show what the witness did in compliance with that agreement, and that the result of that arrangement relieved the defendants of any liability on the notes. The court below refused, upon the objection of the plaintiff, to permit the defendant to state what Mr. Hoffman said to him in explanation of the defendant's failure to get possession of the notes at the time of the settlement, and the fact that he had a settlement with Mr. Hoffman, after the goods were sold and shipped by him under the circumstances stated, and the fact that Mr. Hoffman paid him the difference between the amount of the notes and the amount of the proceeds of sales of the goods, are circumstances tending to support the defense relied upon, and also to explain the conduct of this defendant, as we have stated in regard to the twelfth and thirteenth exceptions.

[9] The twentieth exception occurred in the following cross-examination of Dr. Rutledge:

"Q. I understood you to say that you went to Mr. Williams, saw him afterwards, because you wanted to be certain that the notes were paid? A. Yes, sir. Q. But I understand you to say that Mr. Williams said to you that the notes were paid? A. Yes, sir. Q. Why didn't you get the notes? A. That is a different thing. Mr. Hoffman had those notes. Q. No, sir; the notes were at the bank. You say that you saw Mr. Williams again because you wanted to be certain that the notes were paid, and he told you that the notes were paid. Now, that was after the bank had the notes and you went to Mr. Williams about the notes, and you wanted to know if they were paid. I ask you again why you did not get the notes? Why did you; you went to Mr. Williams to be sure that the notes were paid; why did you not take them up? A. Because I could not then get them because they were in Mr. Hoffman's possession. Mr. Hoffman had them in his possession. Q. How do you know that? A. He told me that he had them in his possession, that he had them in his safe deposit box."

It is apparent that having stated that he had a settlement with Mr. Hoffman, and that the president of the bank had told him the notes were paid, the witness had a right to explain why he did not take up the notes when he went to the bank, and, when pressed to state how he knew that they were in Mr. Hoffman's possession, he had a right to give the source of the information upon which he relied and acted. The evidence, as we have already explained, was not admissible for the purpose of showing that the notes were in fact in Mr. Hoffman's safe deposit box, but it was admissible for the purpose of explaining why the witness did not demand delivery of the notes by the bank.

[10] When Mr. Williams was recalled in rebuttal, he stated that he did not have the interview before the notes were signed with Dr. Rutledge as testified to by Dr. Rutledge, and was then asked by counsel for the bank,

"And he spoke of another interview, I think, after the maturity of the notes, in which you told him that the notes had been paid?" to which he replied:

"No, sir; I had no such interview. On the contrary, he had been notified that they had not been paid."

The court sustained the objection of the defendants to that part of the answer, "On the contrary," etc., and the plaintiff excepted. The witness was then asked, "He further says, and this you must know, that you told him the notes were paid?" and he replied:

"No, sir, I never told him. I did not tell him any such thing. On the contrary, the only interview I had with him on the subject was when I told him the notes were not paid, and that we held them because they had not been paid, and we could not recognize a payment to Mr. Hoffman which he claimed, and in that talk he never claimed that he had any interviews with me on the subject."

The plaintiff got the benefit of the evidence to the effect that the president of the bank told Dr. Rutledge that the notes had not been paid. The cashier of the bank had testified that he sent a notice to the defendants on the 20th of May, 1896, that the notes were about due, and Mr. Williams testified in chief that the date, 20th of May, 1896, on the back of the notes, according to the usual course of business, indicated that the defendants were notified on that day that the bank held the notes. There is nothing in the record to indicate or suggest that Mr. Williams had knowledge of any other notice to the defendants that the notes had not been paid, and the plaintiff could not therefore have been injured by the exclusion of that part of the answer referred to.

[11] On cross-examination the witness stated that the notes were not left at the bank "not as real security but to give some respectability to the large loans that Mr. Hoffman, as a director, had gotten from the bank"; that that was not the transaction; that Mr. Hoffman had not borrowed from the bank in excess of the amount the law allowed him to borrow; that the capital stock of the bank was \$50,000; that he never said that Mr. Hoffman had borrowed \$18,000, from the bank; but that what he did say was that Mr. Hoffman "was liable to the bank in one way or the other," to the amount of about \$18,000; and the witness also said that he was not interested as president of the bank in seeing that its record showed as much collateral as possible to bolster up Mr. Hoffman's indebtedness. He was then asked by counsel for the plaintiff:

"Mr. Offutt has asked you about Mr. Hoffman's large indebtedness to the bank. Will you explain how that was?"

And he replied:

"It was made up of a certain amount of direct loans which were authorized to be made under the law, which would be 10 per cent. of our aggregate capital and surplus, which at that time would be something like \$18,000. And it was also made up of commercial paper and

paper of makers that he had taken to his own order and which were indorsed by him, and upon which he was liable to us as indorser."

Counsel for the plaintiff asked him if that was unusual, and he replied, "Not at all." To the last question and answer the defendants objected, and the twenty-second exception is to the action of the court in sustaining the objection. It does not appear how the plaintiff could have been injured by this ruling. Mr. Williams had fully explained how the notes were held by the bank; that the amount of Mr. Hoffman's liability was within the requirements of the law; and that it was made up of "direct loans" to him, and commercial paper on which he was liable as indorser, as showing that there was nothing unusual in the transaction of the bank in regard to the notes in suit, and we do not perceive how the evidence referred to could have given any additional weight to his testimony, or how its exclusion could have prejudiced the plaintiff.

[12] The only remaining exception is to the ruling of the court on the prayers. By the plaintiff's first prayer the jury were instructed that if they found the execution of the notes, that they were discounted by the plaintiff for Mr. Hoffman a few days after their respective dates, that on or about the 6th day of May, 1896, Mr. Hoffman took up the notes and then pledged them to the plaintiff "as collateral to his other indebtedness to it," and that of said indebtedness there remains due to the plaintiff a sum in excess of the principal and interest of said notes, then the plaintiff was entitled to recover, "unless the jury find that the defendants delivered to said Hoffman for sale certain canned goods sufficient to pay said notes, and further find that the plaintiff knew of such arrangement and assented thereto; and the burden was upon the defendants to show said notice and assent by the greater weight of evidence." By the plaintiff's third prayer the jury were instructed:

"That no agreement the defendants may have had with Allen Hoffman with reference to the delivery and application of canned goods covered by the bill of sale mentioned in the evidence, if they find such, was binding upon the plaintiff, unless the jury find that said agreement was made known to the president of the bank, and by him approved and assented thereto."

The court below granted the defendants' second, third, and fourth prayers. The second and third, which the reporter is requested to set out in his report of the case, are not more favorable to the defendants than the instructions granted at the instance of the plaintiff, and the only objection made by the appellant to any of the defendants' prayers is that there is no evidence to support them, and that the court erred in overruling its special exceptions on that ground. Learned counsel insist that there was no evidence to show that the notes were paid with the

proceeds of the sales of the canned goods. It seems only necessary in this connection to refer to the cross-examination of Dr. Rutledge where he said:

"After the goods had been shipped, I went to see if the drafts had come back and if the notes had been paid, and Mr. Williams told me that the notes had been settled by Mr. Hoffman; that the notes had been settled by the drafts for the canned goods."

Without attempting to further discuss the evidence, we think the testimony to which we have just referred, as well as the other testimony to which we have already alluded, fully answers the plaintiff's exception. In disposing of such questions the court does not, of course, consider the weight of the evidence, which is a matter exclusively for the jury and as to which the court should refrain from any comment, as it is only concerned with the question of the legal sufficiency of the evidence.

After a careful examination of the record and of all the authorities relied upon by the appellant, we find no reversible error in any of the rulings of the court below, and the judgment must be affirmed.

Judgment affirmed, with costs to the appellees.

(124 Md. 101)

FURNESS, WITHY & CO., Limited, v. RANDALL et al. (No. 55.)

(Court of Appeals of Maryland. June 26, 1914.)

#### 1. CONTRACTS (§ 238\*)—PAROL MODIFICATION.

While a written contract cannot be varied by parol evidence, the parties may modify it; hence a contract to furnish a vessel to carry a shipment of grain may be subsequently modified by an agreement that a particular vessel should be furnished.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1117, 1123; Dec. Dig. § 238.\*]

#### 2. CONTRACTS (§ 248\*)—ACTIONS—CONSTRUCTION—JURY QUESTION.

While the construction of a contract is for the court, the determination of what constitutes the contract is for the jury; hence where defendant claimed that plaintiff's assent to defendant's specification that a shipment of grain, which was to be transported by defendant, should be carried by a certain boat modified the contract, the question was for the jury.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 1140; Dec. Dig. § 248.\*]

#### 3. SHIPPING (§ 108\*)—CONTRACTS—DEFENSES.

Where the owner of a vessel agrees to carry in it certain grain, the destruction of the vessel by the perils of the sea is an excuse for breach of contract.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 226, 404, 406-410; Dec. Dig. § 108.\*]

#### 4. CONTRACTS (§ 247\*)—MODIFICATION—EVIDENCE—MATERIALITY.

In an action for breach of a contract to furnish a vessel to carry grain, the exclusion of a question to one of the plaintiffs as to how they could have known when to have the grain ready for shipment, if there had been no nomination of a particular vessel, is not material on the question whether the contract had



been modified so as to require defendants to furnish only a particular vessel.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1139, 1787; Dec. Dig. § 247.\*]

**5. EVIDENCE (§ 139\*)—ADMISSIBILITY—CUSTOM OR USAGE.**

Mere usage or custom can never be received to modify the express terms of a contract, hence in an action for breach of an agreement to carry a shipment of grain, evidence of defendant's custom to nominate a special vessel for shipments, and plaintiff's past acquiescence therein, is not admissible to show that that practice was followed with respect to the contract in suit.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 415; Dec. Dig. § 139.\*]

Appeal from Superior Court of Baltimore City; Carroll T. Bond, Judge.

"To be officially reported."

Action by Blanchard Randall, George S. Jackson and others, copartners trading as Gill & Fisher, against Furness, Withy & Co., Limited, a corporation. From a judgment for plaintiffs, defendant appeals. Reversed and remanded.

Argued before BOYD, C. J., and BURKE, THOMAS, URNER, and STOCKBRIDGE, JJ.

John B. Deming, of Baltimore (Whitelock, Deming & Kemp, of Baltimore, on the brief), for appellant. R. E. Lee Marshall, of Baltimore (Arthur Geo. Brown, of Baltimore, on the brief), for appellees.

STOCKBRIDGE, J. The plaintiffs in this case were and are grain commission merchants in the city of Baltimore. The defendant is a corporation owning and operating a "line" of steamers of irregular sailing between Baltimore and Leith, Scotland, the vessels being what are frequently called "tramp" steamers, and actually performing their voyages only when there was a shipload of freight to be carried. On the 26th September, 1911, an agreement was entered into in the following language:

Dresel, Rauschenberg & Co., Agents Furness Line.

Freight Contract.

Baltimore, Sept. 26, 1911.

Contract No. 66

Engaged from Gill & Fisher.

For shipment per S. S. Furness Line.

Intended to load December, for Leith, Scot.

To be ready when called for on or after Dec. 1st.

Shipper's option of canceling engagement if vessel not ready to receive on or before Dec. 30th.

Description of engagement 2,000 quarters grain. Rate of freight 2/1½ per quarter.

Subject to conditions of bills of lading. If different kinds of grain be shipped, no parcel to be under 2,000 qrs. without agent's approval.

General cargo insurance.

Not to be forwarded on last steamer in December.

O.K. [Signed] Dresel, Rauschenberg & Co.,  
G. & F. Agents.

No vessel appearing the last of December to fulfill the engagement above set out, there was a violation of contract, and this suit

was brought to recover damages for such violation. The defendant appeared to the action, and filed three pleas, of which the third is in the following terms:

"And for a third plea that the steamship *Amana* belonging to the defendant sailed from Leith, Scotland, on December 1, 1911, bound for the port of Baltimore, Md., where she was due to arrive on or about December 20, 1911; that at the time of sailing the said steamship was tight, staunch, and fully manned and equipped for said voyage; that on December 2, 1911, the defendant nominated said steamship *Amana*, which was expected to sail from Baltimore for Leith on her return voyage on December 27, 1911, and which was the last ship of the defendant sailing during that month, to fill its contract to carry for the plaintiffs, 2,000 quarters of grain from Baltimore to Leith during the month of December, 1911, on the last ship of the defendant sailing during that month, and the nomination of said steamship for said contract was accepted by the plaintiffs; that the said steamship *Amana* has never been heard from since December 1, 1911, the date of her sailing from Leith for Baltimore, but became a total loss upon the high seas by reason of perils of the sea, and without fault or neglect on the part of the defendant, and that the loss of the said steamship rendered it impossible for the defendant to perform its said contract with the plaintiffs."

A demurrer to the third plea was interposed and sustained, and thereupon the defendant filed a fourth plea, which set out substantially the same defense as that attempted to be set up in the third plea, but set it out in somewhat fuller detail, alleging in addition that the agreement of September 26th was not the entire agreement between the parties. A demurrer to this plea was also sustained, and thereupon the case went to trial. There are four bills of exception relating to testimony and to a tender of evidence, and a fifth bill taken to the action of the court upon the prayers. The rulings of the court upon the testimony and upon the prayers followed, for the most part, as a necessary and natural sequence to the ruling upon the demurrers to the third and fourth pleas, and if those rulings were correct, the several bills of exceptions are not well founded. The exceptions and the demurrers may therefore properly be considered together.

It is pertinent to state and to keep in mind one or two additional facts in order to accurately apply the law governing the case here presented. The contract of September 26th having been made, nothing further appears to have been done until the 2d day of December, 1911, when a notice, spoken of by the witnesses as a "nomination" was sent by the agent of the defendant to the plaintiffs. That notice was in the following terms:

Baltimore, Dec. 2, 1911.

Mess. Gill & Fisher, City—Dear Sirs: We beg to name steamer *Amana* expected to sail for Leith Dec. 27th for 2,000 quarters grain.

Engagement of Sept. 26, for 2,000 quarters.

Respectfully, Dresel, Rauschenberg & Co.,  
Agents.

Contract No. 66

Per A. F. Sidebotham.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



[1,2] The exclusion of this notice when offered in evidence constitutes one of the bills of exceptions. Subject to all legal exceptions as to admissibility, it was admitted that the steamship *Amana* of the Furness Line sailed from Leith, Scotland, on December 1, 1911, and that she was expected by the defendant to arrive at Baltimore in time to sail from Baltimore on December 27, 1911, for Leith, and was due so to arrive, and that the vessel has not been heard of since December 1, 1911. The theory of the plaintiffs is that the agreement of September 26th was an absolute agreement for the transportation of 2,000 quarters of grain, and that, being an absolute agreement, plain in its language, no evidence is admissible which might tend to vary the legal effect of it, or even to explain any of its terms. Reliance for this position is placed mainly upon the case of *Patterson v. Baltimore Steam Packet Co.* (D. C.) 101 Fed. 296, and 106 Fed. 736, 45 C. O. A. 575, 66 L. R. A. 193. In this case there was a contract not very dissimilar in form from the contract of September 26th, but the only evidence offered in that case in addition to the contract itself was evidence to the effect that the shipper failed at the specified time to produce for shipment the 1,000 bales of cotton, and recovery in the form of damages was allowed at the instance of the owners of a ship belonging to the Johnstone Line and ready to sail at the time specified. In this case if there was nothing before the court except the contract already quoted, and evidence to show that no steamer of the Furness Line had appeared to fulfill and carry out that contract, then the analogy would be complete. This leads to the consideration of the correctness of the rulings by which the notice of nomination of December 2d was excluded from evidence. It is elementary law that where a contract is in writing, parol evidence is not admissible to add to, detract from, or vary the terms of the agreement. This does not mean, however, that the parties may not, subsequently to entering into the contract, rescind it by mutual consent, enter into a new contract, or modify the existing one. This rule was distinctly laid down in the case of *Atwell v. Miller*, 11 Md. 348, 69 Am. Dec. 206, where it was held competent to add to the terms of a bill of lading by proof of a parol supplementary agreement. See, also, *Birely v. Dodson*, 107 Md. 229, 68 Atl. 488. The agreement of September 26th would have been fully gratified by the tender at the time named of any seaworthy ship by the defendant corporation, and that without any notice whatever, and if no notice had been given, it is perfectly clear that the plaintiff would have been entitled to recover under the agreement of September 26th. *Carver on Carriage by Sea* (3d Ed.) § 227. See, also, *Jacobs v. Credit Lyonnais*, 12 Q. B. D. (1884) 603. But as matter of fact in this case the defendant did, on December 2d, name

a particular ship to carry the grain in question. The effect of this was to render more definite, in one particular at least, the terms of the original contract; and the assent to it on the part of the shipper amounted to a modification of the original contract by mutual consent at a time when it was perfectly competent for the parties so to do, and substitute a particular ship, in place of an open contract which would be gratified by the sending of any ship of that line. The notice does not bear upon its face any statement of the acceptance of the designation by the shippers, although it was virtually conceded in the argument that such assent had been given. In the state of this record, therefore, the rule is perfectly clear that, while the construction of a contract is always a matter to be passed upon by the court, the determination of what the contract was is a question to be found by the jury. *Roberts v. Bonaparte*, 73 Md. 191, 20 Atl. 918, 10 L. R. A. 689; *Meyer v. Frenkil*, 113 Md. 36, 77 Atl. 369; *Sullivan v. Boswell*, 122 Md. 539, 89 Atl. 940. It was therefore proper that the question of whether or not the notification of December 2d was intended by the parties to, and did in fact, amount to a modification of the original agreement should have been submitted to the jury.

[3] The impossibility of the performance of the contract by the *Amana* is, as we understand the record, conceded, and thus is presented the question whether the impossibility of performance amounts to an excuse such as will relieve the parties to the contract from all liability for its nonperformance. The leading case with regard to this is the case of *Taylor v. Caldwell*, 3 Best & Smith, 826, and the rule there laid down has been followed in a number of cases both in this country and in England. In the case of *Nickoll & Knight v. Ashton, Edridge & Co.*, L. R. 2 K. B. (1901) 126, a vessel had been chartered to load with cotton seed at Alexandria. While preceding thither the vessel was stranded and injured so that she was unable to fulfill her agreement within the specified time, and her owners were held to be excused. That decision was rendered by a divided court, but the same principle precisely was applied in the case of *Howell v. Coupland*, L. R. 9 Q. B. 462; 1 Q. B. D. 258. In this country the leading case is that of *The Tornado*, 108 U. S. 342, 2 Sup. Ct. 746, 27 L. Ed. 747, and the ruling in this case is well summarized in 36 Cyc. 206, as follows:

"Where a vessel before she breaks ground for a voyage is injured by fire so that the cost of her repair would exceed her value when repaired, and she is rendered unseaworthy and incapable of earning freight, a contract of freightment for carrying cotton to a foreign port and providing for the payment of freight money on the delivery of the cotton at that port is dissolved."

In this case on page 351 of 108 U. S., on page 752 of 2 Sup. Ct. (27 L. Ed. 747), the Supreme Court of the United States adopting

the language of *Taylor v. Caldwell*, *supra*, say:

"Contracts whose performance depends on the continued existence of a given person or thing imply a condition that impossibility of performance arising from the perishing of the person or thing shall excuse the performance."

The general legal principles applicable to a case like the present have been so recently considered by this court and so fully announced in the opinion prepared by Judge Thomas in *American Towing Co. v. Whiteley*, 117 Md. 660, 678, 84 Atl. 182, that a further discussion of them at this time seems unnecessary. It, therefore, follows that there was error in the action of the superior court in sustaining the demurrers to the third and fourth pleas, and that error extended necessarily to the rulings on evidence set out in the first and fourth bills of exceptions, and to the rulings of the court on the plaintiff's prayer and the defendant's first and second prayers.

[4] The second bill of exceptions was reserved to the refusal of the court to permit a witness, who was a member of the plaintiff firm, to answer the following question:

"If there had been no nomination in this instance how could you have known when to have your grain ready for shipment?"

It is difficult to see how this question was in any way material to the issue as made up, and no reversible error can be ascribed to the court for its ruling with regard to this.

[5] The third bill of exceptions and the defendant's third prayer both related to an endeavor to show the custom of the parties over a series of years to have been identical with that pursued in the present case. Usage of the parties to a transaction is frequently shown, and yet it is entirely within their power to contract either without reference to such usage or directly to the contrary of what a usage has been; but the tender of proof in this case goes still further, in that the proffer is to show the usage and interpretation placed by the parties themselves upon contracts in every way substantially like that involved in the present case. Mere usage or

custom can never be received to modify the express terms of a contract, and a departure from this well-recognized rule would open too wide a door for the introduction of improper evidence. We, therefore, entirely concur with the superior court in its ruling upon the third bill of exceptions and the refusal of the defendant's third prayer.

For the errors already indicated the judgment in this case must be reversed, and the case remanded for a new trial.

Judgment reversed and case remanded; costs to be paid by the appellee.

(124 Md. 110)

FURNESS, WITHEY & CO., Limited, v.  
FAHEY. (No. 58.)

(Court of Appeals of Maryland. June 23, 1914.)

Appeal from Superior Court of Baltimore City; Carroll T. Bond, Judge.

"To be officially reported."

Action by John T. Fahey, trading as John T. Fahey & Co. against Furness, Withy & Co., Limited, a corporation. From a judgment for plaintiff, defendant appeals. Reversed and remanded.

Argued before BOYD, C. J., and BURKE, THOMAS, URNER, and STOCKBRIDGE, JJ.

John B. Deming, of Baltimore (Whitelock, Deming & Kemp, of Baltimore, on the brief), for appellant. R. E. Lee Marshall, of Baltimore (Arthur Geo. Brown, of Baltimore, on the brief), for appellee.

STOCKBRIDGE, J. The questions of law presented by this appeal are identical with those considered in the case of *Furness, Withy & Co. v. Randall*, 91 Atl. 797. The only points of difference are that three contracts, dated respectively, September 21, 23, and October 4, 1911, are here involved instead of one. The notice or "nomination" sent on December 2d, designating the *Amana* as the vessel on which the shipments were to be carried, bore upon its face the approval of Fahey & Co. The pleadings, evidence, and rulings were simply a repetition of those in the case of *Gill & Fisher*, and for the reasons there given the judgment appealed from will be reversed, and the cause remanded for a new trial.

Judgment reversed and cause remanded for a new trial, appellees to pay costs.

(83 N. J. Eq. 807)

In re S., One of the Proctors of Prerogative Court.

(Prerogative Court of New Jersey. Aug. 21, 1914.)

**1. CONTEMPT (§ 17\*)—EXECUTORS AND ADMINISTRATORS (§ 31\*)—COURT ORDER—DESTRUCTION.**

S. presented a petition for the appointment of an administrator ad prosequendum, on which an order was entered appointing the clerk in chancery as such administrator, the petition and order being delivered to S. for filing. He having failed to file the same until after he learned that an administratrix had been appointed for the decedent, and that an order of revival would not be made until the order of the ordinary appointing the administratrix ad prosequendum in the surrogate court had been vacated, S. stated that he had destroyed the petition and order without filing them. *Held*, that the order could only be nullified by vacation by the court granting it, and its destruction constituted a contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 48-50; Dec. Dig. § 17;\* Executors and Administrators, Cent. Dig. §§ 186-190; Dec. Dig. § 81.\*]

**2. CONTEMPT (§ 17\*)—DESTRUCTION OF ORDERS OF COURT.**

A judge may destroy an order which he has signed, before it is filed, with the consent of the party obtaining it, treating it as inchoate and not consummate until made a matter of record, but an officer of the court has no right to destroy an order which he has obtained out of the presence of the court and without its consent, though it has not been filed.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 48-50; Dec. Dig. § 17.\*]

**3. CONTEMPT (§ 17\*)—INTENT—DISAVOWAL—EFFECT.**

Where a proctor having obtained an order from the court sought to vacate it by destroying the petition and order before it had been filed, his lack of bad motive or intent to commit a contempt in so doing was sufficient to mitigate, but not to excuse, the offense.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 48-50; Dec. Dig. § 17.\*]

Proceeding to punish S., one of the proctors of the Prerogative Court, for contempt. Guilty.

**WALKER, Ordinary.** S., one of the proctors of the Prerogative Court, preferred a petition to the ordinary, on behalf of himself as receiver in a certain cause depending in the Court of Chancery, praying that an administrator ad prosequendum might be appointed to represent the estate of a deceased defendant in that suit in that court, and thereupon an order was made that letters of administration be granted by the register of this court to the clerk in chancery for the usual limited purposes. The reason assigned for asking for the appointment was that no application had been made for letters upon the estate of the decedent by any one entitled thereto.

[1] After signing the order appointing the clerk in chancery as administrator ad prosequendum, the ordinary handed the petition and order therefor to the proctor, S., who was the petitioner, for filing. Some time afterward S., the proctor, as receiver in the chancery cause, applied to the chancellor for the

revival of that suit against the administratrix of the deceased defendant appointed by the orphans' court, and for whose estate, as already mentioned, the clerk in chancery had been appointed administrator ad prosequendum by the ordinary. Upon being informed by the ordinary that before the revival of the suit in chancery would be ordered against the administratrix appointed by the orphans' court, the order of the ordinary appointing the administrator ad prosequendum in the Prerogative Court would have to be vacated, the proctor stated that he had destroyed the petition and order. Whereupon the ordinary charged the proctor with contempt of court for his having, without authority, failed to file, and for having destroyed, a petition preferred in the Prerogative Court and an order made thereon by the ordinary. The proctor's excuse for his conduct is that, after the order appointing the administrator ad prosequendum was made in the Prerogative Court, he learned that an administratrix of the estate of the deceased had been appointed in the orphans' court, and, believing that she was entitled to defend the suit for the estate of the deceased in preference to the administrator formally appointed, and not having filed the order and petition in the Prerogative Court, he thought he might lawfully destroy them, and thus be saved the trouble of taking proceedings to vacate and annul the appointment of the administrator ad prosequendum. The latter proved a vain hope, because the ordinary compelled the proctor to immediately file a petition suggesting the facts, and ordered office copies of the petition and order appointing the administrator ad prosequendum to be filed in the Prerogative Court, and then made an order revoking the appointment of the clerk in chancery as administrator ad prosequendum. As the destruction of a deed does not divest the title by it conveyed, so likewise the destruction of an order of a court does not operate to vacate it or destroy its effect. Hence the order that the proceedings in the Prerogative Court be established by the filing of office copies, and revocation of the order made in the regular way.

[2] That a judge may destroy an order which he has signed, before it is filed, with the consent of the party obtaining it, and more especially upon his request, treating it as inchoate and not consummate until made a matter of record, I have no doubt; but that an officer of the court has any right to do such a thing out of the presence of the court and without the consent or request of the court, even though it is not filed, I deny. Only the court that makes an order can unmake it, either formally or informally. That an officer of the court can be guilty of such a thing and see no harm in it, as in the case before me, passes my comprehension.

[3] S., the proctor, when charged with con-

tempt, agreed to submit the matter on the facts above stated, and did not require arraignment on formal charges. His only defense is a disclaimer of intentional wrongdoing. As I said in the Matter of P., a Solicitor of the Court of Chancery, 91 Atl. 326:

"This, as a rule, is no excuse, especially where the facts constituting the contempt are admitted, or where a contempt is clearly apparent from the circumstances surrounding the commission of the act. 9 Cyc. 25. Disavowal of any intention to commit a contempt may, however, extenuate or even purge the contempt. Id., 26."

That the destruction of a petition preferred to a court and an order made thereon is at least a contempt of that court goes without saying, and needs not the citation of authorities to support the proposition. Lack of bad motive mitigates, but cannot wholly excuse, the transgression.

Upon reflection I am convinced that my duty requires me to adjudge that S., the proctor, has been guilty of a contempt of the Prerogative Court. The matter of punishment will be reserved for further consideration.

(83 N. J. Eq. 482)

**INCANDESCENT LIGHT & STOVE CO. v. STEVENSON et al.**

(Court of Chancery of New Jersey. July 22, 1914.)

**1. EXECUTORS AND ADMINISTRATORS (§ 329\*)—DEEDS—SALE OF LAND—LIEN.**

3 Comp. St. 1910, p. 3838, § 81, and page 3845, § 94, providing for the sale of lands of a decedent to pay debts, creates a lien on the land in behalf of a creditor for one year, and thereafter until a bona fide sale of the land has been made by the heir or devisee, the expiration of the year having no effect to increase the estate or interest of the heir or devisee, but merely to protect the title of a bona fide purchaser.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1052, 1059, 1342, 1350-1364; Dec. Dig. § 329.\*]

**2. DESCENT AND DISTRIBUTION (§ 84\*)—LIABILITY OF HEIR TO CREDITOR—DELAY IN ADMINISTRATION—INJURY TO HEIR.**

Since by 2 Comp. St. 1910, p. 2739, an heir or devisee of real property is liable to creditors of his testator or intestate to the extent of the assets received, delay in administration is not a source of substantial injury to the heir.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 309, 322-325; Dec. Dig. § 84.\*]

**3. DESCENT AND DISTRIBUTION (§ 84\*)—DECEDENT'S REAL PROPERTY—SALE BY HEIR—INJUNCTION.**

Since a creditor of a deceased person has a lien on his real property in the hands of the heir, prior to a sale to a bona fide purchaser for value, the creditor is entitled to enjoin the heir from selling the land to the prejudice of such lien until the orphans' court has been afforded an opportunity to enforce a lien by a sale of the land to pay debts in the settlement of the es-

tate, without reference to the creditor's delay in causing an administration of the estate.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 309, 322-325; Dec. Dig. § 84.\*]

Suit by the Incandescent Light & Stove Company against George E. Stevenson, administrator, and another. On motion to dismiss bill. Denied.

John Boyd Avis, of Woodbury, for complainant. Herbert C. Bartlett, of Vineland, for defendants.

**LEAMING, V. C.** I am convinced that the motion to dismiss the bill must be denied.

[1] Our statute creates a lien in behalf of a general creditor of a deceased person on the lands of the deceased for a period of one year and thereafter until a bona fide sale of the land has been made by the heir or devisee. *Haston v. Castner*, 31 N. J. Eq. (4 Stew.) 697; *Westervelt v. Voorhis*, 42 N. J. Eq. (15 Stew.) 179, 180, 6 Atl. 665; 3 Comp. Stat. 1910, p. 3838, § 81, and page 3845, § 94. The bill seeks to preserve this lien by enjoining a sale by the heir until the orphans' court shall have made an order of sale of the land for the payment of the debt due complainant.

The expiration of the year in no way increases the estate or interest of the heir or devisee in the land; it merely protects the title of a bona fide purchaser. The lien of the creditor continues until the title of a bona fide purchaser intervenes to extinguish it.

[2] The delay in administration is not a source of substantial injury to the heir, for an heir or devisee of real estate becomes liable to creditors of his testator or intestate to the extent of assets by him received. 2 Comp. Stat. p. 2739; *Jordon v. Logue*, 76 N. J. Eq. (6 Buch.) 471, 472, 79 Atl. 426.

[3] The situation thus presented by the bill is that of a creditor with a lien, who seeks a remedy attainable alone in this court to preserve the existence of the lien until the orphans' court shall have had an opportunity to enforce it by a sale of lands for the payment of debts in the settlement of the estate of the deceased debtor; whereas the only objection to the relief so sought is the delay of the creditor in causing an administration of the estate, which delay cannot be properly regarded as of substantial injury to defendant.

I will advise an order denying the motion to dismiss the bill.

But defendant is entitled to a prompt final hearing on the bill, and the present motion should be equitably treated as a motion to speed the cause, and no costs should be taxed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(83 N. J. Eq. 344)

**PAULSBORO LOAN & BUILDING ASS'N  
v. LUMMIS et al. (No. 5.)**(Court of Errors and Appeals of New Jersey.  
May 4, 1914.)**1. BUILDING AND LOAN ASSOCIATIONS (§ 26\*)  
—LOANS—APPLICATION OF PROCEEDS.**

Defendants having contracted with A., who was secretary of complainant building association, for certain repairs on a house, applied to complainant for a loan, agreeing that the prior liens against the property should be discharged from the money to be loaned. Thereafter complainant drew a draft for \$900, payable to the order of one of the defendants, and delivered the same to A., which he applied, without indorsement by the payee, to the payment of his claim for repairs on the building. *Held*, that defendants' agreement did not confer on complainant or A. the right to ascertain the amount due from defendants to A., without defendants' consent, and to charge an amount so ascertained to defendants, and that the amount of the draft could not therefore be regarded as a payment pro tanto of the proposed amount to be loaned.

[Ed. Note.—For other cases, see Building and Loan Associations, Dec. Dig. § 26.\*]

**2. TAXATION (§ 531\*)—PAYMENT OF TAXES—  
RIGHT TO REIMBURSEMENT—LIEN.**

Where a building association on the faith of a proposed mortgage loan paid certain taxes on the premises, it was entitled to enforce a lien against the property for the amount of the taxes so paid and interest thereon.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 986, 987; Dec. Dig. § 531.\*]

**Appeal from Court of Chancery**

Suit by the Paulsboro Loan & Building Association against Annie E. Lummis and another to foreclose a mortgage. From a judgment declaring the mortgage a lien only for the amount of certain taxes paid by complainant, and interest, it appeals. Affirmed on the opinion of the Vice Chancellor, which was as follows:

In this case I am entirely satisfied that this mortgage cannot be enforced against these defendants in accordance with its terms. There is one element that counsel for complainant, and his witnesses who have testified and who have been permitted even to speak argumentatively, have apparently overlooked from beginning to end. The contract between the defendants and Mr. Adamson was purely personal; it involved the building of a house, or the repairing of a house, and when that work was terminated or discontinued the defendants were entitled to make their own settlement with Mr. Adamson as to the amount which might be found due to him. When the building association allowed this loan, as they were entitled to have the amount of prior liens against the property discharged from the money so to be loaned, this necessarily included such money as was due from defendants to Adamson for work performed by Adamson on the building; but neither the building association nor Adamson had the right or authority by either direction or implication to ascertain without the consent or co-operation of defendants that any specific amount was due from defendants to Adamson and to charge an amount so ascertained to defendants; nor was the building association either directly or impliedly privileged to handle the matter in such manner that the proceeds of the proposed loan would not be applied to discharge the prior mortgage. Mr. Adamson never had the privilege from defendants for himself, nor did the

building association have the privilege from defendants for itself, of determining what the relations were and how the accounts stood between the defendants and Adamson. The building association had no right to consider the proposed loan consummated until the draft which they made payable to Mrs. Lummis for the amount of the proposed loan should receive her proper endorsement. If Mr. Adamson assumed the privilege, as counsel suggests, to turn this \$900 draft-voucher back to the building association as cash without the endorsement of Mrs. Lummis, in doing so he denied Mr. and Mrs. Lummis the privilege of making their own settlement with him. If the building association assumed to take the draft-voucher which was drawn to the order of Mrs. Lummis without the endorsement of Mrs. Lummis, in doing so the building association deprived Mrs. Lummis of any defense against the amount Mr. Adamson might claim to be due for that work. That element seems to have been entirely overlooked. But aside from that I am unable to see how we are justified, under the evidence, in making a finding of fact that the item of \$1220, "receipts of the evening," contained in the cashbook, included this voucher of \$900. It may be that this voucher passed at that time to the treasurer and was accepted by him as so much cash, that is, the treasurer may have cashed the draft for Mr. Adamson, and it may be that the draft has come from the treasurer's custody to this court; but the evidence of all that is very slight indeed, if any at all exists. The treasurer's own testimony was to the effect that he had never seen this \$900 draft-voucher since it was issued until today. That testimony he now thinks may not have been accurate; he now thinks that he may have received it as cash and have turned it over to the building association examiner, but he is not sure of that. What the facts in this respect may be is necessarily more or less a conjecture. This voucher-draft may have still been in the hands of Mr. Adamson at the time of his death. Indeed, I am not at all inclined to believe it was not still in his hands at the time of his death; I am inclined to think from all the evidence in the case that at the time he was stricken with his last sickness he had not abandoned the idea of consummating this building association loan in the manner it had been intended; that the consummation of the transaction had been simply held in abeyance by him; and that he had been reporting to the mortgagor from time to time that he would fix it up, but had deferred doing it for reasons of his own; that the transaction never had become a consummated transaction with the building association, from either the standpoint of that association or of Adamson or of defendants. But be that as it may, the building association was at no time empowered, directly or indirectly, by any conduct upon the part of the defendants, to appropriate or apply, without their indorsement or sanction, a voucher-draft, payable to their order, and in that manner deny them the right to make their own settlement with their own contractor who happened to be the secretary of the association.

[2] On the faith of this proposed mortgage loan the building association undoubtedly paid these taxes and are entitled to the return of the money they paid, and the mortgage probably could be appropriately declared a lien for their protection to that amount; but so far as the \$900 is concerned there is no evidence to satisfy me that that money has ever been paid by them, or, if it was paid by them to Mr. Adamson, that it was paid to him with any adequate authorization upon the part of the defendants. From the standpoint of the defendants this mortgage does not exist as a security for that \$900. It may exist as a security for the taxes. They anticipated that this loan would be made and executed the mortgage as a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

part of that anticipated plan, and upon the faith of that the building association paid and probably appropriately paid those taxes, and I think the mortgage may be declared a lien to that amount; but I do not think that they should be charged with the costs of this foreclosure for the purpose of collecting that infinitesimal item of taxes which no doubt would have been paid if defendants had been made aware of the expenditure or if any special demand had been made for it.

I will advise a decree denying the relief sought except as to the amount of taxes paid by the building association. For that payment the defendants have received benefits, and they should recompense the association to that amount, and the mortgage may stand as a lien to secure the building association and enable it to enforce the payment. No costs, however, should be taxed in favor of either the building association or the defendants. That I believe to be a just and proper disposition of the case. The defendants will owe to the Adamson estate whatever amount Mr. Adamson would be entitled to receive for the value of the work performed by him on defendant's building; but they cannot, I think, under the circumstances of the case, be said to owe the \$900 to the building association.

Mr. Avis: If your honor please, there is a cross-bill asking that the bond and mortgage be delivered up for cancellation.

The Vice Chancellor: I will grant the prayer of the cross-bill upon the terms that they pay the amount of the taxes.

Mr. Avis: Being in the nature of a voluntary payment, I suppose it will not carry interest?

The Vice Chancellor: The defendants got the benefit of the taxes, and I think they should pay the amount of the taxes back with interest; the taxes were paid on the property of the defendants by the building association pending a proposed loan, and I think defendants should refund it with interest from the date of payment.

Mr. Avis: Your honor will advise a decree directing that the bond and mortgage be handed up for cancellation upon the payment of the \$7.80 with interest?

The Vice Chancellor: Yes, and no costs to be taxed on either side.

A. H. Swackhamer, of Woodbury, for appellant. John Boyd Avis and W. Earle Miller, both of Woodbury, for respondents.

**PER CURIAM.** The decree appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor LEAMING.

#### HAINES v. STANDOVEN, City Clerk.

(Supreme Court of New Jersey. Nov. 7, 1913.)

#### MANDAMUS (§ 74\*)—SCOPE OF WRIT—ACTION BY ADMINISTRATIVE OFFICERS—REVIEW.

Where a city clerk, in the performance of the duty imposed by the Legislature, entered upon investigation of whether a petition for an election under the Walsh Act (Act April 25, 1911 [P. L. p. 462]) had the necessary signatures, and, having concluded that it did not, refused to call the election, mandamus was not available to review errors alleged to have been committed by the clerk, either in the method of his investigation or in furtherance thereof.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 100-157; Dec. Dig. § 74.\*]

Mandamus on the relation of Harry B. Haines against T. Simpson Standoven, City Clerk of Paterson, etc. Writ denied.

Argued November term, 1913, before GARRISON, TRENCHARD, and MINTURN, JJ.

Henry Marelli, of Paterson, for relator. Edward F. Merry, William B. Gourley, and John W. Griggs, all of Paterson, for defendant.

**PER CURIAM.** The city clerk of Paterson, in the exercise of the duty cast upon him by the Legislature of determining whether or not a petition for the calling of an election under the "Walsh Act" (Act April 25, 1911 [P. L. p. 462]) had been made in writing by 4,039 legal voters who had voted at the last general election, entered upon an investigation of that question and reached the conclusion that such a petition had not been made and hence refused to issue the call for such election. The clerk may have committed errors either in the method of investigation pursued by him or in the conclusions reached by him; but such errors cannot be reviewed or corrected by the writ of mandamus, neither can this court by such writ direct the city clerk in advance what conclusion he shall reach, what investigation he shall pursue, or what action he shall take as the result thereof. These being the only objects sought to be accomplished by the writ that is applied for, such application must be denied.

(33 N. J. Eq. 521)

#### BATTERY PARK NAT. BANK v. HUNT et al.

(Court of Chancery of New Jersey. June 8, 1914.)

#### 1. TRUSTS (§ 89\*)—RESULTING TRUSTS—SUFFICIENCY OF EVIDENCE.

In a creditor's suit in aid of an attachment to recover property, the title to which was in the name of the debtor's brother, evidence held to show that the purchase price of the property, the amount of a mortgage subject to which it was purchased, and the cost of improvements on the property, were paid with the debtor's money, though part of the payments were made by means of checks drawn on accounts standing in the brother's name, and hence the debtor, by virtue of a resulting trust was the sole beneficial owner of the property.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 134-137; Dec. Dig. § 89.\*]

#### 2. FRAUDULENT CONVEYANCES (§ 208\*)—INTENT TO DEFRAUD CREDITORS—SUFFICIENCY OF EVIDENCE.

Evidence held sufficient to show that an assignment of a mortgage by the debtor to his brother was with intent to hinder, delay, and defraud his creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 892-895; Dec. Dig. § 298.\*]

Suit by the Battery Park National Bank against Williams A. Hunt and others. Decree for complainant.

See, also, 91 Atl. 808.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Condict, Condict & Boardman, of Jersey City, for complainant. William L. Rae, of Jersey City, for trustee in bankruptcy. Lum, Tamblin & Coyer, of Newark, and Frederick Durgan, of New York City, for defendants Williams A. Hunt and Fred M. Hunt.

LEWIS, V. C. This cause was brought to trial on the bill, answers, and replications and cross-bill and answer to cross-bill and proofs. The original bill was filed by the Battery Park National Bank of New York, in aid of an attachment issued out of the Supreme Court of New Jersey at the suit of the complainant, against the property of Fred M. Hunt, one of the defendants.

[1] The property described in the bill consists of a plot of land on Washington street, Newark, upon which there stood at the time of the filing of the bill three brick residences, a stable, and a garage. The title to this land is in the name of Williams A. Hunt, a brother of Fred M. Hunt. The bill charges, however, that the beneficial ownership of this property is in Fred M. Hunt, and that Williams A. Hunt holds the bare legal title as trustee for Fred M. Hunt. The property was originally purchased from Luella K. Beecher, by contract dated November 20, 1911. The agreed purchase price was \$33,000, to be paid by the assumption of a first mortgage of \$15,000 and of a second mortgage (called the Katz mortgage in the testimony) of \$6,500, and the payment of \$11,500 in cash. The purchase price was actually paid as follows: By the assumption of the two mortgages and the payment of three checks to the order of Beecher, on the Bankers' Trust Company of New York, upon an account standing in the name of Williams A. Hunt. These checks were as follows:

November 20, 1911.....	\$ 1,000 00
November 23, 1911.....	4,000 00
December 4, 1911.....	5,683 86

Or a total of.....\$10,683 86

The defendants, Hunt, account for the discrepancy between the \$11,500 cash payment called for by the contract and the \$10,683.86 actually paid by saying it was a credit allowed the purchaser on adjustment of interest on the mortgages and the taxes. After the filing of the bill in this cause, Fred M. Hunt, on September 13, 1912, filed a petition of voluntary bankruptcy in the Southern district of New York. George F. D. Trask was appointed trustee in bankruptcy of his estate. The said trustee thereupon filed a petition in this cause to be made a party. His petition being granted, he filed an answer by way of cross-bill, in which he claimed that the property described in the bill was now vested in him by operation of law as a part of the estate of his bankrupt. Fred and Williams Hunt answered the original bill and Williams Hunt answered the cross-bill. An order was made by the United States District Court of the Southern District

of New York, under section 67f of the Bankruptcy Law, preserving the lien of the above-mentioned attachment for the benefit of the estate of the bankrupt. This order has been made a file of this court in this cause. The trustee has filed, pursuant to the provisions of the Bankruptcy Act, in the register's office of Essex county, a copy of the decree adjudicating Fred Hunt to be a bankrupt.

The complainants and trustee in bankruptcy have a common interest. The complainant makes no claim under its attachment to preference over the other creditors. The complainant and the trustee in bankruptcy take the position that the proofs in this cause are sufficient to sustain their claim that Fred M. Hunt was the beneficial owner of the property in question upon any one of three grounds; that is to say: First, that the admissions of Williams Hunt, coupled with the evidence of the dominion exercised by Fred Hunt over the property, is sufficient to establish the existence of an *express* trust agreement between the two brothers, whereby Williams agreed to hold the property in trust for Fred; and, secondly, that the dominion exercised by Fred M. Hunt over the bank account out of which the original purchase price was paid and the proved fact that Fred expended his own money in paying off a second mortgage on the property, and in erecting an expensive stable and a garage upon the property, establish a trust estate in Fred *resulting* from the payment of him of the purchase price; and, thirdly, that if it be assumed that it was originally intended by the two brothers that Williams should be the beneficial owner, it is apparent that payments made by Fred for the property, and for improvements upon the property, were voluntary conveyances made by Fred and accepted by Williams for the purpose of hindering, delaying, and defrauding the creditors of Fred, whereby a *constructive* trust or equitable lien exists in favor of Fred's creditors. I shall consider the case as one of a resulting trust.

Williams Hunt was examined at great length before the referee in bankruptcy proceeding. A part of his examination in that matter has become a part of the testimony in this cause. His account of the payment of the purchase price was that the property was taken subject to a first mortgage of \$15,000; that \$1,000 was paid by the check of November 20, 1911, and that \$18,000 was paid Beecher in *cash*, "in bills," "all currency," "cash." The examiner was called to the telephone. Upon his return, it appears, by Williams Hunt's testimony in the present case, that the following took place:

"Q. As I left the room your brother, the bankrupt, spoke to you. What did he say to you? A. My brother? Q. Yes.

"Mr. Durgan: Is that competent?

"Mr. Boardman: Certainly; the witness is on the stand, and he spoke to the bankrupt, or the bankrupt spoke to him.

"The Witness: I will have to ask him [indicating the bankrupt].

"Mr. Durgan: See what he said.

"The Bankrupt: I will tell you.

"Mr. Boardman: Never mind.

"The Witness: He said, in regard to when I paid the \$18,000, I should have—it should have been mentioned there that \$1,000 was deposited, and that there was \$17,000, instead of saying \$18,000. Q. That is what your brother told you, is it? A. Yes, sir. Q. You had forgotten that? A. I had forgotten that. I supposed, in fact, you would take it for that."

It is impossible to reconcile this evidence with any theory of a beneficial ownership of this property vested in Williams A. Hunt. Either he was in such darkness as to the transactions as to discredit any notion that he owned it, or he was engaged in a conspiracy with his brother to conceal the true facts concerning the purchase. The conclusion necessary to be drawn from that hypothesis is the same as the other, for if Williams was the true, beneficial owner, there was no reason for the concealment of the fact that the purchase price had been paid by his own checks. He went further in his examination before the referee. He stated that this \$18,000 cash had been taken from a mahogany money box, which he owned, and in which he kept a portion of his wealth. This box had contained, according to his account, \$80,000 on January 1, 1907. The origin of this fund, as accounted for, in the bankruptcy proceeding, was his honest toil for a period of a few years. He was cross-examined further as to this fund of \$80,000 in the present case, and he testified that it had its origin in two very remarkable gambling transactions, each of which netted him the precise sum of \$15,000. This fund of \$80,000 has been used, if the Hunt brothers are to be believed, in paying for the property in question, and in the purchase from Fred of other portions of his estate, and for no other purpose. I am forced to the conclusion that the story of this fund of \$80,000 is a fable.

As has been said, the \$10,683.86 actually paid to Mrs. Beecher was drawn from a bank account in the Bankers' Trust Company standing in the name of Williams A. Hunt. The body of these checks were, in each instance, written by Fred Hunt. They were merely signed by Williams, and Williams testified that Fred Hunt had full authority to sign checks on this account. Williams' ignorance as to the facts in connection with this account is equal to his lack of information as to the facts relating to the purchase of the property. The account was originally opened with the Mercantile Trust Company, which company was afterwards merged with the Bankers' Trust Company. Williams has never been either to the Mercantile Trust Company nor to the Bankers' Trust Company. He does not know how long he has had the account. He never "bothered" with his bank deposit book. He does not know when the merger between the two trust companies took place. He says that part of the

money in this account came out of the mahogany box, but he cannot tell how much of the money that came out of the box went into the bank account. When, in November, 1912, he was examined in the bankruptcy proceedings, he could not tell whether he then had a checkbook for this account or not. He could not then recall the number of checks he had drawn on this account during the year 1912. He could not tell whether it would be more than 20 or less than 20. In fact, he had "no recollection whatsoever." The one definite assertion that he ventured to make was that his balance in this account on January 1, 1912, was about \$10,000. A copy of this account was produced in this cause, and showed the balance on that day to have been \$758.48.

On the other hand, Fred M. Hunt had complete dominion over this account. He drew all the checks and could sign any check that he chose to sign. The check for \$1,000 of November 20, 1911, mentioned above, was produced and offered in evidence before the referee in bankruptcy. It bore the serial number 7100. An examination of a copy of this account, furnished by the banks, shows this check as the sixth withdrawal. A later check in this same series is numbered 8. On the stand, Fred Hunt admitted that the number had been changed, but denied that any sinister purpose had prompted the alteration. A small pocket checkbook, purporting to show this account, was produced before the referee. From the cross-examination of Williams Hunt in this cause, it appears that the earlier stubs had been torn out from this book, and all the entries intended to show the dealing with the account in question were crowded upon two stubs. This book should have shown the three Beecher checks. But, if it did, counsel who examined the witness, apparently failed to detect it. This checkbook, though called for by the complainant, was not produced at the trial of this cause. Fred Hunt was examined as to the method employed in keeping this check account. He stated that each check was entered upon a corresponding stub. It is evident, therefore, that the stub checkbook produced before the referee was not a genuine document. It is quite evident, therefore, that the money that went into the purchase of this property was the money of Fred M. Hunt, though drawn from an account carried in the name of his brother. The property was conveyed by Mrs. Beecher to Williams A. Hunt, subject to a second mortgage of \$6,500. This mortgage was paid off on January 8, 1912, by three checks of Fred M. Hunt, drawn on the Battery Park National Bank, two of which were drawn to the order of one Katz.

After the election of Mr. Trask as trustee, Fred Hunt produced before the referee and delivered to Mr. Trask a bundle of about 300 checks, drawn on the Battery Park account, covering a period of several years. He also produced a bundle of checks drawn on an ac-



count that he carried in the Mechanics' & Metals' National Bank of New York, and six checks drawn on an account in the Bankers' Trust Company, standing in his own name. He also produced what purported to be a stub checkbook on the Battery Park National Bank, another on the Mechanics' & Metals' Bank. He testified that his bank book and stub book on the Bankers' Trust Company account had been "lost in the shuffle." This last account, by the way, was by far the largest account carried by Fred Hunt, showing deposits during a period of 18 months of \$89,344.99, and except for the months of January, February, and April, 1912, this account was the least active of all his numerous accounts. The three so-called Katz checks were not among the large bundle of Battery Park checks delivered to Mr. Trask. It is quite apparent that they were withheld, and, further, that the stub checkbooks delivered to Mr. Trask at the same time were manufactured for the occasion. There are many things that point to this conclusion. Only one need be referred to; that is, that the checks covering the period in question, all or practically all, bore the vignettéd picture of a ship with an appropriate motto. The checks remaining in the stub book bore no such vignette. Yet Fred Hunt had testified before the referee, speaking of these checks and stub books: "I will not say they correspond in number, but *they were taken from those books.*" In the face of this testimony, the story of these brothers, to the effect that Williams gave Fred \$8,500 in cash with which to pay this mortgage, which money Fred gave out in dribbles to his customers and friends, and gave in its place his own checks in payment of the mortgage, is entitled to little, if any, weight. The brothers contradicted each other as to the date of this payment by Williams to Fred, and the friend that they bring in to corroborate them contradicts them both. That this mortgage was paid by Fred M. Hunt with his own money is proved to my satisfaction.

Since the purchase of this property, there has been erected upon it a stable and a garage. The stable was erected by William L. Blanchard, or, what seems to be the same thing, by the William L. Blanchard Company. There was paid to Blanchard on account of this work \$17,250. Of this sum, \$7,000 was paid by six checks drawn by Fred M. Hunt on his account in the Bankers' Trust Company. Fred Hunt now admits giving three of these checks, or \$3,500, but the payment of the whole \$7,000 is so completely proved by Blanchard's books and the records of the Federal Trust Company of Newark and the Bankers' Trust Company of New York that counsel for defendant did not attempt to dispute the fact. Before the referee, however, Fred had testified, speaking of the checks drawn on this very account, as follows:

"Q. Do you want to swear that none of these went to William L. Blanchard? A. No, sir. Q.

None of them did? A. No, sir. Q. Did any of them go to the Newark contract? A. No, sir. Q. Did any go to Newark? A. No, sir; I don't think so."

These are the checks that have been "lost" by Fred Hunt. Two thousand dollars of this \$17,250, was paid by checks drawn on accounts standing in the name of Hunt Bros. But it is clear that Fred Hunt's signature alone was recognized by the banks. Two other checks were given to Blanchard, one for \$750 and one for \$500, drawn on the Newark Trust Company, on an account opened by Fred Hunt on May 8, 1912, in the name of Williams A. Hunt. When Fred opened this account, he filed with the bank a power of attorney from Williams, authorizing him, Fred, to sign Williams' name to checks and notes. At the time Fred opened this account, he had broken with the complainant, he was heavily indebted to the Mechanics' & Metals' National Bank, and his balance in the Bankers' Trust Company was reduced to \$105.97. He had made every preparation to fail. During the preceding two weeks, he had given notes to five of his creditors. There had been recorded a deed of his home property to his friend, Fred Brown, an assignment to Blanchard of a mortgage of \$4,500, an assignment to his sister of an interest in another mortgage, and on the same day, an assignment of his interest in his uncle, Samuel I. Hunt's estate to Williams A. Hunt, for a stated consideration of \$12,000. These two payments to Blanchard, made by checks on this account, were clearly made with Fred's money. The mortgage of \$4,500 assigned to Blanchard as above mentioned, was assigned without consideration, and when redeemed by two payments of \$2,000 and \$2,500, respectively, credits for those sums were given by Blanchard on account of this construction work. The balance of the payments to Blanchard were made in cash by Fred Hunt, who took receipts therefor in the name of his brother. Other and smaller sums were paid to other contractors, while the evidence in connection with these payments is not as clear and satisfactory as in respect to the payments of Blanchard, yet the preponderance of evidence is in favor of their having been made by Fred Hunt. There is no satisfactory proof of their having been made by Williams Hunt. It is therefore clear that Fred M. Hunt was, at the time of the filing of the bill in this cause, and at the time of the filing of the petition in bankruptcy, by virtue of a resulting trust, the sole beneficial owner of the premises described in the bill of complaint.

[2] The cross-bill seeks further to set aside a conveyance of a one-half interest in a certain mortgage given by one Churchman to Fred and Williams Hunt. This half interest Fred assigned to Williams by assignment dated October 10, 1911, which assignment was not recorded, however, until April 27, 1912. On the last-mentioned day, Fred Hunt

handed to Blanchard this assignment, together with a deed of his home, made out to Fred Brown, and an assignment of the \$4,500 mortgage above mentioned. He asked Blanchard to have the deed and the assignment of the Churchman mortgage recorded in the Essex county register's office. Blanchard understood the errand and performed it through his own attorneys, as the records show. It is not necessary to rely upon the declarations of Fred Hunt made to Blanchard to find this assignment fraudulent. Fred had the custody of this unrecorded assignment six months after the date of its execution. There are no witnesses to the payment of the consideration for this assignment. Williams says that he got the money, \$1,150, to pay Fred, out of his pocket. That seems to him a perfectly satisfactory explanation as to the source and origin of this fund. Williams Hunt's alleged reason for not recording the assignment is practically a confession of fraud.

"Q. Was there any reason connected with your brother why you did not record these papers and these instruments at the time when they were given? A. I thought more than likely he would regain his feet again—come to the front—that, he being a brother of mine, I did not want to publish him all over. \* \* \* Q. Did you say anything to him about the hazardous character of his business, or anything like that? A. Nothing more than that I thought he was not doing extra good as he wanted to be borrowing all the time."

The foregoing was brought out by his own counsel upon direct examination. This admission has a double bearing on the case. It was argued by counsel for the Hunts that it was impossible to believe that Fred and Williams had begun as early as December, 1911, to make plans for the protection of Fred's property from his creditors. Yet here we have Williams testifying that that object was in his mind as early as October 10, 1911.

My conclusion is that this assignment of the Churchman mortgage was given by Fred and accepted by Williams with the intent to hinder, delay, and defraud the creditors of Fred, and is therefore void. Williams is chargeable with one-half of the interest collected upon this mortgage since its assignment to him.

I shall advise a decree in accordance with these views.

#### BATTERY PARK NAT. BANK v. HUNT et al.

(Court of Chancery of New Jersey. March 9, 1914.)

Suit by the Battery Park National Bank against Williams A. Hunt and others. Decree for complainant.

See, also, 91 Atl. 804.

Condict, Condict & Boardman, of Jersey City, for complainant. William L. Rae, of Jersey City, for the trustee in bankruptcy. Lum, Tamblin & Colyer, of Newark, and Frederick Durgan, of New York City, for defendants, Williams A. Hunt and Fred M. Hunt.

LEWIS, V. C. This cause was brought to trial on the bill, answers, and replications and cross-bill and answer to cross-bill and proofs. The complainants and trustee in bankruptcy have only a common interest. The complainant makes no claim under its attachment to preference over the other creditors. The complainant and the trustee in bankruptcy take the position that proofs in this cause are sufficient to sustain their claim that Fred M. Hunt was the beneficial owner of the property described in the bill filed by the Battery Park National Bank of New York, and in this view I concur.

The transactions of the Hunts exhibit an unusual, although not novel, attempt of a debtor to put his property beyond the reach of his creditors. It is quite apparent, however, that had it not been for the manifest lack of information regarding them shown by Williams Hunt, no such light would have been shed upon them as we now have. This to my mind forces one to the belief that Williams Hunt was not handling his own funds. And supporting this opinion there is, of course, this fact substantiated from a sifting of the testimony—that Williams Hunt has not satisfactorily shown any source from which he obtained the money to make the substantial investment in Washington street, Newark. The tale of the betting events and the wealth held in the mahogany money box are unconvincing. On the other hand, the bank accounts, checks, check stubs, construction and mortgage payments, dealings with contractors and mortgagees, the darkness of Williams Hunt about all these matters, the detail knowledge shown by his brother of them all, and his dominion and control, lead me unfailingly to the conclusion that the ownership of the property is in Fred M. Hunt, and that he is the sole beneficial owner of the premises described in the bill of complaint by virtue of a resulting trust.

The relief sought by the cross-bill must be also granted. I am not satisfied from the testimony that there has been a bona fide assignment of Fred's interest in the Churchman mortgage to Williams. Neither is the latter's account of the source from which he derived the money to pay Fred, or his reason for not recording the instrument, convincing. And then, too, Fred had the custody of this unrecorded assignment some months after the date of its execution. The whole affair looks like part of the plan to shelter Fred until the rainy season was over. I shall advise a decree accordingly.

(83 N. J. Eq. 514)

#### KAROLY et al. v. HUNGARIAN RE- FORMED CHURCH OF NEW BRUNSWICK et al.

(Court of Chancery of New Jersey. July 25, 1914.)

#### 1. RELIGIOUS SOCIETIES (§ 25\*)—CHURCHES— AFFILIATION—EVIDENCE.

In a suit to set aside a conveyance of church property, evidence held to require a finding that the grantor corporation and its adherents were affiliated with the Presbyterian Church of North America, and was not an independent body without ecclesiastical affiliation.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 154-167; Dec. Dig. § 25.\*]

#### 2. RELIGIOUS SOCIETIES (§ 23\*)—CHURCHES— SECESSION—NUMBERS—PROPERTY.

Though one or any number of members of a church organization may secede at will, no number, however great the majority, may secede and take with them the church property to a new affiliation, so long as there remains a faction which abides by the doctrines and rules of the church government which the unit-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ed body professed when the property was acquired, in which case the property can be disposed of only in accordance with the method prescribed by the judicatory of the original body.

[Ed. Note.—For other cases, see Religious Societies, Cent. Dig. §§ 147-153; Dec. Dig. § 23.\*]

Suit by Nemeth Karoly and others against the Hungarian Reformed Church of New Brunswick, N. J., and others, to set aside certain deeds of church property. On final hearing on bill, answer, replication, and proofs. Decree for complainants.

This is a controversy between two ecclesiastical bodies and their adherents over the ownership and possession of a church edifice and lands situated in New Brunswick. The claim on the part of the complainants is that the property in suit belongs to a corporation which is affiliated with the Presbyterian denomination. The defendants, on the contrary, claim that it now belongs to a corporation which is affiliated with an ecclesiastical body known as the Reformed Church of Hungary, having its situs and headquarters in the empire of Austria.

Prior to 1904 there were many of Hungarian birth and speech in New Brunswick who had formed a voluntary association for the purpose of having divine service held in their native language. Dr. Knox, then and now the pastor of the First Presbyterian Church of New Brunswick, took an oversight of these people, performed their marriages, attended at their funerals, and administered such spiritual comfort as he was able to, and it gradually came to be looked upon as a sort of Hungarian annex to the First Presbyterian Church. As early as the spring of 1903 the Standing Committee on Synodical Home Missions of the Presbytery of New Brunswick made a report to the Presbytery concerning this voluntary association, and introduced to it Mr. Paul F. B. Hamborszky, then a student in the Princeton Theological Seminary, who had been devoting his time and attention to this Hungarian body; and thereupon in April of 1903 Mr. Hamborszky presented a request from 160 Hungarians belonging to that body asking to be taken under the care of the Presbytery. Such proceedings were had in the session of the First Presbyterian Church and in the Presbytery of New Brunswick; that shortly thereafter 171 persons were admitted to membership in that church from the Hungarian voluntary association above mentioned. In the early part of 1904 the Committee on Synodical Home Missions, to whose care the Hungarian body had been committed, recommended that they should be dismissed from the First Church of New Brunswick and should constitute a separate mission congregation, in pursuance of which recommendation there was organized on August 5, 1904, under the laws relating to religious societies, a corporation having the name The Hungarian Presbyterian Church Evangelic Reformed Church. Of

this corporation the 170 odd Hungarians who had joined the First Presbyterian Church became members. For reasons which do not appear plainly the name of this corporation was changed on October 24, 1905, to Magyar Evangelically Reformed Presbyterian Church of New Brunswick, N. J.; and later on, on December 9, 1909, its name was again changed to Magyar Evangelical Reformed Church of New Brunswick, N. J., by which name it claims the title to and ownership of the church property in question.

The contesting claimant is a corporation likewise formed under the general laws of this state concerning the incorporation of religious societies, on July 12, 1912, by the name of The Hungarian Reformed Church of New Brunswick, N. J. Three days later, and on July 15, 1912, the officers of the old corporation conveyed or attempted to convey the premises in question to the new corporation in consideration of "one dollar and other valuable considerations." This was done by two deeds which the complainants pray may be declared to be null and void. The certificate of incorporation of the new corporation (the Hungarian Reformed Church of New Brunswick, New Jersey) provides that it "shall be and remain in inseparable connection with and under the ecclesiastical jurisdiction of the Hungarian Reformed Church in America and the Reformed Church of Hungary," and that it "shall have power from time to time to adopt, alter and amend such by-laws as shall be expressly approved in writing by the Hungarian Reformed Church in America and the Reformed Church of Hungary," and that "no transfer, sale, conveyance, alienation, disposition, lease, incumbrance or mortgage of any of the property of said church or congregation shall be binding or valid for any purpose whatsoever, unless it be made by and with the express consent in writing of the Hungarian Reformed Church in America and the Reformed Church of Hungary." The Hungarian Reformed Church in America therein referred to is the highest American judicatory of the Reformed Church of Hungary.

It will thus be seen that if the conveyances in question shall stand the property in suit is irrevocably taken from the Presbyterian connection and is irrevocably transferred to a connection with a foreign ecclesiastical dominion.

Hutchinson & Hutchinson, of Trenton (Conover English, of Newark, on the brief), for complainants. Alfred F. Skinner, of Newark, and Morris Cukor, of New York City, for defendants. Walter C. Sedam, of New Brunswick, for Rev. Paul F. B. Hamborszky.

HOWELL, V. C. (after stating the facts as above). [1] The principal question of fact is whether the old corporation and its adherents were affiliated with the Presbyterian denomination, or whether they were an

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

independent body without ecclesiastical affiliation with any other body of Christians. If they were so affiliated with and had so become a part of the Presbyterian denomination, then their secular affairs are governed by plain rules of law relating to the ownership of ecclesiastical property, and if they shall be found to be an independent body they are then governed by other rules which are quite as plain. I have no doubt but that the old corporation and its adherents were Presbyterians and were affiliated with the Presbyterian denomination in every sense of the word, and that they broke the tie of brotherhood in an irregular and disorderly manner. Nor do I think it can be said that any fraud or imposition was practiced upon these non-English-speaking people, as has been suggested, because the things that they did and saw and took part in could not fail to impress the most ignorant and careless persons that they were connecting themselves with and were a part of the old corporation with all its Presbyterian formalities. I may pause at this point for a moment to explain the government of the Presbyterian Church. There is first the congregation or worshipping unit, consisting of individual members in every walk of life, who stand on an equality with each other so far as their ecclesiastical relations are concerned. These are governed spiritually by a body called the Session, chosen from their own number. The Session is governed by the Presbytery, a body consisting of delegates elected from each individual church within a certain prescribed geographical area. The Presbyteries in turn are spiritually controlled by the Synod, a representative body, meeting for each state, and the Synod by the General Assembly of the Presbyterian Church. Thus is formed a compact and strongly knit ecclesiastical body having a common purpose, with common objects, and bound together by valid promises and agreements, which promises and agreements may not be lightly broken, but so far as property rights are concerned, are as binding and cogent as are agreements made concerning other rights of property.

We have seen what interest the Presbyterians of New Brunswick took in this struggling association prior to its organization into a corporation. We have seen that this corporation carried as part of its name the word "Presbyterian," and that when its name was changed in the following year the word "Presbyterian" was retained. After its incorporation and its segregation from the First Presbyterian Church of New Brunswick other things were done which still more strongly indicate to my mind the intention of these people to form and retain the Presbyterian connection. The 170 odd Hungarians who became members of the First Church were dismissed to the new congregation after its formation, and until the final attempt at separation in 1912 the Presbyterian Church, by its Presbytery, its Synodical Committee,

and its Session of the First Church, exercised a fostering care over the spiritual welfare of this body of Hungarians, and gave them material aid in maintaining their organization. During the whole period of its existence they furnished money for its support and in every way possible encouraged them by contributions and by advice to continue in their work. On April 9, 1907, the Rev. Mr. Hamborszky was installed as pastor of the church; he was a Presbyterian in fact and in name; he was a graduate of a Presbyterian theological seminary, he had been a member of Presbytery of Lackawanna, and later became a member of the Presbytery of New Brunswick. His call from the congregation was presented to the Presbytery in full session in his presence, and then and there acted upon by the Presbytery, and accepted by him. The installation ceremony took place in their own church building. It was widely advertised and took place in open meeting; a large crowd was in attendance, the church being full. There was a sermon in the Hungarian language containing a charge to the pastor, and likewise a charge to the people in the same language by one of the clergymen present, and the assent of the whole congregation to the whole proceeding was manifested by a vote of approval, in which there were no negatives. On one occasion the Presbytery met in the church building of the Magyar Church on Hale street, and the women of the congregation furnished a noonday meal to its members. They made a mortgage in 1905 on the Hale street property to the Board of Church Erection Fund of the Presbyterian Church, which by the terms of the mortgage ran without interest so long as the property remained in the Presbyterian connection. They contributed to the funds of the Presbytery; they sent delegates to its regular meetings, made to it reports of their progress, and submitted the minutes of the meetings of the Session of the church to it for examination and approval.

All these proceedings point in but one direction. They indicate beyond question that the Hungarians who belonged to the old corporation fully understood that they were Presbyterians and were bound by their Presbyterian connection. Least of all can Rev. Mr. Hamborszky find any excuse whatever for his unseemly and disorderly conduct in his endeavor to release himself from the Presbyterian control. It cannot be said that he did not understand what he was doing; he is an educated man, perfectly familiar with the English language, and he fully understood every step which he was taking and which he was advising his congregation to take.

[2] There is no doubt about the right of individual members of a church organization to secede therefrom at will. The same is true of any number of members of such organizations; but no number, however great

the majority may be, has the right to secede and take the church property with it to the new affiliation, so long as there remains a faction which abides by the doctrines, principles, and rules of the church government which the united body professed when the land was acquired. *True Reformed Dutch Church of Paramus v. Iserman*, 64 N. J. Law, 506, 45 Atl. 771. The question of law on this point was decided in the case of *Schilstra v. Van Den Heuvel* (opinion filed July 12, 1913, and not yet officially reported), affirmed March term, 1914, in the Court of Errors and Appeals on this point, 90 Atl. 1056. It was there said:

"The rules of law relating to freedom of action by independent churches and congregations are different from those rules which apply to congregations which are affiliated with and are subordinate to higher judicatories. Independent churches may do what they please with their property, provided legal action is taken to that end; but when a religious society becomes affiliated with other religious societies, and they unite to construct and maintain for their mutual advantage higher judicatories to which they subject themselves, then the individual society or worshipping unit holds its property and temporalities under an obligation to continue the affiliation until it can be broken by mutual consent; and if secession is attempted by a faction, however large or however small, such faction will not be allowed to carry the church property with it, certainly not so long as there is a loyal body which is recognized by the superior judicatory" (citing *American Primitive Society v. Pilling*, 24 N. J. Law, 653; *True Reformed Church v. Iserman*, 64 N. J. Law, 506, 45 Atl. 771; *Pulis v. Iserman*, 71 N. J. Law, 408, 58 Atl. 554; 24 A. & E. Ency. of Law, 354).

I have therefore arrived at the conclusion that the original corporation was allied and affiliated with the Presbyterian denomination as a matter of fact, and that the members understood and believed that they were so connected, and that as a matter of law it was not competent for the seceding members of the congregation to appropriate to themselves the church property described in the two deeds hereinabove mentioned, and that the deeds should be declared to be null and void and the property restored to its former owner, the Magyar Evangelical Reformed Church of New Brunswick, N. J.

I will advise a decree in accordance with these views.

(38 N. J. Eq. 446)

#### BLANCHARD v. NEILL.

(Court of Chancery of New Jersey. July 30, 1914.)

#### 1. APPEAL AND ERROR (§ 151\*)—RIGHT TO WRIT—"PARTY AGGRIEVED."

A complainant who has received less than the relief demanded, or a defendant who has not been accorded the full amount of his set-off or counterclaim, is aggrieved by the judgment, and may sue out a writ of error to review the same, though it is in his favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 147-852; Dec. Dig. § 151.\*

For other definitions, see Words and Phrases, vol. 1, pp. 273-278, vol. 8, pp. 7569, 7570.]

#### 2. INJUNCTION (§ 37\*)—DECREE—TRIAL OF TITLE AT LAW.

Where a suit for injunction involved the trial of an issue of title which was determined both by a verdict and finding in favor of complainant, he will not be granted a final decree as against an application by defendant to have the issue of title tried at law.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 85; Dec. Dig. § 37.\*]

Suit by one Blanchard against one Neill. On application of complainant for final decree and of defendant for leave to try a question of title at law. Complainant's application denied, and defendant's petition granted.

William A. Lord, of Orange, for complainant. E. L. Davis, of Orange, for defendant.

EMERY, V. C. [1] So far as I have examined the authorities cited by complainant on the right of a party to bring writ of error on a judgment in his own favor, they are all cases where the judgment rendered, either for the plaintiff (appellant) on his claim or the defendant (appellant) on his set-off, and the judgment was less than the amount appellant claimed he was entitled to. In such cases the appellant is clearly "aggrieved" by the judgment in his favor. *Parker v. Newland*, 1 Hill (N. Y.) 87 (1841); *Ingalls v. Lord*, 1 Cow. (N. Y.) 240 (1823); *Johnson v. Jobb*, 3 Burr. (1772).

In *Capron v. Van Noorden*, 2 Cranch, 126, 2 L. Ed. 229 (1804), the verdict and judgment was in favor of the defendant in error, not in favor of the plaintiff in error.

[2] The right to a review by writ of error in the suit of the ruling of the trial judge against the defendant on the question of title is so doubtful that I do not think he should be required to pursue this remedy. But, if he does not do so, he must abide by the effect of this verdict and judgment as res adjudicata upon the matter of title, if it should be held to have this effect, and I have no right to require complainant to abandon this benefit of his suit, if he be entitled to it. Defendant should, however, in my judgment, be allowed to bring an action to settle the disputed question of title, in such manner as he may be advised, and this permission is given in order that an opportunity may be afforded to him of carrying the disputed question of title to an appellate court, if, notwithstanding the judgment, he still has that right. I do not consider that a permanent injunction settling the title, on the basis of the judge's ruling, should be granted without giving this opportunity, if defendant desires it. The action, however, should be brought and prosecuted without delay.

An order will be advised directing that the cause stand over until September 15, 1914, and that, if within 30 days the defendant commence an action at law against the complainant to settle defendant's disputed title and prosecute said action, then the defend-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ant have a right to apply that the cause stand over to await the determination of said action, and, upon failure to bring the said action within said time and prosecute the same, that complainant have leave at said time to apply for final decree in this cause.

Order may be presented for settling on July 31st, unless agreed on.

### **PLOCKZEK v. ST. PAUL FIRE & MARINE INS. CO.**

(Court of Chancery of New Jersey. July 24, 1911.)

#### **1. ACTION (§ 46\*)—JOINDER—LAW AND EQUITY.**

The purchaser of property covered by an insurance policy, providing that it should be void, unless otherwise agreed, if any change in the interest, title, or possession of the property took place, procured additional insurance, and after a loss, brought suit to reform the first policy by making it payable to him, instead of his grantor, and also asked a recovery on the second policy. *Held*, that the cause of action on the second policy was separate and distinct from that on the first policy and could be enforced only in the common-law courts.

[Ed. Note.—For other cases, see Action, Cent. Dig. §§ 449, 451-468; Dec. Dig. § 46.\*]

#### **2. REFORMATION OF INSTRUMENTS (§ 16\*)—GROUNDS OF REFORMATION.**

An instrument in writing can be reformed only where there has been a mutual mistake, or a mistake on the part of one party and fraud on the part of the other.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. § 68; Dec. Dig. § 16.\*]

#### **3. INSURANCE (§ 143\*)—REFORMATION OF POLICY—CHANGE OF BENEFICIARY.**

A purchaser of property covered by a fire policy, providing that it should be void if any change took place in the interest, title, or possession of the property, unless otherwise provided by agreement indorsed thereon or added thereto, who notified the insurer's agent of the change in title, but failed to obtain its consent, could not have the policy reformed after a loss by making it payable to him instead of his grantor; the policy having apparently been in proper form at the time of its issue.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 265-272; Dec. Dig. § 143.\*]

#### **4. INSURANCE (§ 328\*)—FORFEITURE—CHANGE OF TITLE OR INTEREST.**

Where a purchaser of property covered by a fire policy, providing that it should be void if any change took place in the interest, title, or possession of the property, unless otherwise provided by agreement indorsed thereon or added thereto, informed the insurer's agent of the change of title, but did not request the insurer to consent to the change, and the insurer neither assented thereto nor waived the condition, there could be no recovery on the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 794-822, 825; Dec. Dig. § 328.\*]

Suit by John Plockzek against the St. Paul Fire & Marine Insurance Company. Decree for defendant.

Thomas Brown, of Perth Amboy, and Freeman Woodbridge, of New Brunswick, for complainant. John H. Patterson, of Jersey City, for defendant.

HOWELL, V. C. The bill in this case is filed to recover the amount of loss under two fire insurance policies issued by the defendant. The first policy was issued to Andrew Dickey on August 27, 1906, and expired on August 27, 1909; it ran in the name of Dickey, but there was attached a mortgagee clause in favor of Andrew Crosson, mortgagee. On May 7, 1907, Dickey conveyed the land to the complainant. The complainant says that on June 12, 1907, he saw Mr. Pierce, one of the agents of the defendant company, and notified him that the property covered by the policy just mentioned had been conveyed to him; he says that he remembers the first time he saw Mr. Pierce was when he started to fix up the building, and when he had finished that work he went to Pierce & Watson's office and there saw Mr. Pierce and told him he wanted some more insurance on his property; that Mr. Pierce looked in a book and found that the current policy was in Mr. Dickey's name, and then and there he made application for \$300 more insurance. A policy for that amount was issued to the complainant on October 25, 1907. That fact, taken in connection with the testimony of the complainant, leads me to believe that the first time he ever saw Mr. Pierce about the policies was about the date of the issuing of the junior policy. This policy ran to the complainant with the mortgagee clause in favor of Crosson. The complainant never saw and never had in his possession either of the policies. The evidence shows that the older policy was in the possession of Pierce & Watson, the agents of the company, it having been intrusted to them by the mortgagee, and put away in their safe with the mortgage. Matters stood in this way until the premises were destroyed by fire; then proofs of loss, which were apparently in proper form, were submitted to the insurance company, and nothing further appears to have been done until the filing of the bill in this case on March 22, 1910. The bill sets out the two policies and the circumstances under which they were issued, and the notice of the transfer of the title of the property from Dickey to the complainant, and prays that the older policy may be reformed so as to be made payable to the complainant instead of to Dickey, and that a decree may be made directing the defendant to pay the full amount of both policies to the complainant.

[1] I think it is quite apparent that the complainant can have no decree in this court on the junior policy; that was properly issued to the owner of the property, and if the company refused to pay, then the question as to whether the claim of the owner was just or not could be, and indeed would have to be, litigated in the courts of common law. The cause of action on the junior policy is a separate and distinct cause of action from the one accruing on the older policy. There is no

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig.-Key-No. Series & Rep'r Indexes

doubt but that the common-law court would permit a recovery on both policies in one suit, if they both stood on the same footing, but there is likewise no doubt but that a separate suit would be maintainable on each policy. I, therefore, am constrained to say that the complainant can have no relief in this court on the junior policy, and as to that cause of action the decree will have to be in favor of the defendant.

[2-4] The suit on the older policy stands in a somewhat different position. One of the prayers of the bill is that the policy may be reformed by inserting the name of the complainant in the place of that of Mr. Dickey as the person insured. It is a well-settled doctrine, which needs no citation of cases, that the reformation of an instrument in writing can be accomplished in this court in only two cases: (1) Where there has been a mutual mistake; and (2) where there has been a mistake on the part of one of the parties, with fraud on the part of the other. There is no evidence whatever before the court which points in the direction of any fraudulent action on the part of the defendant or its agents; consequently if the complainant recovers, it must be on the ground of mutual mistake. The evidence, therefore, must be searched to ascertain whether the older policy was drawn or continued in the form in which it now appears, by the mutual mistake of the parties. Originally the policy ran to the owner of the fee, and it was apparently in proper form at the time of its issue. No question has arisen about its validity prior to the time of the transfer of the property to the complainant. The policy provides as follows:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if \* \* \* any change other than by the death of an insured takes place in the interest, title or possession of the subject of insurance (except change of occupants without increase of hazard) whether by legal process or judgment or voluntary act of the insured or otherwise."

This provision is a part of the contract, and must be enforced, unless there is evidence that its provisions have been waived by the defendant. I find no evidence of such waiver; therefore the clause thus quoted must stand as part of the contract evidenced by the policy. It is not claimed that there were any negotiations between the complainant and the defendant at the time complainant purchased the property in question, or at any time thereafter, so that there were no contract relations existing between the parties at all. The case, therefore, turns upon the conversation that the complainant says he had with Mr. Pierce, the agent of the company, in either June or October, 1907. The testimony is that at that time Mr. Pierce, the defendant's agent, was notified of the transmission of Dickey's interest to the complainant. He himself says:

"I presume our firm had notice, but it didn't come to me personally direct, because I am always very particular to see that a transfer is made."

I shall therefore assume that the defendant was notified of the change of ownership, but that of itself would not be sufficient to maintain the validity of the policy under its terms. By the terms of the policy the change of ownership invalidates the instrument, unless a note of the change is indorsed on or appended to the policy. This is part of the contract, and is appealed to by the defendant, and must therefore enter into the judgment to be pronounced by this court. The requirement has not been met.

Much reliance was placed by the complainant upon the case of *Milville Mutual Marine & Fire Insurance Co. v. Mechanics & Workmen's Building & Loan Association*, 43 N. J. Law, 652. But there is a difference between this case and that in this regard; in that case the question was whether notice of alienation was given to the company, and *whether the company assented to it or waived the condition of the policy* in this respect.

As I have said before, I find no evidence of waiver of the conditions; neither do I find any assent of the defendant to the alienation of the property insured; neither do I find that there was any request made by the complainant to the defendant for its consent to the transfer of the title. Mere notice of transfer is not sufficient. The mere oral assent of the corporation would make a doubtful case, in the face of the requirement that the consent shall appear in writing indorsed upon or annexed to the policy, yet in a given case the facts might warrant the conclusion of a waiver of the provision.

The decree on the older policy must also be in favor of the defendant.

(83 N. J. Eq. 479)

CUMBERLAND TRUST CO. v. B. S. AYARS & SONS CO.

(Court of Chancery of New Jersey. July 22, 1914.)

1. CORPORATIONS (§ 406\*) — OFFICERS — AUTHORITY OF MANAGER — TRUST AGREEMENT.

Where the entire business management of a corporation had been intrusted to A. without limitation, supervision, or restraint by the board of directors, the corporation would be bound by a trust agreement executed by him, executory in character, and operative alone on the business to be transacted under it, by which it was provided that the corporation would hold in trust and separate, for settlement of the account of petitioner, all goods unsold and all currency, open accounts, notes, liens, mortgages, or other values received by the corporation for the goods.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1611-1614; Dec. Dig. § 406.\*]

2. CORPORATIONS (§ 406\*) — CONTRACTS — VALIDITY — INSOLVENCY — RECEIVERS.

An agreement executed by the business manager of a corporation agreeing to hold in trust and separate, for settlement of the ac-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

count of petitioner, a creditor, all goods unsold, currency, open accounts, and other values received by the corporation for the goods, made in good faith, was valid and enforceable as against the corporation's receiver in insolvency.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1611-1614; Dec. Dig. § 406.\*]

Suit by the Cumberland Trust Company against the B. S. Ayars & Sons Company. On petition to direct receiver in insolvency to deliver certain assets to J. E. Tygert Company. Application granted.

D. O. Watkins, of Woodbury, for petitioner. James S. Ware, of Bridgeton, for respondent.

LEAMING, V. C. [4] 1. I am satisfied that the authority of Arthur D. Ayars to execute the contract in question in behalf of the corporation represented by him has been sufficiently established.

In practical operation the entire business management of the corporation appears to have been intrusted to Mr. Ayars without limitation, supervision, or restraint on the part of the board; an inference of authorization coextensive with the scope of that management cannot be properly resisted. The instrument in question may be said to be unusual in character; but unlike a mortgage (*Howell v. Keene*, 59 N. J. Eq. 634, 43 Atl. 1070), or a warrant for confession of judgment (*Stokes v. N. J. Pottery Co.*, 46 N. J. Law, 237), or cognovit (*Raub v. Blairstown Creamery Ass'n*, 56 N. J. Law, 262, 28 Atl. 384), it in no way fastened a lien on the property of the corporation. It was a purely executory contract operative alone on the business to be transacted under it. The power of the president to execute it in the name of the corporation may be sustained under the principles defined in *Murphy v. Cane*, 82 N. J. Law (53 Vr.) 557, 82 Atl. 854, Ann. Cas. 1913D, 643.

[2] 2. It is undoubtedly true that if the real purpose of the contract was to make an effectual sale with no intent upon the part of the parties to give effect to the trust declared, and the latter provision can be said to have been merely an empty form to be operative only in case of disaster, petitioner cannot now enforce the trust provisions of the contract according to its terms; and a like consequence may be visited upon a waiver of the trust provisions. In *re Harrington* (D. C.) 212 Fed. 542. But I am unable to reach the conclusion that the contract was not entered into in good faith or that its provisions have been abrogated by waiver.

The stipulation contained in the agreement is that the corporation will hold in trust and separate for settlement of the account of petitioner all goods unsold and all currency, open accounts, notes, liens, mortgages, or other values received by the corporation for the goods. There can be no legal obstacle to such an agreement if made in

good faith. Even though it should be thought to fall within the provisions of our statute touching conditional sales (2 Comp. St. 1910, p. 1561), it would be void only as to judgment creditors without notice and subsequent purchasers and mortgagees without notice (*Smith v. Hotel Ritz Co.*, 74 N. J. Eq. 296, 77 Atl. 1135). The failure of the corporation to set apart cash received for goods sold (or to set apart the amount so received through a credit being given by a creditor in a settlement), standing alone, would be fruitful of no consequences other than to render it impossible for the cestui que trust to enforce the trust against the goods so sold because of the right to sell and collect having been bestowed upon the corporation or against proceeds of sales commingled with other funds of the corporation because of inability to identify the proceeds of sale as a specific object of the trust. Assuming that either the terms of the contract or the course of dealings of the parties justifies the conclusion that payments or settlements in the manner referred to were authorized by petitioner, there is yet nothing to be found in the mere right or privilege to make such settlements to warrant the conclusion that petitioner waived the right specifically defined in the contract to have funds so received by the corporation set apart or kept separate as objects of the trust. There can be little doubt that the trust provisions of such an agreement spring from want of confidence in the pecuniary responsibility of the trustee, and to that extent they may be said to contemplate and provide against the danger of future financial disaster; but, as the conventional relation of trustee and cestui que trust are lawful, the rights arising from that relation must be protected by this court as long as that relation in fact and in law continues, and I am unable to conclude that the trust relation defined by the contract in question can be properly said to have been at any time terminated.

I will advise an order pursuant to the prayer of the petition.

(83 N. J. Eq. 536)

# MAYOR AND COUNCIL OF TOWN OF BOONTON v. UNITED WATER SUPPLY CO.

(Court of Chancery of New Jersey. July 25, 1914.)

1. CONTRACTS (§ 10\*)—WATERS AND WATER COURSES (§ 183\*)—CONTRACT TO PURCHASE WATERWORKS—MUTUALITY—WATER COMPANIES—BOOKS AND PAPERS—INSPECTION BY TOWN.

Where a contract by a water company to supply water to the inhabitants of a town provided that the town might purchase the works and "at any and all times" might inspect the books and vouchers of the company, the town was entitled to exercise such right of inspection, though it did not exercise its option to purchase;

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



nor was it a valid objection that the inspection privilege was not mutual.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 21-40; Dec. Dig. § 10;\* *Waters and Water Courses*, Cent. Dig. §§ 277, 278; Dec. Dig. § 183.\*]

**2. EQUITY (§ 48\*)—REMEDY AT LAW—CONTRACT RIGHTS—ENFORCEMENT—INSPECTION OF BOOKS AND PAPERS OF CORPORATION.**

Where a water company's contract with a town provided that the town at any and all times should have the right to inspect the water company's books and papers, the town was not limited to mandamus to enforce such right, but properly sought such relief by suit in equity.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 156, 158; Dec. Dig. § 48.\*]

Suit by the Mayor and Council of Town of Boonton against the United Water Supply Company. Decree for complainant.

Frank H. Pierce and Charles E. Scribner, both of Boonton, and Robert H. McCarter, of Newark, for complainants. Elmer King, of Morristown, for defendant.

LEWIS, V. C. This is an application by the town of Boonton for an inspection of the books and vouchers of the United Water Supply Company. This right is claimed under the terms of a contract made between complainant and Lewis Van Dyne and the Boonton Water Company. The defendant succeeded to the Boonton Water Company by purchasing all its property, including the contract with the town, at a sale in foreclosure proceedings.

[1] From my examination of the case I have reached the conclusion that the relief prayed for by the complainant should be granted. There is no doubt in my mind that, read in connection with the other provisions of the contract, the words "at any and all times," which appears in paragraph 11, means that the water company bound itself to give the inspection, even if the town did not exercise its option to purchase. The privilege, it appears, was incorporated in the contract to give Boonton a chance to know the true conditions before it should agree to exercise its option. This is frequently done where the public is concerned and is to be the purchaser. And it is no doubt true that without such right it would be difficult to get the people at large to sanction the making of a contract such as the one under consideration. There is, of course, consideration for the agreement to give this inspection as the town has been using the water supplied by the water company and paying for the same under the agreement, ever since it was executed.

The suggestion made by counsel for the defendant, that the relief should not be granted because there is a want of mutuality if this is done before the town exercises its option, cannot prevail in view of our decisions, and further this contract by its terms gives this right of inspection to the town authorities—a right not given to the company.

In other words, one party to this contract has a right which the other has not. The principle of mutuality cannot apply under these circumstances. The opinion of Chief Justice Gummere in *Marvel v. Jonah*, 90 Atl. 1004, which Mr. McCarter called to the court's attention upon argument and which was filed on July 17th last, deals with this subject with great clarity and is very much in point. See, also, *Page v. Martin*, 46 N. J. Eq. 585, 20 Atl. 46 (Errors and Appeals); *Madison, etc., Association v. Brittin*, 60 N. J. Eq. 160, 46 Atl. 652; *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 51 Atl. 973, 58 L. R. A. 227, 90 Am. St. Rep. 627.

[2] I have given consideration also to the argument made by counsel for defendant that mandamus was the proper procedure for complainant in this issue; but I think that the action has been properly taken in the Court of Chancery, and that the remedy for the town is not as urged by counsel for the defendant. In the case of the *State v. Elizabethtown Water Co.*, 89 Atl. 1039, which was cited, it was the statute that gave the State Water Commission the right to inspect the books of the water company. Proceedings to enforce the said right in a court of competent jurisdiction were provided for by the statute. The right in the case now before us arises out of the contract between the parties; in the *Elizabethtown Case*, the right to examine arose purely out of a legal statutory duty enforceable only in the Supreme Court by mandamus.

No hardship is suffered by the water company by an order for inspection as such order can be so framed as to prevent the inquisitive but disinterested person or any competitor, if there be one, from coming to knowledge of the company's affairs.

In accordance with these views, an order for inspection may be entered.

(33 N. J. Eq. 442)

CLIFT et al. v. SCHEUTZ et al.

(Court of Chancery of New Jersey. July 23, 1914.)

**1. MORTGAGES (§ 244\*)—ASSIGNMENTS—PRIORITY.**

Unless affected by the recording acts, the earlier in time of two assignments of the same mortgage prevails.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 633-655; Dec. Dig. § 244.\*]

**2. MORTGAGES (§ 244\*)—ASSIGNMENTS—PRIORITY—NOTICE.**

Under Conveyance Act (P. L. 1898, p. 690) § 54, providing that instruments which may be recorded under section 21 shall be void and of no effect against subsequent judgment creditors without notice, and against all subsequent bona fide purchasers and mortgagees, not having notice thereof, whose deed or mortgage shall have been first duly recorded, an assignee of a mortgage, to whom the bond and mortgage were not delivered, and who over a year before acted as attorney in a suit in which the interest of the mortgagee was attached in the possession of the holder of a

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

prior unrecorded assignment, was not a bona fide purchaser without notice.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 633-655; Dec. Dig. § 244.\*]

### 8. MORTGAGES (§ 244\*)—ASSIGNMENTS—RIGHTS OF ASSIGNEE.

Where a mortgagee assigned the mortgage to D., and thereafter made a subsequent assignment to another party, D.'s assignee succeeded to the title and rights of D., though he paid only a small sum for the assignment, and the subsequent assignee was not entitled to redeem on payment of such sum.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 633-655; Dec. Dig. § 244.\*]

Suit by William C. Clift and others against Elizabeth Scheutz and others. Heard on bill, answer, replication, and proofs. Decree in accordance with the opinion.

King & Vogt, of Morristown, for complainants. F. W. Fort, of Newark, for defendant MacLear.

EMERY, V. C. Elizabeth Scheutz and husband gave to Walter P. Lindsley a mortgage on lands in Sussex county, dated July 12, 1904, for \$1,500, payable in one year, with interest. On October 9, 1905, Walter P. Lindsley assigned this mortgage to Dey & Sutphen as collateral security for payments to become due on a building contract between Dey & Sutphen and the O. K. Building Company in which Walter P. Lindsley was interested. The bond and mortgage were delivered to the assignees with the assignment. The amount which afterwards became due on the contract to Dey & Sutphen was \$3,500, and on January 12, 1910, Dey & Sutphen assigned the bond and mortgage, as well as the contract and the debt due thereon, to the complainants Clift and Best. The two assignments of the mortgage were recorded on January 21, 1910.

A writ of attachment at the suit of the Manalapan Light Company was issued against Walter P. Lindsley subsequent to the assignment to Dey & Sutphen, and on June 19, 1906, the sheriff under this writ attached in the hands of Dey & Sutphen all the right, title, and interest of the defendant Walter P. Lindsley in this mortgage, and made return that he attached such interest on the mortgage "in the hands of Dey & Sutphen, but not assigned to them." The authority for inserting this statement "but not assigned to them" in the return has not been shown, and, so far as Dey & Sutphen are concerned, the inclusion of this statement in the sheriff's return has no effect in this case. Mr. MacLear was the attorney for the company in this attachment suit, and more than a year later, on August 23, 1907, he received an assignment of this bond and mortgage from Walter P. Lindsley, executed in his name by Morris B. Lindsley, his attorney in fact, under a power of attorney referred to in the assignment. This assignment was made to MacLear to secure money owing by

Lindsley to him (about \$625) and to the Manalapan Company, about \$800 or \$900. Neither the bond nor mortgage were delivered to MacLear with the assignment. MacLear's assignment was recorded nearly two years later, May 19, 1909, but the previous assignment to Dey & Sutphen was not recorded until January 21, 1910, shortly after the assignment of the mortgage to complainants. The power of attorney from Walter P. Lindsley to Morris B. Lindsley was recorded still later, May 16, 1910. The assignment to MacLear was indexed in the clerk's index book under the name of Morris B. Lindsley, and not of Walter P. Lindsley, and complainants, who had before their purchase of the mortgage had the indexes examined, had no actual notice of the MacLear assignment.

[1] Complainants, as assignees of Dey & Sutphen, are entitled to stand upon the rights of the latter to the bond and mortgage in question. The mortgage and assignment convey an interest in lands, both legal and equitable, and the assignment to Dey & Sutphen, being prior in time to the assignment to MacLear, must prevail against it, unless the general rule as to priority is affected by the recording acts. *Jenkinson v. N. Y. Finance Co.*, 79 N. J. Eq. 247, 258, 82 Atl. 36, 41 (1911, *Emery, V. C.*).

[2] The recording acts provide for the recording of assignments of mortgages and other instruments ("Conveyances," Rev. of 1898, § 21 [2 Comp. St. 1910, p. 1541], and Id. § 53 [2 Comp. St. 1910, p. 1552]), and that the record "shall be notice to all subsequent judgment creditors, purchasers and mortgagees of the execution and contents of the instrument." As to the effect of not recording the assignment or other instrument, it is provided (Id. § 54) that it shall "be void and of no effect against subsequent judgment creditors without notice, and against all subsequent bona fide purchasers and mortgagees \* \* \* not having notice thereof, whose deed or mortgage shall have been first duly recorded." The previous act relating to mortgages (Rev. of 1874 [3 Comp. St. 1910, p. 3407, etc.]) had provided only that the record of assignment of mortgages should be "notice to all concerned" that the mortgage was assigned (section 32, 3 Comp. St. 1910, p. 3418, and section 34, 3 Comp. St. 1910, p. 3419); that payments made to the assignor in good faith, without actual notice and releases to persons not having actual notice, should be valid.

These sections of the mortgage act revision do not, as do the conveyance acts, expressly make the assignments invalid if unrecorded, against any persons, but save only the rights of the mortgagor on payments or releases of the mortgaged lands.

Section 54 of the conveyance act applies to every deed or instrument set forth in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

twenty-first section of the act, which includes assignments of mortgages, and the question therefore is whether MacLear, who was a subsequent purchaser of the mortgage, was a bona fide purchaser for a valuable consideration, not having notice of the prior assignment to Dey & Sutphen. In my judgment MacLear cannot be considered a bona fide purchaser for a valuable consideration without notice.

The fact that the assignor did not have the bond and mortgage to deliver with the assignment, while it might not, as between the assignor and the assignee, prevent the passing of such title thereto as the assignor had, was a notice that they were or might be held by some one other than the assignor. *Kamena v. Huelbig*, 27 N. J. Eq. 78, 80 (Zabriskie, Ch. 1872). And actual notice to MacLear that Dey & Sutphen held the possession at the time of the attachment is proved. He was the attorney for the company who attached the bond and mortgage as in Dey & Sutphen's possession, and subsequently took his assignment of the mortgage to secure this company's debt. No circumstances have appeared which deprive these facts of their effect as notice.

[3] No acts of Dey & Sutphen have been proved which disentitle them to stand upon their assignment and possession of the bond and mortgage as prior to MacLear's assignment, and the complainants have succeeded to the title and rights to Dey & Sutphen. The fact that complainants paid only a small sum for the assignment does not create any equity in favor of the subsequent assignee, and the claim of counsel that the subsequent assignee is entitled to redeem on payment of this sum cannot be allowed.

A decree that the assignment to the complainants is prior to that of the defendant MacLear, and that as between them they are entitled to be first paid out of the proceeds of sale under foreclosure, will be advised.

(83 N. J. Eq. 437)

CLIFT et al. v. FRENCHÉ.

(Court of Chancery of New Jersey. July 23, 1914.)

**1. TAXATION (§ 701\*)—REDEMPTION FROM TAX SALE—PROCEEDING TO BAR RIGHT TO REDEEM.**

Under P. L. 1903, p. 432, § 59, providing that the purchaser of land at a tax sale may give written notice to all persons interested in the land of their right to redeem, and that unless they do so within two years after the sale, if the notice is served more than 60 days before the end of the term, or otherwise within 60 days after the service of the notice, their right of redemption will be barred, and that, if there shall be no redemption within such term of two years or within the time limited by the notice, the right of redemption shall be barred, to bar the right of redemption the statute must be strictly followed.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1407, 1409-1411; Dec. Dig. § 701.\*]

**2. TAXATION (§ 701\*)—REDEMPTION FROM TAX SALE—PROCEEDING TO BAR RIGHT TO REDEEM.**

Where a purchaser of land at a tax sale, after giving notice to all persons interested to redeem within 60 days, pursuant to P. L. 1903, p. 432, § 59, on an application by a party interested within such period to redeem, requested a delay beyond the 60 days for the purpose of taking up the matter, and thereby induced such party not to attempt to redeem within the statutory period, the purchaser was estopped, as against such party, from using such notice as the basis of a statutory foreclosure of the right to redeem, and, to avail himself of the statutory remedy, was bound to give a new notice.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1407, 1409-1411; Dec. Dig. § 701.\*]

**3. TAXATION (§ 722\*)—TAX SALES—SUITS TO REDEEM—MATTERS DETERMINABLE.**

A suit to redeem from a tax sale proceeds on the assumption that the defendant has or can acquire an absolute title, and the validity of his title under the sale cannot be attacked.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1449-1453; Dec. Dig. § 722.\*]

Suit by William C. Clift and others against James Frenché. Decree for complainant.

King & Vogt, of Morristown, for complainants. E. A. Rayner, of Newark, for defendant.

EMERY, V. C. This is a bill by a mortgagee to redeem lands sold for nonpayment of taxes. The lands were sold for 30 years, and the purchaser claims that the right of redemption has been cut off by proceedings taken under the "act for the assessment and collection of taxes." P. L. 1903, c. 208, § 59, p. 432. This section provides two methods for barring or foreclosing the right of redemption, after the period of redemption (two years after the sale) has expired. The first is by an ex parte proceeding entirely within the control of the purchaser, and is by his giving written notice to all persons interested in the land of their right to redeem, and that, unless they do so within 60 days after the service of the notice, their right to redeem will be barred. After this time (60 days) has expired without redemption, the purchaser may annex the notice and affidavit of service to the certificate of sale, together with an affidavit that the sale has not been redeemed, and record and file the same therewith in the office of the county clerk or register. By the statute "the said notice and affidavits and the record thereof shall be presumptive evidence of the service and facts therein stated." Section 56 provides for the recording of the certificate of sale with these notices and affidavits annexed, and also that the certificate of sale shall be presumptive evidence in all courts of the title of the purchaser. The second method of barring the right of redemption given by section 59 is by a bill to foreclose, and this method may be taken whether the 60 days'

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 91 A.—52

notice has been given or not, and, where a bill is filed, the right to redeem continues until barred by the decree of sale of the court of chancery.

As to the expiration of the right to redeem, the fifty-seventh section provides that persons interested "may redeem the same at any time within two years from the date of sale, or at any time thereafter, until the right to redeem has been cut off in the manner hereinafter set forth," by paying the purchase money, interest, fees, and expenses.

[1] Under the first method provided in the fifty-ninth section, this right of redemption would be barred on the failure to redeem within 60 days from the service of the notice to redeem. This method, therefore, is manifestly a strictly *ex parte* statutory method, and, if the purchaser proposes in this manner to foreclose the right to redeem, it must be strictly followed.

[2] In the present case the purchaser received a certificate of sale from the collector of taxes, dated April 3, 1908, reciting the sale for taxes on March 23, 1908, of the lands in question to him for 30 years, for the sum of \$24.86. On March 26, 1910, written notices of this sale and to redeem the same within 60 days were served on both complainants Clift and Best. On May 7, 1910, and within this 60-day period, Best wrote to Frenche: "If you will send me an assignment of your tax claim on the Scheutz property by Mr. Bellis, I will give you a certified check for the amount."

To which Frenche replied by letter of May 11, 1910:

"Box 125

"Hoboken, N. J., May 11, '10.

"Mr. J. Frank Best—Dear Sir: In reply to yours of May 7th I have too much to attend to at present to take up the Scheutse business which would require considerable time, but as I stated to you that you could have your time for redemption extended if necessary I now state specifically that your time to redeem as joint mortgagee of the premises is hereby extended sixty days beyond its fixed expiration, so that there is no need to bother about it at present. I think Mr. Maclear will want some similar accommodation as he does not appear to have his mind made up about redemption. Please acknowledge this letter. I am, dear sir, "Yours respectfully, James Frenche."

The complainants, relying on this letter, took no further steps to redeem within the 60 days. Subsequently, on July 20, 1910, and within the 60-day extension period given, Mr. King, one of the complainant's solicitors, inclosed his firm's check for the amount of taxes, \$50.54; the same being figured as nearly as he could from defendant's statement, said by him to have been previously sent them. Defendant, by a letter of July 22, 1910, to Mr. King, written for him by a Mr. C. Bellis, returned this check, stating that the amount was insufficient, asserting further that he had never sent a statement, and that the amount due would have to be settled by agreement or by the court, as the expenses and the trouble connected with it

had been a great deal more than the taxes. He further stated that the right to redeem the property expired May 24th, but he had favored Mr. Best by allowing him some extra time "to continue his negotiations for his own individual interest," and then continues:

"He has had four months and has done nothing and there is nothing can be done now except to leave the tax lease stand. If you want to buy it, which I think you ought to do, let me so."

Mr. King on July 27th replied to this letter, addressing it to defendant at Waterloo, N. J.; that being the post office address of the defendant's letter to him of July 22d. This letter was returned to Mr. King undelivered, and a letter of Bellis (who had been defendant's agent at Waterloo) to Mr. King, and who received the Frenche letter, stated that a letter from his firm had come to Waterloo for James Frenche, "but cannot be delivered, as he is absent, and I have remailed it to the senders." No address was given. Mr. King's letter of July 27, 1910, was then remailed by him to Mr. Frenche in a letter addressed to him at Hoboken, on August 1st, at the address given by defendant's own letter of May 11th, stating that the inclosed letter had been sent to him at Waterloo, and returned unopened by Bellis. This letter of Mr. King was also returned to the writer unopened, and with the indorsement, "Refused." On the following day, August 2d, defendant himself wrote to complainant's solicitors that he had been informed that they had been addressing letters to him which he did not receive and further:

"This is to inform you that as I have no business with you, no letters from you will be received."

On the day of writing this letter from Newton, August 2, 1910, the certificate of tax sale, with the notice to redeem and affidavits of service on complainants and others, were recorded in the clerk's office at Newton, in Sussex county, where the lands lie. From this correspondence and the evidence given at the hearing in connection with it, I conclude that the defendant, at least as early as July 22d, which was within the time to which he had himself extended the time of redemption, had determined to stand on his strict right of foreclosure under the statute by reason of the failure to redeem within 60 days from the time of the service of the notice on March 26th. The certificate, with its accompanying notice and affidavits, derive their whole efficacy from this failure to redeem within the 60 days so fixed by the notice. Complainant's equity to be relieved from the effect of this statutory *ex parte* foreclosure of the right to redeem arises from the fact that the defendant, on an application to redeem, made within the time limited by the 60-day notice, himself requested a delay beyond the 60 days for the purpose of taking up the matter, and thereby induced complainants not to attempt to redeem within the statutory period of 60

days. By this conduct he must be considered as in equity to be estopped from setting up, as against the complainants, the right to use this 60-day notice as the basis of the strict statutory foreclosure. The result of this action on his part was that, as against the complainants, defendant was obliged to give a new 60-day notice under the statute, if he desired to avail himself of this *ex parte* method of foreclosure. This statutory *ex parte* proceeding affords no method whatever for extending the time originally fixed by the notice, or for the settlement of any equities arising between the parties by reason of their agreements, express or implied, made after serving the notice, to waive or not to proceed on the statutory notice given. By himself leading the complainants to delay beyond the fixed statutory time, defendant is, in my judgment, estopped in equity, under the circumstances of this case, from setting up this failure to redeem under this notice as the basis of his statutory absolute title. And this tax title must therefore be declared subject to redemption. What payments are to be made on redemption will be determined, if the parties fail to agree.

[3] Several other questions were raised on the arguments and briefs; one by the complainant questioning the validity of defendant's title under the sale. As here presented, this question strikes me as purely a question of legal title which could not be decided in this suit. Relief on this bill to redeem proceeds on the assumption that the defendant has, or can acquire, absolute title under the statute.

Another was raised by the defendant questioning complainant's title to the mortgage and setting up title in a third person, a Mr. MacLear. This question has been decided in complainant's favor in a suit to foreclose the mortgage brought against MacLear and others.

(83 N. J. Eq. 571)

### JONES v. JONES.

(Court of Chancery of New Jersey. Aug. 1, 1914.)

#### 1. DIVORCE (§ 133\*)—SUFFICIENCY OF EVIDENCE—DESERTION.

In a husband's suit for divorce, evidence as to the circumstances surrounding the separation of the parties *held* to show that the wife did not desert the husband without his consent.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 446-448; Dec. Dig. § 133.\*]

#### 2. DIVORCE (§ 165\*)—DECREE—OPENING—SUFFICIENCY OF EVIDENCE.

On a wife's petition to open a decree of divorce in favor of the husband, evidence in support of her contention that she failed to defend the suit because of her belief, induced by messages from the husband, that the suit would be withdrawn *held* to show surprise, entitling

her to have the decree set aside in order that she might defend.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533-542, 546, 548; Dec. Dig. § 165.\*]

#### 3. DIVORCE (§ 165\*)—DECREE—OPENING—GROUNDS—FALSE TESTIMONY.

A decree of divorce, obtained by a husband by false testimony in a suit which the wife failed to defend, will be vacated on the wife's application, irrespective of the wife's excuse for her default, as the state was an interested party to the suit, and its interests had been imposed upon by the conduct of the husband, requiring that its rights be vindicated.

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 533-542, 546, 548; Dec. Dig. § 165.\*]

Suit for divorce by William C. Jones against Anna P. Read Jones. On petition by defendant to open a decree in favor of plaintiff. Petition granted, and suit dismissed.

See, also, 89 Atl. 29.

Bourgeois & Coulomb, of Atlantic City, and John W. Wescott, of Camden, for petitioner. Floyd H. Bradley, of Camden, for defendant.

BACKES, V. C. On August 17, 1912, the petitioner filed his petition for divorce a vinculo, in which he alleged that he cohabited with his wife until June of 1906, when she deserted him, and that for more than two years then last past her desertion had been willful, continued, and obstinate. The cause was undefended, and upon the report of the master to whom it was referred, a decree nisi was entered January 17, 1913, and on July 18th following a final decree of divorce was signed. On November 18th of the same year, before the decree was actually enrolled, the defendant filed her petition, praying that the final decree be vacated, and that she be permitted to defend, on the grounds of surprise and merits, in which she sets up that she was deprived of her defense by the fraudulent representations of her husband, and that the decree was procured by false testimony imposed upon the court. An order to show cause issued, an answer was filed, and on the day set for trial the parties and their witnesses were heard in open court.

[1] The petitioner and defendant were married in 1886, and lived together as husband and wife until June of 1906. At that time they were living in Camden. During the previous fall, their daughter, a young lady, had been sent to Swarthmore College for a four-year course. She was in delicate health, and for her better protection and comfort the defendant planned to move to the college town. While her husband was in Denver, Colo., she wrote to him of her intentions, and he replied under date of January 22 (1906):

"Anna: Your letter received this A. M. I am very sorry to hear that the children are not well and I am especially anxious about Edna. It might be wise for her to see Dr. Snader 1919

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Arch St. and have him make a thorough examination particularly of her lungs, and prescribe for her. I have great faith in his ability. In regard to your going to Swarthmore to live, if it will contribute to your happiness or the health of the children it has my entire approval. It might be a good plan for you to consult an agent as such a person would be more familiar with existing conditions and have knowledge of any opportunities to rent or buy. I expect to be engaged here for some time yet, and cannot say how soon I will be able to go east. Yours, Will."

Upon the strength of this letter, the defendant went to Swarthmore to look for a place, and a few days afterwards wrote to the petitioner a gossip letter, in which, amongst other things, she said:

"Dear Will: \* \* \* I suppose you would like to hear of our experience the other day at Swarthmore. Mrs. Keller, Willie and I started about twelve o'clock from Hamilton Court. We went to their country place, got Bill the work horse. We went all over Swarthmore and saw only three houses that we cared for. Two was out by Strathaven Inn. One is Graham's house which is \$15,000 and the one adjoining it is \$11,000. Now Will I am afraid to mention the other one because it is so high in price but it is an ideal house. It adjoins the college grounds and it has every convenience. I went to see the agent yesterday. His office is at Thirteenth and Chestnut. J. T. Jackson is his name. When you come home you can go and see him if you like."

She closed the letter with a love message from the children and herself. Upon the petitioner's return to Camden he negotiated with the owner of the Graham house and purchased it for \$12,000 on April 19, 1906, placing the title in his wife's name. He paid down \$5,000, in cash, and with his wife executed a purchase-money mortgage for the balance. He made extensive alterations to the house, which he personally supervised; purchased rugs and furniture, which he and his daughter selected; paid for the moving of the household effects; made alterations and repairs to the house until recently, and up to the time of this application paid the taxes on the property, interest on the mortgage, water rents, electric-light bills, telephone bills, besides sending to his wife a weekly allowance of \$32.50, which was increased to \$35 in the spring of 1913, and to his children each a monthly allowance. In December of 1909 and January of 1910, he purchased, in the name of his wife, additional ground adjoining the Swarthmore home. In all he spent on the property and in supporting his family, the sum of \$41,500. In the month of June, 1906, the petitioner again went West, and the other members of the family to Atlantic City for the summer, as had been their custom. He returned in the early part of July, and again went to Denver the latter part of August. During this period he made the arrangements for improving the house and for its furnishing. When the house was substantially completed, the defendant moved into it with her household effects (except some personal belongings of her husband), where she has ever since

lived. From that time on, the petitioner never saw his wife to speak to her, although he was a frequent visitor at the house to see his children. The defendant's removal to Swarthmore constituted the alleged desertion upon which the decree of divorce is based.

The testimony taken before the master persuaded him to report that, while the petitioner was in the West, the defendant, without his consent or knowledge, went to Atlantic City, where she remained until the month of September, and that during the latter part of the month of October or the early part of November, 1906, the defendant packed all of her belongings and caused them to be removed to Swarthmore, in the state of Pennsylvania, without the consent or knowledge of the petitioner, at which latter time the defendant deserted the petitioner, and, further, that:

"The petitioner visited the house where the defendant was living, in Swarthmore, a number of times, and there saw his children; that the defendant, from the testimony shown, avoided meeting her husband, the petitioner, and at other times purposely absented herself from her home in Swarthmore, when she knew that her husband was coming to her home; that defendant stated that she would not return to Camden to live with the petitioner, and it is evident to my mind that the defendant fully intended to desert her husband, when she moved from Camden, New Jersey, to Swarthmore, in the state of Pennsylvania."

The petitioner had testified: That he lived with his family at 107 North Seventh street, in Camden, until the 15th of June, 1906. That prior to that time he and his wife had several altercations. That on one or two occasions his wife had told him that she would not continue to live in Camden. That he had told her that he could not live anywhere else; that his business required him to live in that city. On June 15th he was obliged to go to Colorado. He returned in 17 or 18 days, and then went to his home, where he expected to find his wife and children. The house was closed up, and he was informed that they had gone to Atlantic City. He did not see her during the summer for the reasons stated by him, that he believed she had gone away in one of her fits of anger, and that it was best to leave her alone as she would get over it and return all right in the fall. As he had no place to sleep, he went to his office building, where he furnished a room. Soon after this, about the middle of September, he was again required to go to Colorado and was gone until the 1st of November, when he returned and went immediately to his home, and to his surprise found all of the furniture moved with the exception of a few pieces of rubbish and the framed marriage certificate. He learned that his wife had moved to Swarthmore, and he says, "I then knew that when she left me she intended to desert me." He further stated that in the latter part of November, within two or three weeks of his return, he went to Swarthmore to see his wife and talk over

marital relations and about continuing the home in Camden. That he did not succeed in seeing her at that time. That he was informed that his wife was "not at home." That within the next two years following he made six or more trips to Swarthmore to see his wife, for the purpose of arranging a home in the city of Camden, and for her to return and live with him, but that he did not succeed. That whenever he went there he was told that she was not at home, although upon some occasions he believed that she was, but would not see him. That during the next four years he went to Swarthmore many times and saw his children, but on no occasion was he able to, nor did he, see his wife. That he had never had any conversation with her since she had left for Swarthmore. That his wife had never written to him or communicated with him in any way whatsoever since that time. That he has never had intercourse with his wife after she left him in June, 1906, and that he believed that she left him because of extreme jealousy. That he knew of no other reason for her leaving him, and that in fact there was no ground for her suspicion and jealousy. That he had supplied money for the support and education of his children, but whether any of the money sent for the support and education of the children was used by the wife he did not know. That when he went to Swarthmore it was for the purpose of talking with his wife and having her return to their home in Camden, where he had provided a home, or to provide such other place as might be agreed upon between them. That his wife knew that he was calling upon her children, and she must have known that he endeavored to see her a number of times, because he was at the house so many times, but she at no time allowed him to see her, nor did she offer to see him. That, therefore, he was unable to talk with her or make any provision in accordance with her wish, if she had any to express. That he did not write to his wife, because he thought he could make himself better understood by seeing her personally. That they could have arranged the matter between them and by conversing with her he thought they could arrange about her returning to Camden to live with him, and, knowing the disposition of his wife, he thought that writing to her would be futile, when she constantly avoided seeing him when he went to her house to see her and the children. That as early as the spring of 1905, the defendant had a conversation with him, in which she wanted to move from Camden and go to Swarthmore to live, and that he always protested, because his profession required him to live in this state. That between the time of this first conversation and when he went to Colorado in the spring of 1906, he had two or three conversations on the subject. One was held in the office, and that she still persisted and urged that they move to Swarthmore, and that he replied

that it was impossible. That while in Colorado he recalled a conversation that they had had on the subject of moving to Swarthmore, and that he wrote her that while he would do anything in his power for her happiness and the happiness of the children, he could not move to Swarthmore, and that such a thing was impossible. That at one time, prior to June, 1906, his wife told him that if he did not like the house in which they were then living in Camden, he could get out. During in Atlantic City, he regularly supplied her the summer of 1906, when the defendant was with money, and that she had a personal income of between \$50 and \$75 a month, which she was receiving. While she was in Atlantic City, he did not suspect that she had deserted him, but later he concluded that she must have intended to desert him from the time she left to go to Atlantic City. At that time he was sending her \$25 a week, and now sending her \$32.50 a week for the support of the children. That his wife was living in Swarthmore "without his assent or consent."

Testimony was given by two colored servants of the petitioner, his stenographer, and a plumber employed by him to do work at the Swarthmore house. One of the servants said that he heard Mrs. Jones say that she would not live in Camden; that she was going to Swarthmore to live. The other, that whenever the petitioner called at the Swarthmore house, the defendant would seem to know it and on several occasions told him, "Mr. Jones is coming; I am going to Philadelphia"; and that the defendant told him on two or three occasions that she would never live in Camden again. The stenographer testified that Mrs. Jones wanted to move to Swarthmore on account of her daughter going to college, and that in the spring of 1906 the defendant was at the petitioner's office to talk about the purchase of the Graham house. Mr. Jones told her that he was perfectly willing to do anything that would add to her happiness and make her comfortable, but that she knew he could not live in Swarthmore, and that the defendant said that that was the house she wanted, and that she intended going there, and that "her tone conveyed the idea that she was determined to go to Swarthmore to live, and it did not make any difference whether he intended to go or not, or whether he could go. She did not say those words, but that was her tone of voice." The plumber related that on one occasion when the petitioner telephoned to his daughter, he heard the defendant say to the daughter that if her father came she would lock herself in a room so that he could not see her, and that at different times when he was working there, he noticed that the defendant seemed to avoid her husband.

The corroborating testimony is fragmentary and equivocal, and was evidently molded to give color to the petitioner's story. In the

further discussion it need not be commented upon, except as the history of the case explains the true meaning of the defendant's action and of what the witnesses said Mrs. Jones, from time to time, stated to them.

The evidence given by the petitioner before the master was a bald perversion of the truth, that his wife left him, moved to, and was living at, Swarthmore without his assent or consent," and that he endeavored to secure her return to him, is absolute fabrication. It will be observed that the petitioner altogether suppressed the purport of the letter to his wife of January 22, 1906, in which he consented to her moving to Swarthmore, and the fact that he there bought and furnished a house which he was maintaining for his family—and the motive is obvious. The letter and the petitioner's operation in consequence establish incontrovertibly that he was anxious for and consented to a separation. In fact, in his testimony at this hearing, with these circumstances confronting him, he confessed, as he was compelled to, that he consented to his wife's going to Swarthmore, but he endeavored to ameliorate the gravity of the situation in which he found himself—only to involve himself further—by the claim that the consent was to a temporary residence, until the daughter graduated, and that that was the understanding he had had with his wife. This avoidance is disingenuous. Why, if this were the arrangement should he, as he testified before the master. Immediately after he found his wife had gone to Swarthmore, try to see her to get her to come back to Camden? The purchase of a high-priced house and large outlays for improvements speak permanency. The failure of the petitioner to seek a termination of the separation when his daughter graduated, and the fact that in 1910 he bought two additional lots of land adjacent to his wife's home, for her use, add to his confusion, and utterly rout his pretensions.

Although the defendant had gone to the home her husband had provided for her, the petitioner, without relating this important fact to the master, averred, as he did at the present trial, that it was not until then that he knew that she had deserted him. He pretends to have based this belief, principally, upon what he asserts to be the fact that his wife took with her everything, leaving only rubbish and the marriage certificate hanging on the wall. A disdainful abandonment of this token of their union might be significant, if there were not other and controlling circumstances which were not brought to the master's attention. The wife denies the charge, and I am inclined to disbelieve the petitioner as to the incident, and for this reason: In his testimony before the master he said that when he returned from Denver on July 2d, to remain until August 28th, he found his family had gone to Atlantic City (he forgot to say that it was the annual custom), and, having no place to sleep,

he moved to a room in his office building on Market street. Before me, he insisted that during that period he slept in the Seventh street house. The defendant testified that when she came up from Atlantic City, in the summer, she missed the certificate and telephoned her husband about it, and that he replied that he had taken it for safe-keeping. He admits having such a conversation, and I believe that he took it before the family moved to Swarthmore. For why should the defendant, if she had spurningly left it behind with a lot of rubbish, be so solicitous about it as to telephone?

But, aside from this, it is quite clear to me that the petitioner's explanation of this metamorphosis of a temporary separation (if it was that) to a permanent desertion is an absurd prevarication. Domestic discord of a repressed character prevailed for some time before the separation. There were no violent contentions or outbreaks of passion; on the contrary, the manner of the two towards each other was gentle and polite, but cool. Some six months previous she had left his bed, because of an indignity, with which situation he was apparently content. Had he made the least advance, she doubtless would have rejoined him. He was generous in his money affairs and considerate of his wife's comfort and welfare. She, on the other hand, was complacent and hopeful. Their demeanor towards each other was an absolute contradiction of their sentiments. It is the familiar story of the husband tiring of his wife. She had lost her charms for him. Her personality and presence became intolerable. He was willing to provide, but not to embrace. Whether he had found solace elsewhere is not clearly shown, but it does appear that later he lived in Overbrook, Pa., much of his time, in a family in which there was a daughter, to whom he did not deny he paid attention. Before going West in June of 1906, he told his wife that he would never return to the Seventh street house. He virtually abandoned her then. He had previously threatened to procure a divorce. To a letter which she wrote to him while he was desperately ill, offering to nurse him, he made no reply. He claims to have not received it, but I think he did. To his son, who had told him that the defendant still loved him, he replied, with a laugh: "That's too bad; I am sorry. Of course, you know it can't be helped now"—and that it was impossible for them to live together again because his wife was irresponsible and uneducated. To a message which the daughter carried to him, he made a similar response.

That when the Swarthmore proposition was first broached, the petitioner refused to go there with his family, and that he told his wife, as he says, it would be impossible because of his profession, may be true, but that he was willing, if not anxious, that they should go is also true. Vainly did he try to explain away the significance of the



purchase and furnishing of the house. He protested vigorously and emphatically, he says, but nevertheless bought, because his wife, unknown to him, had entered into negotiations with the owner, who threatened suit, and that he completed the bargain to avoid trouble, or as counsel argued, out of self-respect. How impossible of belief this is, when we consider that the petitioner admitted on the hearing that by the letter of January 22d he intended that his wife should select a house at Swarthmore for her home; that by her reply letter she informed him that she had looked at the Graham house; that she had spoken to him about purchasing it, at his office in the presence of his stenographer; and that he bargained with Graham and obtained it for \$12,000, instead of \$15,000.

The petitioner's testimony before the master that he sought his wife with a view to a reconciliation, and that she evaded his efforts, is even more reprehensible. Upon his return from Denver, in July, 1906, he knew that his family was on its annual summer outing. He neither called upon, nor communicated with, his wife, and his reason for this, as given to the master—that he believed that she had gone away in one of her fits of anger, and that it was best to leave her alone, and that she would get over it and would return to her home all right in the fall—in the light of the circumstances as they were developed at this hearing, was manufactured to suit the occasion. After the family moved to Swarthmore, he visited his children there, only upon condition that his wife should be out of the house. Later on, he modified this, so that she might remain in the house, but must be invisible to him. When a visit was projected, he communicated by telephone, or otherwise, to his son or daughter, notifying them of his coming, with a strict injunction that the mother must be absent. This we have, not only from the two children, but also from the family physician, who carried some of the messages to the son and daughter. The defendant silently and uncomplainingly complied. She always vanished. At the time of the commencement exercises, when his daughter graduated, in 1910, the petitioner sent word by this same physician that he would not attend if his wife intended going, and, being assured that she did not, he went. He was besides himself with rage when he saw her in the audience. Furthermore, in his testimony at this hearing, he asserted that he ceased to love his wife when he found she had gone to Swarthmore. Is it likely that he would thereafter seek her? He also admitted that he never asked for her when he called at the house, or ever wrote to her or communicated with her by telephone (they had the facilities). His statement before the master that he did not write because he thought he could make himself better under-

stood by seeing his wife personally stretches one's patience to the breaking point.

The enforced absence of seclusion of the defendant whenever her husband appeared at the Swarthmore house accounts for the testimony of the plumber and the colored servant. If she ever stated that she would never live in Camden again, as both colored servants say she did, but which the defendant denied, her declarations were perfectly consistent with her apprehensions that her husband was permanently estranged.

[2] Process was served upon the defendant while she was summering at Atlantic City. The surprise and shock made her ill. The next day the son went to see his father, and informed him of his mother's condition. He returned with a message to his mother that he had seen his father; that he was sorry that the matter had upset her so, and that he had said she should not worry any more; that she could tear up the papers; and that she didn't have to go to Trenton. In the afternoon of the same day the petitioner met his daughter at the ladies' waitingroom of the Pennsylvania Station in Philadelphia. She wrote to her mother from Evanston, Ill., where she had gone on a trip, that she had seen her father, and that he was very much worried at her condition, and that he had told her to tell the defendant "she needn't worry, that everything would be all right, and that it wasn't necessary for her to go to Trenton." As a result of these communications, the defendant, although she was advised by her niece to consult counsel, refrained from putting in a defense, because, as she says, she trusted Mr. Jones and believed in him, and that thereafter she thought that the case had been dropped, and that she had no information to the contrary until her marriage anniversary on October 27, 1913, when the news was broken to her by her niece.

The petitioner himself interpreted the meaning of these messages as carrying an assurance that the suit would be withdrawn, but he denies the assertions of his son and daughter that he initiated them. To his son, whom he admits asked him whether the defendant would have to go to Trenton, he said he replied:

"It isn't for me to say what she has to do. Your mother has two courses open for her: one is to secure counsel, file an answer and fight the case; and the other is to refuse to do anything, and, if she wishes, throw the papers in the fire. It is immaterial to me what she does."

And to his daughter, who was very much agitated, he claims to have said:

"Don't you worry; you can't help this. It is not your fault. You go on your trip and enjoy yourself."

The petitioner is supported in this statement by his stenographer as to what he claims to have said to his son. But her exquisite recollection of what occurred a year and a half before, and which she described

in the precise language used by her employer, impressed me at the trial that she had been coached. I believe the two children. I am convinced that they told the truth. What possible motive could they have had to bear false information, which they must have realized would deceive their mother and aid in the wrongful purpose of their father? Why should the daughter, when informed by her father that he had procured the decree nisi, as she did, express astonishment and repeat to him his broken pledge? It may seem odd that the wife should have rested entirely upon her husband's assurances, but she says that he always had been truthful to her; that she had confidence in him; that she trusted him, and then still loved him; and that she thought he would not proceed with the suit—and her manner on the witness stand suggested that she was of a confiding, pliable, and dependent nature. In her despair there still flickered hope of a renewed love. I think she was fully warranted in relying upon his representation, and the weekly remittances, which he thereafter regularly made, reassured her that he had abandoned the proceedings. He thereafter acted as he had before, as the executor and trustee of her mother's estate, until May of 1918, and was acting as her agent in the collection of rents and other moneys, even to the time of this hearing. In November, after the petition for divorce was filed, he procured from the defendant (the children acted for her) a mortgage which she held on Camden property, for the purpose of foreclosing it. These were all acts which naturally gave her the impression that he was not proceeding adversely, and that he had not abused her confidence. The defendant has not had her day in court. Of this she was deprived by the deceitful and fraudulent machinations of the petitioner.

From the foregoing review of the evidence, it is manifest that the defendant has abundantly shown merits, as well as surprise, and that she is entitled to be protected by opening the decree, in order to admit her defence. *Miller v. Rushforth*, 4 N. J. Eq. (3 H. W. Green) 174; *Brinkerhoff v. Franklin*, 21 N. J. Eq. (6 C. E. Green) 334; *Day v. Allaire*, 31 N. J. Eq. (4 Stewart) 303; *Richardson v. Richardson*, 67 N. J. Eq. (1 Robbins) 437, 58 Atl. 820; *White v. Smith*, 72 N. J. Eq. (2 Buchanan) 697, 65 Atl. 1017.

[3] There is another consideration which requires that this decree be vacated. The state is an interested party to the suit. Its interests have been imposed upon by the malevolent conduct of the petitioner, and public policy demands that its rights be vindicated.

It is urged that the defendant is in laches, because as it is argued she was careless in relying upon her husband's promise, and that slight investigation would have put her in position to have timely defended herself.

This argument is incongruous. It necessarily assumes that the defendant should have entirely disregarded her husband's promise to withdraw the suit, or should have regarded him as unworthy, of belief, an assumption which is entirely inadmissible and comes with ill grace from the petitioner.

The enrollment will be vacated and the decrees opened. On this hearing the main cause was retried. Both parties presented all of the evidence available on final hearing; and, having reached the conclusion that the defendant was not guilty of desertion, the petition of divorce will be dismissed, with costs, unless the petitioner, on the settling of the decree, shall represent that he has further testimony, to be offered on final hearing.

(33 N. J. Eq. 334)

PIERSON v. GARRISON et al. (No. 25.)

(Court of Errors and Appeals of New Jersey.  
May 4, 1914.)

1. FRAUDULENT CONVEYANCES (§ 104\*)—SERVICES OF DEBTOR—GIFT TO WIFE.

A judgment creditor of a husband may not compel him to work, or to charge for services he renders to others, nor can the creditor complain if the debtor works for his wife without pay, provided the business in which the debtor is employed really belongs to the wife.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 337-344; Dec. Dig. § 104.\*]

2. FRAUDULENT CONVEYANCES (§ 104\*)—JUDGMENT DEBTOR—GIFT TO WIFE.

Where money standing to the credit of a judgment debtor's wife in a bank deposit is in fact his, he cannot make a gift of a portion thereof to her in order that she might pay for real property taken in her own name, and thus prevent the husband's creditor from subjecting the same to the payment of the judgment.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 337-344; Dec. Dig. § 104.\*]

3. FRAUDULENT CONVEYANCES (§ 104\*)—BANK DEPOSIT—OWNERSHIP OF FUNDS.

Where a bank deposit was in the name of a judgment debtor's wife, the fact that he had a power of attorney from her to draw checks against the deposit and deposited to the account funds received by him from a business which he operated as her agent was insufficient to establish that the money deposited in the account belonged to him, so as to entitle his creditors to subject to their claims real property purchased by her from funds drawn from the account.

[Ed. Note.—For other cases, see *Fraudulent Conveyances*, Cent. Dig. §§ 337-344; Dec. Dig. § 104.\*]

Appeal from Court of Chancery.

Suit by Alfred M. Pierson as administrator, etc., against Emma F. Garrison and others. From a decree in favor of defendants, complainant appeals. Affirmed on the opinion of Vice Chancellor Leaming, which was as follows:

I do not believe I will ever be more nearly able to correctly dispose of the facts here involved than I am now. If there is any difference between my present ability to solve the issue and that which would exist at some future

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

time, should I take the case under advisement, it is that I know more about the case now than I ever will again. If there is any just criticism that can be extended to my effort to determine the exact truth touching this partnership, whether that effort is made now or at some future time, it is that the ascertainment of the exact truth is probably impossible, so that whatever course I take will in all probability not be over satisfactory to myself and less satisfactory to counsel.

My own view of the situation is that the human intellect, limited as it is in its capacity, is really unable to fully penetrate into such matters as we have presented here to-day with that degree of accuracy and certainty that carries with it entire and abiding confidence. That may not be true of all intellects, but it is undoubtedly true of mine. There are circumstances in this case that necessarily cause one to hesitate and wonder whether certain inferences should not be drawn or treated as facts, or whether the contrary is the truth, and I doubt whether any judicial investigation could be made in this case that would serve as a basis for what one may call a confident, positive, exact, and certain determination of the facts beyond possibility of error.

There are two separate and independent aspects of the case that are to be determined to-day, and each is essentially independent of the other. The first aspect is that which relates to the status of the two partners. The other aspect is that which relates to the claim of the complainant, who is a judgment creditor of Mr. Garrison, and seeks to impress the lien of the judgment upon certain real estate which stands in the name of the widow of Mr. Garrison, he being admittedly one of the partners.

This partnership appears to have been formed in entirely good faith between Mr. Garrison and Mr. Nichols, and I shall assume what counsel on both sides have assumed that there is no evidence that justifies the conclusion that Mr. Garrison was not acting in that partnership in his own behalf rather than as an agent of his wife, for whom he had been acting in many other matters; so it will be assumed, at the outset, that Mr. Garrison and Mr. Nichols were partners, each representing his individual self.

After the death of Mr. Garrison, Mr. Nichols assumed the burden and the right, which the law gave him, of closing out the partnership business as surviving partner. In doing that he essayed to go beyond the field of his privilege as surviving partner in closing out the partnership business, and attempted to carry on the business for the benefit of himself and the widow of his deceased partner, and also to carry on a like independent business of his own at the same time, and there the trouble began. A bill was filed by complainant herein as a creditor of Mr. Garrison, the deceased partner, through which bill complainant sought to restrain the conduct of this business by Mr. Nichols, and also sought to impress the lien of the judgment, as I have already stated, upon certain real estate standing in the name of the deceased partner's widow. Accordingly, when a hearing was had on an order to show cause, Mr. J. Spicer Leaming was appointed a receiver to supersede Mr. Nichols, as the surviving partner, in closing out the partnership business. The showing made at that time was such that it was manifest that it would have been improper to have permitted the surviving partner to have continued in the exercise of his rights as surviving partner.

Mr. Leaming has filed a partial account and exceptions have been filed to portions of his report, and those exceptions ought to be disposed of at this time so that we can have at least that much of the situation made a finality.

Mr. Leaming as receiver has manifestly done a large amount of difficult and intricate work.

He has undertaken to get order out of chaos in the partnership affairs, and seems to have succeeded fairly well. He inaugurated a series of hearings, in which he had brought before him as receiver all parties in interest, except the judgment creditor with whom he was not concerned, and had the claim of Mr. Nichols and the claims of the representative and widow of the deceased partner presented, and appears to have done everything in his power to ascertain the real situation and to have that situation reduced to writing and to figures.

It is impossible for me to reach the conclusion, and I think no one assumes to suggest, that what the receiver has done has not been done to the best of his ability and with absolute integrity on his part. He clearly had no interest in the matter other than to ascertain the truth, and the very laborious investigation which he instituted and the tedious and troublesome hearings which he had were manifestly with a view to ascertain the truth as nearly as it could be ascertained, without any interest to conserve for himself one way or the other.

As receiver he was representative of one party as much as he was of another. The primary difficulty before him was to ascertain the exact condition of the accounts between the partners. That difficulty was a troublesome one, for the accounts involved not only the transactions of the partners while both were alive, but the transactions of the surviving partner after the death of Mr. Garrison, and no adequate records existed. He seems to have had no great difficulty in arriving at the situation as it existed at the time of the death of Mr. Garrison, although, as stated in his report, it was done by a system of approximation, but with what he thinks to have been reasonable accuracy. Then taking up the accounts of Mr. Nichols as surviving partner the evidence discloses that he allowed all claims presented by Mr. Nichols; this was done because he was not able to disprove them. Item by item was gone over and considered and discussed and allowed and, as I recall it now, none were rejected. If they were, they were rejected after mature consideration and by Mr. Nichols' acquiescence. In making up the charges against Mr. Nichols much the same course was pursued, that is, every item with which he was charged was considered and discussed with Mr. Nichols and, as he states, finally acceded to by Mr. Nichols. The methods which he adopted to ascertain what adjustment should be made by reason of the fact that Mr. Nichols conducted two businesses, one for the surviving partnership and one for himself, with the same teams and paraphernalia, seem to have been reasonable, so far as I can discern, and on the whole I am satisfied that at the time the final solution was reached it was believed by everybody in interest that a just and accurate solution had been arrived at, or that as just and accurate a solution had been arrived at as could be.

The settlement included, however, some claim made by the widow. Those claims are the subject of a considerable testimony and the subject of a great deal of uncertainty in my own mind. Mrs. Garrison's claim of \$500 indebtedness due from the partnership to her, which was, as she claims, secured to her by the record title of a tract of woodland and two lots at Cape May courthouse being taken in her name, is one claim that I should find great difficulty in disposing of under the evidence which is now before me, if nothing had transpired before the receiver; but it does appear that at that time, with Mr. Nichols, the surviving partner present, that matter was taken up and considered fully and solved, and the solution was consented to by Mr. Nichols as being correct, and a stipulation was then prepared and signed, in which Mr. Nichols joined, stat-

ing that this money, \$500 in amount, was due from the firm to Mrs. Garrison, as well as another claim, in amount \$325, for money loaned by Mrs. Garrison to the firm. Now Mr. Nichols comes here to-day in support of exceptions to those two items, and claims, in effect, that he was more or less coerced into consenting to the allowance of these two items and, as a matter of fact, he did not himself know of their correctness. Against that claim on his part to-day there is the testimony of Mr. Brannan to the effect that Mr. Nichols had, on repeated occasions prior to that time, admitted the correctness of these claims, and the further testimony of Mr. Brannan to the effect that before the receiver the matter was fully discussed and acquiesced in by Mr. Nichols, and the testimony of Mr. Leaming to the effect that he understood at the time that account was submitted and the stipulation was prepared that Mr. Nichols fully understood what he was signing and what he had agreed to and what had been determined upon before him as a fact, and I am not able, as I stated before, to doubt that what Mr. Leaming did at that time he believed to be right. I think he believed Mr. Nichols understood the situation fully before he permitted him to accede to the stipulation which was then made and signed.

Now I can't think that in view of these circumstances a court would be justified in declaring, under the testimony now before me, that any part of the accounts which were in fact considered were inaccurately considered or improperly adjusted. I am unable to believe that I would be justified in reaching the conclusion that any matters contained in those accounts, which were arrived at in the manner I have stated, are inaccurate or wrong as to any items that were in fact under consideration by the parties. Of course, if the parties overlooked some items, if items exist which were not considered at all, the statement which was then made or the accounts that were then stated should not be regarded as a bar, but as to matters actually considered by the receiver and discussed by the parties and reduced to figures and to stipulations, I am convinced that no court would be justified in finding, on the testimony as it now stands that the exception should be sustained.

So I feel obliged to find, so far as the exceptions are concerned, that the account as it is stated by the receiver is, in all things, correct so far as the items which were considered in that account are concerned. There are, however, some items that Mr. Nichols testifies were overlooked by him. He says there are some items of moneys, which were expended by him in payment of partnership bills after the receiver was appointed, which he did not present to the receiver, and which he should have presented. Ten dollars he claims was paid A. Brosus on March 14, 1912; \$3.50 to Charles Miller March 23d; \$15.13 to James L. Hand April 6, 1912; \$15.05 to James G. Stiles April 10, 1912, making a total of \$33.88. I think with reference to those items the receiver should be directed, in making his final account, to pass upon their accuracy and allow them or disallow them as he finds they are right or wrong. If he has already considered them and passed upon them, I think they should not be allowed. If he has not considered them at all, then he should give them consideration.

As to the other class of items forming the basis of the exception, I feel convinced that the testimony does not justify any modification of the receiver's report.

So my decree will be, so far as the relations of the receiver and the partner who is surviving and the representative of the deceased partner are concerned, and also so far as Mrs. Garrison as a creditor is concerned, that the receiver's report be confirmed.

These matters, however, are not conclusive upon the client represented by Mr. Miller, who has filed a bill by which it is sought to set aside the title or to impress the lien of the judgment of the complainant upon certain real estate standing in the name of Mrs. Garrison. It is with reference to this real estate and with reference to the pecuniary relations of Mr. Garrison and his wife that I had more particularly reference to when I said I did not believe the human mind was able to solve accurately the exact truth of the entire situation. It is undoubtedly true that before her marriage Mrs. Garrison had some means. I think the evidence must be said to justify the conclusion that she was then the possessor of perhaps \$2,000 or \$3,000. It may be that she had some debts that would reduce those assets to some extent, but I think I am justified in assuming that she had some considerable property, and that she had a business which appears to have been reasonably prosperous. I think it may also be assumed with a fair degree of accuracy that Mr. Garrison was a man without means and a man who has never been successful in making any progress in the world's affairs.

[1] The judgment which the complainant holds against Mr. Garrison was entered May 18, 1896, some eight years before Mr. Garrison's marriage to his wife, so that at the time he married her he was not only apparently without means, but was, as well, a judgment debtor and has continued to be a judgment debtor, at least so far as that judgment is concerned, ever since. His identity has been, during the period from his marriage down to at least the beginning of his partnership, just about that which we usually find in a husband who is a judgment debtor who has a wife with some money. The husband becomes a nonentity, and the bank account is in the name of the wife and the husband's privileges extend to transacting business in the wife's name. Usually we find such a husband taking orders from his wife. Sometimes they have a little more independence and become really active in the management of affairs, but we always find the affairs carried on in the name of the wife; and the suspicion is usually aroused that the business which is being conducted is his business and not the business of the wife, and this suspicion is sometimes well founded. But when the task is imposed upon a court to ascertain the truth, to ascertain whether the activities of the husband are in his own behalf or whether they are in behalf of the wife, it is usually a task that almost defies solution with entire accuracy. There is no reason in the law why a husband shall not transact business in the name of his wife and become just as active in that business as he cares to be, providing the business really belongs to his wife. A judgment creditor of a husband has no right and no means to compel a husband to work, nor has he any right or power to compel a husband to charge for the services he renders to others. Unfortunately a judgment creditor has no right to complain if his judgment debtor sees fit to work for his mere living or if he sees fit to work for nothing.

A judgment creditor has no right to complain, as I understand the law, if the judgment debtor sees fit to work for his wife and charge nothing for his labors. In other words, he can contribute his labors to his wife; if in fact he does so and the business really belongs to the wife, the judgment creditor has no remedy. That has been gone over in a very elaborate and well-considered opinion in the Court of Appeals written, as I recall it, by Justice Reed.

The inquiry and sole inquiry is whether as a matter of fact the business, the capital in the business, the proceeds of the business, and the profits of the business belonged to the wife, or did they belong wholly or in part to the husband, and was the wife's name used as a sub-

terfuge? Now there is nothing here that justifies a conclusion that prior to the date of this partnership there was any business conducted in the name of Mrs. Garrison, or otherwise, that belonged to Mr. Garrison. It is true there is a peculiar circumstance in connection with the bank accounts of Mrs. Garrison as early as 1902 or 1903. An account then standing in her name as Emma F. Garrison, a time account, was transferred to a new account in the name of E. F. Garrison, and another account which stood in her name as Emma F. Garrison was transferred to a time account on the same day in the name of E. F. Garrison. I am not sure that I have stated that quite correctly, but at any rate \$301.48 which stood in the name of the wife in the bank was transferred to her own account under the name of E. F. Garrison, the same being a time account, and another time account was opened on the same day under the same name. It is impossible to do more than guess at what the truth might have been touching that transaction. There is nothing that occurred along about that time, so far as I know or may be able to anticipate, that affords any particular light upon what the probable purpose of that transfer was, but be that as it may Mr. Garrison was privileged to and did use that name and that account from that time on, but whether he used it for his wife in his wife's behalf in the conduct of her business, or whether he used it for himself and used her name simply as a blind, is an inquiry that would be of the greatest service to us if we could solve it with accuracy. There does not appear to have been any prosperous activity upon his part that called for the concealment of his assets at any time until the beginning of this partnership, and I doubt whether we are justified in concluding that prior to that date, at any rate, there ever was a time when we can say with confidence that Mr. Garrison was using his wife's name in conducting his own business, and that money or proceeds of his labors which went to his wife's credit were really his.

If that be true, and I am convinced that nothing will justify a conclusion to the contrary, then the ownership of the Wildwood Crest property which the bill seeks to attack cannot be successfully attacked upon the theory of the bill, because the Wildwood Crest property was purchased and the title taken in the name of Mrs. Garrison June 19, 1907. Prior to that time I am sure nothing could justify the conclusion that any assets that had been or that were in the name of Mrs. Garrison had been really the property of her husband. It must be said, also, that the testimony touching that transaction, if it is to be believed, discloses almost conclusively that that property was purchased by Mrs. Garrison in her own behalf. At the time of the purchase she received \$1,000 from her brother-in-law which he owed her, and he has testified that he paid her the money, as I recall it now, in two checks; the money that she received from her brother-in-law was used to buy that property, and, according to the testimony, a little later, when the improvements were made upon the property, a loan was made by the same brother-in-law to her of \$1,600, which was used by her in two amounts of \$1,000 and \$600 in paying for wages and lumber in connection with the improvements. That \$1,600 loan was subsequently repaid to him out of a mortgage which she placed upon the property. If the testimony to the effect that I have stated is true, then, of course, there is no doubt in the world but that the Wildwood Crest property belonged to Mrs. Garrison and must be held to be hers.

[2] The North Wildwood property consists of two lots which were purchased of Mr. Ottens and title taken in the name of Mrs. Garrison February 10, 1911. That property appears to have been paid for by two checks drawn, one September 5, 1910, for \$22, and the other

February 11, 1911, for \$152.10 or a total of \$174.10. These checks were drawn on the account in the Marine Trust Company which stood in the name of E. F. Garrison. If the money in that account was the money of Mr. Garrison, this was a gift from him to his wife, and such a gift cannot be sustained as against a judgment creditor of the donor. If it was her money, then there is no way that the complainant can complain of the transaction, or in any way enforce his claim against these lots.

I find a good deal more difficulty in solving the status of that E. F. Garrison account in the Marine Trust Company than I do the other matters relating to this case. I scarcely know what to think about it, or how to arrive at any conclusion in which I can feel entire confidence. Mr. Garrison seems to have been in business for himself as a partner of Mr. Nichols, and they appear to have had settlements from time to time, in which half of the profits of the business would be apportioned to Mr. Nichols and the other half to Mr. Garrison and checks drawn on a firm partnership account in favor of each of the partners. Just how often that occurred I do not know. The checks were here, and it was impossible to go through all the partnership checks to ascertain how many checks have been drawn by the firm of Garrison & Nichols to the order of Mr. Garrison in the name of E. F. Garrison, but all of that kind that have been drawn, so far as it appears and as I will assume, have been drawn to Mr. Garrison in the name of E. F. Garrison, and in the Marine Company was this account in the name of E. F. Garrison against which he had, by power of attorney, the right from the wife to draw checks. The suggestion is undoubtedly a forceful one that if this was his business, and if the profits of that business were paid to him by checks to the order of E. F. Garrison, and those checks were deposited in the Marine Trust Company in the name of E. F. Garrison, the name E. F. Garrison represented Firman Garrison, and that the money in the account of E. F. Garrison was the money of Firman Garrison, and it would follow that the money which went to pay for these lots was the money of Firman Garrison; but that conclusion is not a necessity. Those facts can carry that suggestion with a great deal of force, but I am not prepared to say that the conclusion of gift would be justified or even necessarily follow from the mere circumstances that the money in that account belonged to Firman Garrison.

[3] We are not informed that it does not seem to be practicable for us to be informed whether such checks as were drawn to Mr. Garrison in the name of E. F. Garrison as part of the profits of that concern were in fact deposited in the account in the Marine Trust Company. They may have been and they may not have been. There seems to be no way of at present ascertaining, but assuming that such checks as he did receive that represented profits were deposited in that account, it does not necessarily follow that the account was his, and that such deposits were not taken into account in settlements between him and his wife, and in the absence of any evidence to fully establish all of those details one way or the other, I doubt whether a mere circumstance that he found it convenient to take his dividend checks—I will call them—in the name of his wife can be treated as a circumstance to justify an affirmative conclusion that the title to the land standing in the name of his wife belonged to him because it was purchased with two checks drawn on that account, or the conclusion that whatever balance was found in that account after the date of his death belonged to him. It is one of those situations where it seems almost impossible to reach a conclusion that does not find some argument against its soundness; but whatever conclu-

sion may be reached, on the whole I feel convinced that it would be making a mistake to declare that real estate to belong to one other than her in whose name the title stands from the circumstances or evidence which appears in this case. The other tract of land which is in controversy has already been referred to, and that is a tract of wood land standing in the name of Mrs. Garrison, and also two lots at Cape May courthouse. The wood land has been sold by the receiver, and has been converted into cash and the lots have not yet been sold. I have already stated that my conclusion is that the findings of the receiver to the effect that there is due to Mrs. Garrison a balance of \$500 on this wood land and \$325 for money loaned is sustained. While that is not binding against the judgment creditor, it is necessarily binding against him unless there is evidence adduced to show something to the contrary. The judgment creditor is not bound by the testimony of Mr. Nichols to the effect that that money is due. He is not bound by the admission of Mr. Nichols to the effect that that money is due, but there is nothing in the evidence submitted on behalf of the judgment creditor that in any way suggests, to my mind, any doubt of the accuracy of the conclusion of the receiver that that money is due, or in any way suggests a doubt upon my own view that that money is properly due to Mrs. Garrison.

My disposition, then, of the entire case, entertaining the views that I do, is that there must be a decree denying to the complainant any lien upon the real estate which is attacked by the bill. If there is a surplus which is due to the representative of the deceased partner, the judgment will, of course, become entitled to be heard or to be represented in the distribution of that fund. It does not seem to me that that question need be taken up or considered at this time. Before any distribution is made by the receiver of that fund if a surplus is found, the rights of the judgment creditor will be vouchsafed and protected, either by an adjudication at that time as to what distribution shall be made, or else by a payment into court in such manner that no disposition can be made of it until the claim of the judgment creditor is passed upon and such rights as he may have be protected. That will be the disposition that I will make of the case, and I think it covers all the features of the case.

Mr. Miller: Might I suggest there is a 17-acre tract of land the title to which stands in the name of John M. Nichols and which he testified is the property of Garrison & Nichols, that should be sold by the receiver as well as the two lots at the courthouse.

Mr. Zeller: There is a tract of 17 acres in Dennis township held now by Mr. Nichols, and that was also gone into, and I think your reference to the fact the receiver's duties were not quite finished would include that.

The Vice Chancellor: I do not understand there is any dispute touching that land. I will sign an order directing its sale by the receiver.

See, also, 91 Atl. 828, 829.

Louis H. Miller, of Millville, for appellant.  
William E. Zeller, of Vineland, for respondents.

**PER CURIAM.** The decree appealed from will be affirmed for the reasons stated in the opinion filed in the court below by Vice Chancellor Leaming.

# PIERSON v. GARRISON et al.

(Court of Chancery of New Jersey. June 24, 1913.)

**EXECUTORS AND ADMINISTRATORS (§ 94\*)—ASSETS OF ESTATE—INTEREST OF DECEASED PARTNER—PAYMENT TO ADMINISTRATOR.**

On determination of the interest of a deceased partner in the assets of a firm on an accounting in equity, the amount found due is payable to the decedent's administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 409; Dec. Dig. § 94.\*]

Action by Alfred M. Pierson, as administrator, etc., against Emma F. Garrison and others. On application for the determination of the terms of final decree. Granted.

See, also, 91 Atl. 824, 829.

Louis H. Miller, of Millville, for complainant. Walter H. Bacon, of Bridgeton, for defendants.

**LEAMING, V. C.** 1. I deem it important that the decree embody a specific statement that the real estate in the name of Emma F. Garrison and John M. Nichols is the property of the copartnership and also embody a specific description of such real estate. I have accordingly embodied that feature in the decree which I have advised.

2. I think it improper to award an execution against John M. Nichols prior to the coming in of the master's report. It may be found by the master that he is entitled to further credits and at distribution he may also have a substantial credit to be applied against his indebtedness. The decree as entered so provides.

3. The decree as entered adjudges that the real estate referred to in the cross-bill of John M. Nichols as standing in the name of Emma F. Garrison is an asset of the firm, but subject to the payment to Emma F. Garrison of \$825, as is set forth in her answer.

4. The decree as advised also dismisses the bill as to Wildwood Crest and North Wildwood real estate.

5. I have made no direction looking to the payment by the receiver to complainant of the ultimate share found to be due to Garrison. That question may remain open, but I presently see no authority to deny the administratrix of Garrison the right to administer the share. See *Sullivan v. Horner*, 41 N. J. Eq. 299, 7 Atl. 411.

6. The respective claims and interests of the several parties are so interwoven and interdependent that I have thought it proper to deny costs to either litigant as against the other.

7. A copy of the decree will be sent to Mr. Miller and Mr. Bacon.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

**PIERSON v. GARRISON et al.**

(Court of Chancery of New Jersey. July 31, 1914.)

**1. EXECUTORS AND ADMINISTRATORS (§ 94\*)—ASSETS OF ESTATE—INTEREST OF DECEASED PARTNER—PAYMENT TO ADMINISTRATOR.**

After determination of the interest of a deceased partner in the firm, it is payable by the surviving partner to the deceased partner's administrator.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. § 409; Dec. Dig. § 94.\*]

**2. EXECUTORS AND ADMINISTRATORS (§ 324\*)—INCUMBERED REAL PROPERTY—SALE TO PAY DEBTS—"DEBT."**

The "debts" of a testator or intestate, referred to in 3 Comp. St. 1910, p. 3847, § 97a, providing for the sale of incumbered real property of a decedent to pay debts, do not include funeral expenses, which in the settlement of a decedent's estate are entitled to preference over a judgment lien.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1337, 1338, 1342; Dec. Dig. § 324.\*]

For other definitions, see *Words and Phrases*, vol. 2, pp. 1864-1886; vol. 8, p. 7623.]

**3. PARTNERSHIP (§ 841\*)—DISSOLUTION—ESTATE OF DECEASED PARTNER—DISTRIBUTION IN EQUITY.**

Where the interest of a deceased partner in the assets of a firm are ascertained in a suit in equity for an accounting, the proper practice is to order payment of the amount found due to the administrator, without determining priorities of alleged lienors; the orphans' court being the appropriate tribunal to settle such questions.

[Ed. Note.—For other cases, see *Partnership*, Cent. Dig. § 809; Dec. Dig. § 341.\*]

Suit by Alfred M. Pierson as administrator, etc., against Emma F. Garrison, etc., and others. On motion to frame decree. Granted.

See, also, 91 Atl. 824, 828.

Louis H. Miller, of Millville, for complainant. Walter H. Bacon, of Bridgeton, for defendants.

**LEAMING, V. C.** [1] I am convinced that the share of Garrison of the partnership assets should be paid to his substituted administrator.

[2] *Sullivan v. Horner*, 41 N. J. Eq. 299, 7 Atl. 411, has long been regarded as conclusive to the effect that funeral expenses are preferred over a judgment lien in the settlement of a decedent's estate. The "debts" of a testator or intestate referred to in the act of 1903 (3 Comp. St. 1910, p. 3847, § 97a) may be appropriately understood as not including funeral expenses.

[3] But I think the orderly course is to pay the share to the administrator without in any way determining the order of priority; the orphans' court is the appropriate tribunal to settle estates of deceased persons, and has full jurisdiction to protect such lien as may exist, and no loss can result in consequence.

I will advise an order to that effect.

**AROLD v. SUPREME CONCLAVE, IMPROVED ORDER OF HEPTASOPHS. (No. 41.)**

(Court of Appeals of Maryland. June 26, 1914.)

**1. INSURANCE (§ 719\*)—MUTUAL BENEFIT INSURANCE—EFFECT OF BY-LAWS.**

Where a member of a beneficial society, in his application for membership, has agreed to be bound by the rules or laws then in force or thereafter adopted, the society may bind him by after-adopted by-laws, even though not retroactive in terms, if reasonable in character.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1855; Dec. Dig. § 719.\*]

**2. INSURANCE (§ 719\*)—MUTUAL BENEFIT INSURANCE—EFFECT OF BY-LAWS.**

A by-law of a benefit insurance society providing that no action could be brought or maintained on any cause or claim arising out of any certificate, unless brought within one year from the time when such right of action accrued, and that such right of action should accrue 60 days after all proofs of death should have been furnished, was reasonable and binding on the beneficiary of a member, who became such prior to its adoption, and who by his application agreed to conform in all respects to the laws and rules of the order then in force or thereafter adopted.

[Ed. Note.—For other cases, see *Insurance*, Cent. Dig. § 1855; Dec. Dig. § 719.\*]

Appeal from Baltimore Court of Common Pleas; John J. Dobler, Judge.

"To be officially reported."

Action by Mary Arold against the Supreme Conclave, Improved Order of Heptasophs. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before **BOYD, C. J.**, and **BURKE, THOMAS, PATTISON, URNER, and STOCKBRIDGE, JJ.**

George Washington Williams and John Holt Richardson, both of Baltimore, for appellant. John C. Tolson, of Baltimore, and Olin Bryan, of Philadelphia (Albert C. Tolson, of Baltimore, on the brief), for appellee.

**STOCKBRIDGE, J.** George J. Arold became a member of the Improved Order of Heptasophs on the 12th of March, 1895, and received a certificate of membership by which, upon his death, his wife, Mary, was entitled to receive as beneficiary the sum of \$1,000. The application for membership contained, among other matters, this provision:

"I agree to make punctual payment of all dues and assessments for which I may become liable, and to conform in all respects to the laws, rules and usages of the order now in force, or which may hereafter be adopted by the same."

Two years later, in 1897, the order adopted the following by-law:

"Sec. 329. No action at law or in equity in any court can be brought or maintained on any cause or claim arising out of any membership or benefit certificate, unless such action is brought within one year from the time when such right of action accrues. Such right of action accrues sixty days after all proofs called for in case of the death of a member shall have been furnished. In all cases where no proofs of death have been furnished by a beneficiary,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



as required within twelve months after such death, all claims that might have been made shall be regarded as abandoned, and no proofs thereafter shall be received or any claim made thereon accepted; and in all cases where blank proofs of death have been refused by the Supreme Secretary to the beneficiary or beneficiaries, such right of action accrues sixty days from and after the day of the death of a member."

No question is presented of the regularity of the adoption of section 329 of the by-laws just quoted.

On November 26, 1908, George Arold met his death as the result of a self-inflicted gunshot wound. Proofs of death were promptly made out and forwarded to the order. Then ensued a correspondence between Mr. Arold and the general counsel of the order, in which the latter took the ground that the beneficiary, Mrs. Arold, by reason of a by-law relating to suicide, was not entitled to the \$1,000 named in the certificate, but only the sum of \$487. This correspondence continued until the latter part of February, 1909, and was concluded by the payment on March 15, 1909, to Mrs. Arold of the \$487. There the matter rested until January 28, 1913, when this suit was brought to recover the difference between \$1,000 and the amount actually paid. The defendant filed various pleas, among them one setting up as a bar the limitation of time within which suit might be brought as provided in section 329. At the trial, on conclusion of the plaintiff's case, the defendant offered a prayer to direct a verdict for the defendant upon the ground that the suit had not been brought within the time provided by the by-laws of the order, and the action of the court in granting this prayer is the sole ground of appeal in this case.

It was alleged that the long inaction of the appellant was induced by the fraud and deceit of the appellee, but there is no evidence whatever tending in the slightest degree to sustain this allegation. The contention of the plaintiff is that the rights of the parties were fixed as of the time when the deceased became a member of the order, that certain vested rights then attached, which could not be in any manner affected by the subsequently adopted by-laws, and that the by-law as adopted contained nothing to show any intent that it should have a retroactive effect, and so could only be applicable to those who joined the order after the date of its passage. The case was argued with great earnestness on both sides and very voluminous citation of authorities, but in view of two recent decisions of this court the law of this state is clearly defined, and no good purpose would be served by a discussion of the various cases cited. Suffice it to say that the decisions elsewhere are very far from being harmonious, nor is it possible in any way to reconcile them.

[1] The first and most important question now presented is: Was section 329 of the by-laws binding upon members of the order who

had become such prior to its adoption? The same question was before this court in the case of *Mathieu v. Mathieu*, 112 Md. 625, 77 Atl. 112, the opinion being written for the court by the late Judge Schmucker, and in that it is said:

"The mere designation of a person as beneficiary by a member of a mutual benefit society does not confer upon the person so designated any vested right in the fund payable on the death of the member."

And a little further on the opinion continued:

"The acknowledged rule of construction of legislative statutes, by which they are held to be prospective in their operation, in the absence of a clearly expressed intention to give them retroactive force, has been generally applied to the by-laws and regulations of corporate bodies. But the courts have frequently held that by-laws of mutual benefit and similar societies, in view of the nature of the associations adopting them and the character of the by-laws themselves, operated upon and controlled the relation of existing members to the society and their rights to its future benefit, although such laws are not expressed in retroactive terms. Such has generally been held to be the rule where the member has agreed to be bound by such laws as might be enacted."

The question was before this court again in the case of *The Heptasophs v. Rehan*, 119 Md. 92, 85 Atl. 1035, and the by-law there considered was one which attempted to limit the right of recovery in case of suicide. In that case this court, through Judge Burke, said, there appears to be a general concurrence of authority in the proposition "that where a member of a fraternal benefit society agrees in his application for membership to be bound by the rules or laws then in force, or which might be thereafter adopted, the society, after he has become a member, may enact reasonable rules and amendments and bind him to their observance." It is therefore the recognized law of this state that where a member of a beneficial society in his application for membership has agreed to be bound by the rules or laws then in force, or which might thereafter be adopted, the society has the right to bind him by such after-adopted by-law even though the by-law is not in its terms made retroactive, limited only by the qualification that such by-law must be reasonable in its character. This rule is supported by reason as well as by authority. The very foundation of organizations of this character is their mutual character, and, if a member or his beneficiary is bound only by such regulations as are in force at the time when he joins the order, the result will inevitably follow that different members will have entirely separate and distinct rights as between themselves and the order according to the time when they became members of it, and the mutuality of the organization would be destroyed.

[2] The only remaining question with which this case is concerned is whether section 329 of the by-laws is or is not a reasonable regulation. By that it is provided that a right of action should accrue 60 days after



all proof of death called for should have been furnished, and that no action at law or in equity should be brought or maintained arising out of a membership or benefit certificate unless brought within one year from the time when that right of action accrued. In *Bacon on Benefit Societies* (3d Ed.) § 443, it is said, the contract of insurance being a voluntary one, the insurer has the right to designate the terms upon which they will be responsible for losses, and a condition that no action against an insurer shall be sustained unless commenced within a certain time is valid; and the same principle is thus stated in 29 Cyc. 216:

"The constitution, by-laws, or certificate generally provide that an action must be brought to recover benefits within a specified period, shorter than that prescribed by the statute of limitations applicable to such an action, and such provisions are valid so as to bar an action not brought within such time."

This is the doctrine announced by the Supreme Court of the United States in the leading case of *Riddlesbarger v. Insurance Co.*, 7 Wall. 386, 19 L. Ed. 257, and followed by the great majority of adjudications of the question since. See, also, *Modern Woodmen of America v. Bauersfeld*, 62 Kan. 340, 62 Pac. 1012.

It is, of course, true that the limitation of time for the commencement of suit might be made so short as to be entirely unreasonable; but that cannot be said of the period fixed by the by-law here involved. In many instances an even shorter period of time has been sustained by the courts as being a reasonable regulation.

We therefore concur with the action of the lower court in granting the prayer directing a verdict for the defendant, and the judgment appealed from will be affirmed.

Judgment affirmed, with costs.

(123 Md. 667)

PITSNOGLE et ux. v. WESTERN MARYLAND RY. CO. (No. 40.)

(Court of Appeals of Maryland. June 26, 1914.)

EMINENT DOMAIN (§ 167\*)—CONDEMNATION PROCEEDINGS—DISMISSAL—STATUTES—REPEAL.

Code Pub. Civ. Laws, art. 26, § 30, provides that in condemnation proceedings the court shall render judgment against the persons or corporations for whose use the condemnation may be made, in favor of the owners named in the requisition, for the damages awarded, and unless, within 90 days after condemnation ratified, the same shall be abandoned by written notification to the owners, execution may issue on the judgment. Acts 1912, c. 117, relating to the same subject, contains no provision for abandonment of the proceedings when once begun, but enacts a new procedure to acquire property through the power of eminent domain, and repeals only inconsistent prior legislation. *Held*, that the act of 1912 was not inconsistent with the former provisions, and did not repeal the same, and hence proceedings to condemn land for a railroad right of way could be properly abandoned

by the condemnor after the rendition of a verdict on exceptions to an award of appraisers, but before judgment rendered on the verdict, and before title to the land condemned had passed out of the owners.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. §§ 451-456; Dec. Dig. § 167.\*]

Appeal from Circuit Court, Washington County; M. L. Keedy, Judge.

"To be officially reported."

Condemnation proceedings by the Western Maryland Railway Company against Jephtha E. Pitsnogle and another. From an order overruling objections to the dismissal of the proceedings after verdict, on exceptions to an award of appraisers but before judgment, defendants appeal. Affirmed.

See, also, 119 Md. 673, 87 Atl. 917, 46 L. R. A. (N. S.) 319.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, and CONSTABLE, JJ.

Harry Brindle and Frank G. Wagaman, both of Hagerstown, for appellants. Benjamin A. Richmond, of Cumberland, and Charles A. Little, of Hagerstown, for appellee.

CONSTABLE, J. The question in this appeal involves the right of a condemning party to abandon condemnation proceedings, instituted under chapter 117 of the Acts of 1912, after the rendition of the verdict of the jury, on exceptions to award of the appraisers but before judgment on the verdict. This case has once been before this court, and is reported in 119 Md. 673, 87 Atl. 917, 46 L. R. A. (N. S.) 319, which was an appeal by the appellants herein from the judgment of condemnation, which judgment was affirmed by this court.

The appellee filed its petition against the appellants, in which it alleged that it "desires to acquire the said parcel of land to be used for the purpose of locating its railroad tracks, switches, yard tracks, and side tracks \* \* \* on part of the same, and for the location of a substitute private road on the remainder thereof in place of the existing private road which the petitioner desires to close and to use for railroad purposes, said private road being known and designated as the 'Startzman road,' all of which above-described parcel of land it will be necessary for the petitioner to have and use for the said purposes for the proper working and operation of its said railroad, and for the proper handling of its railway business, and for said road in perpetuity."

After the affirmance of the judgment of condemnation, and upon the cause being remanded, further proceedings were taken under the provisions of chapter 117 of the Acts of 1912. Appraisers were appointed as provided by said act, and upon their return exceptions were filed thereto by the appellants without waiving a jury trial. The same were

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tried in court before a jury on the 13th day of December, 1913, and a verdict assessing the damages at \$4,000 was returned. On the 16th day of the same month the appellee filed a motion for a new trial. During the pendency of this motion, but before it was heard, on the 9th day of January, 1914, the appellee filed in the case four papers: (1) An order dismissing the motion for a new trial. (2) An order releasing the judgment of condemnation. (3) An order dismissing, abandoning, and nonprossing the original petition filed by the appellee in the case. (4) Notice to the appellants that the appellee had abandoned the proceedings to condemn their land and all intention of proceeding with said condemnation. This notice was duly served upon the appellants.

The appellants filed a motion "ne recipiat" to the above notice, and each of the orders, except the motion to dismiss the motion for a new trial, and further moved the court to enter judgment upon the verdict of the jury. The court overruled all of the motions of the appellants, and thereupon this appeal was prayed.

At the hearing of the above motions, testimony was taken, from which it appears that the right of way called the "Startzman road" led into the Startzman farm over the land of the appellee; that the Startzman farm had been purchased by the appellee subsequent to the time of entering the judgment of condemnation and before the appeal first taken in this case. It was further shown that the plan of the appellee for its yard, side tracks, etc., was partly carried out upon its own land, but upon no part of the land sought to be condemned; that a portion of the right of way had been rendered impassable by the fill of dirt placed thereon. It was also shown that the appellee did not at any time take possession of any part of the land described in the condemnation proceedings nor enter thereon.

The right of abandonment by a condemning party of condemnation proceedings instituted by it has been the subject of much litigation in this country, and, before discussing the decisions and statutes in force in Maryland, it might be well to quote what is so forcibly stated in 7 Enc. Pl. & Pr. 673, to be the general rule:

"A railroad company which, in the exercise of the right of eminent domain, has instituted condemnation proceedings may subsequently abandon its purpose of taking the property and discontinue the proceedings, and, if it so desires, may select a route other than the one first proposed. Where the condemning party considers the compensation assessed too high, or so high as to render it expedient to go around instead of through the tract, it may abandon the proceedings, and leave the landowner undisturbed."

The same authority at page 674 says:

"The general rule, in the absence of statutory provisions to the contrary, is that the condemning party may discontinue the proceedings at any time before the rights of the parties have become vested. There is not even a cavil

as to the correctness of this rule, but, as to the time when the rights of the parties become vested, there is a diversity of opinion. There seems to be no denial of the right of the condemning party to abandon the proceedings, where they have not been confirmed or consummated. It may do so at any time prior to the confirmation of the commissioners' report, after the assessment of damages has been made, and the award has been filed, and either before the submission of the inquiry to a jury or after verdict and prior to judgment."

After pointing out that the New York rule is that the proceedings cannot be abandoned after the commissioners' report has been confirmed, and that rule is substantially the same in Louisiana, Nebraska, New Hampshire, New Jersey, and Pennsylvania. The same authority adds:

"Opposed to the New York rule is the contrary doctrine which obtains in the great majority of the states in this country. In these jurisdictions the test laid down is to inquire whether the title to the land has vested in the condemning party, and a right to the damages in the landowner, and the discontinuance of the proceedings is permitted until the happening of that event, which does not occur prior to the actual payment or securing of the compensation in the manner required by law, or until the condemning party has entered into possession of the land. In these jurisdictions the company may abandon the proceedings at any time before final judgment, or after affirmation of the verdict in favor of the landowner, or after judgment assessing the damages, or even after appeal from the judgment."

Under these general rules, if nothing to the contrary appeared in our decisions or statutes, the appellee would have the right to abandon its proceedings, and the appellant would not be entitled to a judgment on the verdict; there then remaining nothing of the case to support a judgment. But let us briefly examine our statutes and decisions.

This court in *Graff v. Baltimore*, 10 Md. 544, following the case of *Baltimore & Susquehanna R. R. Co. v. Nesbit*, 10 How. 395, 13 L. Ed. 469, which was a case upon the Maryland statutes, adopted the language of the Supreme Court:

"It can hardly be questioned that, without acceptance by the acts and in the mode prescribed, the company were not bound; that if they had been dissatisfied with the estimate placed upon the land, or could have procured a more eligible site for the location of their road, they would have been at liberty, before such acceptance, wholly to renounce the acquisition. The proprietors of the land could have no authority to coerce the company into its adoption. This being the case, there could, up to this point, be no mutuality, and hence no contract, even in the constrained and compulsory character in which it was created and imposed upon the proprietors by the authority of the statute."

These decisions were followed in *State v. Graves*, 19 Md. 351, 81 Am. Dec. 639; *Merrick v. Baltimore*, 43 Md. 219; *Norris v. Baltimore*, 44 Md. 604; *Baltimore v. Musgrave*, 48 Md. 282, 30 Am. Rep. 458; *Black v. Baltimore*, 50 Md. 241, 33 Am. Rep. 320; *Baltimore v. Hook*, 62 Md. 371.

In *Norris v. Baltimore*, *supra*, the court thus expressed the rule:

"It has long been the settled law of Maryland that both private and municipal corporations, when authorized to exercise the power of eminent domain, have the right to renounce the inquisition and select a more eligible route, or to wholly abandon the improvement or enterprise, at any time before actual payment of the amount assessed, either by commissioners or jury, and until that time no title to the property condemned vests in the corporations."

Under these Maryland authorities, as well as under the general rule stated in *Enc. Pl. & Pr.*, it is clear that the test is whether or not the title to the land has vested at the time in the condemning party.

By chapter 371 of the Acts of 1870, codified section 30, art. 28, of Bagby's Code, it is provided:

"In all cases of proceedings to condemn lands, for any purpose whatever, under any law or charter, upon the return and ratification of the inquisition by the proper court, and in all cases in which inquisitions may have been heretofore returned and ratified, the said court shall render a judgment against the person or corporation for whose use the condemnation may be so made in favor of the owners named in the requisition for the amount of the damages awarded by the jury, and unless within ninety days after condemnation ratified the same shall be abandoned by written notification to said owners, execution may immediately thereafter issue on said judgment, as in other cases of judgments rendered in courts of law."

Chapter 117 of the Acts of 1912 does not in terms repeal any of the prior legislation upon condemnation, except wherein the same may be inconsistent with the provisions of that act. The inquiry now is: Has the act of 1912 rendered nugatory the prior decisions and repealed section 30 of article 28? Nowhere in the act of 1912 is there any provision whatever made for abandonment of the proceedings when once begun. This in itself would be at least an indication of the intention of the Legislature that they did not intend, by the enactment of a new procedure to acquire property through the power of eminent domain, to change the long-settled rule upon the question. But is section 30 of article 28 inconsistent with the provisions of the act of 1912?

Under the law prior to the enactment of the act of 1870, there was no provision for a judgment upon which an execution could be based, but merely a ratification of the inquisition, and the land proprietor was at the mercy, to a certain extent, of the condemnor until the title to the property passed by either the payment of the damages assessed or tender thereof. This act provided a remedy for the landowner in that he was entitled to a judgment "in personam" and execution for the same, unless the proceedings were abandoned within 90 days after

the rendition of such judgment by written notice. The act of 1912, like the prior condemnation acts, contained no provision for the enforcement of a judgment, and like those acts is dependent upon section 30, art. 28 (which is codified, not under the head of eminent domain, but under that of courts), for the full completion of the proceedings. Our opinion is that the provisions of section 30, art. 28, are not inconsistent with the provisions of the act of 1912, and that therefore said section is not repealed by said act but is still in force.

We cannot agree that the appellants, when admitting, for the sake of argument, that section 30, art. 28, has not been repealed by the act of 1912, contend that said section makes it mandatory upon the court, when it directs the entering of a judgment after the assessment of the damages. If the law of this state permits a condemnor to abandon and dismiss the proceedings before a judgment is finally rendered, as we are of the opinion it does, we can see no way in which a judgment can be entered, for there is nothing for a judgment to rest upon; all prior requisites to it being dismissed.

The further contention of the appellants that the appellee is in duty bound to provide a substitute road for the Startzman road is not presented under the facts contained in this record. It must be borne in mind that the proceedings in this case did not ask for the condemnation of the rights of any one in the Startzman road, but covered a tract of land separate and distinct from said road. The improvements, so far as the land sought was concerned, were abandoned, and the land not taken nor entered upon by the appellee. Therefore the appellants' title to the sought land has not been affected by the condemnation proceedings. If, however, any rights the appellants might have had in the Startzman road have been affected by the taking of a portion of that road by the appellee for its uses, they, of course, have an adequate remedy.

The cases cited and relied upon by the appellants in support of their contention (*N. O. R. R. Co. v. Baltimore*, 46 Md. 425; *Eyler v. County Commissioners*, 49 Md. 257, 33 Am. Rep. 249; and *Baltimore City v. Cowen*, 88 Md. 447, 41 Atl. 900) are all distinguished from the present case on the facts, for in them the court was dealing with cases where easements were sought to be acquired, where prior easements already existed, whereas no rights in the Startzman road were sought to be acquired by these proceedings.

Order affirmed, with costs to the appellee.

(134 Md. 11)

**SECURITY CEMENT & LIME CO. v. BOWERS. (No. 44.)**

(Court of Appeals of Maryland. June 26, 1914.)

**1. MASTER AND SERVANT (§§ 286, 289\*)—ACTIONS FOR INJURIES—QUESTIONS FOR JURY.**

In an employe's action for injuries, caused by stepping in a hole in the cover of a screw conveyor, over which was a sack which it was claimed was so covered with lime dust as to appear solid, evidence held to make question for the jury as to the employer's negligence and plaintiff's contributory negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050, 1089, 1090, 1092-1132; Dec. Dig. §§ 286, 289.\*]

**2. MASTER AND SERVANT (§ 90\*)—LIABILITY FOR INJURIES—DUTIES OF MASTER.**

A master must exercise ordinary and reasonable care to avoid unnecessary injuries to his servant in the course of his employment.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 139; Dec. Dig. § 90.\*]

**3. MASTER AND SERVANT (§ 103\*)—LIABILITY FOR INJURIES—DELEGATION OF DUTIES.**

A master's duty to provide and maintain safe machinery and appliances and a reasonably safe place for the work undertaken by the servant cannot be delegated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 175; Dec. Dig. § 103.\*]

**4. MASTER AND SERVANT (§§ 101, 102\*)—LIABILITY FOR INJURIES—DUTIES OF MASTER.**

A master who employs another to enter his service impliedly engages with him that the place in which he is to work and the tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

**5. MASTER AND SERVANT (§ 121\*)—LIABILITY FOR INJURIES—UNSAFE PLACE TO WORK.**

If, as claimed, a screw conveyor, around which employes were required to work, had been covered in places only with sacks for so long as to become so covered with dust as to appear solid, the employer's failure to correct the trouble or to warn the employes of such danger rendered the employer liable for injuries sustained by an employe who stepped through such covering and had his foot caught by the screw.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*]

**6. MASTER AND SERVANT (§ 250½, New, vol. 15 Key-No. Series)—LIABILITY FOR INJURIES—LAW GOVERNING.**

In an employe's action for injuries sustained in West Virginia, due to the employer's failure to properly guard a screw conveyor or to warn employes of the danger, a West Virginia statute requiring machinery, belting, shafting, gearing, etc., if so arranged and placed as to be dangerous, to be securely guarded when possible, and, if not possible, requiring notices of the danger to be conspicuously posted, was properly admitted in evidence, as such statutes will be enforced by the courts of other states, unless contrary to the policy of the state where the suit was brought.

**7. EVIDENCE (§ 150\*)—EXPERIMENTS—SIMILARITY OF CONDITIONS.**

In an employe's action for injuries caused by stepping into a hole in the cover of a screw conveyor, covered only by a sack which it was

claimed was so covered with lime dust as to appear solid, evidence as to an experiment made by a witness, apparently with the object of showing that a sack would sag under the circumstances, was not admissible, where it was not shown that the hole was the same size as the one into which plaintiff stepped, or that the sacks were of the same stiffness, especially as, there being positive evidence as to the actual conditions, it would not seem that such evidence could have had any material effect.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 439; Dec. Dig. § 150.\*]

Appeal from Circuit Court, Washington County; M. L. Keedy, Judge.

"To be officially reported."

Action by Wesley Eugene Bowers against the Security Cement & Lime Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before BOYD, C. J., and BURKE, THOMAS, PATTISON, URNER, STOCK-BRIDGE, and CONSTABLE, JJ.

Wm. J. Witzensbacher and J. A. Mason, both of Hagerstown, for appellant. Frank G. Wagaman, of Hagerstown (Wagaman & Wagaman, of Hagerstown, on the brief), for appellee.

BOYD, C. J. [1] The appellee sued the appellant for injuries sustained by him as the result of the alleged negligence of the appellant. The appellant was engaged in the manufacture of lime and other products from crushed stone in Berkeley county, W. Va. At the plant of the defendant, there were two hydrated tanks and two ground lime tanks standing in a row, each of which was 40 feet high and about 14 feet wide. On top of the tanks there was what is known as a screw conveyor, being a metal trough 12 or 14 inches high, and 10 or 12 inches wide, and in the trough there is a screw made of iron or steel, on which there is a flange, like an auger, made of sheet iron or steel. There is a space of two inches between the conveyor and the tanks. The conveyor runs from an elevator, which brings the lime up, across the tanks, and the lime carried by the conveyor is deposited in them through holes cut in them, over which there are slides. The conveyor runs north and south the full length of the tanks. There was a line shaft and some timber carrying it about five feet above the tanks. Between the two lime tanks there was a sprocket wheel, and the elevator chain drive is on the east side.

A new conveyor was being constructed to run parallel with the old one. The appellee and three others were working there. The two ground lime tanks were known as No. 1 and No. 2. Ellas Malott was standing by Bowers when he was hurt. He said:

"We were on No. 2 tank, cutting the hole, and we couldn't get it cut until we moved the new conveyor, and Mr. Conley said, 'You and Gene (Bowers) go over, and pull that conveyor ahead.' We were on the east side of it; we had to cross it, and then to cross back over the two conveyors; we had to cross, because there is an

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

elevator with a chain and a sprocket wheel on the east side, and we had to cross over it; we had to pass over the old conveyor down to the west side, and then come back and cross over to the east side."

He said both conveyors were there, but the new one was not fastened; that the new one was about four inches from the old conveyor.

The conveyors were in sections, and those of the new one were just east of the old one, over where the holes were to be cut. Malott said, "We moved it north to give them room to cut the holes, maybe three feet, moved one section." They had to go from the middle of one tank to the middle of the other, and the plaintiff's witnesses testified that they could not go down on the side they were, and hence had to cross over to the west side of the conveyors, and then back to the east side. The line shaft was too low to permit them to stand up straight, and, in order to get over the conveyors, Bowers put his hand on the old conveyor, and then put his foot down on it to step over. He stepped on a sack which was over a hole which had been left in the top of the old conveyor. He says he got his foot out, but the sack caught it and dragged it into the hole of the conveyor where the screw was running. His foot went down on the east side of the screw, and the screw forced it over to the west side, thus crushing his leg and foot terribly.

The conveyor was supposed to be covered on top with the same material as the other portions of it, but in some unexplained way a part of the top had slid or been moved, leaving an open space of possibly 12 or 18 inches, although the exact size of the hole is not known. Over that space the sack had been placed. There is a good deal of lime dust about the conveyors, and, according to the evidence for the plaintiff, there was from 1½ to 2½ inches of it on the sack, and Bowers claims he could not see that there was a sack there, or anything unusual. Malott said, "I could not see that the place was not covered, dust over it; it all looked alike, probably 2 to 2½ inches of lime dust over the sack and over the other portions of it." Conley said, "All covered with dust; I judge, 2 inches of dust there; I didn't see the sack." Izer said, "At time Bowers was hurt there was about 1½ or maybe 2 inches of dust on everything up there." That was denied by the defendant's witnesses, but it was a question for the jury to determine. One witness said it would have taken three weeks for dust to accumulate to the depth of 2 to 2½ inches. The superintendent of "the controlling end of the plant" said it would take a couple of months for two or three inches of lime to settle there. He did not think there could have been a sack there on the Sunday before the accident; he was not looking for bags but "was looking for holes in conveyors but saw none; looked for holes in any conveyor, as they are dangerous." He also said, "No excuse not to protect screw conveyors."

There can be no question that there was abundant evidence on the part of the plaintiff tending to show that there was an opening in the top of the conveyor, which was covered with a sack, on which, as well as on the rest of the conveyor, there was considerable lime dust, sufficient to conceal the sack, and to cause any one acquainted with the conveyor to believe that it was properly covered. Bowers testified that he thought it was solid. It was suggested that, if Bowers could not see the sack, the other agents of the defendant could not have done so; but the superintendent's testimony shows that they undertook to keep it dusted—had a man with a blow pipe—machinery was dusted Sunday, and he had been there himself Sunday, and said, "I would have seen bag if there on Sunday; not looking for bags, but had always looked around on top." It can scarcely be doubted that there was a sack or bag there at the time of the accident; four witnesses, besides the plaintiff, so swore. It was pulled out with the foot of the plaintiff, when he was released. One witness said, "I had seen a sack across the conveyor at that point a week, or probably longer before;" and another said, "I can state where he got hurt, but where the sack was I do not know; but where he got hurt, I know there were sacks there, in the immediate vicinity of that place; I saw sacks in those places about two or three weeks before Bowers was hurt." Malott said he "could not notice that the top was off the conveyor while working around there, as there was dust all over there; all the same thing;" and he also said Bowers "set his hand on the conveyor, and set his foot to go across, and his foot went on down into the screw; it was necessary that he put his hand down; he couldn't step across, and he couldn't stand up and step upon it, and he bent and just put his hands on it, and he put his foot up." Conley said, "Campbell and I crossed over the conveyor on tank No. 2; stepped on it; it was impossible for us to step 2 feet and raise 14 inches; at that point both of the conveyors were together."

[2-4] Keeping those facts in mind, there can be no doubt that the lower court properly refused to take the case from the jury. The general rules of law applicable to master and servant are now too well settled to require the citation of many authorities, but it may not be amiss to recall some of the rules we have announced. In *Bernheimer Bros. v. Bager*, 108 Md. 551, 70 Atl. 91, 129 Am. St. Rep. 458, we said:

"It is a fundamental rule that the master must exercise ordinary and reasonable care to avoid unnecessary injuries to his servant, in the course of his employment. While he is permitted to delegate to others certain duties, there are some which he cannot relieve himself of, or avoid the responsibility for, if there be a failure to discharge them to the injury of the servant. One that is required of him, in this as well as in other jurisdictions, is providing and maintaining safe machinery and appliances and a reasonably safe place for the work undertaken by the servant. Necessarily there are

some exceptions to these as well as to most general rules."

In that case we quoted with approval as we had previously done what was said by the Supreme Court in *B. & O. R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772:

"A master employing a servant impliedly engages with him that the place in which he is to work and tools or machinery with which he is to work, or by which he is to be surrounded, shall be reasonably safe. It is the master who is to provide the place and the tools and machinery, and, when he employs one to enter his service, he impliedly says to him that there is no other danger in the place, the tools, and the machinery than such as is obvious and necessary."

We gave, as illustrations of the exceptions above referred to, when a place is out of repair and dangerous, and the employe undertakes to make it safe, and when he accepts an employment or continues in it, with knowledge of the danger, the employe cannot ordinarily hold his employer liable.

[8] Applying these principles to the facts of this case, the plaintiff's first prayer was properly granted, and the defendant's first and second and its prayer 1A were properly rejected. There is nothing whatever in the evidence to contradict the plaintiff, when he said he did not know that the top of the conveyor was not solid, as it was supposed to be and as the defendant claims it thought it was. No witness was more positive about the danger of conveyors than Mr. Taylor, a superintendent of the company, and it may well be inferred from his testimony that he regarded them so dangerous as to inspect them himself. He says he saw the old conveyor the Sunday before the accident, and denied that there was then a collection of lime on the machinery or that there was a sack there. That was either the day before or two days before the accident. Bowers says the accident was April 8th, which was Monday, while one of the witnesses, according to the record, said it was on April 9th. But there was not only some evidence, but abundant evidence, in contradiction of those statements of Mr. Taylor. He is also reported in the record to have testified that there was "no excuse not to protect screw conveyors," and, as it was known that some of the employes would be working about the old conveyor, he would seem to be undoubtedly right in that statement. We can appreciate the difficulties that employers meet with at such a plant, but, if the evidence on the part of the plaintiff is correct (that sacks had been used on this conveyor for a week or more, as one witness said, or two or three weeks, as another said, and that the sack and other parts of the top of the conveyor were covered with so much dust that it would have taken several weeks to accumulate; Mr. Taylor said "a couple of months"), it was inexcusable on the part of the defendant, and it did neglect its plain duty to correct the trouble, or at least to warn the

employes of the existence of such a latent danger.

Whether such conditions did in fact exist was for the jury, as was also the question whether the plaintiff was guilty of contributory negligence. The court could not say, as a matter of law, that it was negligence on the part of the plaintiff to place his foot where he did, if he believed the conveyor was covered, as it ought to have been, and as it usually was. The evidence certainly furnishes sufficient reasons for crossing where he did, and as he did, to require that to be submitted to the jury. The defendant's third prayer, asking the court to take the case from the jury on the ground of contributory negligence of the plaintiff, was therefore properly rejected. Its fourth, fifth, sixth, and seventh prayers, which were granted, fully instructed the jury as to plaintiff's alleged contributory negligence, and its seventh was properly modified. Its eighth, which was also granted with a slight modification, was as favorable as the defendant could expect or ask. The ninth and tenth were properly rejected, and what we have already said will relieve us from discussing them.

In 2 *Labatt's Master & Servant* (2d Ed.) § 995, p. 2668, the effect of changes in the parts of machines is thus stated:

"A servant may recover damages for an injury caused by the removal or alteration of some essential part of a machine, when the danger of using it is thereby materially increased. Hence, whatever doctrine may be entertained as to the existence of a duty on the part of the employer to keep dangerous machinery covered (see sections 975, 976, ante), the employer is *prima facie* liable for an injury resulting from the entire or partial removal of a cover which had been provided. The conditions thus created are clearly more dangerous, because misleading, than those to which the servant is exposed when there has never been a cover at all. In such cases, therefore, the right to maintain the action is complete, and can only be defeated by showing that he understood and deliberately encountered the specific risks arising from the changed circumstances."

In reference to the master's duty under statutes relative to factories, the same learned author in volume 5, § 1856, p. 5665, says:

"It is not sufficient for the master to furnish the guards; he must also adjust them; and the duty of guarding is continuous, so that the guards must be maintained as well as furnished, and kept in condition to perform the service contemplated by the statute."

[8] It only remains to consider the first and second exceptions, which we will briefly do. The first was to permitting a section of the West Virginia Code to be read. That section is as follows:

"1. In all manufacturing, mechanical and other establishments, in this state, where the machinery, belting, shafting, gearing, drums and elevators, are so arranged and placed as to be dangerous to persons employed therein, while engaged in their ordinary duties, shall be safely and securely guarded when possible, and if not possible, the notices of the danger shall be conspicuously posted in such establishments, and no minor or female of any age shall be permitted to clean any of the mill gearing or machinery in such establishments while the same is in mo-

tion." Code W. Va. 1913, c. 15H, § 59 (sec. 518).

As this plant was in West Virginia, we think it was proper to admit that statute in evidence. It is not contended that the plaintiff could not sue the defendant in this state for these injuries, if service on the defendant could be had, as it was. It might materially affect the usefulness of such a statute, if, when suit is brought in a state other than the one where the injury happened, the courts of the former refused to admit it in evidence. It frequently happens that employes live on one side of a state line and work on the other side, and while they can sue in the state where the accident occurred, they are liable to be required to give security for costs and be subjected to other inconveniences, even if they can furnish the security. It is now very generally acknowledged that statutes of this character, if they were really and bona fide passed for the protection of employes, are not only desirable for them, but are in the end beneficial to employers and the public, and in a country like this, where there are so many different jurisdictions, the courts of one state should be inclined to aid in the enforcement of such meritorious statutes of another state, at least to the extent of applying their provisions to suits for injuries sustained where the statutes are in force. Of course we do not mean to say that, if a statute of one state be contrary to the policy adopted by the state in which suit is brought or is deemed unreasonable by the courts of that state, the latter must be governed by it, but, where such is not the case, it would seem to be only just to apply a statute which presumably was read into the contract of employment or at least was binding on the parties.

One count of this narr. specially relies on the West Virginia statute, and while, independent of that, there was enough to go to the jury under the other count, we are of the opinion that the West Virginia statute was admissible. Without quoting from authorities, we will refer to some where the question is considered. *Boston & Maine R. R. v. Hurd*, 47 C. C. A. 615, 108 Fed. 116, 56 L. R. A. 193; *Christiansen v. William Graver Tank Works*, 223 Ill. 142, 79 N. E. 97, 7 Ann. Cas. 69; 22 Am. & Eng. Ency. of Law, 1378; 26 Cyc. 1291.

[7] There was no error in the second exception. Without discussing the question from other standpoints, the conditions stated by the witness, as we understand them, are not shown to be the same as at the time of the accident. Precisely what the size of the opening was, which the sack covered when Bowers put his foot on the conveyor, is not shown, but there was evidence that the screw forced his leg along in the conveyor for some distance, but what the distance was is not known. There was no evidence that the

hole into which Bowers' foot went was larger than the width of the sack, yet the witness in his experiment said he had "used the width of the bag for an experiment (this width was 26 inches), and placed 2½ inches lime upon it; the hole was longer than the width of the sack." If his object was to show that the sack sagged under those circumstances, it is very probable that it did when the hole was longer than the width of the sack. There might have been altogether different results if he had experimented with a hole which was known to be of the same size as the one into which plaintiff's foot went. One of the witnesses said that Bowers' leg had pushed away a part of the covering on top of the conveyor. One sack might have been stiffer than the other, but even if the sack did sag some before Bowers was hurt, unless he knew or had some reason to suppose there was a sack or something other than the regular cover, he would not likely have observed the sagging. He and the other witnesses who saw it said they did not notice that there was a sack there. For this and other reasons which might be given, the experiment could not be accepted as satisfactory, but, at any rate, it is difficult to see how it could have had any material effect, in the face of the positive evidence as to the actual conditions. The judgment will be affirmed.

Judgment affirmed; the appellant to pay the costs.

(112 Me. 175)

# ROLLINS v. CENTRAL MAINE POWER CO.

(Supreme Judicial Court of Maine. Sept. 1, 1914.)

## 1. COSTS (§ 49\*)—DEMURRER—OVERRULING—PLEADING ANEW.

Under Rev. St. c. 84, § 35, providing that, if a demurrer filed at the first term is overruled, the defendant may plead anew on payment of costs, and that, after a decision on the demurrer has been certified by the clerk, judgment shall be entered thereon unless costs are paid and new pleadings are filed on or before the second day of the next term, a defendant whose demurrer is overruled must either pay or tender costs on or before the second day of the next term, and, in case of failure, his amended pleadings will be stricken and judgment rendered on demurrer.

[Ed. Note.—For other cases, see *Costs*, Cent. Dig. §§ 211-215, 217; Dec. Dig. § 49.\*]

## 2. PLEADING (§ 239\*)—DEMURRER—PLEADING OVER—WAIVER OF PAYMENT OF COSTS.

A plaintiff, by failing to object, before adjournment of court on the second day of the term following the one when defendant's demurrer was overruled, to the filing of amended pleadings by defendant, does not waive his right to demand that, as defendant did not pay the costs, judgment should be rendered on the demurrer, because defendant has until the end of the second day to pay such costs and until such time plaintiff cannot know whether defendant intends to make the payment.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 626-635; Dec. Dig. § 239.\*]

### 3. DAMAGES (§ 132\*)—PERSONAL INJURIES—MEASURE OF DAMAGES.

An award of \$4,900 in favor of plaintiff, a young man 23 years of age, who earned \$2 a day, to compensate him for injuries resulting in the loss of one eye which had to be removed and the impairment of the sight of the other, is not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 372, 385, 396; Dec. Dig. § 132.\*]

On Motion and Exceptions from Supreme Judicial Court, Kennebec County, at Law.

Action by Harold C. Rollins against the Central Maine Power Company. Judgment was rendered upon the overruling of defendant's demurrer, and defendant excepted and moved for new trial. Exceptions and motion denied.

See, also, 111 Me. 72, 88 Atl. 86.

Argued before CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Benedict F. Maher, Harold H. Murchie, and Samuel Titcomb, all of Augusta, for plaintiff. Harvey D. Eaton, of Waterville, for defendant.

**BIRD, J.** This is an action for the recovery of damages for personal injuries. It is here upon exceptions to the ordering of judgment upon demurrer and defendant's motion for new trial upon the ground of excessive damages.

[1] As to the exceptions: Upon the facts set out in the plaintiff's bill, we think the exceptions to the ordering of judgment must be overruled. At common law, when exceptions to the overruling of a demurrer to the declaration were overruled, judgment on the demurrer, or that plaintiff recover, followed and was final. The Legislature, relaxing the severity of the common law, has provided:

"If the demurrer is filed at the first term and overruled, the defendant may plead anew on payment of costs from the time when it was filed, unless it is adjudged frivolous and intended for delay, in which case judgment shall be entered at the next term of court in the county where the action is pending, after a decision on the demurrer has been certified by the clerk of the district to the clerk of such county, and not before, judgment shall be entered on the demurrer, unless the costs are paid, and the amendment or new pleadings filed on the second day of the term." R. S. c. 84, § 85; *State v. Peck*, 60 Me. 498.

A new right is thus given, not to the plaintiff, whose rights at common law are abridged, but to the defendant whose rights are enlarged upon his compliance with the conditions named. The defendant filed his new pleadings on the first day of the "next term," but made neither payment nor tender of the costs upon either the first or second day.

A jury being impaneled for the trial of the cause, plaintiff moved on the fourth day of the term for judgment on the demurrer. To the granting of this motion the defendant objected because "there had been no taxation of costs, nor request for payment thereof, nor any mention whatever previously made in re-

gard to costs." The court ruled as matter of law that the filing of the plea without payment of costs did not make a good plea and granted the motion. No objection thus overruled can avail. The objections are based upon failures and omissions of defendant. The plaintiff was under obligations to do none of the things alleged to be undone.

[2] The defendant argues that the plaintiff waived the payment of costs. If this be open to defendant under his bill of exceptions, we are forced to conclude that there was no waiver. Certainly none was expressed, nor do we consider that any can be inferred. Whether the cause was to be tried upon its merits or only upon question of damages, nothing was done during the first two days of the term which was not required in the way of preparation for trial by court or counsel in either event. Until adjournment at the end of the second day of the term plaintiff could not know if defendant had forgone his right. At the close of the second day the rights of the parties were fixed, and we are unable to find in the action of plaintiff thereafter conduct from which a waiver of his rights as determined can be inferred. *Hanscom v. Ins. Co.*, 90 Me. 333, 38 Atl. 324, and *Haskell v. Brewer*, 11 Me. 258, relied upon by defendant, seem to be inapplicable to the present case. There are aspects of hardship in the case, but to grant relief would transcend the function of the court.

[3] Upon entry of judgment upon the demurrer, the damages were assessed by the jury in the sum of \$4,935, which defendant claims to be excessive. Defendant offered no evidence. The plaintiff was at the time of his injury 23 years of age and earning in the employ of defendant \$2 per day. The sight of one eye was destroyed and later the eye was removed. The evidence indicates that his earning capacity has been reduced, the other eye affected, and that annoyance and disfigurement must be experienced throughout life. Considering these elements of damage in view of his expectation of life, his pain, and expenses, the court is unable to say that the amount of the verdict shows bias, prejudice, or improper conduct on the part of the jury.

The exceptions and motion must therefore be overruled.

So ordered.

(112 Me. 559)

### PIERCE v. COLE.

(Supreme Judicial Court of Maine. Sept. 7, 1914.)

### FRAUD (§ 50\*)—DECEIT—BURDEN OF PROOF.

In an action for deceit in the sale of a farm, the burden is on plaintiff to prove the misrepresentations alleged to have induced him to purchase, and on his failure to do so he cannot recover.

[Ed. Note.—For other cases, see *Fraud*, Cent. Dig. §§ 75-77; Dec. Dig. § 50.\*]



On Motion from Supreme Judicial Court, Kennebec County, at Law.

Action by George A. Pierce against Charles J. Cole. On motion for a new trial. Granted. Argued before SAVAGE, C. J., and SPEAR, CORNISH, KING, BIRD, and PHILBROOK, JJ.

Williamson, Burleigh & McLean, of Augusta, for plaintiff. George W. Heselton, of Gardiner, for defendant.

**PER CURIAM.** This is an action of deceit arising from the sale of a farm by the defendant to the plaintiff, in which the plaintiff alleges that the defendant misrepresented the amount of hay which the farm cut in 1907 and previous years, as an inducement to the plaintiff to buy the farm. This case has been tried twice and each time contained a very long record involving, as such cases usually do, much conflicting testimony. The plaintiff obtained a verdict in his favor at each trial. The first verdict was set aside upon exceptions, and the merits of the case, of course, were not considered. The case is now before us on motion only. It would be useless to attempt a detailed review of the evidence contained in this long record of 532 pages. The plaintiff's action sounds in deceit. It was therefore incumbent upon him to prove all the elements necessary to make out and sustain this form of action. The plaintiff's chief contention was that the defendant made such misrepresentations as to the quantity of hay in the barn cut the year he purchased, and as to the quantity cut in previous years, as to sustain in law an action of deceit. It was, of course, the first duty of the plaintiff to prove the misrepresentations claimed. We think he has failed to do this. His own testimony is so contradictory and conflicting upon this vital point that the denial of the defendant of the representations, as claimed by the plaintiff, must prevail in determining this issue. It appeared at this trial of the case that the plaintiff, at a trial in the superior court in 1909 involving other issues, but raising directly and emphatically the representations made by the defendant when the plaintiff purchased the farm of him, denied, upon oath, both upon cross and direct examination that the defendant made any such representations, either to himself, or to his son in his presence and hearing, as he now claims. This trial occurred nearly four years before the present one, when his recollection of what took place must have been fresh and clear. His testimony was certainly without bias or prejudice. We think it should have been regarded by the jury as sufficient to overcome the later testimony which he produced when he was influenced by self-interest to sustain his action of deceit. In this connection it should be noted that at the trial in the superior court, the plaintiff said repeatedly that he relied upon a writing which

had been given him by Mr. Strout, the agent of whom he bought the farm of the plaintiff. But the statement did not contain such a representation as to the quantity of hay in the barn as would sustain an action of deceit. Accordingly, at the present trial the plaintiff furnished the technical oral proof that would sustain his action.

We cannot avoid the conclusion, however, in view of the plaintiff's voluntary and unbiased testimony in 1909, that this evidence of the son was introduced to meet the contingency, that the writing, as the plaintiff called it, was not sufficient to sustain his action. The plaintiff's evidence was so fully contradicted by himself, and the other testimony in the case, that it cannot be regarded as sufficient to sustain his verdict. See *Musgrave v. Farren*, 92 Me. 198, 42 Atl. 355.

Motion sustained.

New trial granted.

(112 Me. 181)

WILSON, Atty. Gen., ex rel. HALL v. McCARRON.

(Supreme Judicial Court of Maine. Sept. 10, 1914.)

1. MUNICIPAL CORPORATIONS (§ 176\*)—CITY MARSHAL—TERM OF OFFICE.

The provision of Lewiston city charter that the city council should annually, on or after the third Monday of March, elect and appoint all subordinate officers for the ensuing year, the same to be chosen and vacancies filled for the current year, was repealed as to the city marshal by Sp. Laws 1878-80, c. 293, which provides that the city marshal shall be appointed by the mayor with consent of the aldermen, and shall hold office for two years, and repealing all inconsistent acts.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 427-440; Dec. Dig. § 176.\*]

2. MUNICIPAL CORPORATIONS (§ 183\*)—CITY MARSHAL—"TERM."

Under Sp. Laws 1878-80, c. 293, § 1, providing that the city marshal of the city of Lewiston shall hold office for two years, a city marshal holds office for the full term of two years from his appointment, whether appointed at the beginning of one of the successive periods of two years counting from the date the act became effective, or to succeed one who did not serve out the full term, especially as the word "term" means a limited or definite extent of time, or the time for which anything lasts, and, when used with reference to the tenure of office, ordinarily refers to a fixed and definite time, and is used in the act to designate a fixed, definite time that the person appointed shall hold the office.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 472-481; Dec. Dig. § 183.\*]

For other definitions, see *Words and Phrases*, vol. 8, pp. 6916, 6917.]

Report from Supreme Judicial Court, Androscoggin County, at Law.

Petition in the nature of quo warranto by Scott Wilson, Attorney General, on relation of George R. Hall, against C. H. McCarron. On report. Petition dismissed.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Newell & Skelton, of Lewiston, for relator. John A. Morrill, of Auburn, and Louis J. Brann, of Lewiston, for defendant.

HALEY, J. This is a petition, in the nature of quo warranto, to determine the title to the office of city marshal of the city of Lewiston, and is before this court upon report.

Prior to 1880 the city marshal, and all members of the police force of the city of Lewiston, were chosen for one year, being elected by the city council on the third Monday of March, or as soon thereafter as convenient, and served from the 1st day of April.

In 1880 the Legislature enacted chapter 293 of the Private and Special Laws (1878-80), which was approved by the Governor on March 16, 1880, and took effect upon its approval by the city council of the city of Lewiston prior to March 25th of that year.

Section 1 of said act reads:

"The city marshal, deputy marshal, and policemen of the city of Lewiston, shall hereafter be appointed by the mayor, by and with the advice and consent of the aldermen. The city marshal shall hold his office for the term of two years, and the remainder of the police force shall hold their office for the term of three years: Providing, however, that the first year after this act shall take effect, one-third in number, as near as may be, of said police force, shall be appointed for the term of one year; one-third in number, as near as may be, shall be appointed for the term of two years, and one-third in number, as near as may be, shall be appointed for the term of three years, and there shall be appointed each year thereafter, one-third in number, as near as may be, of said police force; subject, however, after a hearing to removal at any time by the mayor, by and with the advice and consent of the aldermen, for insufficiency, or other cause."

The police force was organized under this act by appointments made March 25, 1880, when Hillman Smith was appointed and confirmed as city marshal for two years, and March 20, 1882, he was reappointed and confirmed for two years. January 16, 1883, the resignation of Hillman Smith as city marshal was accepted. On January 16, 1883, George W. Metcalf was appointed and confirmed to fill the unexpired term of Hillman Smith. March 12, 1885, John French was appointed and confirmed as city marshal for the term of two years from April 1, 1884. March 22, 1885, Daniel Guptil was appointed and confirmed as city marshal for two years. The last two appointments resulted in a petition for a writ of mandamus by John French, which case is reported in 79 Me. 426, and is relied upon by the petitioner in this case as giving the correct construction of the act in question. After said Guptil had served out his term, other marshals were appointed for the term of two years, were all confirmed and served their terms down to March 28,

1910, when Arsene Callier was appointed city marshal by the mayor, but his appointment was rejected by the aldermen. April 1, 1911, Arsene Callier was appointed and confirmed city marshal for two years, and on March 18, 1913, C. H. McCarron, the respondent, was appointed and confirmed city marshal for the term of two years from the 1st day of April of that year. March 31, 1914, George R. Hall, the relator, was appointed and confirmed for a term of two years from April 1, 1914.

[1] It is the claim of the relator that the terms of office of city marshal are successive terms of two years each, reckoning from the first acceptance of the act and terminating the last day of March of the even years, regardless of vacancies occurring during any term, and that, such being the case, Callier's appointment of April 1, 1911, legally entitled him only to serve out the unexpired term then existing; that his occupancy after March 31, 1912, was de facto only; that the office was in law vacant; and that when McCarron was appointed on March 18, 1913, there remained to be filled only the unexpired term of two years from April 1, 1912. When the act of 1880 was passed and accepted by the city council, the charter provided that the city council should annually, on or after the third Monday of March, elect and appoint all subordinate officers for the ensuing year, the same to be chosen and vacancies filled for the current year, but that provision does not apply to the city marshal of the city, because, by section 2 of chapter 293 of the Special Laws of 1880, it is provided that "all acts and parts of acts inconsistent with this act are hereby repealed," and, as the act provides that the city marshal shall hold his office for the term of two years, it is inconsistent with the provisions of the charter stating that subordinate officers shall be elected and vacancies filled for the current year, and we must look to the act of the Legislature of 1880 in determining the term of office of city marshal, whether appointed to fill a vacancy caused by death, resignation, removal, or the refusal of the aldermen to advise and consent to the appointment of a person to that office by the mayor.

[2] The petitioner claims that the case of French v. Cowan, 79 Me. 426, 10 Atl. 335, is conclusive of the question in issue in this case. That was a petition for a writ of mandamus, and in that proceeding it was sought to try out the title to the office of city marshal of the city of Lewiston by rival claimants, under the act of 1880. The respondent claims that, as that case decided that mandamus was not the proper proceeding to try out the title of a public office, the only rule of law declared in that case was upon that branch of the case, and that the case was correctly decided, because, as the respondent says, it is clear that mandamus was not the proper remedy. It is true that in the opinion the court discussed the question of when the

term of office of an incumbent of the office of city marshal begins, and rule that the office of city marshal begins the 1st day of April of the even year; but it was not necessary to decide that question to dispose of the case, and there was a dissenting opinion filed upon that branch of the case. And the respondent contends that, so far as *French v. Cowan* holds, the term of office of the city marshal begins April 1st of the even year, and continues until the last day of March of the succeeding year; it not being necessary for the decision of the case that the question should be re-examined.

The Opinion of the Justices, 61 Me. 602, holds that judges and registers of probate, who are elected to those offices, are entitled to hold them for a term of four years from the 1st day of January next succeeding their election, although their elected predecessors may have vacated their offices before the expiration of the full term for which they were chosen. The opinion shows the distinction between the case of a person holding an office for a definite term and where the office holder is a member of a board whose terms expire at different times, and holds that the court of county commissioners consists of a board of officers, the election of whom was so fixed by law as to occur upon different years. There was to be an annual election of one of its members. The mere expiration of time did not and could not leave the court vacant. Vacancies might occur in the board by death or resignation. To meet this contingency, and still preserve the annual election of one of its members, the statute provided for a choice to fill the place that was vacant, explaining the Opinion of the Justices in 50 Me. 608.

The case of *Hale v. Brown*, 59 N. H. 555, 47 Am. Rep. 224, cited in *French v. Cowan*, was an action of assumpsit in which a contractor sought to enforce a lien upon timber and lumber that the complainant had cut and hauled by himself and servants in his employ, and it was sought to enforce the lien both for his services and of the men in his employ, and does not bear upon the question in issue in this case.

In *People v. McClave*, 99 N. Y. 83, 1 N. E. 235, cited in *French v. Cowan*, the question in issue was the term of office of a person appointed as police commissioner of the city of New York. Section 25 of the act (Laws 1873, c. 335) in question—

"vested in the mayor the power to nominate and, with the consent of the board of aldermen, to appoint heads of departments and all commissioners, including the commissioners of police (with certain exceptions not material here), but provided that the officers of all such heads of departments, and persons other than those first appointed, shall commence on the first day of May, but the heads of departments, consisting of a board of commissioners first appointed after the passage of this act shall, except as herein otherwise expressly provided, be two, four and six years, respectively, and the board of commissioners of police first appointed as aforesaid, shall hold their offices, one, two, three and four years, respectively.

The person first appointed shall take office on the expiration of the term of office of the present incumbent, and further provided any nomination or election to fill any vacancy which shall hereafter occur by reason of the expiration of the term of one officer, or from any other cause, and which shall not be created by anything in this act providing for the termination of the term of office of any person, or persons, now in office, shall be made to the board of aldermen within ten days from the day of the date of any such vacancy, and any person who shall be appointed to fill any such vacancy shall hold his office for the unexpired term of his predecessor."

The court say:

"This clause places it beyond doubt that an appointee to fill a vacancy caused by the death, resignation, or removal of an incumbent during his term, holds only for the remainder of such term or period, which, of course, may be much less than six years."

In that case the act expressly provided that a person appointed to fill a vacancy should only hold for the unexpired term, while the act of the Legislature of 1880, now under consideration, does not contain any such language, but does provide that the city marshal shall hold his office for the term of two years, which is clearly distinguishable from the *New York* case, as is the case of *State v. Mayor of La Porte*, 28 Ind. 248, in which case the act of incorporation provided "that, after the first general election, said officers shall respectively hold their offices for two years each," and that annually there shall be chosen, by the legal voters of their respective wards, "one councilman \* \* \* to be determined by lot at the first regular meeting after the election, shall hold his office for two years, and the other, to be determined in like manner, shall hold his office for four years; and biannually thereafter, one councilman shall be elected by the voters of each ward"; and the court held the evident intent of the section cited was that only one councilman for each ward should be elected every two years for a period of four years, not the case of an officer appointed to the office for a definite term, but the case of one member of a board going out of office, and, as it was the evident intent of the Legislature that it shall be a continuing board, it is clearly distinguishable from this case, as clearly explained in the Opinion of the Justices, 61 Me. 602, holding that judges and registers of probate are appointed to hold their offices for the term of four years, in the following language:

"It will be perceived that no other limitations than four years is imposed, except in the case of executive appointments. This term seems to be a fixed and positive term attached to an election. The only mode of permanently filling the office, however it becomes vacant, is by election, in which case the Constitution says they shall hold their office for four years. These provisions are clear and unambiguous."

There is no provision of the law of 1889 to fill the office of city marshal of Lewiston, except by the mayor and aldermen of the city, and the law states, in clear and unambiguous language, that the marshal shall hold his office for the term of two years. There is no

different rule of construction of that act of the Legislature than of the Constitution; they both speak in clear and unambiguous language.

The petition urges upon our attention the case of *Baker, Governor, v. Kirk*, 33 Ind. 523, but an examination of the case shows that it is not a similar case to the case at bar, and that the principles of law governing the case are the same that this court applied to the board of county commissioners. In that case the question was when the term of office of one member of the board of prison directors began, and the court uses this language:

"It is very manifest that the term of office of a prison director, as fixed by the above law, after the expiration of the term of office of the person first elected, is for a period of four years. It is equally plain that the object of the Legislature in providing that one of the directors first elected under this law should serve for two years, and that two of them should serve for four years, was to prevent the directors from all going out of office at the same time."

The same question in this case was passed upon in *Smith v. Cosgrove*, 71 Vt. 196, 44 Atl. 73, and the case is so similar that we quote:

"Section 215 of the charter, as amended by the act of 1896, provides for a regular police force for the city, consisting of a chief of police, who shall be appointed by the mayor and shall hold his office for three years, unless sooner removed, and such number of other police officers as the mayor shall deem necessary for the welfare of the city, who shall hold office for such term, not exceeding three years nor less than one year, as shall be designated by the mayor in his appointment. By this section it is clear that, whenever a chief of police is first appointed, under the charter, he holds his office for three years from the date of his appointment, unless sooner removed; and we look in vain for any authority in the charter, as made to read by the act of 1896, for appointing a chief of police for a shorter period. Section 277 of the act provides, in part, that the city officials holding office therein under and by virtue of the general law of the state, or the acts or parts of acts thereby amended or repealed, shall hold office till the expiration of their current term. \* \* \* When it becomes necessary to appoint a chief of police under the new charter by reason of death, removal, resignation, or to fill the place of one whose term has expired, the appointee holds his office for three years from the date of his appointment, unless sooner removed. The language of this section is plain and unmistakable, and there is nothing in the charter relating to the filling of a vacancy in the office of chief, or appointment to that office, that in any way limits or qualifies its provisions. The charter, as amended by the act of 1896, does not fix the time when the term of office of the chief of police shall commence. It only provides for his appointment, and that he shall hold the office for three years, unless sooner removed. In the absence of any provision of the charter fixing the time when his term shall commence, it must be held that his term begins when he is appointed and qualified, and continues for three years, unless he be sooner removed. When a statute creates an office and provides that it shall be filled by election or appointment for a term of years, and is silent in regard to when the term shall commence, and makes no special provision for filling a vacancy in the office or respecting the term for which one appointed to fill a vacancy shall hold the office, and there are no general provisions of the statute that are applicable, there are

no grounds for inferring an exception in case of a person elected or appointed to the office when it has become vacant by reason of the death, resignation, or removal of his predecessor."

The court cites *People v. Green*, 2 Wend. (N. Y.) 266, *Crowell v. Lambert*, 9 Minn. 283 (Gil. 267), *People v. Burbank*, 12 Cal. 378, *People v. Townsend*, 102 N. Y. 430, 7 N. E. 360, and *Sansbury v. Middleton*, 11 Md. 296, as holding to the same effect.

In *Winter v. Sayre*, 118 Ala. upon page 61, 24 South. 98, *McClellan, J.*, says:

"For what the Legislature has done, as clearly shown by the act, is this: They have provided that each incumbent by executive and senatorial appointment shall hold his office for six years, not that each term shall endure for six years (the word 'term' is not used in the act, except in reference to the then incumbent who was in for a fixed term of six years), not that the incumbency of the office shall be divided into terms of six years each, but that each judge so appointed shall be entitled to hold the office for that period. The Legislature could not make him hold it for that period; it could not keep him from dying or resigning; but it could secure to him the right to hold for that length of time if he chose, and lived, to exercise it. And that is what they have done and all they intended to do in this statute. \* \* \* They have not marked the office off into fixed terms \* \* \* of election with equal periods between. They have secured to the incumbent the right to serve for a given period. If he serves that period, it is all well and good. If he dies, or resigns, or is removed, the period ceases; and the appointee who comes after him takes for a like period, not for so much of the time his predecessor was entitled to hold as he did not in fact hold, but for the full period of six years initiated upon his confirmation by the Senate."

In *Hoke v. Richie*, 100 Ky. 66, 37 S. W. 266, 38 S. W. 132, it was held that where by statute an inspector of illuminating oil "shall remain in office for four years," and the incumbent dies during that period, the appointment of his successor is only for the unexpired part of the term, and not for a full term of four years, although the order of appointment so recited. The opinion in the above case cites no cases to support the position taken by the court, and it says, "It is conceded that the apparent weight of authority is against the conclusion we have reached," and quotes from *Troop on Public Officers*, § 319:

"The authorities are not entirely harmonious respecting the duration of the term of an officer elected by the people or appointed by the Governor, or some other officer or board of officers, to fill a vacancy, where the Constitution has failed to specify the duration of his term, or where a provision upon that subject is of doubtful construction; but the weight of authorities is decidedly in favor of the proposition that a person so chosen holds for a full term, and not merely for the unexpired term of his predecessor's term."

It is to be noticed that in the above case the court said:

"We have concluded, though with some hesitation, that the apparent purport of the peculiar language of the statute must yield to the general legislative purpose prevalent in this state."

The following cases are to the same effect as the Opinion of the Justices, 61 Me. 602:

Attorney General v. Brunst, 3 Wis. 787; People v. Coutant, 11 Wend. (N. Y.) 182; Keys v. Mason, 3 Sneed (Tenn.) 6.

In *Mechem on Public Officers*, § 386, it is stated:

"The statutes creating public officers usually prescribe the limits of the terms provided for, fixing the dates at which they will begin and end. The date of the commencement of the term is ordinarily fixed for some appreciable period after election or appointment, in order to give the newly chosen officer time to arrange his affairs and to qualify in the manner prescribed. Where, however, no time is fixed, the term will begin on the date of the election in the case of an elective officer, and at the date of appointment where the officer is appointed."

The words of the act of 1880, in fixing the term of the office of marshal, are: "The city marshal shall hold his office for the term of two years."

In *State v. Tallman*, 24 Wash. 426, page 430, 64 Pac. 759, 760, the court, in discussing the meaning of the word "term," as applied to an office, says:

"'Term,' as applied to time, signifies a fixed period, a determined or prescribed duration. A term of office is a fixed period prescribed for holding office. *People v. Brundage*, 78 N. Y. 403. The word 'term,' when used with reference to the tenure of office, ordinarily refers to a fixed and definite time. *Mechem, Public Officers*, § 386. In fact, the expression 'term of office' so clearly defines itself, the words used are so well understood, and their meaning so generally accepted, that it is useless to attempt to further define it."

Webster's Dictionary defines "term" "as a limited or definite extent of time; the time for which anything lasts, as a term of five years, the term of life, a presidential term."

If the marshal should die, resign, or be removed one week before his term expired, if the petitioner's contention is right, then his successor, if appointed within the week, would only hold the office for the balance of the week, although the statute under which he was appointed expressly states, "The city marshal shall hold his office for the term of two years." He could not have held it before his appointment, and during the legal term of his predecessor. If we give to the language of the act the obvious import of the words, the ordinary popular significance of which is that the marshal holds his office for the term of two years from his appointment, if he so long live, unless he resigns, is removed, or the Legislature changes the law.

The word "term" used in the act of 1880, describing the term of the city marshal, was used to designate a fixed, definite period of time that a person appointed to the office should hold the office.

In *French v. Cowan*, in discussing the question of successive terms, the court considered both the office of marshal and of police officers, as if their terms were the same, as appears from the following from page 433 of 79 Me., page 338 of 10 Atl.:

"In the case before us, the statute, it is true, does not designate any definite point of time from which the terms of the several officers therein mentioned shall commence. Yet the evident purpose of the statute requires, for the police force at least, that a definite time be fixed from which the several terms shall begin."

And at page 433 of 79 Me., at page 337 of 10 Atl., the opinion reads:

"If we were to give any other construction to this statute in relation to commencement and duration of the terms of office of the marshal and the policemen the terms of service of the appointees might soon become such as to entirely destroy the force of the provision that one-third, as near as may be, shall be appointed each year."

While the above statement as to the police officers may be the accurate interpretation of the law as to those officers, it is not applicable to the office of city marshal, which, by the statute, is for a fixed and definite term of years. There is nothing in the act of 1880 providing that one appointed city marshal to succeed one who had not served a full two years shall only serve out the unexpired term of his predecessor.

The opinion does not notice the distinction between the terms of "office of the city marshal," which is for a fixed and definite term, with authority in the appointing power to fill a vacancy in the office by appointment, and that in the office of policemen, who are members of a continuing board of public officers, and the plain intent of the act being that one-third of the members of the police officers should be appointed each year, so that always the board should consist of at least two-thirds of experienced officers, a distinction fully explained in the Opinion of the Justices, 61 Me. 602. As the act of 1880 provides that the city marshal shall hold his office for the term of two years, and does not provide that the person appointed to that office to succeed one who did not serve out the full term for which he was appointed, shall serve only the unexpired term of his predecessor, the plain and obvious meaning of the act, as well as the weight of authority, is that, whenever there is a vacancy caused by death, removal, resignation, or the failure of the mayor to appoint, or the board of aldermen to confirm an appointment, to that position, there is a vacancy in the office and not in the term, and that, when Arsene Callier was appointed and confirmed as city marshal on April 1, 1911, he was entitled to hold the office, by virtue of that appointment, for the term of two years from his appointment (that is, to April 1, 1913), and when the respondent was appointed city marshal and confirmed March 18, 1913, for the term of two years from the 1st day of April, 1913, he became entitled to hold the office for the full term of two years (that is, to April 1, 1915), and the respondent is entitled to judgment.

Petition dismissed, with costs.

(112 Me. 192)

**HOVEY v. BELL.**

(Supreme Judicial Court of Maine. Sept. 12, 1914.)

**1. REFERENCE (§ 99\*)—SCOPE—POWERS OF REFEREE.**

Where a rule of reference contains a stipulation that the judgment rendered on the referee's report shall be final and conclusive, the referee has full power to decide all questions of law and fact, and in the absence of fraud, prejudice, or mistake on the referee's part, to which objections must be raised when the report is offered for acceptance, the decision is final.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 148-156; Dec. Dig. § 99.\*]

**2. REFERENCE (§ 100\*)—SUBMISSION.**

Though a rule of reference provided that the judgment rendered on the referee's report should be final and conclusive, it was nevertheless proper for the referee, in advising a judgment for plaintiff, to reserve to defendant a right of exception in order that questions of law might be submitted to the Supreme Judicial Court.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 157-168; Dec. Dig. § 100.\*]

**3. APPEAL AND ERROR (§ 1018\*)—REVIEW—FINDINGS—EXCEPTION.**

Where there is evidence to support the findings of fact of a referee, and his findings of fact support his conclusions of law, neither are subject to exception.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4006, 4007; Dec. Dig. § 1018.\*]

Exceptions from Supreme Judicial Court, Aroostook County, at Law.

Action by Ivory A. Hovey against Burnham J. Bell. A judgment was rendered in favor of plaintiff on a referee's report, and defendant brings exceptions. Overruled.

Argued before SAVAGE, C. J., and HALLEY, HANSON, and PHILBROOK, JJ.

Harry M. Briggs and Willard S. Lewin, both of Houlton, for plaintiff. Shaw, Burleigh & Shaw, of Houlton, for defendant.

PHILBROOK, J. This is an action in assumpsit on the following account annexed:

Burnham J. Bell, to Ivory A. Hovey, Dr.  
1911, June 1.

To 222 barrels of potatoes, sold and delivered you at \$1.00 per bbl.....	\$222 00
To interest since due and demanded..	23 00
	<hr/> \$245 00

The cause was sent to a referee who reported as follows:

"In this case I find as a matter of fact that Ivory A. Hovey, the plaintiff, was a bona fide lessee of Ulmont H. Hovey, of the five acres which he claims to have planted to potatoes upon the Pennington farm, and that the 200 barrels of potatoes harvested by him therefrom were his property, as between him and his son, Ulmont. In other words, I find that the plaintiff's claim was not a fraudulent one set up for the purpose of preventing these potatoes from becoming an asset of Ulmont's bankrupt estate.

"But as a matter of law the defendant claims, even admitting the plaintiff's good faith, that the title is prevented from vesting in him by

the terms of the lease, which 'reserved the title to said crops to secure the payment of the said rent,' etc. Under this reservation the defendant contends that all the crops by whomsoever cultivated became the property of the lessor, George L. Pennington, through whom the defendant, though nominal, derived his title.

"The defendant further contends that the fact that the plaintiff was sublessee, without the written consent of the lessor, as required by the terms of the lease, left the plaintiff without any rights greater than those of the lessee, Ulmont. Upon this contention I find two things: First, that the lessor had no knowledge of the operation of the plaintiff as sublessee; and, second, that the lessor had no title to the premises when he executed the lease to the lessee, Ulmont.

"Without going into further details, I rule as a matter of law, upon the facts found, that the plaintiff is entitled to recover the sum of \$245, and interest from the date of the writ. Upon this ruling I reserve the right of exception to the defendant."

Upon motion of plaintiff's counsel the justice at nisi prius accepted the report and ordered judgment for the plaintiff. Thereupon the defendant presented the following bill of exceptions, which was allowed, and the case is before us upon these exceptions:

"The referee found the facts upon hearing, which are set forth in his finding and ruled, as a matter of law, that upon the facts found, the plaintiff is entitled to recover.

"The report was submitted to the court and the presiding justice ruled that the ruling of the referee was right, and ordered judgment for plaintiff, upon the report, to which ruling and order of the presiding justice the defendant excepts, and prays that the exceptions may be allowed.

"The finding of the referee is made a part of the bill of exceptions."

The record presented to this court consists only of copies: (1) Of the writ; (2) of a lease from George L. Pennington to Ulmont H. Hovey of a certain piece of land in Houlton; (3) of a paper signed by said Pennington acknowledging receipt from Burnham J. Bell, the defendant, of \$222, "the same being the value of 222 barrels of potatoes raised on land leased by me to one Ulmont Hovey, and sold to said Bell by Ivory A. Hovey, the title to which said potatoes are in dispute," the paper also containing an agreement by Pennington to hold Bell harmless from loss by reason of the claim of any other person to the proceeds of the potatoes; (4) copy of rule of reference; (5) copy of findings of the referee; (6) bill of exceptions. In the plaintiff's brief he says that the evidence given before the referee, "though taken by a stenographer, is not before this court," and no such evidence is contained in the record.

[1, 2] The rule of reference contains the stipulation that judgment rendered on the report of the referee shall be final and conclusive, and the law is well settled that in such a case the referee has full power to decide all questions arising, both of law and fact, and in the absence of fraud, prejudice, or mistake, on the part of the referee,

objections to which should be made when the report is offered for acceptance, his decision is final. *Piscataquis Savings Bank v. Herick*, 100 Me. 494, 62 Atl. 214; *Armstrong v. Munster*, 103 Me. 29, 67 Atl. 573. The powers of the referee were unrestricted. The whole case, both as to law and fact, was submitted to his determination. *Hooper v. Taylor*, 39 Me. 224. In the case at bar the referee did not exercise his full powers, for, by reserving right of exception to the defendant, he virtually gave the defendant an opportunity to submit questions of law to this court. This course was legitimate and proper. *Hooper v. Taylor*, *supra*. The difficulty here is to ascertain precisely what questions of law are properly presented by the bill of exceptions.

[3] There are several findings by the referee. He finds as matter of fact that *Ivory A. Hovey* was a bona fide lessee of *Ulmont H. Hovey*. This finding is not exceptionable if there is any evidence to support it. *Palmer's Appeal*, 110 Me. 441, 86 Atl. 919. In the case at bar no report of the evidence is furnished, except as above stated, and we find nothing in such as is furnished that will warrant this exception being sustained. After stating certain legal claims made by defendant, the referee finds that the lessor had no knowledge of the operation of the plaintiff as sublessee, and that the lessor had no title to the premises when he executed the lease to *Ulmont*. These seem to be findings of fact, and for reasons just given are not exceptionable. Finally the referee rules "as a matter of law, upon the facts found, that the plaintiff is entitled to recover," and upon this ruling reserves the right of exception to the defendant. Here again it would appear that in order to sustain his exceptions the defendant must show that the findings of fact by the referee, as preliminary to his ruling of law based upon those facts, are not sustained by any evidence. The burden at this point is upon the defendant. *Rawson v. Hall*, 56 Me. 142. In our opinion the burden has not been sustained, and the entry must be:

Exceptions overruled.

(245 Pa. 489)

# KOPOCHIK v. PENNSYLVANIA COAL CO.

(Supreme Court of Pennsylvania. May 22, 1914.)

## NEGLIGENCE (§ 136\*)—INJURY TO LICENSEE—QUESTION FOR JURY—EVIDENCE.

Where, in an action for injuries from being struck by a car on defendant's private railroad, maintained in an inclosure surrounded by a high fence containing gates through which it was necessary to pass to reach defendant's office, it appeared that plaintiff went to such office seeking work and, under the directions of the foreman, examined certain places in the mine at which he might work, and was returning home over the crossing at the time of his injury, and the testimony was conflicting whether he stopped, looked, and listened before at-

tempting the crossing, and there was evidence that the car was suddenly set in motion without warning, when he was on the crossing, the questions of negligence and contributory negligence were for the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

Appeal from Court of Common Pleas, Luzerne County.

Trespass by Michael Kopochik against the Pennsylvania Coal Company, for personal injuries. From judgment for plaintiff, defendant appeals. Affirmed.

The facts appear in the following opinion of Strauss, J., refusing motion for judgment n. o. v.:

This is an application for a judgment non obstante veredicto, but not for a new trial. The case has been twice tried, and both times it has resulted in a verdict for the plaintiff. After the first trial this court, upon facts substantially the same as appeared at the trial now under consideration, refused to enter judgment non obstante veredicto, but allowed the motion for new trial because the evidence of contributory negligence was so strong that the verdict seemed to be against the plain weight of the evidence. That evidence is again substantially as strong as before. The case in our opinion must always go to the jury so far as this question is concerned. The defendant now presses the motion for judgment non obstante only, and we shall give that somewhat more attention than was given to it at the first trial.

The facts are rather simple as we view them in the light of the verdict. The defendant operates a colliery known as No. 14, where it employs from 1,200 to 1,500 men. A high fence has been built around the works, and entrance to the ground is obtained through gates. Within the grounds a railroad has been established leading from a breaker and washery to weigh scales. Cars filled with coal at the breaker or washery were habitually run by gravity to the scales. Generally these cars were in charge of a brakeman who regulated their running through control furnished by a brake. About 700 employes went daily to and from their work over a road established within the grounds leading from one of the gates across the railroad. Over the railroad a regular crossing from 12 to 14 feet wide had been established in the line of this road for the use of wagons and of employes. This crossing was so close to the washery that a car, standing under the washery to be loaded, would reach, and sometimes encroach upon, the crossing. It seems to have been usual for persons seeking employment to use this road and crossing in going to the place where the foreman having charge of employment of men might be found.

The plaintiff, who for many years worked at this colliery, but who was out of employment on April 3, 1908, went in search of employment over this road and crossing to the foreman, who sent him into the mine to see several places at which he might work. On returning, plaintiff, with eight or ten other men, went from the shaft over this crossing with a view of returning to his home. There is some conflict in the evidence as to whether the plaintiff stopped, looked, and listened, and walked over the crossing, or whether without these precautions ran across the railroad track some distance below the crossing with a view of catching a car that was passing on a public road outside of the fence. That question of fact was duly submitted to the jury. The plaintiff claimed and testified that usually when cars stood under the washery, and projected out towards, or over the crossing, there was a man on the car at the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.



end nearest the crossing, who warned persons about to use the crossing when it was proposed to start the car, but at this particular time there was no man at that place, and no warning given, and that the car was suddenly set in motion when the plaintiff was on the crossing, whereby he was struck, knocked down, dragged about 20 feet, and had one foot so injured that it had to be amputated and the other less injured but sufficiently to cause the amputation of one or more toes to be necessary.

The defense was twofold. First, on the fact that the plaintiff was guilty of contributory negligence in attempting to cross the track without the precautions required by law at a place, not the crossing, in front of a moving car; and, secondly, that the defendant owed the plaintiff no duty whatever because there was no relation of master and servant; claiming the plaintiff to be only a licensee of the premises who was seeking work, but had not yet entered into the employment of the defendant. It is in consequence of this latter theory that the motion for judgment non obstante veredicto is now presented, and the defendant relies upon the principle followed in *Larmore v. Crownpoint Iron Co.*, 101 N. Y. 391, 4 N. E. 752, 54 Am. St. Rep. 718, and *Shiffer v. Sauer Co.*, 238 Pa. 550, 86 Atl. 479. In the former case, the plaintiff, seeking employment, went upon the grounds of the defendant and while walking along a pathway was struck by a piece from a machine that had suddenly broken. In the opinion the court stated: "The plaintiff was on the premises at most by the mere implied sufferance or license of the defendant, and not on its invitation, express or implied; nor was he there, in any proper sense, on the business of the company. \* \* \* He went there on his own business, and in returning he was subserving his own purpose only. The precise question is whether a person who goes upon the land of another without invitation, to secure employment from the owner of the land, is entitled to indemnity from such owner for an injury happening from the operation of a defective machine on the premises, not obviously dangerous, which he passes in the course of his journey, if he can show that the owner might have ascertained the defect by the exercise of reasonable care."

The court answers the question by saying: "We know of no case which goes to this extent. There is no negligence, in a legal sense, which can give a right of action, unless there is a violation of a legal duty to exercise care. The duty may exist as to some persons, and not as to others, depending upon peculiar relations and circumstances. An employer is required to take reasonable precautions and to exercise reasonable care in providing safe machinery and appliances for the use of his servant. The duty arises out of the relation. \* \* \* The owner of land, in general, may use it as he pleases, and leave it in such condition as he pleases. \* \* \* So, also, where the owner of land, in the prosecution of his own purpose or business, or of a purpose or business in which there is a common interest, invites another, either expressly or impliedly, to come upon his premises, he cannot with impunity expose him to unreasonable or concealed dangers; as, for example, from an open trap in a passageway. The duty in this case is founded upon the plainest principles of justice. \* \* \* The duty of keeping premises in a safe condition, even as against a mere licensee, may also arise where affirmative negligence in the management of the property or business of the owner would be likely to subject persons exercising the privilege, theretofore permitted and enjoyed, to great danger. The case of running a locomotive, without warning, over a path across the railroad, which had been generally used by the public without objection, furnishes an example. *Barry v. N. Y. Central Railroad*, 92 N. Y. 289 [44 Am. Rep. 377].

\* \* \* In the case before us there were no

circumstances creating a duty on the part of defendant, to the plaintiff, to keep the machine in repair, and consequently no obligation to remunerate the latter for his injury. The machine was not intrinsically dangerous. The plaintiff was a mere licensee. The negligence, if any, was passive, and not active—of omission, and not of commission." A judgment in favor of the plaintiff in the court below was therefore reversed, though not without dissent.

In *Schiffer v. Sauer Co.*, 238 Pa. 550, 86 Atl. 479, the plaintiff who was a carpenter seeking employment, entered into a building in the course of erection while the defendants, one a contractor doing plumbing work, and the other a gas company, were jointly engaged in testing and inspecting the gas pipes, and was injured by an explosion resulting from the omission to plug or cap two openings in the gas main. Judgment was entered by the court in favor of the defendant, because the plaintiff was a mere licensee to whom the defendant owed no duty, except to abstain from inflicting on him an intentional, wanton, or willful injury, and the court quoted at length from the foregoing opinion.

It would seem as if there were a plain distinction to be found between the facts of those cases and the one now before us, a distinction indicated in the *Larmore* Case when the court refers to the running of a locomotive without warning over a path across the railroad which had been generally used by the public. The path in this colliery was opened by the railroad company to accommodate the needs of its employees, as well as persons with horses and wagons who had business within the limits of the colliery grounds, and persons who in the course of defendant's business might become its employees and were therefore received by its foreman at a place within the grounds which was reached only by passing over the crossing. Surely an employer of labor who operates a railroad such as this one must operate it without negligence toward those who come upon his ground seeking employment at a place appointed by him for the purpose, who, coming as much about his business as about their own, are by him directed over a railroad crossing as the only way of reaching the office or official that must be visited if employment is to be obtained. When such a railroad is operated negligently, it comes within the instance suggested in the *Larmore* Case, *supra*, where the negligence is active and not passive, where it is an act of commission and not of omission, or, still speaking in the language of that case, we have an instance where "the duty of keeping the premises in safe condition even as against a mere licensee may also arise where affirmative negligence in the management of the property or business of the owner would be likely to subject persons exercising the privilege theretofore permitted or enjoyed, to great danger."

Much stress was laid at the argument on the fact that the defendant had inclosed the property with a high fence. But this overlooks the other potent fact that the defendant had left gates in the fence and established roads from those gates across a railroad operated within the inclosure. Whether the special conditions existing at this place required the establishment of signals or brakemen to give notice before moving the cars was, in our opinion, clearly a question of fact for the jury, and as such it was submitted both in the body of the charge and in the answer to a particular request by the defendant for instructions. On the whole case we deny the motion.

Verdict for plaintiff for \$3,300, and judgment thereon.

Argued before BROWN, MESTREZAT, POTTER, STEWART and MOSCHZISER, JJ.



John McGahren, of Wilkes-Barre, Warren, Knapp, O'Malley & Hill, of Scranton, and Eugene A. Brennan, of Wilkes-Barre, for appellant. James L. Lenahan and John S. Lopatto, both of Wilkes-Barre, for appellee.

**PER CURIAM.** Under the facts in this case, which appear in the opinion of the court denying the motion of the defendant for judgment non obstante veredicto, the negligence of the defendant and the contributory negligence of the plaintiff were questions for the jury, and, as we have not been persuaded that any reversible error was committed in submitting those questions to them, the judgment is affirmed.

245 Pa. 432)

**BAUER et al. v. BYRD. (No. 1.)**

(Supreme Court of Pennsylvania. March 2, 1914.)

**1. LANDLORD AND TENANT (§ 124\*)—LEASE—CONSTRUCTION—AGREEMENT TO FURNISH STEAM.**

A provision of a lease that the lessor should furnish without charge "live steam pressure through a 1-inch pipe as constructed from the boiler room at the present time" did not preclude the lessor from removing the existing 1½-inch pipe and replacing it by a 1-inch pipe, in the absence of fraud, accident, or mistake in the execution of the lease.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 437-440; Dec. Dig. § 124.\*]

**2. LANDLORD AND TENANT (§ 124\*)—CONSTRUCTION OF LEASE—EVIDENCE.**

Where, in a lessee's action to enjoin the lessor from substituting a 1-inch pipe for an existing 1½-inch pipe, it appeared that the lease obligated the lessor, in consideration of stipulated rental, to furnish live steam pressure through a 1-inch pipe for the use of the lessees in their laundry business, but was silent as to the amount of pressure to be maintained, evidence to show how much steam was being furnished when the lease was made, and how much defendant continued to furnish thereafter, was admissible to show the intent of the contracting parties.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 437-440; Dec. Dig. § 124.\*]

**3. LANDLORD AND TENANT (§ 124\*)—LEASE—AGREEMENT TO FURNISH STEAM—CONSTRUCTION.**

Though a lease, obligating the lessor in consideration of stipulated rental to furnish live steam for the use of the lessees in their laundry business, through a 1-inch pipe, was silent as to the amount of pressure to be maintained, it entitled the lessees to receive a live steam pressure through a 1-inch pipe, in an amount sufficient to meet the reasonable requirements of their business and increases consequent on the installation of additional machinery, as contemplated by the contracting parties.

[Ed. Note.—For other cases, see *Landlord and Tenant*, Cent. Dig. §§ 437-440; Dec. Dig. § 124.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Injunction by Louis C. Bauer and another, trading as the American Laundry, against

John Byrd. From decree for plaintiffs, defendant appeals. Reversed.

See, also, 91 Atl. 843, 850.

Argued before FELL, C. J., and MESTRE-ZAT, POTTER, ELKIN, and STEWART, JJ.

Ira J. Williams and Joseph P. Gaffney, both of Philadelphia, for appellant. Joseph R. Embury, of Philadelphia, for appellees.

**ELKIN, J.** [1] This is the kind of a case in which the interested parties are in much better position to settle their own differences, if they approached the subject in a proper spirit, than the courts can settle those differences for them by undertaking to determine the true meaning of the contract made by the parties but about which they cannot agree. When capable business men reduce their agreements to writing, and then disagree about the meaning of their own written instrument, it is difficult for courts to accurately define and exactly enforce their covenants according to the true intent of the parties, when the writing leaves the question in doubt. But when the contracting parties will not or cannot agree, and resort to the courts for the enforcement of their legal rights, it becomes the duty of the courts in considering the case to give due weight to the pleadings, the written instrument, and the surrounding circumstances, in determining what those rights are and how they shall be enforced. This is a proceeding in equity, which follows the law, and since the law of a contract is the agreement of the parties, it is essential to first ascertain what those rights are, before equity will provide the remedy to enforce them. The bill filed in this case prayed for an injunction to restrain defendant from cutting off the steam or power, and from interfering with or removing the pipes and connections which furnished steam to the laundry of appellees. The lease in question provides as follows:

"The said lessor shall furnish to the said lessees, without charge, live steam pressure through a one-inch pipe as constructed from the boiler room at the present time."

It is averred, that at the time of the execution of the 1911 lease, the pipe which connected the boiler room to the premises occupied by the lessees, and through which live steam was furnished, was 1½ inches in diameter. It is therefore urged that, inasmuch as the pipe in dispute here at the time of the execution of the 1911 lease was 1½ inches in diameter, it must remain unchanged, and cannot be replaced by a 1-inch pipe, although the lease in express terms provides that the live steam shall be furnished through a 1-inch pipe. The lease is under seal and was signed in the presence of a witness. It was attached to and made part of the bill of complaint filed in this case. There is no allegation or proof of fraud, accident, or mistake in the preparation and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

The decree will be modified as herein indicated, and the record is remitted for this purpose. Costs to be equally divided between the parties.

(245 Pa. 441)

**BAUER et al. v. BYRD. (No. 3.)**

(Supreme Court of Pennsylvania. March 2, 1914. Supplemental Opinion May 22, 1914.)

**INJUNCTION (§ 219\*)—DISOBEDIENCE OF DECREE—CONTEMPT—APPEAL.**

A decree, adjudging the defendant in an injunction suit guilty of contempt of court for disobeying decrees restraining him from removing a pipe which supplied a laundry with steam and from shutting off plaintiffs' steam supply, will be reversed where it appears that such decrees are contradictory and erroneous with respect to the size of the pipe through which defendant is required to furnish the steam.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 439-441; Dec. Dig. § 219.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Injunction by Louis C. Bauer and another, trading as the American Laundry, for rule to show cause why John Byrd should not be adjudged in contempt of court. From decree for plaintiffs, defendant appeals. Reversed.

See, also, 91 Atl. 847, 848.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

Ira J. Williams and Joseph P. Gaffney, both of Philadelphia, for appellant. Joseph R. Embury, of Philadelphia, for appellees.

**ELKIN, J.** This is an appeal from a decree adjudging appellant to be in contempt for violating certain decrees of the court below relating to the furnishing of steam to appellees for use in their laundry business. The decree awarding the preliminary injunction restrained defendant from cutting off the exhaust steam or lessening the supply of live steam at a pressure of 60 pounds to the leased premises; and also from interfering with the pipes through which the live steam was furnished. After hearing, the final decree required appellant to furnish live steam through a 1½-inch pipe in the same manner and to the same extent as it was furnished at the commencement of the suit. It was further ordered that appellant refrain from altering or interfering with the 1½-inch pipe. This is one of the decrees, for the violation of which appellant was adjudged to be in contempt. We have just decided in another case that appellant was only required to furnish live steam through a 1-inch pipe under the terms of the contract. Hence the decree requiring him to furnish live steam through a 1½-inch pipe, being improvidently entered, was reversed.

The other decree adjudged appellees to be entitled to such pressure of steam, for use in their business, through a 1½-inch pipe, as the capacity of the boilers may reasonably

furnish with the same connections as existed at the commencement of this suit, without any unfair obstruction; also that appellees were entitled to exhaust steam. In the case in which that decree was entered, there was a reversal here, and the record was remitted, with directions to modify the decree so as to require appellant to furnish live steam through a 1-inch pipe, and in accordance with the views expressed in that opinion relating to the rights of the parties.

In this state of the record appellant should not be adjudged in contempt so as to make this a permanent and binding decree of the court against him. It was the duty of appellant to comply with the decrees of the learned court below in good faith, but when those decrees were conflicting and indefinite in some respects, and erroneous in others, the time has not yet arrived when it can be said that the facts constituting the contempt have been clearly and satisfactorily established as the rule requires. To permanently adjudge one to be in contempt for violating a decree, subsequently determined to be of no binding force, would be an extreme and unjustifiable exercise of judicial power.

#### Supplemental Opinion.

Since writing and handing down the opinion in this case, the parties by an agreement in writing have stipulated the terms and conditions upon which the steam is to be used and furnished, and the court now expresses its approval of that agreement, which was duly executed May 22, 1914. This agreement in the future will be accepted as defining the legal rights of the parties and will be the guide to all concerned.

Decree reversed and petition dismissed. Costs to be equally divided between the parties.

(245 Pa. 411)

**COMMONWEALTH ex rel. TODD, Atty. Gen., v. GREEK CATHOLIC CHURCH OF ST. MICHAEL THE ARCHANGEL.**

(Supreme Court of Pennsylvania. May 22, 1914.)

**CORPORATIONS (§ 49\*)—TITLE TO CHARTER—FRATERNAL SOCIETY.**

An organized "brotherhood" obtained a charter of incorporation designated by a Russian name, which translated was the "Greek Catholic Church Brotherhood of St. Michael the Archangel," but in the English translation, which also appeared in the charter, the word "Brotherhood" was inadvertently omitted. After this charter had been used by the members of the brotherhood for nine years, a church congregation styled the "Greek Catholic Church of St. Michael the Archangel" was formed by such members. *Held*, that the brotherhood, and not the congregation, was the owner of, and had the sole right to operate under, the charter.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 137; Dec. Dig. § 49.\*]

Quo warranto by the Commonwealth, on the relation of M. Hampton Todd, Attorney General, against the Greek Catholic Church

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of St. Michael the Archangel. From a judgment for relator, defendant appeals. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Henry M. Stevenson, of Philadelphia, for appellant. Henry J. Scott and Anthony A. Hirst, both of Philadelphia, for appellee.

POTTER, J. This was an action of quo warranto brought against the Greek Catholic Church of St. Michael the Archangel. In the information for the writ, the Attorney General suggested the incorporation of defendant that the purposes for which the corporation was formed were "to establish a congregation and church for religious public worship in accordance with the ritual of the Greek Catholic religion and to provide for members and their families in cases of sickness and death"; that, "on the strength of the corporate powers conferred by the charter, two separate and distinct corporate bodies were organized and brought into existence, one of them the Greek Catholic Church of St. Michael the Archangel, organized for the purpose of establishing and maintaining a church for the conduct of religious public worship, and the other of them the Greek Catholic Church Brotherhood of St. Michael the Archangel, organized for the purpose of conducting a beneficial society for the relief of members and their families in case of sickness or death." It was further suggested that the formation and existence of two separate and distinct corporate bodies under color of the same charter was without warrant of law, and that, by reason of the facts stated, the corporate rights, powers, privileges, and franchises of the corporation had been forfeited and become null and void. The defendants named in the information were served with the writ or accepted service, and appearances were entered for them, and a rule to plead, answer, or demur was also served on them. An answer was filed by the Greek Catholic Church of St. Michael the Archangel (Grecko Katolicki Cerkovno Bractwo Sv. Michaela Archistratija) by Stefan Karpiak, president, and Stefan Petrikowitz, secretary. The answer denied that two separate and distinct corporate bodies had been organized under the charter and averred that only one such body, the respondent, had been so organized. The commonwealth joined issue on the matters alleged in the answer, and the case was called for trial. A large amount of testimony was taken as to the history of the church, the brotherhood, and the corporation, and as to the parties who were entitled to exercise the privileges and franchises of the corporation. Finally the counsel on both sides agreed that the court should dispose of the matter before it by instructing the jury as to which of the two organizations claiming to be the corporation created

by the charter, is entitled to the franchises and privileges conferred by the charter. The trial judge directed a verdict in favor of "the body known as the Greek Catholic Church of St. Michael the Archangel," the president of which at the time the writ was issued was Maxim Szkodosky, and the secretary of which was Wasyl Matolicz. Counsel for respondent made a verbal request for binding instructions in its favor, which was refused, and the jury rendered a verdict in accordance with the instructions of the trial judge. Motions for a new trial and for judgment n. o. v. were dismissed, and judgment was entered upon the verdict. Defendant has appealed.

The record shows the rather anomalous situation of a judgment in favor of defendant, and an appeal by defendant. The record is in a very unsatisfactory condition. The assignments of error are all defective. The writ of quo warranto is not printed, and it is not clear from the copy of the information, and the docket entries what defendants were named in it. Both in the docket entries and in the information, as well as in the verdict, the title of the corporation appears to be incorrectly given, as the "Greek Catholic Church of St. Michael the Archangel." The corporate title as it appears in the charter contains the Russian name in addition to the English translation. The correct wording of this seems to be "Grecko Katolicki Cerkovno Bractwo Sv. Michaela Archistratija," which being translated is the "Greek Catholic Church Brotherhood of St. Michael the Archangel."

Counsel for the commonwealth appears to have waived the right to insist on a forfeiture of the charter, and judgment of ouster, by entering into an agreement that the trial judge should determine merely the question of the respective rights to the charter, of the two contending organizations, the congregation and the brotherhood.

The evidence shows that certain facts in the case were undisputed. The brotherhood or beneficial society, which was the defendant below, in the manner in which the issue was made up, and which is the actual appellant here, was organized and in existence before the charter was obtained. The brotherhood initiated the movement for obtaining a charter, and carried it out, through a committee of its members, and paid the expenses, the attorney's fees, and costs. All members of the brotherhood were members of the church, but not all members of the church were members of the brotherhood. On the part of appellant, it is claimed that the English title as it appears in the charter was intended to be an exact translation of the Russian title, but that the translation of the word "Bractwo," meaning "brotherhood," was omitted by mistake of the attorney who prepared the charter. As above stated, the brotherhood was already organized when the charter was obtained. No organization as

a church by any of these people was averred until 1906, some nine years after the charter in question was obtained, and there is nothing to show that the church organization then effected was intended to be under the charter, which had been previously obtained by the brotherhood. When that charter was obtained, the members of the brotherhood worshiped at the Holy Ghost Church on Passyunk avenue. In the year 1905 or 1906, there was a division in that congregation, and some of them, including most of the Brotherhood of St. Michael the Archangel, left the Holy Ghost Church, worshipping for a time at Eighteenth and Callowhill streets. There appears to have been some litigation with the congregation remaining at the Holy Ghost Church, which was settled by the latter retaining the church property and relinquishing its rights to the sum of \$4,263.99 deposited in the Equitable Trust Company. The testimony shows that this sum of \$4,200, in round figures, was paid to the society, or brotherhood. The money received from the Holy Ghost Church, together with other sums contributed by members of the brotherhood, and the sum of \$6,000 borrowed upon mortgage, was used to purchase the church property at Ninth and Buttonwood streets. The title was taken, not in the complete corporate name, but in the name of the "Greek Catholic Church of St. Michael the Archangel."

The real question at issue would seem to have been whether the charter was valid, or whether there has been a misuse of the rights and privileges granted therein. But no such question was decided. Under the agreement of counsel, the trial judge undertook to say whether the charter was the property of the "brotherhood," set forth in the information as the "Greek Catholic Church Brotherhood of St. Michael the Archangel," or was the property of the church congregation known as the "Greek Catholic Church of St. Michael the Archangel."

We can find nothing in the record to justify the finding that the "congregation," as against the "brotherhood," was entitled to be regarded as the owner of the charter. The members of the brotherhood obtained the charter in 1897, and used it and worked under it, beyond question for nine years, or until 1906. There is no pretense that the church organization here in question was affected prior to 1906. Nor does it appear that the congregation acquired in any proper or legal way the corporate rights which had been bestowed upon the brotherhood, some nine years before the church congregation came into existence.

The confusion seems to be due in part to the failure to insert the word "brotherhood" in the English translation of the corporate name.

Whether or not the inclusion in a charter,

in its statement of purpose, of provisions for establishing a church for religious worship, and for caring for the members and their families in case of sickness and death, was the setting forth of a double purpose, and for that reason illegal, was not decided by the court below. Care of the sick and the bereaved might very well be held to be of the essence of true religion. And the avowal of such a purpose might be considered as in its nature so closely allied to, and so much a part of, the work of a religious body, as to properly fall within a statement of the general purpose of such a body, in an application for a charter. But however that may be, upon this record as it stands, we are clearly of the opinion that it was the "Greek Catholic Church Brotherhood of St. Michael the Archangel" which secured for its membership incorporation in 1897; and it was to that body that the charter here in question was granted; and it is that body which has worked under it ever since, and has rightfully exercised the powers, rights, and franchises, which were granted in the charter. While the members of the brotherhood are members of the church congregation, yet we find nothing in the evidence to indicate that the congregation as such has ever in any lawful way succeeded to the ownership or control of the charter, which was granted to the members of the brotherhood, and under which they became an incorporated body.

The twenty-first, twenty-second, twenty-third, and twenty-fifth assignments of error are sustained. The judgment of the court below is reversed, and judgment is here entered for the respondent the Greek Catholic Church of St. Michael the Archangel (Grecko Katolicki Cerkovno Bractwo Sv. Michaela Archistratija), of which, when the writ was issued, Stefan Karpiak was president, and Stefan Petrikowitz was secretary.

(245 Pa. 422.)

**FEISER v. PHILADELPHIA & R. RY. CO.**

(Supreme Court of Pennsylvania. May 22, 1914.)

**CARRIERS (§ 320\*)—INJURY TO PASSENGER—NEGLIGENCE—QUESTION FOR JURY.**

In a passenger's action for injuries from being thrown beneath the train which he was attempting to board, evidence for plaintiff held sufficient to go to the jury on the question of defendant's negligence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1118, 1126, 1149, 1153, 1160, 1167, 1179, 1190, 1217, 1233, 1244, 1248, 1315-1325; Dec. Dig. § 320.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Charles J. Feiser against the Philadelphia & Reading Railway Company for personal injuries. From judgment for plaintiff, defendant appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Wm. Clarke Mason, of Philadelphia, for appellant. John W. Wescott, of Philadelphia, for appellee.

ELKIN, J. Appellant contended in the court below, and contends here, that there was not sufficient evidence of negligence in the case at bar to submit to the jury, and that it was error not to direct a verdict for defendant as requested at the trial. In the printed argument learned counsel for appellant states his position as follows:

"It was the duty of the plaintiff to prove that some employé of the defendant company in charge of the train saw the plaintiff attempting to board the train or was in a position where he could have seen him. If the time for the departure of the train had come before the plaintiff approached it and the signal had been given to start it and the employés had gotten upon the train, then there was no duty upon them to stop it and hold the train until the plaintiff could get on board."

One answer to this argument is that there is no evidence that the signal to start the train had been given, or to show what position the employés were in when plaintiff stepped on the platform of the car. It is argued that there was no testimony to show that the train was started before schedule time, or that any employé saw the plaintiff approaching for the purpose of boarding the train, or to indicate that he was an intending passenger. This position, which is very strongly pressed in the argument, has made it necessary to carefully examine all the facts and circumstances disclosed by the record for the purpose of determining whether there was sufficient testimony to carry the case to the jury. Without offering any testimony, counsel for defendant at the conclusion of plaintiff's case asked for binding instructions. Under these circumstances, all the facts stated by the witnesses produced by the plaintiff, and the inferences to be drawn therefrom, must be accepted as established. This means that the facts testified to are undisputed and that it is the province of the jury to draw the inferences that may properly arise under such a state of facts. The precise question for decision here is whether, giving to the undisputed facts and the inferences to be drawn therefrom their due weight, there was sufficient evidence to warrant a finding by the jury that the train had been negligently started while the plaintiff, an intending passenger, was attempting to board it. We have concluded that the evidence was sufficient to sustain the negligence charged in the statement of claim, and that the learned trial judge would not have been warranted in taking the case from the jury. To have done so would have required the trial judge to declare as a matter of law that the defendant was not guilty of the negligence charged, and this under the evidence would have been error. It

is not disputed that the plaintiff was an intending passenger, having purchased a ticket, and waited at the station more than two hours after midnight to take the train in question. He fell asleep in the station while waiting for the train and was awakened by an employé of the defendant company when the time had arrived for its departure at 2:15 a. m. He testifies, and this testimony must be accepted as true because undisputed, that he had ample time to get aboard the train after he was notified, and although he went to the toilet room, when he returned, the gate to the train shed was open, the sign above it gave notice that it was the train he desired to take, and he walked directly along the platform to one of the coaches, took hold of the rail in the usual way of boarding a car, stepped upon the first step, when the train "buckled" or "jerked" in such a violent manner as to throw him under the wheel.

The reasonable inference to be drawn from this testimony is that the train was standing still when he attempted to board it, and that it was started with such a sudden jerk before he had time to enter the car and reach a place of safety as to throw him off and thus cause the very severe injuries for which he seeks to secure damages in this action. There is no evidence to show that he attempted to board a moving train, or that he was negligent in this regard. The contention of appellant is that there is no evidence to indicate that any employé in charge of the train saw him, or could have seen him by the exercise of reasonable care. The evidence does not show that either the conductor or brakeman actually saw him; but, taking all the facts and circumstances into consideration, we cannot say as a matter of law that the employés could not have seen him if they had exercised reasonable care, or that they had no duty to perform in connection with the safety of this intending passenger. The notification in the station that his train was ready, the open gate and the sign above it, and the train standing on the tracks along side of the platform, were invitations to plaintiff to take that train, and everything he did indicated that he was an intending passenger. Under these circumstances, our conclusion is that it was for the jury to say whether the employés had negligently started the train without giving plaintiff an opportunity to enter the car in safety.

The fourth assignment of error relates to the instructions of the trial judge on the question of the measure of damages. While these instructions might have gone into the question more fully, we cannot find anything therein contained which can be said to be clearly erroneous. Indeed, the charge as a whole was full, fair, and impartial, and as we view it appellant has no just ground of complaint about the manner in which the learned trial judge submitted the case to the jury.

Judgment affirmed.

(245 Pa. 448)

**HOGARTY v. PHILADELPHIA & R. RY. CO.**

(Supreme Court of Pennsylvania. May 22, 1914.)

**1. COMMERCE (§ 8\*)—FEDERAL EMPLOYERS' LIABILITY ACT—APPLICATION.**

The federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), supersedes the state laws on all matters within its scope, and controls cases of injuries to employes engaged in interstate commerce on interstate railroads.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 5; Dec. Dig. § 8.\*]

**2. MASTER AND SERVANT (§ 87\*)—FEDERAL EMPLOYERS' LIABILITY ACT—APPLICATION.**

The provision of the federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), that any contract, rule, regulation, or device, the purpose of which is to enable a common carrier to exempt itself from liability for negligence of its employes, shall be to that extent void, applies to all cases, within the scope of the statute, with like effect as though promulgated by an act of the state Legislature.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 188; Dec. Dig. § 87.\*]

**3. MASTER AND SERVANT (§ 264\*)—INJURY TO SERVANT—VARIANCE—FEDERAL EMPLOYERS' LIABILITY ACT.**

Where, in an employe's action for injuries, plaintiff does not expressly plead the federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), proof of a case under such act is not at such variance with the pleading as will entitle defendant to binding instructions in his favor.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 861-876; Dec. Dig. § 264.\*]

**4. MASTER AND SERVANT (§ 100\*)—INJURY TO RAILROAD EMPLOYE—DEFENSE—ACCEPTANCE OF BENEFIT.**

In a railroad employe's action for injuries received while engaged in interstate commerce, the federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), providing that a common carrier shall not exempt itself from liability for negligence of its employes, precluded the defense that plaintiff's acceptance of benefits as a member of defendant's relief association released defendant from liability.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 166-170; Dec. Dig. § 100.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by William J. Hogarty against the Philadelphia & Reading Railway Company for personal injuries. From judgment for defendant on a directed verdict, plaintiff appeals. Reversed and remanded for new trial.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Ira J. Williams, of Philadelphia, for appellant. Wm. Clarke Mason, of Philadelphia, for appellee.

MOSCHZISKER, J. On February 1, 1910, William J. Hogarty, an employe of the Phil-

adelphia & Reading Railway Company, while working on a freight train, met with an accident which caused him to lose his right arm. The plaintiff charged in his declaration that the casualty was due to the negligent construction and maintenance of the defendant's road. The trial court first gave binding instructions for the defendant, and then entered judgment in its favor. The plaintiff has appealed.

The uncontradicted evidence was sufficient to go to the jury on all the issues usually involved in a case of this character; but the defendant proved that the plaintiff had accepted benefits as a member of its relief association, and contended that this was a bar to his recovery, citing *Reese v. Railroad Co.*, 229 Pa. 340, 78 Atl. 851, and other cases. The plaintiff rejoined by formally calling attention to the Act of Congress of April 22, 1908 (35 Stat. 65, c. 149), which, *inter alia*, forbids the defense in question in cases arising from accidents happening to employes of railroads while engaged in interstate commerce; and it was formally agreed at the trial that this accident happened in the course of, and while the plaintiff and defendant were both "engaged in, interstate commerce." To the position thus taken, the defendant replied: (1) That the suit had been brought at common law, and therefore the federal statute had no application; (2) that, if this contention was not correct, then, the plaintiff having pleaded at common law and proved a case under the federal statute, there was a fatal departure between the allegata and the probata. Finally, the plaintiff contends that, if he should have formally pleaded the federal statute, he is entitled to amend accordingly. Properly to adjudge the merits of these various contentions requires the consideration of several recent United States Supreme Court decisions and at least one of our own cases.

[1, 2] In *Second Employers' Liability Cases*, *Mondou v. R. R. Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, the court disposed of four different appeals, and determined many general points, among others that: "(1) The United States is not a foreign sovereignty as regards the several states, but is a concurrent and, within its jurisdiction, a paramount sovereign; (2) until Congress acted on the subject, the laws of the several states determined the liability of interstate carriers for injuries to their employes while engaged in interstate commerce, but, Congress having acted, its action supersedes that of the states, so far as it covers the same subject; (3) when Congress, in the exertion of a power confided to it by the Constitution, adopts an act, it speaks for all the people and all the states, and thereby establishes a policy for all, and the courts of a state cannot refuse to enforce the act on ground that it is not in harmony with the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

policy of that state" or "on the ground of inconvenience or confusion." The case we are discussing involved the same federal statute which is now before us, and it expressly supports the constitutionality of the very provision whose protection the present plaintiff claimed in order to meet the defense here interposed. Supplementing what we have already quoted, the United States Supreme Court held that for the purposes of this act Congress had made a valid classification of railroads engaged in interstate commerce, that the provisions of the statute "supersede the laws of the state in so far as the latter cover the same field," that this piece of national legislation must be heeded by all courts, that in its enforcement by state courts the act in question is "not to be treated as a foreign statute" but as one "establishing a policy for all," and, finally, that the policy thus established is "as much the policy of Connecticut (the state from which the appeal was taken) as if the act emanated from its own Legislature." Three of the suits there under review were commenced in United States Circuit Courts and one in a state court, and in each instance the federal statute was formally pleaded in the plaintiff's declaration; but we cite the case for the broad general principles laid down, which have since been followed and applied by the Supreme Court in reviewing other cases of like character instituted in state courts and brought at common law.

*St. Louis, I. M. & S. R. Co. v. Hesterly*, 228 U. S. 702, 33 Sup. Ct. 708, 57 L. Ed. 1031, was commenced in a state court, and recovery was had by the personal representative of a deceased employé, which included an item not allowed by the federal statute. The statute was not formally pleaded; and so far as the report shows there was nothing in the plaintiff's declaration to indicate that her decedent was engaged in interstate commerce at the time of the accident. The defendant contended that the act of Congress controlled, but the trial court held that it did not apply, and the Supreme Court of the state subsequently decided that the federal statute was "only supplementary and the judgment could be upheld under the state law." The United States Supreme Court reversed, citing *Second Employers' Liability Cases*, *supra*. In *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, the action was by the widow and parents of a railroad employé killed in interstate service; it was brought in a state court, and the federal statute was not pleaded, nor did the plaintiff's statement of claim indicate that the deceased was engaged in interstate commerce at the time of his injury. The defendant urged that the act of Congress applied and thereunder the personal representative of the deceased was the only one entitled to sue; but its contention was not sustained. On appeal, the United States Supreme Court reversed, "without prejudice to

such rights as the personal representative of the deceased may have" under the federal statute. In *North Carolina Railroad v. Zachary*, 232 U. S. 248, 34 Sup. Ct. 305, 58 L. Ed. 591, the suit was by the personal representative of a decedent killed while employed upon the defendant road. The action was instituted in a state court, the act of Congress was not pleaded, and the plaintiff's declaration did not indicate that the deceased was engaged in interstate service. The defendant set up, "as a special defense," that:

"At the time plaintiff's intestate was killed he was engaged in interstate commerce, and that the liability of the defendant \* \* \* was fixed and regulated by the federal Employers' Liability Act."

In refusing a nonsuit, the trial court held:

"That the action was brought under the statute of North Carolina, that the federal act had no application, and that the cause was triable under the statutes of the state."

In reversing, the United States Supreme Court ruled that "the federal act governed to the exclusion of the statutes of the state," citing *Second Employers' Liability Cases*, *supra*.

In *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 33 Sup. Ct. 135, 57 L. Ed. 355, Ann. Cas. 1914B, 134, the plaintiff, in her individual capacity, commenced an action in a Circuit Court of the United States to recover damages for the death of a son killed in the employ of the defendant company. The case was in the United States court by reason of diverse citizenship, and the federal statute was not pleaded. The defendant contended in its answer that the cause of action was "not governed by the laws of Kansas," but by the federal Employers' Liability Act; whereupon the plaintiff asked to amend and plead the statute. The defendant objected on the ground that the period of limitation had run since the cause of action accrued; but the court allowed the amendment. The case proceeded to trial, and judgment was entered for the plaintiff. In affirming, the United States Supreme Court said:

"It is contended that the plaintiff's original petition failed to state a cause of action, because she sued in her individual capacity and based her right of recovery upon the Kansas statute, whereas her action could legally rest only upon the federal Employers' Liability Act of 1908, which requires the action to be brought in the name of the personal representative of the deceased; that the plaintiff's amended petition \* \* \* alleged an entirely new and distinct cause of action; and that such an amendment could not lawfully be allowed so as to relate back to the commencement of the action, inasmuch as the plaintiff's cause of action was barred by the limitation of two years."

The opinion proceeds:

"It is true the original petition asserted a right of action under the laws of Kansas, without making reference to the act of Congress. But the court was presumed to be cognizant of the enactment of the Employers' Liability Act, and to know that with respect to the responsibility of interstate carriers by railroad \* \* \* it had the effect of superseding state laws upon the subject. \* \* \* Therefore the pleader was not required to refer to the federal act,

and the reference actually made to the Kansas statute no more vitiated the pleading than a reference to any other repealed statute would have done."

The court then held that the amendment was not "equivalent to the commencement of a new action," subject to "the two years' limitation"; and in so doing it expressly distinguished the case of *Union Pacific Ry. Co. v. Wyler*, 158 U. S. 285, 15 Sup. Ct. 877, 39 L. Ed. 983, cited by the present defendant, stating in conclusion:

"Since \* \* \* the federal statute did not need to be pleaded, and the amended petition set up no new facts as the ground of action, the decision in the *Wyler* case is not controlling."

Also, see *Philadelphia, B. & W. Rd. Co. v. Schubert*, 224 U. S. 603, 32 Sup. Ct. 589, 58 L. Ed. 911.

The last reported case touching upon the subject before us is *Taylor v. Taylor*, 232 U. S. 363, 34 Sup. Ct. 350, 58 L. Ed. 638, which decides that the proceeds of a judgment recovered in a state court, by an administratrix, in a personal injury case, within the act of Congress, must be distributed under the federal law and not under the law of the state where the accident happened and the decedent resided. Most of the recent federal cases are reviewed in the course of this opinion; the court stating, in connection with *Second Emp. Cases*, *supra*, that the statute and its amendments "having been enacted, \* \* \* state laws must give way to them; they established the policy for all, \* \* \* and the courts of a state cannot refuse to enforce them on the ground that they are not in harmony with the policy of the state. Congress having acted \* \* \* the laws of the states, in so far as they cover the same field, are superseded; for necessarily that which is not supreme must yield to that which is." Later, in discussing *Missouri, K. & T. Ry. Co. v. Wulf*, *supra*, it is said:

"Notwithstanding the original petition asserted a cause of action \* \* \* without making reference to the act of Congress, the court was presumed to be cognizant of the federal enactment, and to know that, with respect to the responsibility of interstate carriers by railroad to their employes injured in such commerce after its enactment, it had the effect of superseding state laws upon the subject."

These United States decisions establish that this broad, general act of Congress supersedes the laws of the states upon all matters within its scope; and that, so long as it remains upon the books, in cases involving accidents happening upon interstate railroads, to employes engaged in interstate commerce, such state laws must be viewed as though nonexistent. This is the key to the whole situation, and it readily explains the *Wulf* decision, and makes clear its applicability to the present case.

[3, 4] In allowing the plaintiff in that case to proceed as though the federal statute had been originally pleaded, there was no departure "from law to law," as in the *Wyler* Case; for, where in a particular class of

cases but one law exists and can by any possibility apply, ex necessitate, there can be no departure "from law to law." This principle also distinguishes our own case of *Allen v. Tuscarora Val. Ry. Co.*, 229 Pa. 97, 78 Atl. 34, 30 L. R. A. (N. S.) 1096, 140 Am. St. Rep. 714, relied upon by the defendant.

In the *Allen* Case the statute was not of the character of the one at bar, which ordains broad, general rules of public policy, and within its field not only supersedes the common law but all relevant state enactments; on the contrary, the statutory provision there relied upon ordered a minute regulation, to wit, that a certain kind of mechanical contrivance, or coupler, be used upon all cars engaged in interstate commerce. The plaintiff in that case first declared upon a liability arising from common-law negligence, and then, after the statute of limitations had run, he desired to amend by pleading the act of Congress, so that he might prove a breach of this specific regulation, as a substantive part of his case in chief. We determined that this could not be done, as the amendment would present not only a departure from "law to law" but from "fact to fact"; and our decision was based largely upon the *Wyler* Case, which is distinguished in the *Wulf* Case. But in the present instance the plaintiff simply relied upon the relevant general principles, or rules of law, whatever their source, applicable to the whole class of cases to which his cause belonged; and, as we have already pointed out, since those established by the federal statute cover the field and apply to the exclusion of ordinary state common-law rules and statutory provisions, there could be no departure from "law to law." Further, in order to support the plaintiff's case in chief, he did not depend upon or desire to plead any statutory regulation requiring the proof of a certain defined condition of fact; hence, there was no departure from "fact to fact," as in *Allen v. Tuscarora Ry. Co.*, *supra*.

The federal statute was not brought into the case at bar until a special defense was entered upon, and then the plaintiff promptly drew attention to its express prohibition of all defenses of the character of the one offered; just as in the ordinary industrial accident case, although not formally pleaded, a plaintiff may claim the benefit of any particular provision in our *Fellow Servant Act* of June 10, 1907, P. L. 523, or our *Factory Act* of May 2, 1905, P. L. 352, if the circumstances call for it. True, the law depended upon at bar happened to be a federal statute; but, since the Supreme Court of the United States has decided that this statute must be treated by state courts, in each instance, as though an act of their own Legislature, for all practical purposes it is a Pennsylvania statute, in the same category as the two acts to which we refer; and its provision that "any contract, rule, regulation, or devise whatsoever," the purpose of which is to enable a common



carrier to exempt itself from liability for negligence to its employes, "shall to that extent be void," is the announcement of a broad rule of public policy applicable to all cases within the scope of the statute, with like effect as though promulgated by one of our acts.

The question before us has been made strictly a federal one, by the act of Congress and the relevant United States Supreme Court decisions; and thereunder, when we consider that the plaintiff's case in chief did not depend upon any specific and peculiar statutory regulation, such as in the Allen Case, that he is a person bound by and entitled to all the benefits of the federal statute, that his declaration is entirely consistent with an action under that statute, and that the law thereby established is the only law that could by any possibility apply to his cause, it becomes plain that he could rely upon the provision of the act of Congress forbidding the defense here interposed. Moreover, from the authorities cited, it is clear that he was entitled to this as a matter of substance, and, if by reason of any technical rule of practice he should have mentioned the statute in his declaration, he was entitled to amend.

In this particular instance, it is evident that no one can suffer any real harm, or plead surprise, even in the strict legal sense of that term, if the case is treated as though expressly brought under the act of 1908, supra; for the defendant is an interstate road, and it admitted at trial that the plaintiff was an employe engaged in interstate commerce at the time of the accident, so we may fairly assume that it had this knowledge from the first.

The learned court below erred in giving binding instructions for the defendant; the assignments are sustained, and the judgment is reversed with a venire facias de novo.

(245 Pa. 478)

In re RUETSCHLIN'S ESTATE.

APPEAL OF MAGEE et al.

(Supreme Court of Pennsylvania. May 22, 1914.)

1. EXECUTORS AND ADMINISTRATORS (§ 417\*)—CLAIM AGAINST ESTATE—RIGHT TO PREFERENCE.

Where, at the audit of the account of executors of an insolvent estate, claim was made for a preference of \$12,500 pursuant to an unrecorded agreement between decedent and claimants' testator, stipulating that on the sale of a plot of ground decedent would give such testator one-half the proceeds, and that claimants' testator would not demand payment of a loan of \$32,000 for five years, it appeared that the land had been sold by the executors for \$25,000 and had been purchased by decedent with the money loaned him by claimants' testator, and that such testator had loaned decedent other amounts in addition to the sum mentioned in the agreement, but it did not appear that at the time of any particular loan decedent agreed to grant claimants' testator an interest in the land or that any money was given by such testator to decedent for the specific purpose of buying such

land, the orphans' court properly decreed that the agreement did not constitute a declaration of trust or an equitable assignment of half of the proceeds realized from the sale of the land, and that hence claimants were not entitled to a preference over creditors.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1646-1651; Dec. Dig. § 417.\*]

2. EXECUTORS AND ADMINISTRATORS (§ 124\*)—MORTGAGE BELONGING TO ESTATE—BOND COLLATERAL TO MORTGAGE—POWER OF EXECUTOR TO PURCHASE.

That one of three executors wrote a letter stating that he would purchase property, mortgaged to his decedent, for \$500 "over and above the bond and mortgage now held by us," did not estop the executors from subsequently enforcing the bond, where he withdrew the offer within a few days after making it and notified the recipient of the letter that counsel had advised him that he had no power to purchase real estate, and a conference was held shortly afterwards between the parties in interest at which the question of foreclosure of the mortgage was discussed but no mention was made of the letter.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 496-507; Dec. Dig. § 124.\*]

Appeal from Orphans' Court, Philadelphia County.

Adjudication in the estate of Henry Ruetschlin, deceased. From a decree dismissing exceptions to the adjudication, Henry I. Magee and others, executors of Francis Magee, deceased, appeal. Decree modified.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Henry Spalding, William Y. Tripple, and Alfred Moore, all of Philadelphia, for appellants. Frederick J. Knaus, Charles H. Edmunds, Ruby R. Vale, and Conlen, Brinton & Acker, all of Philadelphia, for appellee.

MOSCHZISKER, J. At the adjudication in the estate of Henry Ruetschlin, deceased, the executors of Francis Magee presented several claims. They contended for a preference to the extent of \$12,500, by reason of a written agreement existing between their decedent and the one whose estate was under distribution.

[1] By a paper dated November 1, 1909, executed by "Henry I. Magee, trustee for Francis Magee," and Henry Ruetschlin, it was stipulated that "upon the sale of \* \* \* the plot of ground situated" (no description) Ruetschlin would "give to" Magee "one-half of all money which he (Ruetschlin) shall receive as his portion of the proceeds" of such sale; and Magee agreed not to require payment of "the loan of \$32,000," due to him by Ruetschlin, for a period of five years, unless the ground was sold in the interim; at the expiration of that time Magee to have the "option" of calling in the loan, or, should the ground still remain unsold, "to renew the agreement" for a further period of five years.

The executors of Ruetschlin included in their account an item of \$25,000, derived November 20, 1912, from the sale of a one-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

third interest in a lot of ground in West Philadelphia; they admitted that this property was the same as that "mapped out" on a certain blueprint attached to the written agreement between Magee and their decedent. Testimony was offered which showed that Ruetschlin died insolvent July 24, 1911, that early in June, 1911, a meeting was held between him and Henry I. Magee, at which time Ruetschlin acknowledged that the blueprint represented the ground referred to in the agreement; and further that he had used money loaned to him by Magee to purchase his (Ruetschlin's) interest in this land. It appeared that Magee had from time to time advanced Ruetschlin other moneys, in addition to the amounts claimed at the adjudication and the \$32,000 mentioned in the agreement; but there was no evidence to show what particular funds coming from Magee actually went into this West Philadelphia land. Moreover, there was no proof that at the time of any particular loan Ruetschlin then and there agreed to grant Magee an interest in the property in question, or that money was given by the latter to the former for the specific purpose of buying the land covered by the blueprint. So far as the evidence goes, it merely appears that Magee made loans to Ruetschlin for the latter's own purposes, that some of the money was used in the purchase of an interest in this real estate, and, long after the purchase was made, Ruetschlin agreed that, when he sold, he would give his creditor (Magee), one-half of the proceeds. It is not a case where one purchased land in his own name for another; no more is it a case where money was advanced for the specific purpose of a particular purchase, with the agreement at bar in view. The property was not sold by Ruetschlin in his lifetime; and the agreement does not declare that he held it in any manner or to any extent for the benefit of Magee, or even that he would so hold one-half of the proceeds in the event of a sale. Finally, Ruetschlin in no respect expressly limited his right to sell, or personally to receive the proceeds in the event of a sale.

Under the circumstances, we cannot sustain the appellants' contention that the written agreement constituted a declaration of trust or an equitable assignment. What might have been determined had the question arisen during the lifetime of Ruetschlin, it is not necessary to decide; but, as between the several creditors of Ruetschlin's insolvent estate, it is clear that this writing, which was not of record, and was unknown to creditors other than Magee, cannot be construed to give a preference to his estate. We have looked at the authorities cited by both sides; but, on their facts, all of them are distinguishable from the present case, although *Wylie's Appeal*, 92 Pa. 196, is nearest in principle. Also, see *Wood's Estate*, 243 Pa. 211, 215, 89 Atl. 975. It is clear the

court below did not err when it refused the preference claimed by appellants.

[2] The next matter for consideration arises out of a bond conditioned for the payment of \$10,000, dated May 31, 1911, and given by Ruetschlin to the three executors of the estate of Magee as collateral to a mortgage on another piece of real estate. This mortgage was foreclosed, and the property was purchased at sheriff's sale by the Magee executors for \$50. It appears that one of these executors wrote a letter to an executor of the Ruetschlin estate, dated December 21, 1911, in which he stated that the Magee estate would purchase the mortgaged property for \$500 "over and above the bond and mortgage now held by us." But a few days later the writer of the letter notified its recipient that counsel had advised him he had no power to purchase real estate; and the offer was withdrawn. Shortly afterwards a conference was held at which the attorney of the Magee executors met one of the Ruetschlin executors and his counsel, with some other persons, and discussed the question of the foreclosure of the mortgage. We have read all the testimony in reference to this meeting, and, were we sitting as a chancellor, we should find that the attorney for the Magee executors neither said nor did anything at that time, or at the subsequent sheriff's sale, that estops his clients from claiming on the bond now before us. Of course, had the court below, after seeing and hearing the witnesses, made specific findings of fact compelling a contrary conclusion, we should hesitate to reverse; but the learned auditing judge goes no further than to say that:

"The solution of the question involved is attended with difficulties, and, in view of the existence of the letter written by one of the executors aforesaid, it is but reasonable to believe that those present, with the exception of Mr. Tripple (the attorney for the Magee executors), left the conference with the distinct understanding that Mr. Tripple would buy in the property in satisfaction of the debt."

Upon this view of the facts, the learned court concluded that the appellants were estopped from claiming on the bond, but we cannot concur in the conclusion. It is clear that the epistle in question was written before the conference, and it was not even mentioned at that time; in point of fact, so far as the appellants are concerned, the testimony shows that neither the attorney nor any of the executors of the Magee estate, other than the writer of the letter, then knew of its existence.

As a matter of law, there can be no doubt about the appellants' right to pursue their remedy on the bond (*Wolfe's Appeal*, 110 Pa. 126, 20 Atl. 410; *Lomison v. Faust*, 145 Pa. 8, 23 Atl. 377; *Mollenauer v. Smith*, 51 Pa. Super. Ct. 517, per Rice, J.), and in view of the specific offer made at the bar of the court below, by the attorney of the Magee estate, to surrender the property purchased under

foreclosure, upon payment of the mortgage debt with interest, and to "put the thing back into statu quo," so far as possible, we are not impressed with the equity of the position taken by the appellees; but, however that may be, clear error was committed in the ruling that no valid claim could be made upon the bond.

The first, second, third, and fourth assignments of error are overruled; the others, including the eighth (so far as it relates to the questions before us), are sustained. The record is remitted to the court below with directions to modify the final decree in accordance with the views here expressed; one half of the costs to be paid by the estate of Ruetschlin and the other half by the estate of Magee.

(245 Pa. 418)

**COX & SONS CO. v. NORTHAMPTON BREWING CO.**

(Supreme Court of Pennsylvania. May 22, 1914.)

**1. BILLS AND NOTES (§ 327\*)—NOTICE OF INFIRMITY—APPLICATION OF STATUTE—CORPORATIONS.**

Negotiable Instruments Act of May 16, 1901 (P. L. 202) § 56, providing that, to constitute notice of an infirmity in an instrument, or defect in the title of a person negotiating the same, the person to whom it is negotiated must have had actual notice of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith, applies to corporations as well as natural persons.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. § 792; Dec. Dig. § 327.\*]

**2. BILLS AND NOTES (§ 494\*)—COMMERCIAL PAPER OF CORPORATIONS—PRESUMPTION OF VALIDITY.**

Negotiable paper issued by a corporation having either express or implied power to issue such paper is presumably valid.

[Ed. Note.—For other cases, see Bills and Notes, Dec. Dig. § 494.\*]

**3. BILLS AND NOTES (§ 367\*)—ACCOMMODATION INDORSEMENTS—LIABILITY.**

A corporation, having general power to issue negotiable paper and to indorse the same for its own benefit in the course of its business, is liable on its accommodation indorsement, where the paper has passed into the hands of a bona fide holder for value, before maturity, without notice of the character of the indorsement.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 947, 948; Dec. Dig. § 367.\*]

Appeal from Court of Common Pleas, Northampton County.

Assumpsit on promissory notes, by the Cox & Sons Company, against the Northampton Brewing Company. Judgment for defendant, and plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

Calvin F. Smith, of Easton, and E. C. Nagle, of Siegfried, for appellant. Robert A. Stotz and William H. Schneller, both of Easton, for appellee.

**ELKIN, J.** The defense mainly relied on by the appellant corporation is that it was an accommodation indorser on the promissory notes in suit, and that as to a corporation such indorsements are ultra vires acts, and therefore void. It is established as a fact that the plaintiff became the holder of the notes sued on in due course for value before maturity without notice of any infirmity. At the trial plaintiff contended that the notes were indorsed by defendant for its own benefit in the usual course of business and that it was not in any proper legal sense an accommodation indorser. The learned trial judge refused to submit this question to the jury on the evidence, and, the contention of plaintiff having prevailed on other grounds, there was no occasion to assign this ruling for error. We will not discuss it now further than to say that there are doubts in our minds upon this question, and we are not convinced that it should have been withdrawn from the consideration of the jury.

[1] The case was submitted to the jury on the theory that the defendant was liable if the plaintiff became the bona fide holder of the notes for value before maturity without notice of any infirmity, even if it subsequently developed that the indorsements were made for accommodation purposes. There is no pretense in the present case that plaintiff had actual knowledge of any infirmity in the notes, and there is no evidence of bad faith in taking the notes. Section 56 of our Negotiable Instruments Act of May 16, 1901 (P. L. 194) provides:

"To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

[2, 3] This law applies to all classes of persons, artificial as well as natural, and must be so regarded. It is argued, however, that the mere fact of the notes having been indorsed by a corporation is sufficient to charge the holder with notice of the irregular indorsement, and to show that failure to make inquiry as to the character of the indorsement amounted to bad faith. With this proposition we do not agree. A corporation having either an express or implied power to issue negotiable paper is presumed to act within the scope of its power; and hence there is a presumption in favor of the validity of negotiable paper issued pursuant to such power. Eaton and Gilbert on Commercial Paper, page 136. It is not denied—indeed it could not be—that appellant has the power to issue negotiable paper, and hence could accept the notes in suit in the course of its business and indorse the same for its own benefit. Therefore there was nothing on the face of the notes, or in the indorsements, to put a third party on notice that the indorsements were irregular, or

that the notes had not been negotiated in the usual course of business by appellant and for its benefit. In many jurisdictions it has been held that a corporation is bound even as an accommodation indorser on negotiable paper when in the hands of a third party who took it in good faith, for value, before maturity, without notice of any infirmity. *Marshall National Bank v. O'Neal*, 11 Tex. Civ. App. 640, 84 S. W. 344; *Bird v. Daggett*, 97 Mass. 494; *Blake v. Domestic S. Mach. Co.*, 64 N. J. Eq. 480, 38 Atl. 241. Indeed, it has been so held in most jurisdictions where the question has been raised. This does not mean that a corporation has the power to make or indorse accommodation paper, but it does mean, as hereinbefore indicated, that a corporation having the general power to issue negotiable paper, and to indorse the same in the course of its business for its own benefit, will be liable on its indorsement when the paper passes into the hands of a bona fide holder for value, before maturity, without notice of the character of the indorsement, even if it turns out to be an indorsement for accommodation purposes. The precise point may not have been fully discussed and finally determined in our Pennsylvania cases, but whatever doubt may have existed on the question is resolved in favor of the rule above stated. The following cases are in line with this conclusion and may be cited in answer to several contentions pressed on us by learned counsel for appellant: *Culver v. Ice Co.*, 206 Pa. 481, 56 Atl. 29; *First National Bank v. Colonial Hotel Company*, 226 Pa. 292, 75 Atl. 412; *Chestnut St. Trust & Sav. Fd. Co. v. Record Publishing Co.*, 227 Pa. 235, 75 Atl. 1067, 136 Am. St. Rep. 874; *First National Bank of Bangor v. Slate Co.*, 229 Pa. 27, 77 Atl. 1100.

With the main question decided adversely to the contention of appellant, the remaining assignments of error are without substantial merit, and need not be discussed. Our conclusion is that the case was properly submitted to the jury, whose province it was to determine all the questions of fact upon which the right to recover depended.

Judgment affirmed.

(245 Pa. 467)

**GRALKA et al. v. WORTH BROS. CO.**  
(Supreme Court of Pennsylvania. May 22, 1914.)

**1. EXPLOSIVES (§ 8\*)—INJURY TO INFANT—BURDEN OF PROOF.**

In an action for injuries to a seven year old child from the explosion of dynamite, alleged to have been left by defendant's servants in an open shanty in which the child played, the burden was on plaintiff to prove defendant's negligence.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.\*]

**2. EXPLOSIVES (§ 8\*)—INJURY TO INFANT—DIRECTION OF VERDICT.**

Where, in an action for injuries to a seven year old child from the explosion of dynamite,

alleged to have been negligently left by defendant's servants in an open shanty in which the child was playing, evidence held insufficient to go to the jury on the issue of defendant's connection with the dynamite which caused the injury.

[Ed. Note.—For other cases, see *Explosives*, Cent. Dig. §§ 4, 5; Dec. Dig. § 8.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Emil Gralka, by his father and next friend, Adolph Gralka, and Adolph Gralka, individually, against Worth Brothers Company, for personal injuries. From judgment for plaintiff, defendant appeals. Reversed.

Argued before BROWN, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

John G. Johnson and Henry P. Brown, both of Philadelphia, for appellant. William T. Connor and John R. K. Scott, both of Philadelphia, for appellees.

BROWN, J. Worth Bros. Company is a corporation owning and operating blast furnaces and rolling mills at Coatesville, this state. On January 18, 1913, several boys went into a shanty owned by the company and found a box of dynamite in it. They took a portion of this up to the side of a hill, where they built a fire, and one of them threw some of the dynamite into it. As a result of the explosion that followed Emil Gralka, one of the boys—then seven years of age—lost an eye. From the judgments recovered by him and his father against the defendant company—found by the jury to have negligently left the dynamite in the shanty—it has appealed.

[1] The burden was upon the plaintiff below, who sued for himself and his injured son, to show by competent testimony that the defendant had been guilty of the negligence with which he charged it. The averment upon which he relied in asking for the recovery of damages was that it had negligently permitted dynamite to be in its shanty on January 18, 1913, and for a long time prior thereto, and that the injuries sustained by his son had resulted from this negligence. The shanty was open and accessible to the boys, and if the dynamite which they found in it had been put or left there by the defendant, or by one of its employees in the course of his employment, or had been allowed to remain in the building by the defendant after knowledge that it was there, the charge of negligence would have been sufficiently proved. In passing upon the contention of learned counsel for appellant that a verdict ought to have been directed in its favor, the first inquiry must be as to the sufficiency of the proof submitted by the plaintiff in support of his averment of the negligence of the defendant, without regard to what it may have shown by way of defense.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

[2] In the spring of 1912 the defendant company constructed a road through a part of its property, and, in the construction of the same, it was necessary to use dynamite for blasting purposes. George Shamonski, called by the plaintiff, testified that he had acted as a labor boss for the defendant in the construction of the road; that he left its employment in June, 1912; that all of the blasting was over at that time; and that seven or eight days before he left he saw a little wooden box in the shanty containing dynamite. Another witness, a former employé of the defendant, called by the plaintiff, testified that all of the blasting had been done in the spring of 1912. There is no testimony that any dynamite was ever seen in the shanty from June, 1912, down to January 18, 1913; nor was there any testimony that, during that interval, the defendant company had used dynamite for any purpose whatever. The boy who found the dynamite in the shanty on January 18, 1913, testified that it was in a paper box, and the case went to the jury under the following instruction:

"How will you reconcile the dynamite that was found in the paper box with the dynamite that was left there in June, 1912, if you believe the latter was in a wooden box? That, to the mind of the court, is one of the important questions for you to consider in this case; and unless you can reconcile it, and unless you can find from the testimony, not outside of the testimony, but from the testimony, as to the difference in the receptacles these two boxes of dynamite were in, some way to account for the transfer of this dynamite from a wooden box into a paper box, your verdict must be in favor of the defendant, and that would be an end of the case and it would be unnecessary for you to further consider the case in any aspect whatsoever."

The jury were thus given to understand that the only evidence of the defendant's negligence was the testimony of Shamonski as to the presence of dynamite in the shanty in June, 1912, and were permitted to find that what he then saw there in a little wooden box was what the boys found seven months later in a paper box. A license was thus given the jury to guess that the defendant had been negligent, and that this was error is most manifest in view of other testimony submitted by the plaintiff. For six or seven months prior to January 18, 1913, the shanty, which was unfenced, along a public road, had been empty at all times. Children, in playing around it, went in and out of it, using it as a playhouse. Others went to it as a loafing or resting place, and negroes frequented it in shooting crap. The testimony as to this is thus correctly summed up by the learned trial judge in his charge:

"It appears from the very testimony on the part of the plaintiffs in this case that this shanty was open; that it was used as a common resort by children, playing there, by men taking their lunches there, and by negroes and others going into it as a place for loafing or resting; and that it was in that condition for a period of from six to seven months, from the time Shamonski said he saw the dynamite there to

the time this accident happened to these boys. Besides, it was along a public road, as we remember it, at about the intersection of two roads called Ercildon Road and Modena Road."

The mere finding of the dynamite in the shanty on January 18, 1913, was not in itself, under the circumstances stated, evidence that the defendant was responsible for its being there. Indeed, we do not understand that learned counsel for appellee so contend. How it got into the shanty does not appear, but it does appear that for months that building, with its doors and windows at all times open, had been frequented by all sorts of people. Some of them may have carried the dynamite into it; but whether this be so or not is not the question in the case. It was upon the plaintiff to show that the defendant had put or left it there, and the only evidence in support of this material fact was that, in the preceding spring, the appellant had used dynamite for blasting purposes in the vicinity of the shanty, and that seven months before the boys went into it one of its employés had seen in it a little wooden box containing dynamite. The dynamite which the boys found long afterwards, on January 18, 1913, was in a paper box, and the boy who found it—fifteen years of age when he testified, less than a year afterwards—admitted that he had never seen it before that day, though he had been in the shanty only the day before; and he further said, in reply to a question put to him by the court, that if it had been in the shanty on the previous day he would have seen it.

After the most careful review of all the testimony submitted by the plaintiff, we can find nothing in it which justified the finding that the dynamite which was in a little wooden box in the shanty in June, 1912, was the same that was found by the boys in a paper box in the following January. In this connection it may be proper to say that it nowhere appears, as counsel for appellee state in their printed argument, that after the accident the appellant claimed as its own the dynamite left in the shanty by the boys.

The first assignment of error is sustained, the judgment is reversed and is here entered for the defendant.

(245 Pa. 462)

BECKER et al. v. PHILADELPHIA RAPID TRANSIT CO.

(Supreme Court of Pennsylvania. May 22, 1914.)

# 1. TRIAL (§ 121\*)—ARGUMENT OF COUNSEL—EVIDENCE.

Where, in an action against a street railway company for injuries to a passenger from a collision between two cars, there was nothing in the testimony of a physician called by defendant as a witness to indicate that he was unfair or biased, and no attempt was made to impeach him, it was improper for plaintiff's counsel to say in his argument, "Will you believe the testimony of the physician for the transit company, whose business it is to minimize inju-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

lots of ground lying westward of said hereby granted lot and to prevent any obstruction thereto in all time to come no building or buildings shall ever be built, erected or placed, upon the said lot to front upon or towards Schuylkill Fifth (now Eighteenth) street"; and the other half of the defendant's land is subject to the first part of this restriction. Some years ago the defendant erected a building at the southwest corner of Eighteenth and Arch streets; and the structure which the plaintiffs now seek to restrain is in the rear of that building, at the northwest corner of Eighteenth and Cuthbert streets. Each of the plaintiffs owns property to the west of the defendant's land.

The chancellor found as a fact that:

"The building which is being erected \* \* \* is neither an addition nor a back building to the building situated at the corner of Eighteenth and Arch streets."

Further, that:

"The building at the corner of Eighteenth and Arch streets does not extend to a greater width than 120 feet southward from the regulated south line of Arch street."

These findings effectually dispose of the first part of the building restriction. In connection with the second part of the restriction, the chancellor found the following facts:

"For nearly 25 years one of the main entrances of the building on the southwest corner of Eighteenth and Arch streets has been upon Eighteenth street. \* \* \* For about the same time there was a 1½-story building at the northwest corner of Eighteenth and Cuthbert streets, which was occupied and used by \* \* \* the defendant, during all that time, and until torn down to make way for the building now objected to. \* \* \* The building now objected to \* \* \* is 34 feet on Eighteenth street by 91 feet on Cuthbert street, and is 32 feet high at the eaves and 43 feet high at the highest point of the roof, and is roofed in. The contract for its erection and construction was made September 18, 1913. It is to cost \$19,281. It is more than 120 feet southward from the regulated south line of Arch street. \* \* \* On or about the last of September, 1913, all persons passing the building \* \* \* could see that its front and entrance were upon Eighteenth street, and thereafter the work upon said building steadily progressed. \* \* \* None of the plaintiffs made any objection to the building \* \* \* until November 8, 1913, and no notice was given to the builder, Franklin B. Davis, one of the defendants, until November 11, 1913. \* \* \* At that time the building was largely completed, being nearly to its full height in the rear and over one-half its full height in the front, and the builder had made all his contracts in regard to it, except about \$1,200 thereof, and there had been then expended upon it the sum of \$7,000."

In addition, the court found that one of the plaintiffs knew of the intention to erect a new building in September, 1913, and had knowledge that the work was actually being done upon it "for five weeks prior to November 13, 1913," that another of the plaintiffs had such knowledge by "the first week of October," and the last of them "knew about it in the middle of October, 1913." On these facts the court concluded that the "plaintiffs were guilty of laches in not sooner objecting to the construction of said building"; further, that "the plaintiffs have lost by their laches all right to proceed in equity to compel the tearing down of said building, or to prevent its completion"; and the bill was dismissed.

Many other points were raised in the court below, and argued before us on appeal; but as we are not convinced of error in the findings of fact or conclusions of law just narrated, and since they amply vindicate the decree entered, it seems unnecessary to go further. In this connection, however, it may not be out of place to note that the building restriction here insisted upon first appears in 1837, in a conveyance of a lot 66 feet wide extending along the west side of what is now Eighteenth street, from Arch to Filbert street, that since that date Cuthbert street has been opened as an intermediate highway, and all the ground between the latter street and Filbert street has been built upon for some years, several of the houses fronting upon Eighteenth street, in apparent violation of the building restriction in question; thus it may be seen that the west side of Eighteenth street was built up, almost solidly, from Arch to Filbert street, before the defendant undertook the erection of the structure now objected to. The facts at bar far remove the defendant's case from those involving a deliberate violation of a building restriction, after notice; and, under the circumstances, the officers of the defendant corporation might well have believed that this old restriction would not be insisted upon. But, be that as it may, we are convinced the court below did not err in deciding that the laches of the plaintiffs barred them from the relief sought.

[2] All the assignments of error except the last which goes to the decree, are dismissed, as technically defective (see *Prenatt v. Messenger Printing Co.*, 241 Pa. 267, 270, 88 Atl. 439), the last assignment is overruled, and the decree is affirmed, at the cost of the appellants.

(112 Me. 559)

**DORNBURGER v. MAINE CENT. R. CO.**  
(Supreme Judicial Court of Maine. Sept. 14, 1914.)

**MASTER AND SERVANT (§ 217\*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.**

A railway signal maintainer, who had held that position for several months, was directed to investigate the condition of a signal, but was given no instructions as to the manner of doing the work, leaving him free to use such methods as he thought best. In remedying the difficulty, he found it necessary to pass several times through a cut, against the sides of which snow had been thrown by a snowplow so as to make perpendicular walls of snow and ice. On one of his trips through the cut he was overtaken by a snowplow and injured. He knew that a passenger train was due in a few minutes, and that a plow usually preceded the locomotive. *Held*, that he assumed the risk of the conditions resulting in the injury, and could not recover, irrespective of the company's negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

On Motion from Supreme Judicial Court, Somerset County, at Law.

Action by J. B. Dornberger against the Maine Central Railroad Company. On motion by defendant for a new trial. Motion sustained.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Merrill & Merrill, of Skowhegan, for plaintiff. Johnson & Perkins, of Waterville, for defendant.

**PER CURIAM.** The accident occasioning the injury for which plaintiff seeks the recovery of damages occurred on defendant's railroad at a point between Crawford Station and Crawford Notch. The distance between the station and notch is about 900 feet, and at either end is a cut. That from the notch west is about 375 feet long, while the length of the other, or western cut, is about 250 feet. In the space between these cuts, the land upon one side is either level with the roadbed or slopes below its level. In winter the snow is thrown by the snowplows against the sides of the two cuts, forming perpendicular walls of snow and ice some five or six feet high. As the plows are wider than the trains, the cuts afford a narrow space on either side of a train. While the cuts were in this condition early in the morning of March 2, 1912, plaintiff was directed to investigate the condition of signal 847 near the western end of the western cut. The wind was blowing and the snow drifting during the day.

To remedy the difficulty he found existing made it necessary for him to pass several times through the cuts. At about 11:55 in the forenoon he was making his third or fourth trip and, proceeding westerly, had reached about the middle of the western cut when he was overtaken by a snowplow and,

being unable to climb the precipitous wall of snow and ice, was injured. At the time of the accident, the plaintiff had held the position of signal maintainer for defendant for about eight months and been in the employ of defendant for about two years. That he knew that snowplows were necessarily and frequently employed and often preceded the passage of trains by a short interval of time was the result of his experience. He was also familiar with the general manner of operating the plows and knew that the plow usually preceded the locomotive as was the case at the time of the accident. He was also aware that a passenger train from the east was due at Crawford Station at 12:02 p. m.

It is clear that no instructions were given him as to the manner in which he should do his work nor could his employer, unadvised of the cause of the difficulty, know the character of the work required to repair the signal of the time necessarily employed. He was therefore free to use such methods and seize such occasions as he thought prudent and best.

Without considering the question of negligence of defendant, it is the opinion of the court that plaintiff assumed the risk of the conditions which resulted in his injury.

"It is well-established law, reiterated in hundreds of decisions, that when one enters into the service of another, by virtue of the employment, he assumes the risk of all obvious and apparent dangers which are incident to the business, and all of which, by the exercise of reasonable care, one of his age, capacity, and experience ought to know and appreciate. He also assumes the risk of all dangers of which he knows and which he should appreciate, whether obvious and visibly apparent or not." *Babb v. Oxford Paper Co.*, 99 Me. 298, 59 Atl. 290.

Instances of the application of the principle will be found in *Morris v. B. & M. R. Co.*, 184 Mass. 368, 371, 68 N. E. 690; *Wiley v. Batchelder*, 105 Me. 536, 75 Atl. 47; *Brown v. C.*, R. J. & P. Ry. Co., 69 Iowa, 161, 162, 28 N. W. 487; *Id.*, 64 Iowa, 652, 21 N. W. 193; *Howland v. M., L. S. & W. Ry., Co.*, 54 Wis. 226, 11 N. W. 529.

The motion must be sustained. So ordered.

(77 N. H. 307)

**SANBORN v. BOSTON & MAINE R. R.**  
(Supreme Court of New Hampshire. Merri-mack County. June 2, 1914.)

**1. CONSTITUTIONAL LAW (§ 322\*)—RIGHT TO REMEDY—NEW TRIAL—NEWLY DISCOVERED EVIDENCE.**

Denial of a motion for a new trial for newly discovered evidence is not a violation of plaintiff's constitutional right to a certain remedy for all injuries guaranteed by the Bill of Rights, art. 14.

[Ed. Note.—For other cases, see *Constitutional Law*, Cent. Dig. § 951; Dec. Dig. § 322.\*]

**2. JURY (§ 31\*)—RIGHT TO JURY TRIAL—MOTION FOR NEW TRIAL—DENIAL.**

The court's finding that if the alleged newly discovered evidence for which a new trial was asked was relevant, it should be excluded

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes  
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on the ground of remoteness did not deprive plaintiff of his constitutional right to a jury trial, guaranteed by Bill of Rights, art. 20.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.\*]

### 3. NEW TRIAL (§ 7\*)—RIGHT TO NEW TRIAL —BILL OF RIGHTS.

Bill of Rights, art. 14, guaranteeing to a suitor a certain remedy for all injuries he may receive, does not entitle him to a new trial for newly discovered evidence as a matter of right, but in order to obtain such relief he must show, not only that he was free from fault, but that a different result would probably be reached if he was given a new trial, as provided by Pub. St. 1901, c. 230, § 1.

[Ed. Note.—For other cases, see New Trial, Cent. Dig. § 18; Dec. Dig. § 7.\*]

### 4. JURY (§ 31\*)—RIGHT TO JURY TRIAL —COMPETENCY OF EVIDENCE.

Though plaintiff has a constitutional right to have a jury pass on any competent evidence he may produce, he has no right, constitutional or otherwise, to have the jury pass on the competency of the evidence by which he proposes to prove his case.

[Ed. Note.—For other cases, see Jury, Cent. Dig. §§ 204-219; Dec. Dig. § 31.\*]

Exceptions from Superior Court, Merrimack County; Pike, Judge.

Action by Crosby A. Sanborn against the Boston & Maine Railroad. A motion for a new trial for newly discovered evidence was overruled, and the case transferred to the Supreme Court on exceptions. Overruled.

Motion for a new trial, on the ground of newly discovered evidence. The case is the same as that reported in 76 N. H. 523, 86 Atl. 157, where it was held that the evidence did not warrant the conclusion that the defendants had given the plaintiff to understand they would keep the spurs sharp upon the ladder which he was using at the time of his injury. The new evidence, in substance, was: (1) That it was the custom of the man in charge of the planer to sharpen the spurs; and (2) that other workmen who had occasion to use the ladder did so without making an examination of it. The superior court found that the plaintiff was not at fault in failing to offer the new evidence at the trial, and that such evidence, if relevant, was so remote and inconclusive that justice did not require the granting of a new trial, and denied the present motion, subject to the plaintiff's exception.

Robert W. Upton, of Concord, for plaintiff. Streeter, Demond, Woodworth & Sulloway, of Concord, for defendant.

YOUNG, J. As the case is understood, the court found in effect that if a new trial were granted it would not change the result, because it would be the court's duty to exclude for remoteness the evidence by which the plaintiff seeks to sustain his contention. In other words, the court found that if the evidence on which the plaintiff relies is relevant to the issue of what the defendants gave their employes to understand in re-

spect to the sharpening of the spurs on the ladder, the inference that can be drawn from it is so uncertain and remote that it is more likely to prevent than to promote the discovery of the truth. It cannot be said that there is no evidence to support this finding.

[1-4] There is no merit in the plaintiff's contention that the denial of his motion for a new trial is a violation of his right to "a certain remedy \* \* \* for all injuries he may receive" (Bill of Rights, art. 14), or that the court's finding that if the new evidence is relevant it should be excluded on the ground of remoteness deprives him of his constitutional right to a jury trial. Bill of Rights, art. 20. Article 14 of the Bill of Rights does not entitle him to a new trial as a matter of right. In order to obtain such relief he must show, not only that he is free from fault, but also that a different result will probably be reached if he is given a new trial. P. S. c. 230, § 1; Crafts v. Insurance Co., 36 N. H. 44, 50; Dennett v. Dennett, 44 N. H. 531, 535, 84 Am. Dec. 97. Although the plaintiff has a constitutional right to have a jury pass on any competent evidence he may produce (St. Pierre v. Foster, 75 N. H. 11, 70 Atl. 289), he has no right, constitutional or otherwise, to have the jury pass on the competency of the evidence by which he proposes to prove his case.

Exception overruled.

PLUMMER, J., was absent. The others concurred.

(77 N. H. 37)

### SLEEPER v. SMITH et al.

(Supreme Court of New Hampshire. Merrimack County. June 27, 1914.)

### 1. FRAUD (§ 58\*)—REPRESENTATIONS—KNOWLEDGE OF FALSITY—EVIDENCE.

Evidence that defendant was a good business man, that he had carefully examined a mortgaged farm to ascertain its value, with a view of buying it, and that it was worth \$14,000, justified a finding that he knew it was worth much more than about the amount of the first two mortgages on it, \$7,000, the amount which he represented it to the owner of the third mortgage to be worth.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 90, 91; Dec. Dig. § 58.\*]

### 2. FRAUD (§ 11\*)—REPRESENTATIONS—OPINIONS.

As regards fraud, there is a false representation of fact where one expresses an opinion as to value for the purpose of misleading, when in fact he does not entertain that opinion.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 11; Dec. Dig. § 11.\*]

### 3. FRAUD (§ 58\*)—RELIANCE ON REPRESENTATIONS—EVIDENCE.

While the fact that plaintiff called in two men to advise her in the matter of making a sale to defendant may be evidence that she did not rely entirely on what he said, it is not conclusive that she was not misled by his statements.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 90, 91; Dec. Dig. § 58.\*]



#### 4. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE.

Admission, in an action for fraud, of plaintiff's testimony that a man from Boston tried to buy her mortgage after she had sold it to defendant is harmless; she having previously, without objection, stated all this, except the man's residence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

Exceptions from Superior Court, Merrimack County; Chamberlin, Judge.

Action on the case by Elmira W. Sleeper against Charles D. Smith and others, for fraud in the purchase of a farm mortgage. There was a verdict for plaintiff, and the case is transferred from the Superior Court on defendants' exceptions to the denial of their motions for a nonsuit and the direction of a verdict in their favor. Exceptions overruled.

Niles & Upton, of Concord, for plaintiff. John H. Albin, of Concord, and Edgar W. Smith, of Wells River, Vt., for defendants.

WALKER, J. [1] The defendants' motions for a nonsuit and for a directed verdict present the question of law whether the evidence authorized the jury to find that the defendants made false and fraudulent representations to the plaintiff, intending thereby to induce her to sell her mortgage security to them for a sum far below its actual value, and that the plaintiff relied on and was induced by such representations to sell her mortgage for the sum mentioned. As there were no exceptions to the charge, it must be assumed that the jury were properly instructed in regard to the law of the case. The principal contention, therefore, relates to the sufficiency of the evidence to support the verdict. That the plaintiff sold her mortgage on the farm in question to the defendants for \$100, a ninth part of the sum for which it was originally given, upon the personal solicitation of one of the defendants, Smith, who was acting for the others as well as for himself, is conceded. It is also admitted that the plaintiff was an old lady who had little knowledge of real estate values, while Smith was a business man who was conversant with land values in that vicinity and who, in conjunction with his partners, purchased the first mortgage on the farm and sought to buy the plaintiff's interest for the purpose of making money by the transaction. It is clear that Smith's purpose in visiting the plaintiff was to induce her in some way to sell her mortgage, which was the third mortgage on the property. There was evidence tending to show that the defendants were enthusiastic in carrying out their purpose of buying up the outstanding mortgages and in acquiring an absolute title to the property upon foreclosure proceedings, which had been begun. The plaintiff testified that Smith told her he could not pay her more than \$100

for her mortgage, for he did not know how they would come out. A reasonable inference from his conversation with her, according to her testimony, would be that he had serious doubts about the property being worth more than the amount of the first two mortgages, which was about \$7,000, and that the plaintiff relied upon this representation and was induced to give up her security for \$100, upon the theory, as she testified, that it was better to take that than to lose the whole of her claim. Considerable evidence was introduced upon the subject of the value of the farm, from which the jury might have found that at the time of this transaction it was worth about \$14,000, and that the defendants understood that it was at least worth much more than the mortgage indebtedness. The facts that the defendants were good business men, and that they had carefully examined the property to ascertain its value with a view of purchasing it, justified the finding that they knew it was worth much more than Smith represented it to be to the plaintiff. There was evidence, therefore, of all the elements of fraud perpetrated by the defendants upon the plaintiff—a false representation, known by the defendants to be such, as to the value of the plaintiff's property, made for the purpose of inducing her to sell it to them for little more than a nominal sum, her sale of it to them in justifiable reliance upon their representation, and the resulting damage to her. *Stewart v. Stearns*, 63 N. H. 99, 56 Am. Rep. 496; *Spעד v. Tomlinson*, 73 N. H. 46, 61, 59 Atl. 376, 68 L. R. A. 432; *Shackett v. Bickford*, 74 N. H. 57, 65 Atl. 252, 7 L. R. A. (N. S.) 646, 124 Am. St. Rep. 933; *Sipola v. Winship*, 74 N. H. 240, 66 Atl. 962; *Cunningham v. Company*, 74 N. H. 435, 69 Atl. 120, 20 L. R. A. (N. S.) 236, 124 Am. St. Rep. 979; *Redgrave v. Hurd*, 20 Ch. Div. 1.

[2] The argument advanced by the defendants that what Smith said about the value of the property and the almost worthless character of the plaintiff's mortgage was a mere expression of opinion, and not the assertion of a fact upon which she was entitled to rely, is fallacious; for if in one sense it was the expression of an opinion, the jury could find that, in view of his business ability and the careful examination he had made of the property, he did not in fact entertain that opinion, but expressed it for the purpose of misleading the plaintiff.

"When a person gives his opinion, the statement that it is his opinion includes one that he believes what he has said to be the truth; in other words, that what he has stated as his opinion is his opinion. Every expression of opinion contains at least that one statement of fact; consequently, a person can state what he knows to be false, for the purpose of inducing another to change his position, when he pretends to express his opinion as to any matter, as well as when he pretends to state facts in relation to it. In such a case the falsity of the statement consists in stating something as his opinion which is not his opinion."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Spעד v. Tomlinson, 73 N. H. 62, 59 Atl. 381, 68 L. R. A. 432.

[3] The fact that the plaintiff called in two other men to advise her in the matter may have been evidence that she did not rely entirely on what Smith said, but it is not conclusive that she was not misled by his statements. It was clearly competent for the jury to find that she was.

[4] The exception to the plaintiff's testimony that a man from Boston tried to purchase her mortgage after she had sold it to the defendants is unavailing. It seems she had already stated without objection that she received such an offer. Whether the man lived in Boston or not does not seem to be important or prejudicial. Its admission was not error.

Exceptions overruled; judgment for the plaintiff.

PLUMMER, J., was absent. The others concurred.

(77 N. H. 332)

YEATON et al. v. SOMERSWORTH  
GRANGE OF PATRONS OF HUSBANDRY  
BANDRY et al.

(Supreme Court of New Hampshire. Strafford County. June 27, 1914.)

1. ASSOCIATIONS (§ 5\*)—GRANGES—BY-LAWS—DETERMINATION—REVIEW BY COURTS.

The question, whether a by-law of the State Grange, prescribing jurisdiction of a subordinate grange as to admission of members, has become a "dead letter," having been finally determined by the regular tribunals of the order, will not, ordinarily, be re-examined by the courts.

[Ed. Note.—For other cases, see Associations, Cent. Dig. §§ 4-6; Dec. Dig. § 5.\*]

2. ASSOCIATIONS (§ 5\*)—GRANGES—BY-LAWS—REPEAL—SUBORDINATE GRANGES.

A by-law imposed by the State Grange on all subordinate granges as to jurisdiction in the admission of members cannot be, in effect, repealed by a subordinate lodge, by it for a long time disregarding it.

[Ed. Note.—For other cases, see Associations, Cent. Dig. §§ 4-6; Dec. Dig. § 5.\*]

3. ASSOCIATIONS (§ 5\*)—GRANGES—BY-LAWS—REPEAL—EVIDENCE.

It cannot be inferred that the State Grange had waived or repealed a by-law imposed by it on subordinate granges as to jurisdiction in the admission of members, because some of its officers knew, or were chargeable with knowledge, that the by-law had not always been observed by some of the subordinate granges in a certain vicinity.

[Ed. Note.—For other cases, see Associations, Cent. Dig. §§ 4-6; Dec. Dig. § 5.\*]

4. ASSOCIATIONS (§ 8\*)—GRANGES—BY-LAWS—"MISTAKE."

A by-law of the State Grange, in effect, that discovery that a subordinate grange has "inadvertently or by mistake" initiated a member from the jurisdiction of another grange, without its consent, shall not render his admission illegal, refers to a mistake of fact as to the applicant's place of residence, and does not include a mistaken belief that another by-

law, limiting its jurisdiction as to admitting members, was a "dead letter."

[Ed. Note.—For other cases, see Associations, Cent. Dig. § 8; Dec. Dig. § 8.\*]

For other definitions, see Words and Phrases, vol. 5, pp. 4539-4542; vol. 8, p. 7722.]

Exceptions from Superior Court, Strafford County; Young, Judge.

Bill in equity by George H. Yeaton and others to enjoin the Somersworth Grange of the Patrons of Husbandry from refusing plaintiffs admission to its hall and from depriving them of the privileges and benefits enjoyed by members of the organization in good standing, the New Hampshire State Grange and the National Grange also being made defendants. Findings and rulings were adverse to defendants, and they excepted. Exceptions sustained.

The plaintiffs while residents of Rollinsford applied for membership in the Somersworth Grange, and, being declared eligible by the master of that grange, they were thereupon elected and took the first two degrees of the order. This proceeding was in violation of a by-law of the order legally adopted by the State Grange and imposed upon the subordinate granges in their admission of members, which provided that in such a case the Rollinsford Grange should be notified and its consent obtained; but the court found that the by-law had not been observed in many instances by granges in the vicinity of Somersworth, and that for that reason it had become a dead letter. As soon as the Rollinsford Grange learned that the plaintiffs had been admitted to the Somersworth Grange it entered a complaint with the master of the State Grange, who upon a hearing ruled that the plaintiffs had not been admitted in accordance with the rules of the order, and dismissed the complaint. The Somersworth Grange appealed from the decision to the State Grange, and from its decision to the National Grange. Both of these organizations sustained the finding of the master of the State Grange. The question whether the plaintiffs became members through "inadvertence or mistake," within the meaning of another provision of the by-laws, was not decided upon the appeals; but the court ruled that if the by-law as to jurisdiction was in full force and effect, nevertheless the plaintiffs became members through inadvertence and mistake as to the meaning and effect of that by-law. To these findings and rulings the defendants excepted.

Elmer J. Smart, of Rochester, for plaintiffs. Harry W. Spaulding and Robert L. Manning, both of Manchester, for defendants.

WALKER, J. [1] In the "by-laws of the New Hampshire State Grange" (page 29) it is provided that "when a grange [i. e., a sub-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ordinate grange] receives an application for membership from a candidate residing within the jurisdiction of another grange, it should be laid upon the table, and no further action be taken upon it until the consent of the grange having jurisdiction is obtained"; also, that "complaints for infringement of jurisdiction must be made to the master of the State Grange within sixty days after the initiation of the candidate." The former by-law was not observed when the plaintiffs' applications were received by the Somersworth Grange. The proceedings upon the applications were the same as are observed when an applicant is within the territorial limits of the grange he desires to join. The master of the grange declared them to be eligible, and they were elected at the first meeting and took the first two degrees. In this situation the question arises whether they were admitted to membership in the Somersworth Grange, in apparent violation and repudiation of the rule or by-law in regard to jurisdiction. Their contention is that this by-law had become a "dead letter" in consequence of a custom that had grown up in that vicinity of disregarding its provisions in such cases; that is, that its nonobservance in many former cases occurring in granges in the vicinity of Somersworth had deprived it of its validity, and that the jurisdictional test of eligibility to membership had been waived. The question thus presented having been finally determined by the regular tribunals of the order adversely to this contention, upon the appeal of the Rollinsford Grange against the Somersworth Grange, would not ordinarily be re-examined in this court.

"The preponderance of authority is in favor of the doctrine that as to all questions of policy, discipline, internal government, and custom, the legal tribunals must accept as binding the decision of the regularly constituted judicatories of the church, fraternity, association, or society." 1 Bac. Ben. Soc., § 68.

See, also, *Spilman v. Home Circle*, 157 Mass. 128, 31 N. E. 776; *Connelly v. Association*, 58 Conn. 552, 20 Atl. 671, 9 L. R. A. 428, 18 Am. St. Rep. 296; *State v. Knights of Pythias*, 53 N. J. Law, 536, 22 Atl. 343; *People v. Board of Trade*, 80 Ill. 134; *State v. Grand Lodge*, 8 Mo. App. 148; *Watson v. Jones*, 13 Wall. 769, 20 L. Ed. 666; 24 Am. Law Rev. 556.

[2] But it is urged in argument by the plaintiffs that as they were not technically parties to the proceedings upon appeal, they are not bound by the decision, which in effect was based upon a ruling that they were not members of the Somersworth Grange, never having been legally admitted as such; and that no procedure is provided by which they can bring the question of their membership before the grange for adjudication. It might be a sufficient answer to this contention to say that when they applied for membership they impliedly agreed to be bound by the rules of the order, and that they are

bound by the adjudication upon their membership rights in the contest between the two granges. But however this may be, an examination of the facts leads to the same conclusion as that reached by the tribunals of the order.

The plaintiffs' argument, based upon a custom to disregard a positive by-law in regard to the admission of members in subordinate granges, if otherwise sound, overlooks the essential fact that the by-law in question is not a regulation adopted by the Somersworth Grange, but one imposed upon it and all other subordinate granges in the state by the superior authority of the State Grange. It could not modify or repeal it, nor could it accomplish that purpose indirectly by a series of violations of its provisions. Whatever effect its continued nonobservance of a rule adopted by it might have, it is clear that it could not of its own motion, through the acts of its master, declare an applicant for membership eligible in violation of a rule formulated by the state organization and made obligatory and binding upon the local branches in their admission of new members. It is true that such a case, if the member living in another jurisdiction was formally admitted without a compliance with the rule, his status as a member might become established, if no complaint was interposed by the grange in whose territorial limits he lived, within 60 days after his initiation. But his right to membership would at most be conditional during that period; it might upon complaint be determined, in accordance with the procedure and rules of the order, that he did not become a member, and such was the result with reference to the plaintiffs upon the complaint of the Rollinsford Grange against the Somersworth Grange. If they had been parties to that proceeding in a technical sense, they would undoubtedly have been bound by the final decree or order. Whether they are so bound need not be considered; for by that decision, upon appeal to the highest tribunal of the order, it has been held that the by-law in question was in full force when they applied for admission, and that the action of the Somersworth Grange in admitting them was void. This interpretation of the by-law is at least an authority to be considered by the court in this case, as indicating with some force what the by-law means and what the effect is of its violation. It is not necessary to hold that it is a conclusive authority, for it seems to coincide with the views of the court above expressed.

[3] The fact that some of the officers of the State Grange knew, or were chargeable with knowledge, that the by-law in question had not always been observed by some of the subordinate granges in the vicinity of Somersworth does not authorize the inference that the State Grange, that established the by-law, had waived or repealed it. It

would be a novel doctrine that knowledge on the part of those charged with the enforcement of a law that it has been violated in some instances, unaccompanied with any attempt to enforce it, is evidence that the law is of no legal force. There is no evidence that by any act of the State Grange this by-law has been repealed or invalidated.

[4] But it is urged that if the by-law was in force they were admitted by inadvertence and mistake, within the meaning of another by-law which provides that "should a grange, inadvertently or by mistake, initiate a member from the jurisdiction of another grange without the consent of such grange, it shall pay the injured grange all the initiatory fees, except what goes to the State Grange." It is found as a fact that this point was not raised or considered by the State Grange upon the appeal, and it does not appear to have been determined by the order in any case. The only mistake suggested is in the assumption of the plaintiffs and of the Somersworth Grange that the by-law relating to jurisdiction was a "dead letter." Although it is found as a fact that they all entertained this idea in good faith, it does not follow that the legal efficacy of this by-law, as applied to them, was thereby abrogated. The evident purpose of the by-law was to make an honest mistake by a subordinate grange as to the residence of the candidate ineffectual to render his admission illegal. It was not intended that a mistake as to the force and validity of a by-law, or an erroneous assumption that a rule of the order defining the eligibility of a candidate was of no consequence, should have the same effect as a careful compliance with the rule. The honest, but mistaken, opinion of a subordinate grange that a rule prescribed by the State Grange relating to the admission of members, not formally repealed or modified by the superior body, was not intended to have the force and effect of law in the particular cases in which it might be applied does not render its nonobservance an immaterial circumstance. If there was a mistake of fact as to the jurisdictional line between two granges, or as to the actual domicile of the applicant, whether within or without that line, the by-law prescribes, in effect, that his initiation does not become void upon the discovery of the fact that he lived without the jurisdiction. The previous rule prescribing a jurisdictional test of the eligibility of the applicants does not apply in such a case. But the finding of the court that the mistake or inadvertence related, not to the fact of the actual residence of the plaintiffs, but to the validity of a material by-law, is not sufficient to relieve the plaintiffs from the consequences of a violation of the by-law when they sought admission to the order. Such a result would be contrary to the

evident intention expressed by the language of the by-law. It is not to be presumed the rule as to the eligibility of candidates was not to apply when there should be a mistaken belief by the parties that it was not in force. Such an assumption is absurd. The mistake suggested and relied upon by the plaintiffs was a mere mistake of law. They erroneously supposed that the by-law was meaningless, but they are not thereby authorized to profit by their error of judgment. *Evans v. Gale*, 17 N. H. 573, 575, 43 Am. Dec. 614; *Bradley v. Laconia*, 66 N. H. 269, 20 Atl. 331; *Stratford Savings Bank v. Church*, 69 N. H. 582, 44 Atl. 105; *State v. Goodenow*, 65 Me. 80; *People v. Powell*, 63 N. Y. 88, 92.

Moreover, by applying for admission to the grange the plaintiffs in effect agreed that their eligibility should be determined by its existing rules and in accordance with the prescribed procedure. If the rule in regard to mistake and inadvertence is deemed to be a part of the contract relation to which the plaintiffs assented, its interpretation does not differ from what it is when viewed as a quasi legislative provision. The question is still one of intention, to be ascertained from the language employed in its application to the subject-matter. No different test is required, and no different result is reached. The plaintiffs did not become members of the Somersworth Grange.

Exceptions sustained.

YOUNG, J., did not sit. PLUMMER, J., was absent. The others concurred.

(77 N. H. 340)

#### WHITE MOUNTAIN FUR CO. v. TOWN OF WHITEFIELD.

(Supreme Court of New Hampshire. Coos. June 27, 1914.)

#### 1. TAXATION (§ 72\*) — PROPERTY SUBJECT TO TAX—"TRADESMAN."

The word "tradesman," in its most common meaning, is synonymous with "shopkeeper"; but it is frequently used in the sense of a skilled workman, as a blacksmith, carpenter, or tanner, and such was the intended meaning of the word in Pub. St. 1901, c. 55, § 7, cl. 6, taxing the stock in trade of tradesmen, and as so used it did not include the owner of a fox pack kept for breeding purposes and for sale.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. § 157; Dec. Dig. § 72.\*

For other definitions, see *Words and Phrases*, First and Second Series, *Trader*.]

#### 2. WORDS AND PHRASES — "MERCHANT" — "SHOPKEEPER."

A merchant is one whose business or occupation is buying and selling commodities; but every person who buys and sells commodities is not necessarily a merchant. What is true of a merchant is true of a shopkeeper, for whether a person who buys and sells commodities as a business is one or the other depends on the extent, and not on the character, of his business; if his business is large he is a "merchant," and if it is small he is a "shopkeeper."

[For other definitions, see *Words and Phrases*, First and Second Series, *Merchant*; *Shopkeeper*.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

3. TAXATION (§ 72\*)—PROPERTY SUBJECT TO TAX—FOXES—"STOCK IN TRADE"—"MERCHANT."

Pub. St. 1901, c. 55, § 7, cl. 6, provides for the taxation of "stock in trade, whether of merchants, shopkeepers, mechanics, or tradesmen, employed in their trade or business," and that, for the purpose of taxation, raw materials, manufactures, and vessels shall be deemed "stock in trade." Held that, while the word "stock" includes all useful animals, including a fox pack, whether kept for sale or for breeding purposes, the word, as used in such act, applied only to property employed by merchants in their business, and since one raising foxes and selling them is not a "merchant," such foxes would only be taxable to one buying and selling them as a merchant.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. § 157; Dec. Dig. § 72.\*

For other definitions, see Words and Phrases, vol. 7, pp. 6665-6668.]

Transferred from Superior Court, Coos County; Sawyer, Judge.

Petition by the White Mountain Fur Company against the Town of Whitefield, for abatement of a tax on plaintiff's fox pack. Case transferred to Supreme Court on agreed statement of facts without a ruling. Remanded, and case discharged.

The plaintiff is the owner of a pack of foxes which it is keeping in "expectation that they will increase, and that as they reach maturity they may be killed and their pelts sold for fur." The plaintiff also intends to "buy and sell live foxes for breeding purposes, in such quantities and at times as may seem most advantageous to it." The tax which the plaintiff asks to have abated was assessed on these foxes for the year 1913.

Drew, Shurtleff, Morris & Oakes, of Lancaster, for plaintiff. Edgar M. Bowker, of Whitefield, for defendant.

YOUNG, J. The defendants concede that foxes are not taxable as such, but contend that these foxes were taxable as stock in trade, under the provisions of subdivision 6 of section 7, c. 55, Public Statutes. Stock is broad enough to include all useful animals (9 Cent. Dict. 5955, Stock 22); that is, to include the plaintiff's foxes, whether kept for sale or for breeding purposes. But, while all stock is in a sense stock in trade, that term is usually applied to the stock of merchants and tradesmen. 9 Cent. Dict. 5956. Consequently, if the language the Legislature used is to be given its ordinary meaning, that is the sense in which "stock in trade" is used in this subdivision. The context tends to the same conclusion, for after providing that "stock in trade, whether of merchants, shopkeepers, mechanics, or tradesmen, employed in their trade or business," is liable to be taxed, it goes on to say that, "for purposes of taxation, raw materials and manufactures of any manufactory, wood, \* \* \* manufactured or otherwise, \* \* \* fishing vessels, \* \* \* or other vessels, \* \* \* shall be deemed stock in trade." The fact that this subdivision says that certain classes of personal property, which are stock in trade, when that term is used to include all property employed in any trade or business, are to be deemed stock in trade for purposes of taxation tends to the conclusion

that that term is to be given its limited or ordinary meaning; that is, that by it is intended only personal property employed by merchants, etc., in their trade or business. As there is nothing to rebut this presumption, it must be held that the only property, in addition to the classes of personal property enumerated in this subdivision, liable to be taxed as stock in trade is that employed by merchants, shopkeepers, mechanics, and tradesmen in their trade or business. Therefore, if it is conceded that these foxes are stock in trade, it will still be necessary to consider whether the plaintiff was a merchant, shopkeeper, mechanic, or tradesman on April 1, 1913, in order to determine the validity of this tax.

[1] No one contends that the plaintiff was a mechanic, within the meaning of the statute. Was it a tradesman at the time the tax was assessed? When that word is given its most common meaning, it is synonymous with shopkeeper (10 Cent. Dict. 6416, Tradesman 1); but it is frequently used in the sense of a skilled workman, as, for example, a blacksmith, a carpenter, or a tanner, and the history of the legislation tends very strongly to the conclusion that that is the sense in which it is used in this subdivision. 1 Prov. Laws (Batch. Ed.) p. 26; Laws (Ed. 1797) p. 203; Laws (Ed. 1805) p. 219; Laws (Ed. 1815) p. 262; Laws (Ed. 1830) p. 555, § 8; R. S. c. 89, § 3, cl. 4; O. S. c. 41, § 3, cl. 5; G. S. c. 49, § 5, cl. 6; G. L. c. 53, § 6, cl. 6; P. S. c. 55, § 7, cl. 6. In short, the history of this legislation tends to the conclusion that by tradesman is intended a mechanic engaged in business for himself. Whatever the plaintiff's business may have been on April 1, 1913, it is clear that it was not exercising a trade; that is, that it was neither a mechanic nor a tradesman at that time.

[2] Was it a merchant or shopkeeper? By a merchant, as that term is ordinarily used, is intended a person whose business or occupation is buying and selling commodities. Although every merchant buys and sells commodities, the converse of this proposition is not true, for but very few of those who buy and sell commodities are merchants. Every producer buys and sells commodities, but producers are not merchants, within the ordinary meaning of that term. On the one hand, they buy commodities to use in their business, while merchants buy them to sell again. On the other hand, they produce, while merchants buy, the commodities they sell. In a word, they produce commodities, and merchants deal in them. What is true of a merchant is true of a shopkeeper, for whether a person who buys and sells commodities as a business is one or the other depends on the extent, not on the character, of his business. If his business is large, he is a merchant; if small, he is a shopkeeper. 6 Cent. Dict. 8713, Merchant. In short, a person who buys and sells commodities, not

occasionally but as a business, is either a merchant or a shopkeeper. 27 Cyc. 479.

[3] Therefore, the test to determine whether the plaintiff was a merchant or shopkeeper on April 1, 1913, is not to inquire how it got its foxes, but why it got them. If its business at that time was buying and selling foxes, it was a merchant or shopkeeper, within this provision of the statute. If, however, it was not dealing in foxes, but keeping them as farmers keep sheep, it was not a merchant or shopkeeper, notwithstanding it bought its foxes intending to sell them and their increase, either for breeding purposes or for their pelts, as might "seem most advantageous to it." If, however, it bought them to sell again, or, rather, if its business is dealing in foxes, the fact that it breeds them does not change the character of its business, for in that case breeding them is merely incidental to dealing in them. The question is: How does the plaintiff expect to make its profit, by buying and selling foxes, or by raising foxes and selling them? In fact, the test to determine the validity of this tax is the same in principle that would be applied if the property had been hay, or, for that matter, almost any tangible personal property, as, for example, books or cotton cloth. The hay a dealer buys to sell again is taxable under this subdivision, but the hay he buys to feed his teams is exempt from taxation. In short, the test to determine the validity of a tax on either hay or books, in so far, at least, as this subdivision is concerned, is to inquire as to the character of the owner's business. If he is a dealer in them and carrying them in stock, they are taxable. If, however, he bought them, not to sell, but for use in his business, they are not taxable as the stock in trade of a merchant, etc., employed in his trade or business. The reserved case is as capable of the construction that the plaintiff bought its foxes for breeding purposes as that its business is dealing in foxes. Therefore, if the parties do not agree as to what the plaintiff's business was at the time this tax was assessed, that fact must be found before any decree can be made in this case.

It will not be necessary at this time to consider whether a person who steals one of the plaintiff's foxes is guilty of larceny, for, even if he cannot be convicted of that offense, the plaintiff can recover either the fox or its value from the thief. In other words, these foxes are property; and no reason is apparent, and none has been suggested, why the Legislature could not include them in the list of personal property liable to be taxed. Whether it has so included them depends on the character of the plaintiff's business on April 1, 1913; in other words, on whether its business was breeding foxes or dealing in them. Case discharged.

PLUMMER, J., was absent. The others concurred.

(77 N. H. 319)

**O'DOWD v. ELLIOTT et al.**

(Supreme Court of New Hampshire. Hillsborough. June 2, 1914.)

**CONTRACTS (§ 74\*)—BENEFIT OF THIRD PERSON—CONSIDERATION—CONDITION.**

Defendants contracted to become partners in a business with O. and another in consideration of defendants' agreement to pay plaintiff what O. owed him, the latter agreeing to continue in the business and manage the same. Plaintiff assented to the arrangement for the payment of the debt and discharged O. from liability. *Held*, that plaintiff's release of O. from liability at defendants' request was a sufficient consideration for their promise to pay O.'s debt for which they were liable, though O. did not perform his promise to continue in the business and manage the same, and plaintiff would not have released O. from liability but for such promise.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 331-343; Dec. Dig. § 74.\*]

Exceptions from Superior Court, Hillsborough County; Peaslee, Judge.

Assumpsit by Hugh D. O'Dowd against Harriet B. Elliott and another to recover on defendants' promise to pay plaintiff a sum of money owed him by one Olsen and another. A verdict was returned in favor of the plaintiff, and the case was transferred on defendants' exception thereto. Overruled.

The Olsens admitted the defendants as partners in business in consideration of their agreement to pay the plaintiff what the Olsens owed him. The Olsens agreed to, continue in the business and manage the same, but subsequently withdrew. The plaintiff assented to the arrangement for the payment of his debt and discharged the Olsens from liability, but would not have done so but for their promise to continue as managers of the business.

David W. Perkins, of Manchester, for plaintiff. James A. Broderick, of Manchester, for defendants.

YOUNG, J. The fact that the plaintiff would not have released the Olsens from liability but for their promise to continue as managers of the business is immaterial in so far as the defendants' liability is concerned. The plaintiff released the Olsens from liability at the defendants' request, and that is a sufficient consideration for their promise to pay the plaintiff what the Olsens owed him. Cutting v. Whittemore, 72 N. H. 107, 103, 54 Atl. 1098; Head v. Richardson, 16 N. H. 454, 456. Exception overruled.

PEASLEE, J., did not sit. The others concurred.

(77 N. H. 347)

**BAKER et al. v. CITY OF NASHUA.**

POLLARD et al. v. SAME.

(Supreme Court of New Hampshire. Hillsborough. July 17, 1914.)

**1. MUNICIPAL CORPORATIONS (§ 186\*)—POLICE OFFICERS—APPOINTMENT—COMPENSATION FOR SERVICES.**

Where police commissioners of the city of Nashua, acting in good faith, appointed certain persons as police officers and they performed all the duties of the office, they were officers *de jure* and entitled to compensation.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 510-517; Dec. Dig. § 186.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

## 2. OFFICERS (§ 95\*)—OFFICERS DE JURE—PERFORMANCE OF SERVICE—COMPENSATION.

The fact that a de jure officer has not performed the duties of his office, because they have been performed by a de facto officer, does not deprive him of the right to recover his salary.

[Ed. Note.—For other cases, see *Officers*, Cent. Dig. §§ 184, 189; Dec. Dig. § 95.\*]

## 3. MUNICIPAL CORPORATIONS (§ 176\*)—POLICE DEPARTMENT—APPROPRIATIONS—EXPENDITURES BY POLICE COMMISSIONER—STATUTES—REPEAL.

Laws 1913, c. 148, creating the police commission for the city of Nashua and certain other cities, provides (section 4) that it shall be the duty of the commission to appoint such police officers as they may in their judgment deem necessary, and to fix their compensation, and section 8 repeals so much of Laws 1891, c. 208, § 8, the laws and ordinances of the city, and city charter, as are inconsistent with the provisions of chapter 148. *Held* that, since the commission cannot determine the number of men to be employed to police the city and fix their compensation, if the city council has power to limit the expenditure for such purpose, so much of the pre-existing law as was inconsistent with the right of the commission to decide such questions for itself was repealed, and the commission had power to pledge the city's credit to the extent necessary to pay such number of police officers as in its discretion were necessary to be employed to properly police the city, and it was the duty of the council to provide the amount necessary for that purpose.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 427-440; Dec. Dig. § 176.\*]

Exceptions from Superior Court, Hillsborough County.

Actions by George E. Baker and others and by Harvey Pollard and others against the City of Nashua. Rulings were made in favor of plaintiffs in each case, and the city brings exceptions. Overruled.

After the rescripts in *Pollard v. Gregg*, 77 N. H. 190, 90 Atl. 176, and *Baker v. Barry*, 77 N. H. 198, 90 Atl. 180, were transmitted to the superior court, the plaintiffs amended both actions by making the city of Nashua a party defendant and by filing declarations in assumpsit. Upon a hearing, the court found (1) that the police commissioners acted in good faith, and (2) were not guilty of a breach of trust, and (3) that the plaintiffs in both actions were entitled to recover from the city, and (4) ruled that the commission had power to pledge the credit of the city over and above the amount appropriated by the city councils for the use of the police department. To these findings and rulings the city of Nashua excepted.

Wason & Moran, George F. Jackson, and Doyle & Lucier, all of Nashua, and Remick & Jackson, of Concord, for plaintiffs. Henry A. Burque, of Nashua, for City of Nashua.

PER CURIAM. 1. There was evidence from which it could be found that the police commissioners acted in good faith, both in removing the old officers and in appointing the new ones, and that they were not guilty of a breach of trust. The city therefore

takes nothing by its first and second exceptions.

[1, 2] 2. This is also true of its third exception, in so far as the right of the plaintiffs to recover is a question of fact. Since the commission acted in good faith in appointing the plaintiffs in the first action, they are entitled, in any permissible view of the law, to recover compensation as fixed by the commission (*Cousins v. Manchester*, 67 N. H. 229, 38 Atl. 724); for they are not only officers de jure, but have performed all the duties of the office. Although the plaintiffs in the second action are officers de jure, they have not performed any of the duties of the office. The question therefore, in so far as they are concerned, is whether that fact is an answer to the action. Although some courts hold that a de jure officer cannot recover under such circumstances when the salary has been paid to a de facto officer without notice of the former claim, most courts hold that the simple fact that an officer de jure has not performed the duties of his office is no defense to an action to recover the salary attached to the office. *Andrews v. Portland*, 79 Me. 484, 10 Atl. 458, 10 Am. St. Rep. 280; *State v. Carr*, 129 Ind. 44, 28 N. E. 88, 13 L. R. A. 177, 28 Am. St. Rep. 163. This rule obtains in this state. *Stone v. Towne*, 67 N. H. 113, 29 Atl. 637. The question as to the rights of de facto officers, discussed in the defendants' brief, is not before the court. *Peterson v. Benson*, 38 Utah, 286, 112 Pac. 801, Ann. Cas. 1913B, 640, 32 L. R. A. (N. S.) 949, note.

[3] 3. Chapter 148, Laws 1913, creates the police commission and prescribes its duties. Section 4 provides:

"It shall be the duties of said police commissioners to appoint such police officers \* \* \* as they may in their judgment deem necessary, and to fix their compensation."

Section 8 repeals so much of section 8, c. 208, Laws 1891, the Public Statutes, the laws and ordinances of the city, and the city charter, as are inconsistent with the provisions of chapter 148.

If the language of section 4 is to be given its ordinary meaning, it is the duty of the police commission to appoint as many officers as it thinks are necessary to properly police the city and to determine the amount they shall be paid. The only limitation on its power, in so far as these matters are concerned, is its honest judgment as to what the public welfare requires. Whether section 4, c. 148, Laws 1913, repeals so much of section 8, c. 208, Laws 1891, as makes it the duty of the city councils to determine the amount of money the police commission may use depends, therefore, on whether that provision is inconsistent with the provisions of section 4 which make it the duty of the commission to determine the number of officers necessary to police the city and to fix their compensation.

If the city councils can limit the amount of

money the commission may use, it is apparent that it cannot determine the number of men which should be employed to police the city and fix their compensation. In other words, it is obvious that, if the city councils can, the police commission cannot determine the amount of money which should be used to police the city. Therefore, so much of section 8, c. 208, Laws 1891, as is inconsistent with the right of the commission to decide these questions for itself is repealed. In short, the commission is the city in so far as determining the number of men that should be employed and fixing their compensation is concerned; its acts, in so far as these matters are concerned, are the acts of the city, and its mistakes, if it makes any, are the mistakes of the city. Section 4, c. 148, Laws 1913, therefore gives the commission the right to pledge the credit of the city to the extent necessary to pay the men it thinks should be employed to properly police the city, and by necessary implication makes it the duty of the city councils to provide the money necessary for that purpose, as well as to pay all the other necessary expenses of the police department.

Exceptions overruled.

(124 Md. 66)

**HOLT et al. v. STATE ROADS COMMISSION et al.** (No. 53.)

(Court of Appeals of Maryland. June 26, 1914.)

**1. CORPORATIONS (§ 544\*)—INSOLVENCY—ADMINISTRATION OF ESTATE—TRUST FUND.**

When a corporation becomes insolvent, it is so far civilly dead that its property may be administered in equity as a trust fund for the benefit of its stockholders and creditors, of whatever state they may be residents.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2162-2169; Dec. Dig. § 544.\*]

**2. COUNTIES (§ 129\*)—IMPROVEMENTS—HIGHWAYS—BRIDGES—SUBCONTRACTORS—SURETIES.**

Where a bridge company contracted to construct a bridge and certain highways for two counties, and executed a bond conditioned that if the bridge company should comply with the contract and should indemnify and save harmless the commissioners of the contracting counties and the state against all costs, expenses, damages, or loss to which the commissioners and state might be subjected by reason of any wrongdoing, misconduct, want of skill or care, negligence, or default on the part of the bridge company, its agents or employes in and about the execution and performance of the contract in the matter of constructing the highway, then the obligation should be void, otherwise to remain in full force and virtue, the surety was not liable for the bridge company's failure to perform its contract, by which it sublet the construction of the highways to a subcontractor, due to the bridge company's subsequent insolvency.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 197; Dec. Dig. § 129.\*]

**3. COUNTIES (§ 130\*)—IMPROVEMENTS—BRIDGES AND HIGHWAYS—CONSTRUCTION—SUBCONTRACT—RIGHTS OF SUBCONTRACTOR.**

Where a bridge company contracted to construct a bridge and certain highways for two

counties, and sublet the highway work to plaintiffs, and then became insolvent, plaintiffs were mere creditors of the bridge company and not of the counties, and could not apply the doctrine of subrogation, so as to enforce a liability against the fund in the hands of the counties remaining to the credit of the bridge company, which instead was payable to the latter's receiver for distribution among all the creditors.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 198; Dec. Dig. § 130.\*]

**Appeal from Circuit Court No. 2 of Baltimore City; James M. Ambler, Judge.**

Action by Thomas S. Holt and another, trading as the Holt Construction Company, against the State Roads Commission and others. From an order sustaining demurrers of the Title Guaranty & Surety Company and others, and dismissing the bill, plaintiffs appeal. Affirmed.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, URNER, STOCKBRIDGE, and CONSTABLE, JJ.

Frank Gosnell, of Baltimore (Hazelton A. Joyce, Jr., of Cambridge, and Marbury, Gosnell & Williams, of Baltimore, on the brief), for appellants. Julian W. Ridgely and Aubrey Pearre, Jr., both of Baltimore (Barton, Wilmer & Stewart and Harley & Whelittle, all of Baltimore, on the brief), for appellees.

**BURKE, J.** Thomas S. Holt and Clayton S. Kauffman, copartners trading under the name of the Holt Construction Company, filed their bill of complaint in circuit court No. 2 of Baltimore city against the appellees on this record.

The material facts which need be stated are these: On or about the 15th of May, 1911, the York Bridge Company, a Pennsylvania corporation, entered into a contract with the county commissioners of Caroline county and the county commissioners of Talbot county for the furnishing of all material and labor for the construction and completion, according to plans and specifications on file in the office of each of said counties, of a bridge known as Dover Bridge, and also a section of highway for a distance of about .83 miles upon and along the Dover Bridge road in Caroline county.

Under the contract of the York Bridge Company with the county commissioners of the two named counties, it was to be paid the following prices for the road construction: For borrow and fill, the price of 50 cents per cubic yard. For all class B oyster shell surfacing, 75 cents per square yard. For riprapping, \$1.25 per square yard.

The contract further provided that the contractor should give his personal attention to the performance of the contract, and should keep the same under his control. The subletting of portions of the work to be done under the contract might be done only upon the written consent of the county commissioners and approved by the engineer, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



that the contractor should not, either legally or equitably, assign any of the moneys payable under the contract, or his claim there-to, unless by and with the like consent of the county commissioners in writing. No liability should attach to the county commissioners or to the counties, under the terms of the contract, until the engineer had approved the work and certified in writing that the contractor had completed the work according to the requirements of the contract.

It was further provided that the contractor should not be entitled to demand or receive payment for any portion of the work or material, except in the manner set forth in the contract and specifications, and until the engineer had given his certificate to that effect, whereupon said counties, by and through the county commissioners, will, within 30 days after such completion and delivery of said certificate, pay, or cause to be paid, the said contractor, in cash, the whole amount of money then due the said contractor, under the contract, excepting such sum or sums as may be lawfully retained under any of the provisions of the contract hereinbefore set forth.

The Title Guaranty & Surety Company, one of the appellees, became surety upon the bond of the York Bridge Company for the completion of the work according to the terms of the contract. This bond was given under the Acts of 1910, c. 217, § 39 (Code 1912, art. 91, § 72). The condition of the bond was that if the principal, the York Bridge Company, shall in all respects comply with the terms and conditions of said contract, and his obligations thereunder, including the specifications therein referred to and made part thereof and such alterations as may be made in said specifications as therein provided for, and shall indemnify and save harmless the said county commissioners of Caroline and Talbot counties and the said state of Maryland against or from all costs, expense, damages, injury, or loss to which the said county commissioners of Caroline and Talbot counties and the said state of Maryland may be subjected, by reason of any wrongdoing, misconduct, want of care or skill, negligence, or default, upon the part of said principal, his agents or employes in or about the execution or performance of said contract, including said specifications, and such alterations as may be made in said specifications as therein provided for, and shall save and keep harmless the said county commissioners of Caroline and Talbot counties and the said state of Maryland against and from all losses to them or either of them, from any cause whatever, including patent infringements, in the matter of constructing said section of state-aided highway, then this obligation to be void, and otherwise to be and remain in full force and virtue in law.

About a year after the contract had been awarded to the York Bridge Company, it entered into a contract with the plaintiffs for

the construction of the section of highway mentioned along the Dover road. The portions of that contract material to this case are:

"Whereas, on the 15th day of May, A. D. 1911, the York Bridge Company entered into a contract in writing with the county commissioners of Caroline and Talbot counties, Maryland, for the furnishing of all material, etc., and to construct and complete, as per plans and specifications on file in the offices of the county commissioners of Caroline and Talbot counties, bridge known as Dover Bridge and section of state highway for a distance of about 0.83 miles upon and along Dover Bridge road, in Caroline and Talbot counties, Maryland, which contract is known in the business of the York Bridge Company as contract number eleven hundred and ninety-four (1194): Now, therefore, for and in consideration of the sum hereinafter named, the construction company agrees to furnish all labor, tools, appliances and every other thing necessary and pertinent to the construction of the said section of state highway upon and along Dover road. It is understood and agreed that the construction company is to assume all the obligations and to do everything necessary to the construction and completion of said road as called for by the plans and specifications which are on file in the offices of the county commissioners of Caroline and Talbot counties, and to be governed by the said plans and specifications the same as the York Bridge Company itself has agreed to be governed. For and in consideration of the work to be performed, the bridge company agrees to pay the construction company, upon approval and acceptance of said road by the county commissioners as follows: For borrow and fill, the price of fifty cents (\$.50) per cubic yard. For all class B oyster shell surfacing, eighty cents (\$.80) per square yard. For riprapping, the price of one dollar and twenty-five cents (\$1.25) per square yard."

It will be noted that the only change in the prices for the work was that the plaintiffs were to receive 80 cents for oyster shell surfacing instead of 75 cents, as provided in the contract of the bridge company with the county commissioners.

The bill alleged that the plaintiffs "completed their said work under said contract with the York Bridge Company, a body corporate, and there is now due and owing your orators under said contract the sum of four thousand five hundred dollars (\$4,500) or more," and that said sum is due the plaintiffs "for labor and materials furnished by them to said contractor, the York Bridge Company"; that the state roads commission and the county commissioners have in hand and ready for payment on said contract the sum of approximately \$5,000. It is further alleged that the plaintiffs are the only persons, so far as they know, to whom the York Bridge Company is indebted for labor and materials; that the said bridge company is a nonresident of this state, and is insolvent and unable to pay its debts, and that a receiver had been appointed for said corporation in the state of Pennsylvania by a court of competent jurisdiction. It is then alleged that the Title Guaranty & Trust Company is liable for the indebtedness of the York Bridge Company to the plaintiffs, and that it should pay the same and be subrogated to

the rights of the plaintiffs, and should collect the amount thereof from the state road commission and the county commissioners of Caroline and Talbot counties.

The relief prayed for was:

(1) That a receiver may be appointed to take charge of the said fund now in the hands of the said state roads commission and the said O. E. Weller, as chairman thereof, and the said county commissioners of Talbot county and the said county commissioners of Caroline county, and such other property as the said York Bridge Company may have in the state of Maryland, and to preserve or dispose of the same under the direction of this court.

(2) That the said state roads commission and the said O. E. Weller, as chairman thereof, and the said county commissioners of Talbot county and the said county commissioners of Caroline county may be required to bring into this court, to be deposited to the credit of this cause, the aforesaid fund now due on said contract.

(3) That the said York Bridge Company and its foreign receiver may by injunction be restrained and enjoined from collecting the said fund or any part thereof from the said state roads commission, the said O. E. Weller, as chairman thereof, the said county commissioners of Talbot county and the said county commissioners of Caroline county.

(4) That the said state roads commission and O. E. Weller, as chairman thereof, the said county commissioners of Talbot county and the said county commissioners of Caroline county may by injunction be restrained and enjoined from paying over the said sum of money or any part thereof, until the further orders of this court.

(5) That your orators' claim to the said fund may be adjudicated by this honorable court in these proceedings.

(6) That the said the Title Guaranty and Surety Company may be required to pay the claim of your orators, and in turn be subrogated to the rights of the plaintiffs to the fund in question.

(7) That your orators may have such other and further relief as the nature of their case may require.

Redmond C. Stewart, the receiver of the York Bridge Company, filed a petition in which he stated that by an order of court passed in the case pending in circuit court No. 2 of Baltimore city, entitled "York National Bank v. York Bridge Co.," he had been authorized to take proceedings in this cause, looking to the establishment of his claims as receiver against the fund involved in this controversy, and prayed to be made a party defendant, and an order of court was passed admitting him as a party defendant as prayed.

The state roads commission filed its answer to the bill in which it denied:

"That the Title Guaranty & Surety Company is entitled to collect the amount of the indebtedness of the York Bridge Company to the complainant from these defendants, or that the complainant is entitled to an injunction restraining these defendants from paying over said balance of \$5,516.66, or any part thereof, to the York Bridge Company, or its receiver, or that the complainant is entitled to have a receiver appointed for said sum of money, or any part thereof."

The Title Guaranty & Surety Company and Redmond C. Stewart, the receiver of the York Bridge Company, filed demurrers to the bill.

The court sustained the demurrers and dismissed the bill, but ordered the costs of the proceedings to be paid by the receiver out of the fund in dispute. From this order the plaintiffs have appealed.

[1] "It is an established rule of equity that, when a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors (Graham v. La Crosse & M. R. R. Co., 102 U. S. 148, 167, 26 L. Ed. 106)—not simply of stockholders and creditors residing in a particular state, but all stockholders and creditors of whatever state they may be citizens. In Wabash St. L. & P. R. R. Co. v. Ham, 114 U. S. 587, 594, 5 Sup. Ct. 1081, 29 L. Ed. 235, it was said that the property of a corporation was a trust fund for the payment of its debts, in the sense that when the corporation was lawfully dissolved, and all its business wound up, or when it was insolvent, all its creditors were entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders.

\* \* \* When the general debts and assets of a private corporation, lawfully doing business in a state, are in course of administration by the courts of such state, creditors who are citizens of other states are entitled, under the Constitution of the United States, to stand on the same plane with creditors of like class who are citizens of such state, and cannot be denied equality of right simply because they do not reside in that state, but are citizens residing in other states of the Union." Blake v. McClung et al., 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432.

[2] The Title Guaranty & Surety Company is not liable for the payment of the plaintiffs' claim for the reason that it assumed no such liability under the terms of the bond. Although such a liability was asserted by the bill, it was not pressed in argument, or insisted upon in the brief, and it must be conceded that under the terms of the bond, which we have transcribed, that company is under no obligation to pay the plaintiffs' claim.

It is said in 4 Elliott on Contracts, § 3633, that:

"The contractor may assign different parts of the work to subcontractors and others, unless prohibited by the agreement, but he is responsible for those he employs, since a contract does not exist between a subcontractor employed by the general contractor and the owner of the building, and the responsibility of the owner is only to the general contractor. Thus a provision in a contract for the construction of a railroad, permitting the railroad company to apply any money due or to become due under the contract to the payment of liens for labor and materials furnished the contractor, does not impose any obligation on the railroad company to pay liens, since the provision was wholly for the benefit of the railroad company."

What the York Bridge Company in fact did was to sublet a portion of the work covered by the contract to the plaintiffs, although, by the express provision of the con-

tract quoted above, it was prohibited from doing so, without the written order of the county commissioners approved by the engineer, and this order and approval does not appear to have been given. It was likewise prohibited from assigning any money payable under the contract. The plaintiffs must be treated as mere subcontractors.

[3] They are simply creditors of the York Bridge Company, and not of the defendants, who are debtors to that company, and to whose receiver the fund is now payable. Under the facts of the case, the doctrine of subrogation has no application. That doctrine is never applied, when by so doing it will work an injury upon other persons by destroying their legal or equitable rights. In *Milbolland & Wilcox, Trustees, v. Tiffany*, 64 Md. 460, 2 Atl. 834, the court says:

It "may be applied on equitable principles in behalf of one, who at the instance and request of the debtor pays a lien or incumbrance which he was under no legal obligation to pay, provided it does not interfere with intervening rights and incumbrances. It will not, of course, be applied as against superior or equal equities."

The plaintiffs have no more claim upon the funds than other persons who may have supplied labor and material on the erection of the Dover Bridge. To sustain the plaintiffs' claim under the circumstances would be to establish a precedent that might involve the public authorities in litigation and result in the expenditure of public money and the consumption of public time in any case in which there was a dispute between the subcontractor and the general contractor. Although the facts are not precisely similar, the principles announced in *Lombard Gov. Co. v. Mayor and City Council of Baltimore*, 121 Md. 303, 88 Atl. 140, should be applied to this case. The plaintiffs occupy the same situation as other subcontractor creditors of the insolvent company, and must share rateably with them in the distribution of the assets of the company.

The cases of *Ex parte Golding, Davis & Co.*, 18 Ch. Div. 628, and *Kemp v. Falk*, 7 App. Cas. 573, cited by the appellants, dealt with the right of stoppage in transitu, and established the right of an unpaid vendor to the surplus proceeds of the sale of his own goods after the rights of the subpurchaser had been performed. In the first case cited there had been an absolute sale of the goods by the original purchaser, but the purchase money had not been paid. "Can the vendor," said Cotton, L. J., "make effectual his right of stoppage in transitu without defeating in any way the interest of the subpurchaser? In my opinion he can. He can say: I claim the right to retain my vendor's lien. I will not defeat the right of the subpurchaser, but what I claim is to defeat the right of the purchaser from me; that is, to intercept the purchase money which he will get, so far as is necessary to pay me."

Nor do we find anything in the cases of *Bellamy v. Davey* (1891) 3 Ch. 540, and *Hurley v. Atchison, etc., Ry.*, 213 U. S. 126, 29 Sup. Ct. 466, 53 L. Ed. 729, in conflict with the conclusion we have reached. Those cases presented a dissimilar state of facts and were governed by different principles.

The order appealed from will be affirmed.

Order affirmed; the costs in this suit to be paid by the receiver of the York Bridge Company out of the fund.

(83 N. J. Eq. 470)

MAYOR AND COMMON COUNCIL OF  
NEWARK v. NATIONAL SILK  
DYEING CO. et al.  
(No. 88171.)

(Court of Chancery of New Jersey. Aug. 21, 1914.)

INJUNCTION (§ 26\*)—GROUNDS OF RELIEF.

An injunction could not be granted to enjoin separate suits at law, brought by millowners, whose factories adjoin the Passaic river, for damages for the wrongful abstraction of water from the river by a water company, which suits had no connection with each other, since to do so would violate a fundamental equity rule that distinct and independent causes of action may not be united in one bill.

[Ed. Note.—For other cases, see *Injunction*, Cent. Dig. §§ 24-49, 54-61; Dec. Dig. § 26.\*]

Suit by the Mayor and Common Council of Newark against the National Silk Dyeing Company and others, to enjoin certain suits at law. Denied.

Herbert Boggs, of Newark, for complainant. W. I. Lewis, of Paterson, for National Silk Dyeing Co. et al. Gilbert Collins, of Jersey City, for East Jersey Water Co.

STEVENS, V. C. This is an application to enjoin 12 suits at law, brought by millowners, whose factories adjoin the Passaic river, for damages for the wrongful abstraction of water by Newark, Jersey City, and the East Jersey Water Company. The application must be denied, for the reasons given by me in the case of *Newark v. Chestnut Hill Land Co.*, 77 N. J. Eq. 23, 75 Atl. 644.

It is said that the case on hand is distinguishable from the case cited in that there it did not appear that a multiplicity of suits would be prevented by the mere transfer of jurisdiction, while here it does, for the object here is to consolidate 12 suits into one. But, if this court sustained the contention, it would violate one of the fundamental rules of equity pleading, viz., that distinct and independent causes of action must not be united in one bill. The suits by the National Silk Dyeing Company against Newark have no connection with those against Jersey City or the East Jersey Water Company. The suits by the different companies against those corporations have no connection with each other. *Simmons v. Paterson*, 60 N. J. Eq. 385, 45 Atl. 995, 48 L. R. A. 717, 83 Am. St.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Rep. 642, was quite different. There several complainants, suffering from a common nuisance, joined in one bill. The effect of this nuisance upon lands, known as riparian, was the subject dealt with by the Court of Errors. Here it would seem that the injury or principal injury complained of is the injury to the various businesses of the plaintiffs. There the complainants were affected by the same act. Here the plaintiffs are affected by the perfectly distinct acts of Newark, Jersey City, and the water company.

It is true that the aggregate damage resulting from the separate acts of the three wrongdoers may be variously estimated by different juries, if the cases be tried separately, but the possibility of different findings on the same state of facts is not a ground of equity jurisdiction. Besides, there is nothing to indicate that, if the verdicts should be the result of differing or conflicting estimates of total damage, Newark would be the one to suffer. If consolidation of the suits for the purpose of trial be, to a greater or lesser extent, desirable, I know of no reason why the Supreme Court should not be asked to consolidate.

I cannot overlook the fact that the Supreme Court, in the suits brought by the Weidman Dyeing Company, has formulated a rule which it has applied to this very class of cases, thus declaring that it deems itself competent properly to deal with them.

(33 N. J. Eq. 454)  
**SCHICKHAUS v. SANFORD.** (No. 33-478.)  
 (Court of Chancery of New Jersey. Aug. 21, 1914.)

**1. HUSBAND AND WIFE (§ 193\*)—MARRIED WOMEN—RIGHT TO CONTRACT—STATUTES.**

3 Comp. St. 1910, p. 3226, § 5, declaring that contracts of a married woman shall be enforceable in equity as if she were sole, is qualified by section 14, declaring that a married woman may not execute any conveyance of her real property or any instrument incumbering the same without her husband's joinder.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 716-718, 940; Dec. Dig. § 193.\*]

**2. COVENANTS (§ 20\*) — IMPLIED RESTRICTIONS.**

Restrictions, in a general plan adopted by the owner to sell lots, may in equity be imposed on the lands beyond the express restrictions contained in the deeds to the purchaser, on the theory of implied covenant.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 19; Dec. Dig. § 20.\*]

**3. HUSBAND AND WIFE (§ 150\*)—MARRIED WOMEN — CONTRACTS — ENFORCEMENT IN EQUITY.**

3 Comp. St. 1910, p. 3226, § 5, declares that contracts of a married woman shall be enforceable in equity as though she were sole, and section 14 provides that a married woman may not execute any conveyance or incumbrance on her real property without her husband's joinder. *Held*, that paragraph 14 related only to the character of conveyances and instruments by which a married woman's real property might be conveyed or incumbered, and

did not restrict the power of a wife, under paragraph 5, to make contracts, express or implied, with reference to the improvement of real property which would be enforced in equity, though not created by conveyance or other instrument.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 575-581; Dec. Dig. § 150.\*]

**4. HUSBAND AND WIFE (§ 202\*)—OWNERSHIP OF PROPERTY—RESTRICTIONS—ENFORCEMENT AGAINST WIFE.**

Where a husband and wife, owning a tract of land by the entirety, laid it out in building lots according to a general plan, imposing limitations on the use of the land as building lots and restrictions intended to secure the erection of first-class one-family residences on the tract, and the husband sold complainant a lot, with reference to the plan, which showed that certain other lots were abutting and subject to such restrictions, the wife after the death of her husband, and becoming a feme sole, was liable to complainant for the performance of the limitations and restrictions with reference to the adjoining property as an implied covenant, though all of the restrictions and limitations were not specified in complainant's deed.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 737, 945; Dec. Dig. § 202.\*]

Action by Emma L. Schickhaus against Margaret J. Sanford. On motion to strike out bill for want of equity. Denied.

W. C. Headley, of Newark, for the motion. Ernest F. Keer, of Newark, opposed.

**EMERY, V. C.** The facts set out in the bill substantially show that one Sanford and his wife, being the owners by the entirety of a large tract of land in Newark, laid out the same for sale in building lots according to a general and uniform plan relating to the limitations made upon the use of said lands as building lots, and with restrictions, intended to secure the erection of first-class one-family residences on the tract. The bill also shows specially, as to the lot which was purchased by the complainant's predecessor in title, that according to the general plan as declared by the owners, appearing by the map adopted by the owners, complainant's lot was to be a lot 50 feet by about 100 feet in depth, located on Sanford avenue, one of the three streets laid out through the tract, and abutted on two lots fronting on Clinton avenue, each about 50 feet in width and 175 feet in depth. According to the general plan as alleged in the bill, these two lots were to be sold together as a lot fronting 100 feet on Clinton avenue and 175 feet deep. Complainant's lot was purchased, relying on the existence of this map and plan, making the adjoining lots abutting lots, and upon the special representation by the owners that these lots on Clinton avenue were to be sold as abutting lots, and, as thus shown on the map then produced, for the purpose of inducing complainant's purchase of the adjoining lot, the price of which, as then agreed on, was increased by reason of this adjacency to the abutting lots. But the deed for complainant's lot, which is also set out in the bill, while it referred to the lot as being No.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

22 on the map, did not contain any express restriction or covenant, on the part of the grantors, that the adjoining lots should be sold as abutting lots, as shown on the map. It did, however, contain express restrictions as to the character and use of the building to be erected by complainant upon the lot conveyed, its distance from the curb line, its cost, and also contained a covenant on behalf of the husband (in which the wife did not join) that no stable should be erected or placed on the lands lying south of and adjoining the lots conveyed (being the abutting lots) within 40 feet of the dwelling house to be erected on the premises conveyed. The wife herself made no express covenant by the deed in relation to the adjoining lots.

Complainant's predecessor in title, as her bill states, refused to accept this deed, because she desired further and more explicit assurances that the building plan or scheme would be carried on in respect to the lot conveyed being an abutting lot, and thereupon Mr. Sanford wrote the following letter:

"In regard to the sale of lot 22 on map of my property (being complainant's lot) in answer to your request of me to my intentions in regard to my other property lying between the lot conveyed by me to you and Clinton avenue (the abutting lots), state that my intention is to sell all my property under restrictions, and the lots lying between your lot and Clinton avenue, in two lots or plots only, and if a stable be allowed on either of said lots that the same be placed on the dividing or central line of the lots and at least 40 feet from any dwelling house erected by you."

This letter was not signed by Mrs. Sanford, who has survived her husband, and is now the sole owner of the unsold portions of the tract. Since her husband's death, she has, as the bill alleges, repudiated any obligation to observe the assurances of the letter in reference to the method of sale of the lots, and has (among other acts) offered the rear portion of the lots abutting on complainant's lot for sale as a single lot fronting on the same street with complainant, and as an adjoining lot. If this change should be carried out and a dwelling be erected adjoining complainant's lot, it would deprive complainant of certain advantages of light, air, and access which she claims the right to enjoy as the owner of a residence on abutting lots. The bill is filed to establish and enforce the restriction claimed to have been imposed by the owners on the sale of these Clinton avenue lots by the general building plan, as declared and announced by the husband and made in connection with the sale by reference to the map, and to require these adjoining lots to be sold as abutting lots.

A motion to strike out the bill for what of equity is made, and the reason mainly relied on at the argument is that no contract or agreement, in reference to the sale of the lots as abutting lots, enforceable against Mrs. Sanford, appears in the bill. It is claimed that the alleged building plan set out in the bill appears to have been made or

joined in by her while she was a married woman and while holding an estate in entirety with her husband; and that, in the absence of any deed or conveyance imposing the equitable burden or restrictions on her remaining lands, she is not, as the owner of the entire estate after her husband's death, bound by such plan made during the coverture and during the continuance of the estate by the entirety.

[1] The Married Women's Act (Compiled Stats. p. 3226, § 5), makes the contracts of a married woman enforceable in equity as if she were a feme sole, but the subsequent section of the same act (id. p. 3237, § 14) qualifies the effect of this section by providing that it shall not enable a married woman to execute any conveyance of her real estate or any instrument incumbering the same, without her husband's joining therein, as heretofore.

The husband, in the deed conveying complainant's lot, entered into an express covenant restricting the character and use of the adjoining lots, but in this covenant the wife did not join, nor did the covenant entered into by the husband expressly restrict the sale as an adjoining lot, or the erection of any building other than a stable within 40 feet of the dwelling house to be erected on the purchaser's lot. The husband did, however, by his letter set out in the bill, impliedly, if not expressly, agree that the lots in question should be abutting lots, and procured the sale and the acceptance of the deed for the purpose of erecting a dwelling house, on the faith of this assurance. It is not claimed that the wife's estate after her husband's death is bound by this letter as a contract on her part, and, under the decisions, it could not be incumbered by the husband's sole agreement. *Washburn v. Burns*, 34 N. J. Law, 18; *Servis v. Dorn*, 78 N. J. Eq. 241, 78 Atl. 246 (Walker, V. C., 1909); 2 Kent's Comm. 133. It is claimed, however, that she is bound in equity to observe these restrictions by reason of the general building plan imposed and adopted by both of them in connection with the map referred to in the deed, which showed the lots as abutting lots and the representations relative thereto at the time of the purchase.

[2] Restrictions under a general plan adopted by the owner for the purpose of selling lots may in equity be imposed upon lands of the owner, extending beyond the express restrictions contained in the deeds to a purchaser, and on the doctrine of implied covenants. *Lennig v. Ocean City Association*, 41 N. J. Eq. 606, 608, 7 Atl. 491, 56 Am. Rep. 16 (Errs. & App.); *Herold v. Columbia Investment Co.*, 72 N. J. Eq. 857, 860, 67 Atl. 607, 14 L. R. A. (N. S.) 1067, 129 Am. St. Rep. 718, 16 Ann. Cas. 580 (Errs. & App. 1907); *Tallmadge v. East River Bank*, 26 N. Y. 105 (1862).

In this case (heard as on demurrer) the imposition of the restriction on the sale of

the corner lots by the general plan, in connection with the map, and the special representations at the time of the sale must be taken as admitted. But as it sufficiently appears by the bill that these restrictions on the adjoining lots, now solely owned by the defendant, were not imposed by a conveyance or instrument in which her husband joined, and which was acknowledged by the wife as a deed, the question is whether the wife's contracts, representations, or acts of other kinds imposing such restrictions are not within the exception of the fourteenth section.

[3] In my judgment they are not, for the reason that this provision of the fourteenth section was, I think, one which related only to the character of conveyances and instruments which were intended to be the means employed for conveying or incumbering the legal or equitable title of a married woman in the lands, and to prescribe the formalities for such conveyance or instrument, if made. It was not intended, in my judgment, to restrict the power of the wife, under the fifth section, to enter into such obligations and contracts, express or implied, as would be enforced by a court of equity, independent of their being created by a conveyance or other instrument.

[4] Had the defendant, as a feme sole, imposed the plan and entered into the restrictions alleged in the bill, there would be no question of the right of a court of equity to enforce the restrictions by injunction, independent of any conveyance or other instrument creating them, and in my judgment the constructing of the two sections together, as applied to the facts in the present case, is that the wife's contracts or obligations, which relate to lands which she owns or in which she has an interest, are enforceable in equity to the same extent as if she were a feme sole, with the qualification that if, as against a feme sole, the creation or enforcement of such contracts requires a conveyance or other instrument, then, in the case of a married woman, this conveyance or instrument must be executed with her husband as heretofore, otherwise it cannot be created or enforced. But where a feme sole in equity, without a conveyance or other instrument, would be required by injunction to specifically perform a contract, and this performance does not require the execution of a conveyance or other instrument, then a married woman in similar circumstances may be required to perform the contract. This construction prevents any decree for specific performance of a contract for conveyances of land by a married woman in which the husband did not join, as was held by V. C. Stevens in *Corby v. Drew*, 55 N. J. Eq. 387, 391, 36 Atl. 827 (1897), but does not prevent the enforcement by this court by injunction of restrictions as to her lands under a building plan, made by her as a married woman,

which would have been binding on her as a feme sole, and which may be enforced without requiring any conveyance or other instrument.

The motion to strike out must be denied, and the bill should be answered.

(83 N. J. Eq. 472)

**HARRIS et al. v. PEARSALL**

(Court of Chancery of New Jersey. Aug. 31, 1914.)

**1. MORTGAGES (§ 318\*)—RELEASE—COVENANTS—ENFORCEMENT.**

Where a mortgage provided that any person acquiring 2,500 square feet of land covered might at any time tender the money and have the benefit of the clause for release of such portion, such provision constituted a continuing covenant on the part of the mortgagee to release to any purchaser of 2,500 square feet or more the amount so purchased on tendering the proportionate part of the mortgage debt.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 956-961; Dec. Dig. § 318.\*]

**2. SPECIFIC PERFORMANCE (§ 134\*)—COSTS.**

Where suit was instituted to compel specific performance of a mortgagee's covenant to release parts of the property on tender of a proportionate amount of the mortgage debt, the bill would be regarded as a suit for specific performance and not a bill to redeem, and defendant having answered denying complainant's right to a release, and been cast, costs would not be awarded to either party.

[Ed. Note.—For other cases, see *Specific Performance*, Cent. Dig. § 441; Dec. Dig. § 134.\*]

Bill by Walter J. Harris and another against Leigh M. Pearsall, for specific performance. Decree for complainants.

T. A. Spraggins, of Jersey City, for complainants. Lloyd Thompson, of Westfield, for defendant.

STEVENSON, V. C. (orally). I shall dispose of this case without regard to technicalities. There are a number of technical questions which arise in the case. We have two parties suing as complainants, whose interests are entirely distinct. No objection has been made to the bill on the ground of multifariousness or misjoinder, and this is the sort of a case which very conveniently can be brought in that way, although an accurate analysis of the case would disclose two separate causes of action, which do not correlate. There is no difficulty in making a decree which covers the cases of both of these parties complainant as to their respective lots.

[1] I shall construe the bill, not as a bill to quiet title, but as a bill to redeem, or as a bill to compel the specific performance of the covenant contained in the mortgage, and my conclusion is that this clause in the mortgage is not limited at all to any period, is permanently attached to the mortgage, and follows it as long as the mortgage exists, and that any person who acquires 2,500 square feet of land covered by that mortgage may at any time before the mortgage comes due, or afterwards, come forward and tender

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the money and have the benefit of the clause for a release, contained in the mortgage.

This is not a new question in my mind. I have had occasion to consider it heretofore, and while there is no reported case that I know of where the question has been discussed or decided in this state, without any authority to the contrary, I think it is the duty of the court to take the language of the covenant precisely as it reads.

There is nothing in the mortgage which indicates that that covenant was to be operative only while the mortgage remained outstanding and not due. The language is general, and in my judgment creates an absolute, permanent right, and practically has the effect of distributing the mortgage through the tract, very much as if a separate mortgage was given on every 2,500 square feet. Of course that is not an accurate statement, because, under the terms of this covenant, a man might have 3,500 square feet, and, by tendering the right amount, would be entitled to his release.

While the decree will give the complainants releases upon their payment of the amount, according to the scale fixed by the mortgage, it is very clear that they are not entitled to any costs. They have not proved that they made any tender.

[2] If this is to be regarded as a bill to redeem, then, under the old English rule, costs have to be paid by the complainant, not by the defendant. But that rule grew out of a state of affairs which does not exist, in my judgment, in this country, and I do not think the American courts have enforced it; it has not been declared to be a rule of practice in New Jersey. Moreover, this bill is more in the nature of a bill for the specific performance of the covenant contained in the mortgage.

In my judgment the complainant is not entitled to any costs, and, if the defendant had not come in with an answer denying the right of the complainant to a release, I think the decree should award costs to the defendant; but, inasmuch as the defendant filed an answer denying the right of the complainants to any release at all, the decree will not award the defendant any costs. There will be no costs allowed to either party.

(83 N. J. Eq. 539)

**McCLINTIC MARSHALL CONST. CO. v. BOARD OF CHOSEN FREEHOLDERS OF HUDSON COUNTY et al. WALDO v. SAME. VANDERBILT et al. v. SAME.**

(Court of Chancery of New Jersey. Sept. 8, 1914.)

**1. DAMAGES (§ 78\*) — BREACH OF CONSTRUCTION CONTRACT—DELAY—LIQUIDATED DAMAGES OR PENALTY.**

A contract for the construction of a steel and concrete viaduct provided that the contractor should pay the board of freeholders of the county for delay in completing the work, if any, beyond the time fixed for completion at the

rate of \$1,500 per month on the first section, \$600 per month on the second section, and \$650 per month on the third section, which sum was stipulated to be the true value of the use of the land to the board of freeholders and the true damages it would sustain by such delay, which the board was authorized to retain out of any moneys due or to become due to the contractor. *Held*, that the damages provided for were liquidated damages, and not a penalty.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 157-163; Dec. Dig. § 78.\*]

**2. CONTRACTS (§ 300\*)—PERFORMANCE—DELAY—NOTICE.**

Where three contracts were entered into between defendant board of freeholders of a county and a contractor for the construction of a viaduct, and each provided that the board or its engineer should designate the day and place or places when and where the contractor should commence work, and that the contractor should complete the same within 18 months thereafter or be subject to specified deductions for delay as liquidated damages, the contractor was entitled to a notice from the board or its engineer, plainly stating when the contract term would begin to run against him as to each section of the work, and, no such notice having been given, he was under no liability for delay.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 1372-1381; Dec. Dig. § 300.\*]

Consolidated actions by the McClintic Marshall Construction Company, William B. Waldo, and Edmund B. Vanderbilt and others against the Board of Chosen Freeholders of Hudson County and others. Judgment for defendants.

Cortlandt and Wayne Parker, for complainant McClintic Marshall Const. Co. Randolph Perkins, of Jersey City, and Frank M. Patterson, of New York City, for complainant William B. Waldo and his trustee. Thomas G. Haight and James J. Murphy, both of Jersey City, for defendant Board of Chosen Freeholders of Hudson County. Joseph S. Parry, of Hoboken, for Edmund B. Vanderbilt and Henry H. Vanderbilt, executors of the estate of Jacob Vanderbilt, deceased. Joseph F. Autenrieth, of Jersey City, for Robert W. Hunt Co. Theodore Rurode, of Jersey City, for Mack Mfg. Co. Hudspeth, Rysdyk & Garrison, of Jersey City, for Citizens' Nat. Bank of Toranda and Mechanics' Bank of Groton.

LEWIS, V. C. These actions have been consolidated. They were brought under the "act to secure the payment of laborers, mechanics, merchants, traders and persons employed upon or furnishing materials toward the performing of any work in public improvements in cities, towns, townships and other municipalities in this state," approved March 30, 1892, and by the decision in the Court of Errors and Appeals in this state in the case of "*DeLafield Construction Co. v. James R. Sayre, Jr., et al.*," 60 N. J. Law, 449, 38 Atl. 666," such actions must be brought in the Court of Chancery.

By stipulation of counsel, the question of damages has been submitted to this court:



counsel of the respective parties having reached an agreement among themselves in regard to the other questions involved in the suits.

The suits are brought for the purpose of obtaining money alleged to be due to the various complainants for work done and materials furnished in the construction of a municipal improvement, known as the "Fourteenth street viaduct." This structure was erected under three separate contracts, which were entered into between the Owego Bridge Company, a corporation, and the board of chosen freeholders of the county of Hudson, in June, 1907. For the purpose of erection, the viaduct was divided into three sections, and a separate contract was entered into for each section. The viaduct is built in the shape of the letter "Y," the first section extending from Willow avenue, Hoboken, to the point where the two branches of the "Y" separate; the second section is the projection on the left; and the third section is the projection on the right. The contracts were subsequently assigned by the Owego Bridge Company to the Syracuse Bridge Company, one of the defendants in these actions, this being done with the consent of the board of freeholders, and the Syracuse Bridge Company took upon itself the fulfillment of all the duties and obligations contained in the original contract. The complainants and the other defendants are subcontractors. The McClintic Marshall Construction Company had the subcontract for the steel work; William B. Waldo had the subcontract for the concrete, paving, excavation, etc., and the other parties various other works. The first and second sections were completed on June 1, 1912, and the third section on November 7, 1912.

The county seeks to deduct, from the monies which would otherwise be due, damages for delay in completion, which is resisted by the other parties to the suit.

Each of the contracts provides (paragraph D, p. 54, of printed book):

"That the contractor shall commence work on such day and at such place or places as the board of chosen freeholders or the engineer may designate, and progress therewith so as to complete the work in accordance with this agreement, on or before the expiration of one year and six months after being directed to begin work," etc.

The contract further provides (same section) as follows:

"And in the computation of said time (expressed in days or parts of days) during which the work, or any part or section thereof, has been delayed in consequence of the condition of the weather, or by any act or omission of the parties of the first part (the board of freeholders), or strikes beyond the control of the party of the second part (the contractor) whereby the receipt of material is delayed (all of which shall be determined by the engineer, who shall certify the same in writing), and also the time during which the prosecution of the whole work is suspended by the engineer, shall be excluded. But if the performance of the contract shall require work or materials in

greater or less amounts or quantities than those mentioned and set forth in the engineer's estimate, then the said time will be increased or diminished as much as the engineer shall deem just and reasonable and fairly proportionate to the amount of said increase or diminution."

It appears that the contractor, which was then the Owego Bridge Company, was ordered to begin work on September 19, 1907, at the intersection of the West Shore Railroad and Fourteenth street, Hoboken. The communication containing this order is dated September 5, 1907, and is signed by the engineer. This communication was acknowledged on September 8, 1907, by the Owego Bridge Company. The place which was designated to begin the work was on section 1. On September 27, 1907, the Owego Bridge Company wrote to the engineer, as follows:

"We find that the board of freeholders have not secured any property whatever on the line of the Fourteenth street viaduct, in Hoboken, so we can commence the substructure work to any advantage, being confined to the street entirely. This, as you know, is a great disadvantage to us, and will make us extra expense in doing this work. We, therefore, want to give you notice that all this will be taken into consideration as to the time that we commence the contract. We will want to be allowed all extra time that we lose in any delay caused by our not having the entire right of way and property so we can work to an advantage."

On December 31st the engineer wrote:

"Mr. A. H. Mallery, Owego Bridge Company: In reply to your question for the extension of time for the three contracts known as sections 1, 2 and 3, and specifications for the Fourteenth street, Hoboken, viaduct, I am advised by our counsellor, Mr. John Griffin, that this work is not officially commenced until all the land is secured on each of the sections. The land for the first section will be secured about the 15th of February, 1908, and the eighteen months specified in your contract should commence on that date, if the land is secured. At present writing we cannot even give an idea when all the land will be secured for the other sections. We will most likely secure the Holland property next month, which will give you sufficient area to secure crushed stone for foundations and permit the erection of the steel work."

The last piece of property on the right of way of section 1 was acquired on September 30, 1907, but the owner was not actually ejected from the property until November 1, 1908. The last piece was acquired on section 2 from the owner on June 25, 1908, and on the third section the last piece was acquired on July 3, 1908. Work was started on the first section in the latter part of October, 1907. The board of freeholders contend that the contractor was verbally notified to begin work on the second section on April 1, 1908, and it will be noticed that this alleged notification was before all the land on that section had been acquired. The board of freeholders also contend that work on the third section began in September, 1908.

The contracts provide (clause E, p. 55, printed form):

"That the contractor shall pay the board for delay in the completion of the said work, if any, beyond the time fixed for completion (unless the same be extended by a proper authority,



or permissible under this contract) at the rate of (different amounts as to each section, as will be hereinafter set forth) per month, which said sum it is hereby stipulated and agreed is the true value of the use of said land to the board and the true damages it will sustain by such delay, which said sum the said board is authorized and empowered to retain out of any moneys due or to grow due to the contractor."

On the first section the damages were fixed at the sum of \$1,500 per month, on the second section, \$600 per month, and on the third section, \$650 per month.

Counsel for the various claimants have raised two questions regarding the right of the county to claim allowance for delays: First. That the moneys specified in the contracts to be paid by the contractor for delays are penalties and not liquidated damages. Second. That the county itself caused delay to the contractor in the prosecution of the work, and is therefore not entitled to avail itself of the right to claim the damages which the contract provides is payable to it for delays.

Of course the county board will be held to a strict performance of the contracts; that is, it must perform all the conditions which are requisite for it to perform before the contractor can be held liable for liquidated damages. Outside of the question of liquidated damages, however, compensatory damages would be allowed if there were unreasonable delay in the prosecution of the work.

[1] There is no doubt in my mind that the damages provided for in the contract are, under the cases in this state, liquidated damages. See *Monmouth Park Association v. Wallis Iron Works*, 55 N. J. Law, 132, 26 Atl. 140, 19 L. R. A. 456, 39 Am. St. Rep. 626; *Robinson v. Centenary Fund*, 68 N. J. Law, 723, 54 Atl. 416; *Moore v. Durnam*, 68 N. J. Eq. 96, 51 Atl. 449; *Brown v. Norcross*, 59 N. J. Eq. 427, 45 Atl. 605; *Gussow v. Beineson*, 76 N. J. Law, 209, 68 Atl. 907; *Jersey City v. Flynn*, 74 N. J. Eq. 104, 70 Atl. 497, affirmed 76 N. J. Eq. 607, 76 Atl. 3; *Tilton v. McLaughlan*, 83 N. J. Law, 107, 84 Atl. 1044; *Van Buskirk v. Board of Education*, 78 N. J. Law, 650, 75 Atl. 909.

[2] Under the evidence, however, I do not feel that liquidated damages could be allowed; that it would be inequitable. There were three contracts, and each one contained the clause that the board of chosen freeholders or the engineer were to designate the day and the place or places when and where the work was to commence. I shall find that the contractor was entitled to three distinct notices, one for each of the sections, clearly notifying him when the 18 months began to run against him in each case. I think he was clearly entitled to that, and, if he was left in doubt about such a vital matter, he should have the benefit of it. He was notified by the engineer (who had the necessary power under the contract to give such notice) to commence work on section 1. Afterwards the engineer clearly countermanded that order, according to my view, by his letter to Mr. A. H. Mallery on December 31st, supra, and thereafter my finding is that the contractor did not receive any sufficient notice that would bind him to pay the liquidated damages, and the same is true as to sections 2 and 3, so far as the lack of proper notice sufficient to bind the contractor to pay liquidated damages is concerned.

In the case of *Hoey v. Jarman*, 39 N. J. Law, 526, I find the rule there stated to be that, where there is ambiguity or obscurity which the other parts of the instrument do not explain, it is to be construed against the party giving the contract.

As I have already found, I do not feel that liquidated damages should be allowed, and I do not think that there has been any sufficient evidence produced from which I could draw any conclusion with respect to the allowance of compensatory damages. The evidence convinces me that the entire course of conduct and dealings between the board and the contractor was such as to evince an acquiescence on the part of the board in the length of time actually taken to complete the work.

(245 Pa. 453)

NIRDLINGER v. AMERICAN DISTRICT  
TELEGRAPH CO.

(Supreme Court of Pennsylvania. May 22,  
1914.)

1. NEGLIGENCE (§ 136\*)—PRIMA FACIE CASE—  
ACTION FOR LOSS FROM THEFT.

In an action for the loss of goods by theft after an employé of the defendant company had negligently failed to reset the electric burglar alarm, installed by defendant on plaintiff's premises, evidence held sufficient to entitle plaintiff to go to the jury on the question of defendant's negligent failure of duty.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

2. NEGLIGENCE (§ 56\*)—"PROXIMATE CAUSE."

Where an act of negligence is so linked to succeeding facts that all are one continuously operating succession of events, in which the first is so naturally linked to the last as to be its cause, "proximate cause" is established; but where the chain is so broken that the events and facts become independent, the result is not the proximate consequence of the primary cause.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 69, 70; Dec. Dig. § 56.\*]

For other definitions, see *Words and Phrases*, vol. 6, pp. 5758-5769; vol. 8, p. 7771.]

3. NEGLIGENCE (§ 136\*)—PROXIMATE CAUSE—  
QUESTION FOR COURT.

Where, in an action for loss by theft, there was no conflict in the evidence whether the negligence of defendant's employé in failing to reset a burglar alarm, installed by defendant on plaintiff's premises, and in defendant's charge, was the proximate cause of the loss, the question of proximate cause was for the court and not for the jury.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 277-353; Dec. Dig. § 136.\*]

**4. NEGLIGENCE (§ 62\*)—PROXIMATE CAUSE.**

Where a company undertook to equip plaintiff's house with a burglar alarm, and to protect it from burglarious entry by the dispatch of guards thereto when warned by automatic signals, and where the house was burglarized while the burglar alarm was not set, due to the negligence of defendant's employé, the question whether the loss would not have occurred but for such negligence depended on several contingencies; and hence the proximate cause of the loss was not such negligence, but was the felonious entry of the building.

[Ed. Note.—For other cases, see *Negligence*, Cent. Dig. §§ 76-79; Dec. Dig. § 62.\*]

**5. ACTION (§ 27\*)—NATURE AND FORM—ACTION ON CONTRACT—INCIDENTS.**

Though an action may be in form as for a tort, yet if the subject of it be based on contract, the action will be attended by all the incidents of an action *ex contractu*.

[Ed. Note.—For other cases, see *Action*, Cent. Dig. §§ 160-195; Dec. Dig. § 27.\*]

**6. DAMAGES (§ 18\*)—BREACH OF CONTRACT—PROXIMATE RESULT.**

Where a company which has installed burglar alarms on plaintiff's premises breaches its contract to care for the premises in plaintiff's absence, it is liable for such damages as proximately result from such breach, though some damages result to the property during plaintiff's absence otherwise than proximately through such breach.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. § 37; Dec. Dig. § 18.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by Samuel F. Nirdlinger, for himself and for the use of the Frankfort Marine, Accident & Plate Glass Insurance Company of Frankfort-On-Main, Germany, against the American District Telegraph Company, a corporation. From judgment for plaintiff, defendant appeals. Reversed.

See, also. 240 Pa. 571, 88 Atl. 6.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

Horace Michener Schell and Frank R. Shattuck, both of Philadelphia, for appellant. Arthur S. Arnold, of Philadelphia, for appellee.

**STEWART, J.** The defendant engaged with the plaintiff for an annual money consideration to install and maintain in the latter's dwelling house, on North Broad street in the city of Philadelphia, an electrical signal apparatus known as burglar alarm, so constructed that it would automatically transmit to the defendant's office a notice by signal of any invasion or disturbance of door or window in the house, and that upon receipt of such signal the defendant would at once dispatch an agent to the invaded premises. So far as the evidence discloses this was the full extent of the defendant's undertaking. During the early morning of 26th October, 1910, while this relation between plaintiff and defendant continued, and the plaintiff's house was unoccupied by plaintiff or members of his household, a burglarious

entrance was effected therein through a raised window, and various valuable articles, amounting in the aggregate to a very considerable sum, were stolen. The record shows an express admission by the defendant that on this particular occasion no agent was dispatched to the invaded premises, and no alarm signal was received at defendant's office. The negligence charged in the statement of claim was failure on part of the defendant to properly set and adjust, and keep properly set and adjusted, the alarm system which it had installed, and failure to promptly dispatch an officer for the protection of the premises. The evidence submitted by the plaintiff was to the effect that during periods when the dwelling house was not occupied, it was his custom, if not a duty required of him, to leave the key of the house with the defendant company, so that, if occasion required, easy entrance could be obtained; that during the morning of the day preceding the burglary plaintiff, desiring to get some articles from the house, requested the agent of the company to open the house for that purpose, and upon his withdrawal therefrom to restore the electrical connection which would be interrupted by the opening of the house; that the agent accompanied plaintiff, to the house, opened it, and then withdrew, requesting plaintiff to close the door after he had obtained what he wanted from the house, and promising to shortly return and reset the alarm; that plaintiff on withdrawing from the house carefully closed and secured the door through which he had been given entrance; that defendant's agent, if he returned at all to lock the house, neglected to reset the alarm before finally leaving it. Plaintiff's effort was to show that the electrical apparatus had given no alarm when the burglarious entry was being made because of failure on part of defendant's agent to reset it. This became the main fact in dispute. It would serve no purpose to review the evidence on one side and the other touching this disputed point.

[1] It cannot be questioned that the evidence by plaintiff was quite sufficient to warrant an inference of negligence on part of the defendant, either in failing to have the apparatus reset, or if it had been reset, in failing to send a representative to interrupt the burglary. The electrical apparatus was in the exclusive management of the defendant; all the elements of the occurrence, barring the burglary itself, were within its control, and the result was so far out of the usual course that no fair inference that it would have been produced by any other cause than defendant's negligence could arise. *Zahniser v. Torpedo Co.*, 190 Pa. 350, 42 Atl. 707. It was for the defendant to overcome the prima facie case so made out. The case as tried turned on this question of fact: Did the defendant's agent on the afternoon of 25th October, when he reclosed the house, re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

store the current? If he did, and for some unknown reason the apparatus failed to give an alarm when the house was broken into, however the defendant might otherwise be responsible, it could not be charged, because of this fact, without more, with negligence; if, however, he did not restore the current, it was negligent failure of duty for which the defendant would be responsible. The question with suitable instructions as to the law was submitted to the jury, and the finding was for the plaintiff.

[2] With defendant's negligence established, did a right of action for the tort result to the plaintiff? The instruction of the learned trial judge on this point was as follows:

"Even although you conclude that the alarm was not put on, unless you find that the failure to put it on was negligence, and you are convinced by the evidence that the failure to set the alarm was the proximate cause of the loss of the articles that it is claimed were stolen, your verdict must be for defendant. The proximate cause of an event is that which in a natural and continuous sequence, unbroken by any new cause, produces the event. The consequence must be the natural and probable consequence, distinguished from the possible consequences. The natural and probable consequences are those which human foresight can foresee, because they happen so frequently that they may be expected to happen again. The possible consequences are those which happen so infrequently that they are not expected to happen again. Unless the proximate cause of the robbery was the failure to set the alarm, your verdict must be for the defendant. If you are convinced that the robbery was the natural and probable consequence that would be expected to follow a failure to set the alarm, and that the alarm was not set, you will be justified in finding a verdict in favor of the plaintiff."

[3] This was a correct statement of the law; and we are now confronted by a finding by the jury that plaintiff's loss was the natural and probable consequence of defendant's failure to reset the electrical alarm. It is to be observed that on this particular question of proximate cause there was no conflict of testimony whatever, and the fact of an intervening agency was manifest. A submission of the question, therefore, was unwarranted; it was clearly within the province and duty of the court to decide it. Now that it is raised on the appeal by the second assignment of error, it is properly for our consideration. *Hoag v. Railroad Co.*, 85 Pa. 293, 27 Am. Rep. 653.

[4] Briefly stated the question is: Was the plaintiff's loss or damage the natural or probable result of defendant's negligence? That is to say, was it a consequence which followed directly from such negligence, and which might or ought to have been foreseen by the defendant as likely to result from a failure on its part to reset the alarm apparatus? Of course, the defendant was not an insurer against loss; nevertheless, if plaintiff's loss is traceable to its negligent breach of a duty that it owed to the plaintiff, it is liable. The question is, Can it be so traced to the negligence established in the case as the primary, efficient, and therefore proximate

cause, or was the negligence but a remote, as distinguished from the proximate, cause? Where the original cause, that is, the negligence, is by continuous operation so linked to each succeeding fact as that all may be said to be one continuous operating succession of events, in which the first becomes naturally linked to the last, and to be its cause, and thus within the probable foresight of him whose negligence is charged, then the proximate cause is established. Where, however, the chain is so broken that the events and facts become independent of each other, then the result cannot be said to be the natural and probable consequence of the primary cause. *Penna. R. R. v. Hope*, 80 Pa. 373, 21 Am. Rep. 100. Let us apply this test to the facts of the present case. The fact next preceding the fact of plaintiff's loss, and the one fact to which the loss must be referred as its nearest antecedent is the felonious entry of plaintiff's house. How was the defendant's negligence linked, as an operating cause, to this fact or event? Certain it is that it did not produce it. The law regards those consequences as remote, and therefore not actionable, which are produced by the intervention of human agency, or the voluntary act of a person over whom the defendant has no control, and his act no influence. *Sedgwick on Damages*, § 126. We find, then, a proximate cause of the loss here in the felonious entry of the dwelling, but back of that nothing, at least nothing that involves this defendant. It is argued, however, that defendant's negligence was the proximate cause of the loss because, except for it, the alarm signal would have announced to the defendant the fact of the invasion, and the company thereupon would have dispatched a representative to the invaded premises, and thus prevented the loss. But this is pure speculation. Whether that would have been the result had the apparatus been in working order can never be known. It would depend upon contingencies without number, any one of which would have been sufficient to disappoint it. Certainly there is nothing in the case from which a legal inference could be derived that the loss would have been averted had the electrical alarm been in order. Adjudicated cases of this character are not frequent. But one more nearly parallel to this than any to which we have been referred is that of *State v. Ward*, 9 Helsk. (Tenn.) 100, cited by Mr. Sedgwick on his *Treatise on Damages* in support of his text. There the state had leased convicts to the defendant and agreed to keep a guard over them. It failed to keep the guard. The defendant's establishment was burned by a fire set by one of the convicts, and in an action by the state for the hire, the defendant set up his loss in recoupment. *Nicholson, C. J.*, in the opinion says:

"Looking to the contract, then, for the measure of damages for its breach, it follows inevitably that the expense of such guards as are contracted furnish the true measure of damages,

It is conceded for the lessees that the failure to keep a night guard on watch did not cause the fire, but it enabled the incendiary to consummate his design of setting fire to the shop. While, therefore, it is clear that the loss was the direct and immediate consequence of the fire, it is equally clear that it was not the direct and immediate consequence of a failure to keep up a night watch. Such a loss cannot reasonably be assumed to have entered into the contemplation of the parties. The contract was that a night guard should be employed; the breach was in not having such a guard; the damage looked to in making the contract was the expense of such guard and not the probable or possible or remote damage that might occur."

So here the failure of the electric apparatus to give the appropriate signal may have enabled the invader of the house to consummate his design, but it did not cause the burglary.

The result of the court's submission of the question to the jury was a recovery by plaintiff for an act of negligence which at best was a remote cause of the loss. Admitting the facts to be as claimed by the plaintiff, the learned trial judge should have held that they did not show defendant's negligence to have been the proximate cause of plaintiff's loss, and he should have limited the damages recoverable to those sustained by reason of the breach of contract.

[6] The appellee mistakenly assumes in the brief submitted that this point was otherwise decided in the former appeal reported in 240 Pa. 571, 88 Atl. 6, which was from a judgment sustaining a demurrer to plaintiff's declaration. The learned trial judge in sustaining the demurrer had filed no opinion, and we were left to conjecture his reasons. The contention of appellee on argument was that because the declaration averred a contract and a breach of duty by defendant thereunder, notwithstanding it further averred a tort through negligence, plaintiff's exclusive remedy was by action in assumpsit. We declined to accept this view, holding that the declaration was sufficient to call for a plea, and we accordingly reversed, with leave to plead. Whether the tort alleged was in itself actionable or otherwise was not the subject of contention, nor was a decision of the question called for. Notwithstanding its insufficiency, a right would still remain in the plaintiff, under the declaration in the case, to recover on account of the admitted breach of the contract.

"The weight of authority, says Bell, J., in *Livingston v. Cox*, 6 Pa. 360, has put it beyond question that, though the action may be in form as for a tort, yet if the subject of it be based on contract, the suit will be attended by all the incidents of an action ex contractu."

[8] For the reasons given we sustain the second assignment of error, without, however, limiting the plaintiff's right of compensation to the amount paid by him for the wiring of his house as there stated. It will be for the jury, under proper instructions from the

court, to say what damages properly resulted from defendant's breach of its contract.

The judgment is reversed and a venire de novo awarded.

(245 Pa. 479)

#### SHIFFER et al. v. HUDSON COAL CO.

(Supreme Court of Pennsylvania. May 22, 1914.)

#### 1. MINES AND MINERALS (§ 70\*)—MINING LEASE—ACTION FOR ROYALTY—QUESTION FOR JURY.

Where, in an action for the balance due under a mining lease binding the lessee to pay a certain rental in monthly installments until the lessee believed that the amount paid for coal not mined equaled the royalty value of the unmined coal yet on the premises and capable of being worked, the evidence left doubtful the question of the bona fides of the lessee's expressed opinion that it had paid such amount, such question was for the jury.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 192-197; Dec. Dig. § 70.\*]

#### 2. MINES AND MINERALS (§ 70\*)—MINING LEASE—CONSTRUCTION.

The right given the lessee to suspend payment of the rental under a mining lease providing that if the lessee should, in the opinion of its proper officers, have paid for as much coal as still remained in the premises unmined and capable of being worked, it should give notice thereof, and thereupon, subject to certain conditions, be relieved from payment of further rental was dependent upon the exercise of due diligence by the lessee.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 192-197; Dec. Dig. § 70.\*]

#### 3. ESTOPPEL (§ 90\*)—MINING LEASE—RECOVERY OF ROYALTY.

That the lessors failed to object to the suspension of payment of rental under a mining lease, pursuant to a provision authorizing such suspension whenever the lessee should be of the opinion that the rental paid on unmined coal equaled the coal yet unmined, did not estop representatives of the lessors, after the death of the lessors, from recovering the unpaid rental, on the ground that the lessee's expressed opinion was not bona fide and that lessee did not exercise due diligence in the matter, where it did not appear that it had relied on the conduct of the lessors.

[Ed. Note.—For other cases, see *Estoppe*, Cent. Dig. §§ 242-244, 248-256; Dec. Dig. § 90.\*]

#### 4. MINES AND MINERALS (§ 70\*)—MINING LEASE—CONSTRUCTION.

The rental recoverable under a mining lease providing that the lessee should pay a certain annual rental in monthly installments was not limited to the royalty value of the minable coal on the leased premises, though the lease also contained a provision, of which the lessee failed to properly avail itself, that, if in the lessee's opinion it should have paid as much for coal not yet mined as still remained unmined, it should, subject to certain conditions, have a right to suspend payment of rental.

[Ed. Note.—For other cases, see *Mines and Minerals*, Cent. Dig. §§ 192-197; Dec. Dig. § 70.\*]

Appeal from Court of Common Pleas, Luzerne County.

Assumpsit by Frank E. Shiffer, trustee of

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the estate of Thomas Stem, deceased, and others, against the Hudson Coal Company, for rents and royalties due under a coal lease. From judgment for plaintiffs, defendant appeals. Affirmed.

The facts appear in the following opinion of Fuller, P. J., sur defendant's motion for a new trial:

This action of assumpsit was brought June 9, 1908, by the legal representatives of the original lessors in a certain lease of coal, against the assignee of the original lessee, to recover certain coal rents and royalties which accrued after the assignment. The lease was made in 1894 by Lacoe, Shiffer, Ford, and Stem, to the Langcliffe Coal Company, Limited, of all the coal under certain land in Lackawanna county, "to have and to hold until all the merchantable coal available by careful mining should be mined out." The lessee agreed to pay during the continuance of the lease the annual rental of \$4,800, in monthly installments of \$400, for which payment it was entitled to mine each month 1,250 tons of coal above the size of pea. In addition to this minimum rental, the lessee also agreed to pay at the same time for all coal above the size of pea actually mined in excess of 1,250 tons, at a royalty of 32 cents per ton, for all pea coal actually mined, at a royalty of 20 cents per ton, and for all buckwheat coal actually mined, at a royalty of 10 cents per ton; the different sizes being determined by the mesh through which the coal was screened. Between 1894 and 1897 the lessee paid minimum rental amounting to \$13,600, and mined coal of all sizes amounting to \$4,600, thus leaving a deficit of \$9,000. Then it ceased to make further payment, claiming that it had paid for all of the merchantable coal on the premises available by careful mining, although it continued its mining operations until 1901, when the deficit had been reduced to \$7,000. In 1901 it assigned the lease to the defendant, who went into possession and has been mining coal under the lease from that time until the present.

Lacoe died in 1899; Shiffer and Ford in 1901. By 1905 the actual mining covered the deficit, and thereafter the defendant tendered payment for coal actually mined, aggregating, to January 1, 1912, \$8,888.13, and during the year from June, 1907, to June, 1908, also tendered payment of the minimum rental; but all tenders were refused, as the plaintiffs stood upon the contention that they were entitled to full payment of the minimum rental during the entire period. In fact, from 1894, when the lease was made, until the time of the trial, in March, 1912, no payment was ever made for the smallest sizes of coal, but the mining thereof was credited upon the actual payment of minimum rental, and no payment was made of the minimum rental, except the sum of \$13,600, paid by the original lessee between 1894 and 1897, nor was any tender of payment made, except by the defendant, as just stated, in 1905, down to 1908, when this action was instituted for the arrearages on both accounts, accruing since 1901. During the entire period, possession and mining under the lease have been continuous, and at the time of the trial upwards of 12,000 tons of merchantable coal still remained available, thus establishing the continuance of the lease and imposing liability for the amount of the verdict, unless such a result be obviated by the defense which has been set up.

The lease stipulates: "The second party (lessee) will pay or cause to be paid to the first parties (lessors) from the first day of October, A. D. 1894, the annual rental of \$4,800 during the continuance of this lease, payable

in monthly installments of \$400 each, the payment of which rentals shall entitle the second party (lessee) to mine and remove from the demised premises 1,250 tons of coal of larger sizes than pea coal in each month of each and every year during the continuance of this lease." And then it allows the lessee to make up in any subsequent year the deficit between the payment of minimum rental and actual mining in any year, without interruption of minimum, by the provision "that if in any one year such rentals be paid and the total quantity of such coal mined in that year shall be less than the total quantity which such payment of rentals should entitle the second party (lessee) to mine as aforesaid, the deficit may be mined and removed in any subsequent year during the continuance of this lease, without further payment, but this provision shall in no wise affect or interrupt the monthly payments of fixed rental as above agreed upon." But nowhere does the contract disclose any intention to absolve the lessee from payment of the minimum rental, except in the twelfth covenant, viz.: "If at any time or times, the second party shall in the opinion of its proper officers, have paid for as much coal which they have not mined as still remains in the premises unmined and capable of being worked under this agreement, they shall give notice thereof to the first parties, and thereupon each party shall choose a competent and disinterested mining engineer, who shall select a third competent and disinterested mining engineer, and the three so chosen shall make all necessary examination of the premises and receive such other proper evidence and tests as shall be sufficient to determine the amount of coal unmined therein, taking into account such coal as is required to be mined under the provisions of this agreement; and the second party agrees, at its own expense, to furnish such evidence and make such actual tests as will be sufficient for that purpose. And if on such examination, proof and tests, it shall be shown and proved by the second party that it has paid rentals as aforesaid upon all the coal in said premises minable as aforesaid, the second party shall thereupon not be required to make any further payments of rent or royalties until it shall have mined out the quantity upon which rentals have been so paid, and thereafter it shall only be liable to pay rentals or royalties upon coal mined in excess of the amount on which rentals or royalties have been so paid, using due diligence to complete the mining of the same. Provided, however, that whenever the party of the second part, by virtue of this clause and the proceedings above indicated, shall have ceased paying the fixed monthly rentals aforesaid for a period of ten years, the parties of the first part may at their option terminate this lease and proceed to recover possession of the demised premises as in case of forfeiture for nonpayment of rentals when due."

The defendant undertook to bring itself within the benefit of this twelfth covenant, not through the medium of disinterested mining engineers at all, but through the opinion of the original lessee formed in 1897 and communicated to the original lessors then living, since deceased, who so far as the evidence shows made no objection.

It will be observed that the covenant does not expressly constitute the engineers a board of arbitration, nor provide for an award, and we held the opinion upon the trial that the right to suspend was only dependent upon the formation by lessee of an honest, intelligent opinion, communicated to the lessors and fortified by examination. Accordingly, we charged the jury thus: "The lessees' right to claim the benefit of this covenant No. 12 and suspend the minimum payments of rental is conditioned and depends upon these things: First, the proper officers

of the lessee should have come to the honest and intelligent opinion that all the coal in the ground had been paid for; second, they should then have given notice to that effect to the lessors and selected a competent and disinterested mining engineer for the investigation; then, if the lessors did their part as agreed and made a like selection, all the machinery would be set in motion to decide the matter properly, but, if the lessors failed to do their part and make a selection so that no further steps along that line could be taken as agreed, the lessees should still make such investigation, if not already made, as would reasonably justify the formation of an opinion in respect to the quantity of coal left unmined. It is very plain, I think, that the lessee could not of its own sweet will arbitrarily decide to suspend payment on pretext of an opinion, unsupported by reasonable investigation or knowledge of the conditions. It should be an honest and intelligent opinion, formed in good faith, on adequate knowledge." Then, after an exhaustive review of the testimony, we submitted the case with this final instruction: "If you find as a fact that the original lessee in good faith, with honest intention and intelligent knowledge, after notice to the lessors in conformity with covenant No. 12, suspended payment of the minimum rental, the verdict in this case should be in favor of the plaintiffs for only \$9,469.55; if you fail to find such a fact (and the burden to establish the fact is upon the defendant), your verdict in that event should be in favor of the plaintiffs for the full amount, \$48,180." These figures were concededly correct, according to the alternative adopted.

The evidence on the subject is fully recited in our charge, to which we refer. It consisted chiefly of contemporaneous testimony given by the engineer and the treasurer, who were also stockholders, of the original lessee, and who only acquired competency to testify against the representatives of the deceased lessors by parting with their stock. Fortified though it was, we could not have withdrawn from the jury the credibility of these witnesses, particularly in light of the fact, established by later development of the property, that they were in error to the extent of 50,000 tons, more than twice the quantity mined at the time of suspension.

The failure of the lessors, Shiffer, Lacoe, and Ford, old men, to combat the claim of deficiency during the few remaining years of their lives, was not a fact of controlling significance, and, while a jury would have been fully warranted in taking defendant's view of the question, we are unable to say that they were not warranted in taking the opposite view. Furthermore, conceding that the suspension of minimum payments in 1897 was proper under the circumstances, the period of suspension, nevertheless, was limited, in the language of the twelfth covenant, by the "use of due diligence to complete the mining." This phase of the matter seems to have been overlooked at the trial, but clearly it should be considered. The fact of deficiency could not be conclusively determined by the judgment of the lessee, even though honest, intelligent, and fortified by the finding of engineers in the manner stipulated, for such a conclusion might be refuted, as it was refuted, by actual development of the property. The privilege of suspension is coupled with the obligation to catch up and finish as fast as possible in the exercise of due diligence, and not to stop or to loiter at pleasure.

In this case, in the absence of the counter-vailing proof, which it was incumbent upon the defendant to produce, due diligence is *prima facie* determined by the minimum annual payment of \$4,800 for 15,000 tons above the size of pea, at 32 cents per ton, which tonnage added to the incidental production of smaller sizes, as shown by the mining under this lease, amounts to nearly 20,000 tons per year. The minimum, in other words, expressed the under-

standing of the parties as to what would constitute a fair year's mining. During the period from 1894 to 1897, however, the mining only averaged 8,000 tons, from 1897 to 1901 only 2,000 tons, from 1901 to 1905 only 9,000 tons, from 1905 to 1908 only 3,000 tons, from 1908 to 1912 only 5,000 tons, and over the entire period of the lease, from 1894 to the time of trial in 1912, eighteen years, a maximum mining is shown of only 90,000 tons, a general average of 5,000 tons, without disclosure of adequate cause for such an extraordinary deficit below the minimum. This surely demonstrates a lack of due diligence after 1897 to complete the mining, and, regardless of the attitude manifested towards the original lessee by the original lessors prior to their deaths, fully justified their representatives in terminating the suspension, by notice, in 1902, to this defendant, would perhaps have justified binding instructions in favor of the plaintiffs, and furnishes persuasive reason against disturbing the verdict.

[1-4] The defense in this case, as urged upon the trial and expressed in the reasons for a new trial, is principally predicated upon the contentions: (1) That the weight of credible evidence established the affirmative of the question submitted to the jury, on which their verdict by instruction of the court was made to hinge, viz., the bona fides of lessee's opinion in 1897; (2) that the attitude of the original lessors demonstrated their acquiescence in said opinion and now estops their representatives on the theory of defendant's reliance thereon in taking and working the property; (3) that a reasonable interpretation of the lease limits total payment to the royalty value of the original minable coal, which value is far less than the amount of the verdict, \$48,180, added to the prior payment of \$13,000, an inequitable result.

The first contention is overruled because the preponderance was not so plain as to exclude the province of the jury, and also because the right of suspension was subject to the exercise of due diligence.

The second contention is overruled because we fail to find any room for the operation of estoppel in favor of the defendant against the plaintiffs. No claim is made for the minimums which accrued from 1897 to 1901, anterior to defendant's acquisition of the lease. No proof was given or offered to show reliance by the defendant upon the conduct of the original lessors in failing to make objection, although an offer was made to show defendant's knowledge of such conduct. The representatives of the lessors did give notice of objection, which, coupled with the broken condition to exercise due diligence, revived the original obligation to pay minimum, if, indeed, the obligation was ever really interrupted.

The third contention could not be sustained without making a new contract for the parties and doing violence to the decisions which hold that the contract governs, regardless of deficiency between amount paid and quantity minable. It is a plain case of *stare decisis*. *Lehigh & Wilkes-Barre Coal Co. v. Wright*, 177 Pa. 387, 35 Atl. 919; *Lehigh Valley Coal Co. v. Everhart*, 206 Pa. 118, 55 Atl. 864. The purpose of a minimum is to expedite removal of the coal and return of the property when removal is complete. It is not inequitable for lessors to claim literal enforcement of a stipulation which entails no injury upon a lessee using due diligence as defined in the contract.

By the contract in this case, the lessee agreed to pay certain minimum rentals and royalties "during the continuance of the lease"; the lease continues "until all the merchantable coal available by careful mining shall be mined out"; upwards of 12,000 tons of such coal have not yet been mined out; therefore the obligation to pay still continues unless obviated by covenant twelve; and for reasons already stated that covenant cannot obviate under the circumstances. The main distinction sought to be drawn

between this lease and those construed in the cases above cited, viz., the presence here of a provision absent there, known as a "stop clause," enabling lessee on certain conditions to obtain relief, does not lead to any different result if the contractual conditions are not fulfilled, and so this case, like the others in the last analysis, must stand upon the contract. The suggestion of hardship in being compelled to pay for more coal than can be mined has been urged and ignored in all the cases, and in the present case the net hardship simply consists in paying, exclusive of interest, about \$50,000 for about 100,000 tons of coal, making an average royalty of about 50 cents per ton, which is not inordinate in light of reputed profits derived from the business.

Upon a dispassionate view of the whole case, while it presents difficulties and perhaps involves material errors, we have concluded that the verdict should not be disturbed, and accordingly the motion for a new trial is denied.

Verdict for plaintiff for \$48,180 and judgment thereon. Defendant appealed.

Argued before BROWN, MESTREZAT, POTTER, STEWART, and MOSCHZISKER, JJ.

James H. Torrey, of Scranton, John T. Lenahan and Andrew H. McClintock, both of Wilkes-Barre, and Walter C. Noyes, of New York City, for appellant. F. W. Wheaton and P. F. O'Neill, both of Wilkes-Barre, for appellees.

**PER OURIAM.** The facts in this case appear in the opinion of the court denying the motion for a new trial, and, for the reasons therein stated, the case was for the jury. We discover nothing in the assignments of error calling for its submission to another jury, and the judgment is therefore affirmed.

(245 Pa. 515)

DELAWARE, L. & W. R. CO. v. LUZERNE COUNTY COM'RS et al.

(Supreme Court of Pennsylvania. May 22, 1914.)

**1. TAXATION (§ 608\*)—COLLECTION—INJUNCTION.**

Equity will enjoin the collection of a tax only where there is either want of power to tax or disregard of imperative constitutional requirements.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.\*]

**2. TAXATION (§ 608\*)—COLLECTION—INJUNCTION—EXISTENCE OF OTHER REMEDY.**

A bill in equity to restrain the collection of a tax because of invalidity of the assessment was properly dismissed, where it appeared that the taxing authority had power to make the assessment and levy the tax, and that all the irregularities complained of could be corrected on appeal.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 1230-1241; Dec. Dig. § 608.\*]

**3. TAXATION (§ 348\*)—VALUATION—REALTY.**

The law requiring that the valuation of realty for taxation shall be based on the actual value limited and defined by the market value, is binding, not only on the taxing authorities, but on the courts, regardless of the apparent desirability of some other method of valuation.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 584-589; Dec. Dig. § 348.\*]

**4. TAXATION (§ 319\*)—VALUATION—BOARD OF ASSESSORS—POWERS.**

Under the express provisions of the act of March 24, 1905 (P. L. 47), subordinate assessors are required to make assessments and valuations and the powers of the board of assessors are limited to an examination and revision of the valuations returned by the subordinate assessors for increasing or decreasing the same, and cannot go beyond this, except to add taxable property omitted by the assessors.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 514, 527-529, 532-534; Dec. Dig. § 319.\*]

Appeal from Court of Common Pleas, Luzerne County.

Injunction by the Delaware, Lackawanna & Western Railroad Company against the County Commissioners of Luzerne County and others. From decree refusing an injunction, plaintiff appeals. Affirmed.

From the record it appeared that the plaintiff, the owner of certain tracts of coal land in the township of Plymouth, Luzerne county, filed a bill in equity complaining that the assessment and valuation upon its coal lands in said township was an unlawful, illegal, and void assessment, and by reason of such illegality the taxing authorities and the tax collector ought not to be permitted to collect any taxes thereon for the reason that the subordinate assessor had no part whatsoever in making the assessment, and that the valuation per acre was not determined by a consideration of what the coal lands would separately and bona fide sell for, as required by law, but arrived at on a basis and blanket rate per foot acre, regardless of conditions which would render the coal available or nonavailable, and praying that an injunction be awarded, restraining the tax collector from collecting a tax based upon such illegal and void assessment, and that the assessment be declared illegal and void and stricken from the assessment book. Other facts appear in the opinion of the Supreme Court. The court on final hearing dismissed the bill.

Argued before FELL, C. J., and MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

Benjamin R. Jones, Andrew H. McClintock, and F. W. Wheaton, all of Wilkes-Barre, and D. R. Reese, of Scranton, for appellant. William S. McLean, Jr., of Wilkes-Barre, M. J. Mulhall, of Pittston, John T. Lenahan and William S. McLean, Sr., both of Wilkes-Barre, for appellees.

ELKIN, J. This bill was filed for the purpose of having the assessment upon which the special tax was levied declared illegal and void, and to restrain the defendants from proceeding in any manner to collect the tax in question.

[1] Equity has power in a proper case to restrain the collection of a tax, but it is a



power that should be cautiously exercised, because as a general rule there is an adequate remedy at law. Equity will only intervene in such a case where there is either want of power to tax or a disregard of imperative constitutional requirements. *Banger's Appeal*, 109 Pa. 79; *Gas Co. v. Elk County*, 168 Pa. 401, 31 Atl. 1077.

[2] In the present case the taxing authorities had power to make the assessment and levy the special tax, and the irregularities complained of can all be corrected on appeal as provided by law, without the intervention of a court of equity. Under all the facts this court does not feel warranted in reversing the decree entered by the learned court below and declaring the assessment illegal and absolutely void. We base our conclusion on the ground that appellant has an adequate remedy at law and that this remedy should be pursued.

This decision must not be understood as an adjudication of the validity of the assessment, nor as an expression of approval of the method adopted by the board for the assessment and revision of taxes under the act of 1905 (Act March 24, 1905 [P. L. 47]). What we do decide is that every question presented for our consideration in the case at bar can be raised on appeal from the revised assessment under the law. There being an adequate remedy at law, a court of equity should be very slow to extend its restraining arm when by so doing the entire assessment would be stricken down. We assume that appeals are pending, and that the learned court below will have the opportunity of passing upon the merits of the questions raised here when the facts are presented on the law side of the court. In this connection it may be proper to remark that all parties concerned should approach the solution of the questions involved in a spirit of equity and fairness, keeping in mind the rules applicable to such controversies as laid down in several recent cases. The law is as well settled as it can be, and nothing of value can be added to what has already been said as to the legal and proper method of making assessments.

[3] The law requires that the valuation of real estate for the purpose of taxation shall be determined upon the basis of market value, or rather actual value, limited and defined by market value. What the law requires cannot be disregarded, no matter how desirable some method not authorized might prove to be. *Pennsylvania Stave Company's Appeal*, 236 Pa. 97, 84 Atl. 761. The proper method of making such assessments was very fully discussed in *Lehigh & Wilkes-Barre Coal Company's Assessment*, 225 Pa. 272, 74 Atl. 65, *Philadelphia & Reading Coal & Iron Co. v. County Commissioners*, 229 Pa. 400, 79 Atl. 109, and in several other recent cases. With these cases as a guide there should be no difficulty in adopting the prop-

er method of ascertaining the taxable value. Scientific formulas, arithmetical deductions, and mental contemplations, have small value in making assessments under our practical system of taxation. The market value of the separate tracts at public sale, after due notice, is the legal basis recognized by our statutes of determining the assessable value of real estate, and until the Legislature changes this method, it is binding, not only upon the taxing authorities but upon the courts as well.

[4] Nothing contained in the act of 1905, applicable to Luzerne county, changes the basis of determining assessable value. Under this act the subordinate assessors make the assessments and valuations, and it is made the duty of the board of assessment to "examine and revise the said valuation increasing and decreasing the same as in their judgment may seem to be proper or adding thereto such property or subjects of taxation as may have been omitted." It will thus be seen that by the express terms of the act the duties of this board are limited to an examination and revision of the valuations returned by the subordinate assessors, increasing or decreasing the same as in their judgment may seem proper. Beyond this the board of assessment cannot go, except to add taxable property that may have been omitted by the subordinate assessors. The act is too plain to be misunderstood, and there should be no difficulty in determining what the board may and may not do. It should be the effort of all parties concerned to fix the valuations upon a legal basis, and when this is done, there will be no occasion for further litigation.

Decree affirmed at cost of appellant.

(245 Pa. 496)

CHARLES v. LEHIGH VALLEY R. CO.

(Supreme Court of Pennsylvania. May 22, 1914.)

JUDGMENT (§ 199\*)—CROSSING ACCIDENT — JUDGMENT NON OBSTANTE VEREDICTO—EVIDENCE.

Where, in an action for the death of plaintiff's husband from being struck by a locomotive at a crossing, there was nothing to indicate defendant's negligence other than the mere negative testimony of two witnesses that they heard no warning, and the bare presumption of law that deceased stopped, looked, and listened, and five disinterested eyewitnesses testified that ample warning was given, and that had not deceased negligently failed to stop, look, and listen he would have been aware of the approach of the locomotive, the court properly entered judgment for the defendant non obstante veredicto.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 219-274; Dec. Dig. § 199.\*]

Appeal from Court of Common Pleas, Luzerne County.

Trespass by Angeline Charles against the Lehigh Valley Railroad Company, for death of plaintiff's husband. From judgment for defendant n. o. v., plaintiff appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



The facts appear in the following opinion of Fuller, P. J., sur defendant's motion for a new trial, and for judgment n. o. v.:

This action was brought to recover damages for the death of plaintiff's husband, who was killed by a locomotive while crossing defendant's west-bound railroad track on Broad street in the city of Hazleton.

The specific and only negligence averred as the foundation of defendant's liability was the lack of warning. In support of these motions defendant urges: (1) The absence of affirmative proof establishing negligence of the defendant; (2) the presence of affirmative proof establishing contributory negligence of the deceased.

The sum total of plaintiff's proof on both branches of the case was:

(1) The negative testimony of two witnesses that they heard no warning. One of these witnesses did not arrive on the scene of the accident until the locomotive was out of sight, and the other was engaged in conversation with a friend. A third witness, when called and examined by the plaintiff respecting the occurrence, was not asked about the warning at all, but the same witness, when afterwards called by defendant, testified that a warning was given.

(2) The bare presumption of law in favor of the deceased that he stopped, looked and listened. This meagerness was met by the defendant with: (1) The positive testimony of five disinterested eyewitnesses, including the one above mentioned, in addition to the engineer on the locomotive, that the headlight was lit and the bell was rung; (2) the testimony of one disinterested eyewitness that deceased had his head down and hands in pocket and was apparently in a deep study; the testimony of still another disinterested eyewitness that he kept right on moving; the testimony of still another disinterested eyewitness that he walked straight in front of the locomotive; the testimony of still another disinterested eyewitness who walked with the deceased as far as the east-bound track, saw the locomotive, and stopped to let it go by, while the deceased, with head bowed and hands in pocket, walked straight on and was struck; the physical fact that there was at the crossing an unobstructed view of the track for 800 to 1,000 feet in the direction from which the locomotive approached; the mental, moral, and physical certainty that if the deceased had stopped, looked, and listened, or even looked before going upon the west-bound track, he must have seen the locomotive.

It seems to be a case in which the plaintiff's negative weakness is overwhelmed by the defendant's positive strength.

We have given all possible consideration to the argument of counsel for plaintiff, who has argued with great force and ingenuity the long diagonal character of the crossing, the noise of the train passing on the same track just before the accident, the position of the arc light on the street, possibly affecting the vision of the deceased, the sufficiency of the bell as a warning, and certain inconsistencies developed on cross-examination of defendant's witnesses, as matters whose bearing upon the question of negligence and contributory negligence could not be withdrawn from the jury; but we feel constrained to conclude nevertheless that the verdict in favor of the plaintiff cannot be sustained on the evidence, and that defendant's request for binding instructions should have been affirmed.

Argued before BROWN, MESTREZAT, POTTER, STEWART, and MOSCHZIS-KER, JJ.

Abram Salsburg, Mose H. Salsburg, and E. Lynch, all of Wilkes-Barre, for appellant. P. F. O'Neill and F. W. Wheaton, both of Wilkes-Barre, for appellee.

PER CURIAM. This judgment is affirmed on the concise and clear opinion of the court below entering judgment for the defendant non obstante veredicto.

(245 Pa. 499)

## BAKER v. TUSTIN.

(Supreme Court of Pennsylvania. May 22, 1914.)

### 1. MORTGAGES (§ 454\*)—FORECLOSURE—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

In an action of scire facias sur mortgage an affidavit of defense, setting up that plaintiff had unlawfully entered judgment against defendant on the bond accompanying the mortgage, to the damage of the defendant in the sum of \$10,000, but not alleging that defendant had asked to have the judgment opened or stricken off, or stating the facts showing the damage with reasonable precision, was insufficient.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 1319-1328; Dec. Dig. § 454.\*]

### 2. PLEADING (§ 156\*)—AFFIDAVIT OF DEFENSE—REQUISITES.

Affidavits of defense should aver with reasonable precision the facts depended on.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 312; Dec. Dig. § 156.\*]

### 3. PLEADING (§ 142\*)—SET-OFF—CERTAINTY OF AVERMENTS.

Averments of set-off must be as specific as those used in a statement or claim.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 290, 291, 297, 300; Dec. Dig. § 142.\*]

### 4. PLEADING (§ 150\*)—AFFIDAVIT OF DEFENSE—CONSTRUCTION.

An affidavit of defense is to be taken most strongly against the defendant.

[Ed. Note.—For other cases, see Pleading, Dec. Dig. § 150.\*]

Appeal from Court of Common Pleas, Columbia County.

Action of scire facias sur mortgage by Arvilla Baker, now Arvilla Troxell, against George M. Tustin. From judgment for plaintiff for want of sufficient affidavit of defense, defendant appeals. Affirmed.

Argued before BROWN, MESTREZAT, POTTER, STEWART, and MOSCHZIS-KER, JJ.

G. M. Tustin and R. R. John, both of Bloomsburg, for appellant. C. A. Small, of Bloomsburg, and G. W. Moon, of Wilkes-Barre, for appellee.

PER CURIAM. [1-4] The sole defense set up by the appellant in his affidavit is that the appellee had unlawfully entered judgment against him on his bond accompanying the mortgage upon which this writ of scire facias was issued, and the averment upon which he relied in the court below, in asking

for the discharge of the rule for judgment for want of a sufficient affidavit of defense, is merely that he had been damaged by the entry of the said judgment in the sum of \$10,000. It does not appear that he ever asked to have it opened or stricken off; but, aside from this, the vague allegation of the damage sustained was utterly insufficient to prevent the entry of judgment on the mortgage. "Affidavits of defense should aver the facts depended upon with reasonable precision and distinctness. *Markley v. Stevens*, 89 Pa. 279. Averments of set-off must be as specific as those used in a statement of claim. The defendant in respect to such a claim is the actor, and the obligation is upon him to aver his set-off in terms incapable of being misunderstood. *Loeser v. Warehouse*, 10 Pa. Super. Ct. 540. An affidavit of defense is to be taken most strongly against the defendant, for it is to be presumed that he has made it as favorable to himself as his conscience would allow. *Comly v. Simpson*, 6 Pa. Super. Ct. 12; *Kemp v. Kemp*, 1 Woodw. Dec. 154." *Law v. Waldron*, 230 Pa. 458, 79 Atl. 647, Ann. Cas. 1912A, 467.

Judgment affirmed.

(245 Pa. 509)

**GALLAGHER v. BLACK CREEK COAL CO.**

(Supreme Court of Pennsylvania. May 22, 1914.)

**1. MASTER AND SERVANT (§ 285\*)—DEATH OF EMPLOYÉ — NEGLIGENCE — QUESTIONS FOR JURY.**

Where, in an action for the death of a mine employé from an electric current coming from a feed wire through a signal wire which he was operating, there was evidence that the range of oscillation of the signal wire was sufficient to allow it to come into contact with feed wires, from one of which the insulation had been broken several days before the accident, the contact being indicated by a deposit of solder on the signal wire, and the evidence was conflicting on whether the control of the electric wire was in the mine foreman or in an electrician assigned to the duty by the mine superintendent, the questions whether the accident was due to the cause claimed by plaintiff, whether the defect in the feed wire would have been discovered by adequate inspection, and whether the control of such wire was in the mine foreman or the electrician, were for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 1002, 1003, 1007, 1008, 1016, 1035, 1043, 1053; Dec. Dig. § 285.\*]

**2. MASTER AND SERVANT (§ 276\*)—DEATH OF MINE EMPLOYÉ—EVIDENCE—PROBATIVE EFFECT.**

In an action for the death of a mine employé from an electric current coming from a feed wire through a signal wire which he was operating, evidence that deceased and his assistant were unable to release their holds on the signal wire until the controller was moved by a third person, though showing that the electric shock was continuous and not momentary, was not proof that it resulted from an unexplained cause, and not from contact between an oscillating signal wire and the bare feed wire, since the oscillation of the signal wire may have caused it to become entangled

with the feed wires and thus produce a continuous current.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 950-952, 954, 959, 970, 976; Dec. Dig. § 276.\*]

Appeal from Court of Common Pleas, Luzerne County.

Trespass by Bridget Gallagher against the Black Creek Coal Company, for the death of plaintiff's son. From judgment for plaintiff, defendant appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, ELKIN, STEWART, and MOSCHZISKER, JJ.

Henry S. Drinker, Jr., of Philadelphia, and G. J. Clark, of Wilkes-Barre, for appellant. Charles B. Lenahan, of Wilkes-Barre, James P. Costello, of Hazleton, and James L. Lenahan, of Wilkes-Barre, for appellee.

PER CURIAM. [1] The plaintiff's son who was employed in defendant's coal mine was killed by an electric shock while pulling a signal wire by means of which communication was had with the hoisting engineer at the surface. The signal wire was not insulated, and was placed three or four inches below insulated feed wires by which electricity was carried to the bottom of the shaft for light and power. The pulling of the signal wire caused a hammer to strike a plate in the engineer's room and the wire was slack enough to allow the hammer to drop back after the plate was struck. It appeared from the testimony on behalf of the plaintiff that the range of the oscillation of the wire was sufficient to allow it to come into contact with the feed wires, from one of which the insulation had been broken four or five days before and actual contact of the wires was indicated by a deposit of copper solder on the signal wire at a point corresponding to the place on the feed wire from which the insulation had been broken.

The grounds of defense at the trial were that there was not sufficient evidence to show the cause of the accident, and that if there was negligence in not inspecting the wires it was the negligence of the certified mine foreman for whose neglect the defendant was not answerable. The issue of fact was clearly defined by the learned trial judge, and it was submitted with the instruction that to entitle the plaintiff to a verdict, the jury must find that her son's death was caused by an electric shock, and that the current in the signal wire came from the feed wire, and that the defect in the latter would have been discovered by adequate inspection, and that the control of the electric wire was not in the mine foreman, but in an electrician assigned to that duty by the superintendent of the mine.

[2] The contention that the cause of the accident was not shown is based on the testimony for the plaintiff that while the deceased held the signal wire he called to his

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

assistant, who also took hold of it, and that neither was able to release his hold until the controller was moved by a third person: From this it is strenuously argued that the shock which caused the death was not a momentary one that would have resulted from contact of the signal wire and the bare feed wire but a continuous one that must have been the result of an unexplained cause. This, however, overlooks the testimony that the oscillation of the signal wire might have caused it to be entangled with the feed wires and thus produce a continuous current.

We find no error which calls for a reversal. The judgment is affirmed.

(245 Pa. 512)

**BURKE v. PENNSYLVANIA COAL CO.**

(Supreme Court of Pennsylvania. May 22, 1914.)

**1. MASTER AND SERVANT (§ 286\*)—INJURY TO MINE EMPLOYÉ—NONSUIT.**

Where, in a mine employé's action for injuries due to his foot being caught between a motor and the floor of a gangway, when he fell after dismounting from a car and while running ahead to sand the track, there was no proof that the motor was not of the ordinary and usual kind used in coal mines, or that the space between the motor and the floor was insufficient, and that such insufficiency caused the accident, or that there was any obstruction in the floor other than the ordinary inequality of surface common to all mines, the court properly refused to take off a nonsuit.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1006, 1008, 1010, 1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

**2. MASTER AND SERVANT (§ 217\*)—INJURY TO MINE EMPLOYÉ—ASSUMPTION OF RISK.**

Where a mine employé, who was of mature age and had been employed at the same place and at the same work for upward of six months and had passed over the place of accident many times, was injured by an accident which was not such as the employer in the exercise of legal care should have anticipated, the injury was due to a risk which the employé had assumed.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

Appeal from Court of Common Pleas, Luzerne County.

Trespass by John Burke, by his father, and the father in his own right, against the Pennsylvania Coal Company for personal injuries. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

The facts appear in the following opinion of Fuller, P. J., sur plaintiff's motion to take off nonsuit:

[1] The minor plaintiff, on December 8, 1910, while employed in defendant's coal mine as a motor brakeman, with the duty of spragging cars, coupling cars, and sanding the track, had his foot crushed by being caught between the motor and the floor of the gangway. He describes the accident thus: "We were coming

out with the first trip in the morning to the slope, and before coming to this certain point it was my duty to get off, run ahead, and sand the road, and while doing so I fell and my foot got caught between the motor and the side and crushed my foot so hard that it had to be amputated." By "the side" he did not mean of course the rib or side of the gangway, but the floor thereof alongside of the track. This injury he claims was caused by the defendant's negligence in respect to: (1) Insufficiency of space between that portion of the motor projecting beyond the rail and the roadbed; (2) insufficiency of space between the rib or side of the gangway and the rail; (3) failure to keep the passageway between the rib and the rail free from obstruction. He was 19 years and four months of age, and had been engaged in the same employment for upwards of six months, going in and out through the gangway in the performance of his duty about 10 times a day, and was therefore thoroughly familiar with the work which he had to do as well as with all the physical conditions surrounding its performance. It would seem that at the place of the accident the floor of the gangway was slightly elevated above the rail, thus making it possible for his foot to be caught by the motor when he fell in running ahead, as he testified, to sand the rail. His contributory negligence was patent, but this would have been a question of fact for the jury, and the nonsuit was only entered on the ground of failure to establish defendant's negligence.

Referring to the points aforesaid upon which negligence is predicated, we held upon the trial, and we still hold: (1) That the first point was not sustained by any evidence to show that the motor was not of the ordinary and usual kind used in coal mines for the purpose; (2) on the second point there was an entire absence of evidence to show what the space was, or that its insufficiency occasioned the accident; (3) on the third point there was no evidence of any obstruction, properly speaking, nor of anything in the floor of the gangway more than an ordinary inequality of surface, common in all mines, according to the testimony of plaintiff's witness.

[2] We held then, and we hold now, that the accident was not such as the employer in the exercise of legal care should have anticipated, and, furthermore, that the plaintiff, having been employed at the same place in the same work for upwards of six months, passing the place over and over again and being of mature age, must be held to have assumed the risk.

Upon a careful examination of the trial record we fail to find any warrant for the submission of the case to a jury, or for setting aside the nonsuit.

Accordingly the motion is denied.

The trial judge entered a nonsuit, which the court subsequently refused to take off.

Argued before FELL, C. J., and MESTREZAT, ELKIN, STEWART, and MOSCHIZKER, JJ.

M. J. Mulhall, of Pittston, for appellant. John McGahren, of Wilkes-Barre, and Warren, Knapp, O'Malley & Hill, of Scranton, for appellee.

**PER CURIAM.** The judgment is affirmed on the opinion of Judge Fuller dismissing the motion to take off the nonsuit.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(245 Pa. 519)  
**STRATTON v. ALLEGHENY COUNTY et al.**  
 (Supreme Court of Pennsylvania. May 22, 1914.)

**1. CONSTITUTIONAL LAW (§ 48\*)—VALIDITY OF STATUTES—CONSTRUCTION TO AVOID INVALIDITY.**

The court will declare a statute to be void only when it clearly violates the Constitution.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

**2. STATUTES (§ 94\*)—GENERAL AND SPECIAL LAW—PUBLIC BUILDINGS.**

Act April 18, 1913 (P. L. 96), authorizing cities and counties wherein the county seat is within the limits of a city, to erect joint county and municipal buildings, being a general law, does not violate Const. art. 3, § 7, providing that the General Assembly shall not pass any local or special law regulating the affairs of counties or cities.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 103, 104; Dec. Dig. § 94.\*]

**3. STATUTES (§ 76\*)—GENERAL AND SPECIAL LAW—PUBLIC BUILDINGS.**

Act April 18, 1913 (P. L. 96), is not violative of the provision of Const. art. 3, § 7, which prohibits the enactment of any law granting powers or privileges in any counties where the granting of same shall have been provided for by general laws, or where courts have jurisdiction to grant same or give the relief asked for.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 77½-78½; Dec. Dig. § 76.\*]

**4. CONSTITUTIONAL LAW (§ 63\*)—DELEGATION OF LEGISLATIVE POWERS—PUBLIC BUILDINGS.**

Act April 18, 1913 (P. L. 96), does not violate Const. art. 3, § 20, providing that the General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise, or interfere with any municipal improvement.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 108-114; Dec. Dig. § 63.\*]

**5. MUNICIPAL CORPORATIONS (§ 330\*)—LETTING OF CONTRACTS—CONSTRUCTION OF STATUTE.**

The statutes requiring that contracts relating to city affairs be let, after advertisement, to the lowest responsible bidder, do not apply to a contract by a city for the employment of an architect for the erection of a public building.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 854, 855; Dec. Dig. § 330.\*]

**6. MUNICIPAL CORPORATIONS (§ 865\*)—INCREASE OF INDEBTEDNESS—CONTRACT FOR PUBLIC BUILDING.**

Where a city has raised money by a bond issue for the construction of a public building, the making of a contract for the erection of such building is not a further increase of municipal indebtedness, where the money on hand is sufficient to meet all obligations imposed by the contract.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1836-1838; Dec. Dig. § 865.\*]

Appeal from Court of Common Pleas, Allegheny County.

Bill in equity by E. L. Stratton against the County of Allegheny and others, to declare void a contract entered into between the county of Allegheny and the City of Pittsburgh, and for an injunction. From a decree

refusing an injunction, plaintiff appeals. Affirmed.

Swearingen, J., filed the following opinion in the common pleas:

The important question in this case is the constitutionality of the act of April 18, 1913 (P. L. 96). It has been attacked upon the following grounds:

1. It is alleged that the act violates article 3, § 7, of the Constitution, which provides: "The General Assembly shall not pass any local or special law. \* \* \* Regulating the affairs of counties, cities, townships, wards, boroughs, or school districts. \* \* \* Nor shall any law be passed granting powers or privileges, in any case where the granting of such powers and privileges shall have been provided for by general law, nor where the courts have jurisdiction to grant the same or give the relief asked for."

2. It is also alleged that the act violates article 3, § 20, which provides that: "The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise, or interfere with any municipal improvement, money, property, or effects, whether held in trust or otherwise, or to levy taxes, or perform any municipal function whatever."

[1] In the courts, the presumption is that a statute, regularly enacted by the lawmaking branch of the government, is constitutional. "We can declare an act of Assembly void only when it violates the Constitution clearly, palpably, plainly, and in such manner as to leave no doubt or hesitation on our minds." Commonwealth ex rel. v. Hyneman, 242 Pa. 244, 88 Atl. 1015.

[2] Is the act now in question a local or special law, within the meaning of the prohibition contained in article 3, § 7, of the Constitution above quoted? The act authorizes the construction of joint county and municipal buildings. Both counties and cities must have such buildings, and the cost thereof must be paid out of the public funds raised by taxation. There can be no doubt that the act purports to regulate the "affairs of counties and cities." If, therefore, it is a local or special law, as contended by the complainant, it offends against said article 3, § 7, of the Constitution. If it is not a local or special law, the Legislature did not transcend its powers in enacting the same.

The act provides: "That in each county of this commonwealth, where the county seat is within the limits of any city, the county commissioners and the corporate authorities of such city shall have the power, and they are hereby authorized, to agree upon a site within the limits of such city, and to erect thereon a joint county and municipal building, to be used by the county for courthouse and other county purposes, and to be used by the city for municipal purposes."

It is apparent, of course, that the act did not apply, and it was not intended to apply, to all the counties and cities of the state, at the date of its passage. But no county nor city was excluded from its operation. In time every county seat in the state may be within the limits of a city, for no distinction is made between cities. It is a fact, of which we take notice, that the act does apply to many counties and cities. Harrisburg in Dauphin county, Scranton in Lackawanna county, New Castle in Lawrence county, Philadelphia in Philadelphia county, and Pittsburgh in Allegheny county, are some that may be mentioned. But it does not now apply to all counties. Therefore the act is one of classification. It authorizes the erection of joint county and municipal buildings, where the county seat is within the limits of a city, and it necessarily excludes from its present opera-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

tion those counties in which such conditions do not exist. Is this a genuine classification, founded upon "natural, reasonable and necessary conditions"?

It seems to us that there is a real distinction between counties wherein the county seats are within the limits of cities and counties where they are not. In the former case, cities have grown up from natural causes. They have necessarily become the centers of great populations with all that is implied thereby. The counties have in consequence, and likewise from natural causes, also become of great importance. In a county, where such a condition exists, the two municipalities must have buildings for the transaction of the business of the public. A more commodious and convenient building can be erected jointly than can two or more be erected separately, and necessarily the expense to the taxpayers of both will be far less. Many difficulties in securing a suitable and proper site will be avoided by a joint building. But the great consideration is the convenience of the public. The convenience of the people in transacting their business with the county and city will be much more efficiently subserved by having the courts and the public offices of both municipalities in substantially the same place. Especially is this true here, where the population of Pittsburgh is almost half of the entire population of the county of Allegheny. It is therefore apparent that there is a real, not a fanciful, distinction between counties in which the county seats are located within the limits of cities, and those in which they are not. The former do possess "natural, reasonable and necessary conditions," which do not belong to the latter. *Pittsburg's Petition*, 217 Pa. 227, 66 Atl. 348, 120 Am. St. Rep. 845.

We cannot distinguish between the classification prescribed in the act under consideration and that in the act of May 6, 1897 (P. L. 46). The latter made bridges over streams which divided counties a separate class and authorized the counties to rebuild them, under certain conditions. The Supreme Court, in an opinion by Justice Mitchell, held that the classification was genuine and founded upon a real distinction. In the opinion it is said: "Legislation for a class distinguished from a general subject is not special but general, and classification is a legislative question, subject to judicial revision only so far as to see that it is founded on real distinctions in the subjects classified, and not on artificial or irrelevant ones used for the purpose of evading the constitutional prohibition. If the distinctions are genuine, the courts cannot declare the classification void, though they may not consider it to be on a sound basis. The test is, not wisdom, but good faith in the classification. The first condition (a bridge over a river or stream forming the boundary line between two counties) is founded on a natural and manifest distinction, which is to a large extent unavoidably local. Rivers or streams forming boundaries between counties are comparatively few in number, and their locality is fixed. So, also, bridges over them are almost necessarily fixed as to location, by the centers of population and travel. They form a distinct class, because not exclusively a bridge of either county, and they are matters of exact site, style, material, expense, etc., as to which the two counties may not be in harmony. This basis of classification, therefore, is not only competent, but obviously proper." *Seabolt v. Commissioners*, 187 Pa. 318, 41 Atl. 22.

In the said act of 1897, the conditions prescribed coexisted in but few counties of the state, and they probably never will coexist in all of them. These conditions limited the operation of the act to but few places, and necessarily made it local in effect. But the court held that, since the conditions were genuine and called for legislation peculiar thereto, the mere

fact that it applied to but few places did not make the law local and special within the meaning of the constitutional prohibition. In this act of 1913, there are no conditions which will necessarily restrict its operation to particular counties. In due time, and from purely natural causes, the act may extend to all the counties of the state, for none can be excluded. And we discover no prohibition in the Constitution against making cities, which are county seats, a distinct class for necessary legislative purposes. Other circumstances than mere differences in population justify classification. In the act of February 7, 1906 (P. L. 7), authorizing the annexation of cities and providing for a temporary government and the payment of the indebtedness of each and the enforcement of claims, such cities had to be "contiguous or in close proximity," and no borough must intervene. Thus the act did not apply to all cities, and it was therefore a classification founded upon the conditions stated. This was sustained in *Pittsburg's Petition*, 217 Pa. 227, 66 Atl. 348, 120 Am. St. Rep. 857, *supra*.

We must therefore conclude that the classification prescribed in the Act of April 18, 1913, is founded upon a real, genuine distinction, and that therefore it is a general, and not a local or special law. It is not local because it does not pertain to a definite place and is not restricted to one portion of the state. It is not special, because it does not relate to particular persons, places, or things. With the wisdom of the legislation we have nothing whatever to do.

[3] Neither does the act of 1913, in our opinion, offend against the last paragraph of section 7, article 3, of the Constitution above quoted. Even if this paragraph could be held to extend beyond the object of said section 7, which is an enumeration of subjects concerning which local or special legislation is prohibited, we are unable to perceive how it has any application to the situation disclosed by this record. It is true, both counties and cities had the power to acquire land and to erect buildings for their respective public purposes, but they did not, prior to this act, have power to join in the erection of a building, which could be utilized in the manner prescribed, and to sell or exchange their lands as designated. These are powers which had not been previously provided for by general law. If this be true, it cannot be said that the act of 1913 offends against the last paragraph of section 7, article 3, of the Constitution.

[4] We are also of opinion that the act is not in violation of section 20, article 3, above quoted. Clearly, this act of 1913 does not pretend to "delegate to any special commission" any powers whatever. It authorizes the lawfully constituted authorities of counties and of cities to do certain things. The purpose of the said section was to thereafter prohibit the Legislature from naming a commission, composed of members who were in no way connected with the constituted authorities of municipalities, which was to perform some duty of a municipal character. But it was not thereby intended to prohibit the Legislature from authorizing counties and cities, jointly or severally, to perform any lawful and necessary municipal function, which can only be done by the governing bodies thereof, whose membership will change from time to time as their terms expire.

In view of the foregoing, how can it be said that the act of April 18, 1913 (P. L. 96) "violates the Constitution clearly, palpably, plainly, and in such manner as to leave no doubt or hesitation on our minds"? Certainly we cannot say so. We, therefore, hold that said act is constitutional.

If, therefore, the Legislature had the power to enact the statute of April 18, 1913, it could

authorize counties and cities to do what is prescribed therein. It could empower them to erect joint buildings, to convey lands to each other, in exchange or otherwise, and to sell lands no longer needed for public purposes. There is no provision in the Constitution, to which our attention has been called, which prohibits the Legislature from granting by general law the powers enumerated in the act of 1913. If the Constitution does not forbid the enactment of such legislation, the authority to do so is presumed to have been conferred, because the act is "in its character and essence a law." The power of the Pennsylvania Legislature to pass any statute of such kind is unlimited, except where restrained by express or necessarily implied constitutional prohibition. *Sharpless v. Philadelphia*, 21 Pa. 147, 59 Am. Dec. 759.

[5] It was neither alleged, nor was there any proof to show, that any fraud was committed on the part of the county commissioners or of the authorities of the city of Pittsburgh. Hence in the making of the contract, and in choosing an architect, the said representatives of the county and city are presumed to have acted in good faith. It does not appear that they passed the bounds of the authority vested in them by the statute. It was their duty to choose an architect. It was their duty to provide for his compensation. They were not obliged to adopt a program of competition. They might have chosen an architect without any competition. Therefore their judgment cannot be reviewed by the court, in the absence of an allegation of fraud, or unmistakable proof of an abuse of discretion. While there may be honest differences of opinion as to what has been done by the authorities, yet the evidence submitted is clearly insufficient to warrant a finding that there was any abuse of discretion by them. It is true that in cities of the second class "all contracts relating to city affairs shall be let to the lowest responsible bidder after reasonable notice. \* \* \*" A similar provision also governs the letting of contracts by the county. It has never been held so far as we have been able to ascertain, that the above provisions apply in the making of contracts for the employment of attorneys, physicians, engineers, or others, involving professional skill. Certainly an architect's services do involve professional skill, knowledge, and judgment.

"Scientific knowledge or professional skill has also been regarded as furnishing a ground for an exception to the statutory rule. Thus it has been said that the services of a lawyer, of a physician, or of an architect or a surveyor are not embraced within a provision requiring the letting of contracts to the lowest bidder." *Dillon on Municipal Corporations*, § 1203.

[6] We have been asked to find that the in-

debtedness of the city of Pittsburgh, at the time of the passage of the act of April 18, 1913 (P. L. 96), was, and still is, largely in excess of any indebtedness which the council of said city has the right to create, and we have declined to do so because we regarded such a finding as immaterial to any issue in this case. Testimony was introduced at the trial, showing that the constitutional limit of indebtedness had been exceeded by the city of Pittsburgh. But it does not appear that the city of Pittsburgh will incur any indebtedness by reason of the contract, mentioned in findings of fact 7. No appraisal of the real estate of either the county or the city has yet been made. Therefore it is impossible now to determine whether the city will or will not incur any indebtedness whatever by reason of the proposed exchange. The city of Pittsburgh now has in its possession the sum of \$1,500,000, being the proceeds of bonds authorized for the construction of a municipal building. There was no condition that this building was to be erected in any particular place. Consequently it was within the discretion of the city authorities to determine where the building should be located. This statute now provides that the building may be located alongside of the county building, the two to be erected jointly. In our judgment, the said fund of \$1,500,000, will be applicable for the erection of that joint building. So far as appears, we are unable to say, and it cannot be now shown, that the cost of the city's portion of the joint building will exceed the amount of money which is at present available therefor. In view of the foregoing, it cannot be determined that the city will incur any indebtedness by reason of the project under consideration. Therefore the question whether or not the indebtedness of the city now exceeds the constitutional limit is immaterial.

In view of the whole case as presented, we are constrained to hold that the complainant is not entitled to the relief for which he has prayed in the bill, and that it must be dismissed.

The court on final hearing dismissed the bill. Plaintiff appealed.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

A. E. Anderson, John S. Ferguson, and Jos. F. Mayhugh, all of Pittsburgh, for appellant. Edward B. Vaill, C. A. O'Brien, A. B. Hay, and J. B. Eichenauer, all of Pittsburgh, for appellees.

PER CURIAM. The decree appealed from is affirmed at the cost of the appellant on the opinion of Judge Swearingen.

(83 N. J. Eq. 397)

**SECOND WORKINGMEN'S BUILDING & LOAN ASS'N OF NEW BRUNSWICK  
v. WICKERS et al. (No. 38-254.)**

(Court of Chancery of New Jersey. Sept. 8, 1914.)

*(Syllabus by the Court.)*

**1. EQUITY (§ 263\*)—ANSWER — MOTION TO STRIKE—PARTIES.**

In a suit to foreclose a mortgage, where a person is made a party defendant because of holding a judgment against the mortgagor, which judgment is by the bill alleged to be a lien upon the mortgaged premises, such judgment creditor defendant has no standing to move to strike out parts of answers filed, one by a married woman codefendant without her husband joining her therein, and another by codefendants, both setting up that the judgment is pretended, was im- providently recovered and entered, is not a lien upon the mortgagor's property, is insufficient and raises no defense, and amounts to a collat- eral attack upon the judgment.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 535-540; Dec. Dig. § 263.\*]

**2. EQUITY (§ 263\*)—OBJECTION TO ANSWER —RIGHT TO PRESENT.**

While formerly, when a married woman put in an answer separately from and without her husband joining her, and without leave of the court therefor, such irregularity could only be objected to by the complainant to whose bill the answer was responsive. A codefendant having no interest whatever in the question, could not make the objection; but now under the provi- sions of rule 219 of this court a married woman, party defendant in any cause, may appear by solicitor and file an answer, plea, demurrer or other pleading, in her own name, separately from her husband, and without any special or- der therefor.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 535-540; Dec. Dig. § 263.\*]

**3. EQUITY (§§ 225, 263\*)—OBJECTION TO COM- PLAINT—WHO MAY OBJECT.**

The test as to whether a party to a chan- cery suit may demur to a bill of complaint, or move to strike out an answer in the nature of a cross-bill, or put in exceptions to an answer, must be whether or not, in the alternative, the party objecting could answer the pleading.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 491, 535-540; Dec. Dig. §§ 225, 263.\*]

**4. EQUITY (§ 214\*)—ANSWER—OBJECTION.**

To an answer in the nature of a cross-bill, the complainant in the original bill, or a code- fendant against whom it is preferred, as the case may be, is required to answer by a special replication, or move to strike out in lieu of demurring.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 487; Dec. Dig. § 214.\*]

**5. JUDGMENT (§ 441\*) — PROCEEDINGS TO SET ASIDE—FRAUD.**

The doctrine that a judgment pronounced by a court of competent jurisdiction is final and conclusive between the parties to it with respect to all matters put in issue in the case in which it is recovered, and must stand and be so treat- ed everywhere, unless and until it is set aside by the court which pronounced it, or is revers- ed in direct appellate proceedings, does not oper- ate to prevent proceedings in equity to set aside a judgment as fraudulent or collusive.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 836, 840; Dec. Dig. § 441.\*]

**6. EQUITY (§ 263\*)—OBJECTIONS TO ANSWER —"INSUFFICIENCY."**

"Insufficiency" means that a portion of the bill of complaint has not been answered, to which portion the complainant is entitled to an answer, and does not mean that the answer is insufficient in the sense that it presents no equi- table defense.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 535-540; Dec. Dig. § 263.\*]

For other definitions, see Words and Phrases, First and Second Series, Insufficiency.]

Bill by the Second Workingmen's Build- ing & Loan Association of New Brunswick, N. J., against Ella Cecelia Wickers and others. On motions to strike out parts of answers. Motions denied.

Theodore Strong, of New Brunswick, for the motion. John P. Kirkpatrick, of Newark, opposed.

**WALKER, Ch.** The bill is one to fore- close a mortgage given by Ella Cecelia Wick- ers and Albert George Wickers, her husband, and recites that they, being indebted to the complainant in the sum of \$1,500, made the bond and mortgage set out in the bill. Then follows an allegation that on September 15, 1911, the National Bank of New Jersey re- covered a judgment against Ella C. Wickers, Albert George Wickers, and others in the Supreme Court for \$1,241.69, by virtue of which the bank claims a lien upon the mort- gaged premises, but that the judgment was obtained subsequent to, and with full notice of, the complainant's mortgage, and, if a lien upon the mortgaged premises, is sub- sequent to the incumbrance of the complain- ant's mortgage. The bill then alleges that on November 1, 1912, Mr. and Mrs. Wickers executed another mortgage on the same premises to Israel Marx for \$300; that the Marx mortgage was executed and registered subsequent to the complainant's mortgage and with full notice, and, if an incumbrance upon the mortgaged premises, is subsequent to the incumbrance of the complainant's mortgage. Then follows an allegation of another mortgage made by Mr. and Mrs. Wickers to Israel Marx, February 1, 1913, for \$200, subject also to the priority of com- plainant's mortgage. Marx died, and his widow was made executrix, and, she dying, the defendants Price, Wolfson and Plechner were appointed and qualified as substituted administrators c. t. a.

The defendant the National Bank of New Jersey filed a notice that it desires to have its judgment set forth in the bill, reported upon by the master to whom the cause may be referred.

The defendant Ella Cecelia Wickers, with- out her husband joining her, filed an answer to the complainant's bill, in which, among other things, she avers:

"And this defendant, further answering, ad- mits that there appears of record in the office of the clerk of the Supreme Court of the state of New Jersey a certain pretended judgment re-

covered by the National Bank of New Jersey against this defendant, George Wickers, Henry Weidenhaupt, and C. F. Wickers, for the sum of twelve hundred forty-one and  $\frac{9}{100}$  dollars, or some other sum, as this defendant is informed; but this defendant charges and insists that said judgment was improvidently recovered and entered, and that the same is not a lien upon or an incumbrance against any property of this defendant."

The defendants Price, Wolfson, and Plechner filed an answer, making the same averment with reference to the bank's judgment.

[1, 2] The defendant the National Bank of New Jersey moves to strike out those answers—as to that of Mrs. Wickers because (1) she answered without her husband joining her and without leave of the court for that purpose obtained, and (2) because the averment that the judgment is pretended was improvidently recovered and entered, and is not a lien upon the defendant's property, is insufficient and raises no defense, and amounts to collateral attack upon the judgment; as to the answer of Price, Wolfson, and Plechner because the averment concerning the judgment amounts to collateral attack.

It may be that the answer of Mrs. Wickers would formerly have been irregular, because put in separately by the wife without her husband joining her, and without leave of the court therefor (Dick. Ch. Prec. p. 82, note "a," and cases cited; also McDermott v. French, 15 N. J. Eq. 78); but that could only have been objected to by the complainant, to whose bill it is responsive, the defendant the National Bank of New Jersey having no interest whatever in that question. But now, under the provisions of rule 219 of this court, a married woman, party defendant in any cause, may appear by solicitor and file an answer, plea, demurrer, or other pleading, in her own name, separately from her husband and without any special order therefor. And, furthermore, whatever the character of these answers with reference to the point made against them to the effect that the attack on the judgment is collateral, the defendant who objects to them has no standing to make the attack, and for these reasons:

The averments in the answers are directed to an allegation of the complainant's bill. The defendant the National Bank of New Jersey has filed no pleading in the case against which this attack is leveled by a co-defendant.

If either of the defendants, Mrs. Wickers or Price, Wolfson, and Plechner, had filed an answer in the nature of a cross-bill against their codefendant the National Bank of New Jersey, alleging the judgment recovered by it against Wickers and others to be void, and praying that it be set aside in favor of their incumbrances, then the bank would have had standing to make the objection that it now levels against an answer not preferred to any pleading or allegation which it makes, but put in only to the bill filed by the complainant, and other party, because in such case the motion would have been tanta-

mount to a demurrer to a cross-bill. *Westervelt v. Ackerson*, 35 N. J. Eq. 43.

[3, 4] The test as to whether a party to a chancery suit may demur to a bill, or move to strike out on answer in the nature of a cross-bill, or put in exceptions to an answer, must be whether or not, in the alternative, the party objecting could answer the pleading. A defendant is required to plead, answer, or demur to a bill of complaint. A complainant is required to reply to an answer, or file exceptions to it for scandal, impertinence, or insufficiency. To an answer in the nature of a cross-bill the complainant in the original bill, or a codefendant against whom it is preferred, as the case may be, is required to answer the pleading by a special replication, or may move to strike it out in lieu of demurring. Beyond this, neither the rights nor the obligations of the parties go. And, measured by this test, a defendant may neither except to a codefendant's answer, nor move to strike out an answer in the nature of a cross-bill, not directed to him. And, further, measured by this test, the motions to strike out in this case are misconceived.

[5] Of course a judgment pronounced by a court of competent jurisdiction is final and conclusive between the parties to it with respect to all matters put in issue in the suit in which it is recovered, and it must stand and be so treated everywhere, unless and until it is set aside by the court which pronounced it, or is reversed in direct appellate proceedings. See *National Docks Co. v. P. R. R. Co.*, 52 N. J. Eq. 58, 61, 28 Atl. 71. But that does not prevent a proceeding in equity to set aside a judgment as fraudulent or collusive. See N. J. Digest, tit. "Judgment," IX, "Equitable Relief," §§ 150, 151, and cases cited.

The answering defendants claim that under the authority of *Brantingham v. Brantingham*, 12 N. J. Eq. 160 (Chancellor Williamson, 1858), they are entitled to set up in answers in a foreclosure suit, that a judgment recovered against the mortgagor in another court, which would displace their lien or interest, is invalid, at least as against such lien or interest.

Apparently Mrs. Wickers' only interest in averring the invalidity of this judgment is that, if there should be any surplus money arising from the sale of the mortgaged premises after the payment of the complainant's mortgage and the two Marx mortgages, all of which she admits are valid liens, she would be entitled to the remainder, without its being tolled to pay the bank's judgment. And, quite apparently, the interest of the defendants Price, Wolfson, and Plechner in averring the judgment to be invalid is to put themselves in position to reach the surplus after the payment of the complainant's mortgage, although they do not aver, in terms, that by reason of the invalidity of the judgment their mortgages are to be advanced in priority over it.

These averments in the answers of Mrs. Wickers and of Price, Wolfson, and Plechner



are apparently within the practice laid down in *Brantingham v. Brantingham*, supra, except that the averments before me may, in and of themselves, be insufficient (by reason of meagerness and lack of detailed facts) to raise the issue that the defendants seek to import into the case. But as to that no decision is necessary.

[6] The motions to strike out in this case are tantamount to exceptions to an answer, which may be taken for scandal, impertinence, or insufficiency. I cannot better describe the situation on this head in the case at bar than to quote the language of Vice Chancellor Reed in *Steeple v. Public Service Corp.*, 65 N. J. Eq. 529, at page 530, 56 Atl. at page 127, where he said:

"I do not perceive that the answer is obnoxious to an exception upon either of these grounds. It is not scandalous, nor impertinent, nor insufficient, in the sense in which that word is used in this connection. Insufficiency means that a portion of the bill has not been answered, to which portion the complainant is entitled to an answer. It does not mean that it is insufficient in the sense that it presents no equitable defense."

Subjected to this test, it will be seen at a glance, that the answer, in the respect objected to, is not insufficient. Therefore the motions to strike out cannot prevail. But, moreover, as already stated, such motions, if well founded, could only be made by the complainant to whose bill the answers are responsive. They cannot be made by a defendant against a codefendant whose pleading in response to the complainant's makes an averment that the objecting defendant's incumbrances are invalid. The incumbrancer thus assailed is in no worse position than as if his codefendant made a verbal statement to the same effect. He would not be obliged to answer either, and, consequently, would be bound by neither.

As the defendant the National Bank of New Jersey had no standing whatever to make the motions to strike out the answers under consideration, quite aside from the defendants' right to plead as they did, both motions must be denied, with costs.

(83 N. J. Eq. 448)

REICH v. REICH et al. (No. 37147.)

(Court of Chancery of New Jersey. Aug. 21, 1914.)

1. SPECIFIC PERFORMANCE (§ 49\*)—SALE OF LAND—CONSIDERATION.

A parol agreement by a mother to transfer land worth at least \$6,000 to her son in consideration of his agreement to execute to her a mortgage on the land for \$2,000, and pay her annually for life an amount equal to 5 per cent. on such sum, the mortgage to be canceled on her death, if regarded as a sale, was not based on a consideration sufficient, in proportion to the value of the property, to justify a decree of specific performance.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 140-151; Dec. Dig. § 49.\*]

2. SPECIFIC PERFORMANCE (§ 64\*)—RIGHT OF ACTION—EXPENDITURES BY PLAINTIFF.

Where a mother, to induce her son to remain with her, offered to convey to him a tract

of land worth \$6,000 on his agreeing to pay her interest on \$2,000 at 5 per cent. annually during her life, and he, in consideration of the agreement, entered and made certain expenditures in improvements, etc., which, however, were comparatively small and could be secured to him by decreeing a lien on the land, he could not enforce the gift in equity.

[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 191-195, 198; Dec. Dig. § 64.\*]

Suit by William H. Reich against Augusta W. Reich and others, for specific performance of an alleged oral agreement to transfer certain land. Decree for defendants.

Joseph M. Degnan, of Newark, for complainant. Smith & Dugan, of Orange, for defendants.

EMERY, V. C. This is a bill filed by a son against his mother for the specific performance of an oral agreement to convey a tract of land to him, being about 56 acres of her farm, comprising altogether about 83 acres. The 56 acres are situated on the southerly side of a public road which runs through the farm, and on this portion a barn is located; the homestead being on the northerly, or 27-acre, portion.

The oral agreement set up in the bill, which is denied by the answer, is one for the conveyance of two tracts of land, the one a lot of one acre, situate on the southerly side of the road, and the other the 56 acres in question. The one-acre lot has been conveyed, but the defendant refused to convey the farm, and after this refusal conveyed her entire farm to a daughter, Mrs. Cobane, and her husband, who have been made parties to the bill, because of this conveyance. This subsequent conveyance was made with notice of complainant's claim, and, as also appears from the answer, was made without the payment of any consideration, and for the purpose of protecting the mother against complainant's claim. The oral agreement set up in the bill is that Mrs. Reich agreed to convey to William Reich, the complainant, the one-acre lot, free and clear, and that the 56-acre tract should be conveyed to him on condition that he give a mortgage to his mother for \$2,000, with interest at 5 per cent., payable semiannually during her natural life, and after her death to be null and void. So far as appears by the bill, no further or other money payments to the mother were agreed to be made as the consideration for the conveyance, but the further consideration, claimed to be established by the proofs, is substantially as follows: Complainant, then unmarried, had been living on the farm and with his mother and his sister, then unmarried, for about three years, and carrying on the dairy business, with his own stock, paying no rent for the farm, but, as he claims, maintaining, or assisting in maintaining, the common household. In December, 1912, proposing to marry and to give up the farm, he finally, at the request of his mother, gave up

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

his plans for removing, and consented to remain on the farm, upon certain conditions; these were: First, that he should have a deed for the one-acre lot, free and clear, for the purpose of building his house on it, the money for which he proposed to procure in part by giving a mortgage on the lot; next, that his mother was to convey the 56-acre tract to him, taking back a mortgage for \$2,000, the interest of which, at 5 per cent., he was to pay semiannually during her life, and at her death it was to be null and void. It appears by the proofs that the final oral agreement was that the complainant was to have the option of paying to his mother the principal sum of \$2,000 at any time, and that this provision was made on the suggestion by his mother that her son might sell the farm after he received the deed. He was also to pay the taxes and insurance. This agreement was made in December, 1912, and the deeds were to be given as soon as the surveys could be made. The deed for the one-acre lot was delivered on or about January 29, 1913, and complainant at once erected his dwelling thereon, costing, as he says, over \$3,000, of which \$1,800 was procured by mortgage thereon. The mortgagee took this mortgage, which he thought a rather large one, for the security offered, relying on complainant's statement that he was to have the farm and intended to install a water system for the barn, and this mortgagee had previously been informed by Mrs. Reich that she was going to give her son William this land adjoining the one-acre lot, as long as she lived. The surveying of the farm was delayed on account of the weather, but complainant continued the occupation of the 56 acres, which was separated by a highway from the remaining portion of the farm on which the homestead stood. He kept his cattle thereon, using the manure, worth about \$300, on the farm, and made substantial repairs to the barn, at a cost, as he says, of about \$200, and also repaired the fences. He also incurred an expense of \$435 in putting down an artesian well upon the one-acre lot. This was done for the purpose of providing water for use at the barn on the farm property adjoining, and the expense was increased by reason of this, beyond that necessary for the use of his dwelling alone. The connection of the water for use in the barn has, however, not been made. This part of the farm so occupied by the son was the portion which, by a will Mrs. Reich had drawn, was given to complainant. Mr. Kahn was the executor of the will and knew of this fact at the time when the parties were brought together by him. The oral agreement was made in his presence and with his advice given to both parties.

[1] I think the proofs show substantially the oral agreement for conveying the lands set up in the bill, with the addition of the provision for complainant's paying the taxes and insurance and the option of complainant to pay the principal sum of \$2,000 at any

time during his mother's life, in discharge of the mortgage, and that the possession of the 56 acres, taken under the oral agreement, was a sufficient part performance to take the case out of the operation of the statute of frauds. The real point of difficulty in the case is whether both conveyances were not, and were not intended to be, so substantially in the nature of gifts that the specific performance of them, farther than actually carried out, cannot be enforced. That no money or other valuable consideration passed, or was intended to pass, to the mother at the time of the agreement is obvious, for the agreement on the son's part was only to pay interest on \$2,000 mortgage on the land conveyed, and, as the grantee was to have possession of the land, the interest is presumably supplied by the rents or profits. The lowest valuation put on the lands by complainant's witnesses is \$4,000, and defendant's witnesses place it as high as \$200 per acre. It is worth, in my judgment, at least \$6,000, and if the agreement is to be considered as resting only on the basis of a sale, and for a valuable consideration, then it would clearly be so hard and unreasonable a bargain that the court should not enforce it. The annual payment of \$100 during Mrs. Reich's life (her age is 65), estimated according to the tables, would be only about \$700, and, even if she had the right to demand the payment of the principal sum of \$2,000, this sum is so much below the real value that, on the basis merely of a sale, it should not be specifically enforced.

[2] The transaction as to the farm was, in my judgment, intended at the time to be substantially a gift to the son in consideration of love and affection, and the question is whether the expenses subsequently incurred by the complainant and the changes in his plans, made by him, relying on the agreement to convey the farm to him, in connection with this consideration of love and affection, are sufficient to entitle him to compel the execution of the parol gift. In this case the complainant on his part did not bind himself by any contract to stay on the farm during his mother's life or to render any future services to her in consideration of the conveyances, and the whole consideration on his part therefore, apart from natural love and affection, was his giving up his plan for immediate removal, and the expenses or outlay made after the agreement. The expenses incurred in building the house on the lot conveyed to him, being on his own land, or the mortgage given thereon, cannot be considered as part of the expense incurred in carrying out an oral agreement to convey the farm, for this expense was incurred for his own benefit, which he retains, and there has been no proof or claim that any loss has or will result by reason of it. Mrs. Reich certainly gets no benefit from this expense. Actual pecuniary loss by reason of change in complainant's original plan for leaving the farm has not been established, and as there was no agree-

ment on complainant's part that he should stay on the farm either during his mother's life or for any definite time, if the agreement should now be specifically enforced as to the farm claimed, complainant would be as free at any time to leave the farm and rent or sell it as he is now to sell or lease the house and lot. His original consent to stay cannot be considered as any substantial consideration on which to base a decree for specific performance. As to the expenses incurred by him after taking possession of the farm on the strength of the agreement, the situation is different, and had these been of such an amount and character as permanently to increase the value of the farm, and if in addition the complainant was unable to be compensated therefor, except by specific performance, he might then be entitled to relief.

The cases in our courts, where parol agreements to devise or convey property in consideration of services rendered or other valuable consideration subsequently given have been specifically enforced, have been those where the remedy at law was inadequate, and such enforcement was necessary in order to prevent fraud. See cases cited in *Clawson v. Brewer*, 67 N. J. Eq. 201, 207, 58 Atl. 593 (1904), affirmed on appeal 70 N. J. Eq. 803, 67 Atl. 1102 (1905); *Vreeland v. Vreeland*, 53 N. J. Eq. (8 Dick.) 387, and cases cited pages 389, 390, 32 Atl. 3 (Ch. McGill, 1895).

But in this case the amounts expended on the farm were comparatively small, and for the expenses so incurred, of which the farm receives the benefit, he may, I think, by the decree of the court on this bill, under the prayer for general relief, be protected. This is upon the principle that, where the court refuses to perform a verbal agreement against the vendor, it may, in favor of the vendee in possession, decree compensation for the fair value of improvement. *Pom. Sp. Perf.* (3d Ed.) § 129, citing *inter al.* *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. (N. Y.) 273 (1814), approved in *Copper v. Wells*, 1 N. J. Eq. (Saxt.) 10, 17 (*Vroom, Ch.*, 1830). The principle of these cases covers, I think, a case where the court cannot decree specific performance over an objection for want of consideration or inadequacy. This being the status of the complainant as to the changes made or expenses incurred by him in reliance on the agreement to convey the farm, the case must be finally disposed of, I conclude, on the basis of it being in substance one where the donee applies to the court for the specific performance of an incomplete gift. The settled general rule in equity is that a valuable consideration is necessary. *Fry, Spec. Perf.* (4th Ed.) § 116; *Pom. Sp. Perf.* § 39; *Drake v. Lanning*, 49 N. J. Eq. (4 Dick.) 452, 24 Atl. 378 (*Ittney, V. C.*, 1892), collecting the New Jersey cases and *Tunison v. Bradford*, 49 N. J. Eq. (4 Dick.) 210, 214, 22 Atl. 1073 (*Green, V. C.*, 1910).

None of our decisions have ever extended the right to specific performance to an agreement which appears on the proofs to be substantially a gift based only on the good consideration of love and affection. In my judgment, these are not enforceable.

The bill, so far as it seeks specific performance, should be dismissed, but, under the prayer for general relief, complainant is entitled to compensation for repairs and improvements made by him on the property.

I will hear counsel as to other expenses being chargeable. For the amounts chargeable, he is entitled to a lien upon the premises. The conveyance to the Cobanes is voluntary and with notice, and no defense against the lien.

(83 N. J. Eq. 402)

BOARD OF HEALTH OF NEW JERSEY  
v. INHABITANTS OF TOWN OF  
PHILLIPSBURG.

(No. 30-519.)

(Court of Chancery of New Jersey. Aug. 28, 1914.)

1. STATUTES (§ 138\*)—TITLE—OBJECT—SUPERADDED WORDS—INSTRUMENTALITIES—MINOR INCIDENTAL MATTERS.

When in a legislative act which can constitutionally have but one object, which must be expressed in the title, superadded words are inserted in the title, describing instrumentalities and other minor or incidental matters, such words cannot foreclose the Legislature from afterwards amending the body of the act so as to affect those instrumentalities, or incidental matters, under a title which expressly amends the original act, appropriately reciting its title.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 205, 206; Dec. Dig. § 138.\*]

2. STATUTES (§ 138\*)—AMENDMENT—SUPPLEMENT—TITLE.

Act March 24, 1899 (P. L. p. 536), is entitled "An act to prevent the pollution of the waters of the state by the establishment of a state sewerage commission, and authorizing the creation of sewerage districts, and district sewerage boards, and prescribing, defining, and regulating the powers and duties of such commission and boards." *Held*, that the constitutional object of such act was the preservation of the waters of the state from pollution, the establishment of a state sewerage commission, etc., being the instrumentality only by which the object was carried out, and hence Act April 16, 1908 (P. L. p. 605), terminating the terms of office of the several members of the sewerage commission, and vesting their powers in the state board of health, was properly enacted under a title, to wit, "A supplement to an act entitled 'An act,' etc., reciting the title of the act of 1899.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. §§ 205, 206; Dec. Dig. § 138.\*]

3. NAVIGABLE WATERS (§ 35\*)—STATE BOUNDARIES—RIGHTS IN STREAM.

Though the title to the bed of the Delaware river above tide water is in the private riparian owners, subject to the paramount public right of user, the control of the river to the middle of the stream on the New Jersey side is in the state, and it has full power to prevent the pollution of the water by sewage discharged into it from municipal corporations in New Jersey.

[Ed. Note.—For other cases, see *Navigable Waters*, Dec. Dig. § 35.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

#### 4. NAVIGABLE WATERS (§ 35\*)—Pollution—Injunction—Defenses.

Where the state board of health instituted suit against a town in New Jersey to restrain it from discharging sewage into the Delaware river in violation of an order served on the town officers by the board, as provided by Act March 24, 1899 (P. L. p. 536) and its supplements, it was no defense that the city of Easton on the opposite side of the river in Pennsylvania was also discharging sewage into the river in greater quantities than defendant.

[Ed. Note.—For other cases, see *Navigable Waters*, Dec. Dig. § 35.\*]

Suit by the Board of Health of the State of New Jersey against the Inhabitants of the town of Phillipsburg, to restrain defendant from polluting the Delaware river. Decree for complainant.

Nelson B. Gaskill, Asst. Atty. Gen., for complainant. John I. Blair Reiley, of Phillipsburg, and Gilbert Collins, of Jersey City, for defendant.

**WALKER, Ch.** The complainant in this cause is a quasi corporation, created and existing under and by virtue of an act of the Legislature approved March 31, 1887 (P. L. p. 80), and the various acts amendatory thereof and supplementary thereto. The state sewerage commission was constituted under and by an act of the Legislature approved March 24, 1899 (P. L. p. 536). The title of this act is important in this litigation. It reads as follows:

"An act to prevent the pollution of the waters of this state by the establishment of a state sewerage commission, and authorizing the creation of sewerage districts and district sewerage boards, and prescribing, defining and regulating the powers and duties of such commission and such boards."

This act was subsequently amended in extenso by an act approved March 21, 1900 (P. L. p. 113). To this act a supplement was passed, approved May 7, 1907 (P. L. p. 361). In and by section 1 of the last-mentioned act it was provided as follows:

"The state sewerage commission is hereby authorized and empowered to inspect any of the waters of this state, and if it finds that any of the waters of this state are being polluted in such manner as to cause or threaten injury to any of the inhabitants of this state, either in health, comfort or property, it shall be its duty to notify, in writing, any person, municipal or private corporation found to be polluting said waters that prior to a time to be fixed by said commission, which time shall not be more than five years from the date of said notice, said person or corporation must cease to pollute said waters and make such other disposition of the sewage or other polluting matter as shall be approved by said commission; any person or corporation aggrieved by any such finding may appeal therefrom to the Court of Chancery at any time within three months after being notified thereof, and the said court is hereby authorized and empowered to hear and determine such appeal in a summary manner, according to its course and practice in other cases, and thereupon to affirm, reverse or modify the finding of said commission in such manner as it may deem just and reasonable."

And by section 2 as follows:

"The state sewerage commission is hereby authorized to apply to the Court of Chancery for writ of injunction to prevent any violation of or to enforce the provisions of this act and the act to which this is a supplement, and it shall be the duty of the said court, in a summary way, to hear and determine the merits of said application; and in all such cases to restrain violation of or enforce the provisions of the said acts."

And by section 3 as follows:

"'Waters of this state,' as used in this act and the act to which this is a supplement, shall include the ocean and its estuaries, all springs, streams and bodies of surface or ground water, whether natural or artificial, within the boundaries of this state or subject to its jurisdiction."

By section 8 of the amendatory act of 1900 (P. L. p. 113) it is provided as follows:

"It shall be unlawful for any person, corporation or municipality, after the date specified in the notice provided for by the fifth section of this act, to permit or allow any sewage, or other polluting matter, to flow into said waters from any sewer, drain or sewerage system, under the control of said person, corporation or municipality, except under such conditions as shall be approved by the state sewerage commission."

Subsequently, and by virtue of an act of the Legislature approved April 16, 1908 (P. L. p. 605) the terms of office of the several members of the state sewerage commission were terminated; and by another act approved on the same day (Id.), entitled "A supplement to an act entitled 'An act to prevent the pollution of the waters of this state by the establishment of a state sewerage commission, and authorizing the creation of sewerage districts and district sewerage boards, and prescribing, defining and regulating the powers and duties of such commission and such boards,' approved March twenty-fourth, one thousand eight hundred and ninety-nine," all the powers and duties theretofore vested in and executed by the state sewerage commission were vested in, and were to be executed by, the board of health of the state of New Jersey, and it was therein further provided that nothing contained in that act should be held to abate or render invalid any notice or proceeding, or suit at law or in equity, which had been served, begun, or instituted by the state sewerage commission prior to the date of the said act, but that the same should continue in full force and effect, and be further advanced and prosecuted in the name of the board of health of the state of New Jersey.

The town of Phillipsburg is located upon the east bank of the Delaware river within the state of New Jersey, which river is numbered among the waters of this state used for potable purposes by its citizens, and is subject to the jurisdiction of this state, as will presently be shown. The town of Phillipsburg was incorporated by an act of the Legislature approved March 8, 1861 (P. L.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

p. 207) by the name of "the inhabitants of the town of Phillipsburg."

The state sewerage commission, prior to its abolition, investigated a complaint of pollution of the waters of the Delaware river by the flow of sewage and other polluting matter from the town of Phillipsburg, and found that the river was one of the waters of this state used for potable purposes by its citizens, and that those waters were being polluted by the town of Phillipsburg in such manner as to cause, and threaten to cause, injury to the inhabitants of this state in their health, comfort, and property by permitting sewage and other polluting matter to flow into the waters of the Delaware river from the sewerage systems and drains of the town, and therefore on the 8th day of October, 1906, the said state sewerage commission gave notice in writing to the town of Phillipsburg (which was duly served on the 13th day of October, 1906, on Joseph H. Firth, mayor of the town of Phillipsburg), directing and commanding that town to cease polluting the waters of the Delaware river by permitting sewage and other polluting matter to flow therein from the sewers and drains of the town, prior to the 1st day of October, 1907, being not more than five years from the date of the notice, and that before the date mentioned the town of Phillipsburg should make such disposal of its sewage and other polluting matter as should be approved by the state sewerage commission. The town of Phillipsburg has not appealed to the Court of Chancery from the notice to cease from polluting the river from and after October 1, 1906, nor had it, at the time of filing the bill in this cause, ceased to pollute the Delaware, one of the potable waters of this state, nor prior to October 1, 1907, made such disposal of its sewage and other polluting matter as should be approved by the state sewerage commission. And this situation continues. The city of Trenton and various other cities of this state are now using the waters of the Delaware river for potable purposes, supplying the same to their citizens, inhabitants of New Jersey, who, by reason of the pollution of the waters of that river, as hereinabove set out, are suffering injury in their health, comfort, and property, in that they are compelled to expend large sums of money to purify the waters of the Delaware for potable purposes, for the protection of their health, and to exercise unusual precaution to protect themselves from risk of disease arising from pollution of those waters. The bill prays that the town of Phillipsburg, by mandatory injunction, may be compelled to cease from polluting the waters of the Delaware river by permitting sewage and other polluting matter to flow therein from its sewerage system and drains, and to make such disposal of its sewage and other polluting matter as shall be approved by the board of health of the

state of New Jersey, and for other and further relief.

The first defense leveled at the complainant's proceedings is that the state board of health, while endeavoring, has not the power, to enforce the notice of the state sewerage commission of October 8, 1906, requiring the town of Phillipsburg to cease polluting the waters of the Delaware by permitting sewage and other polluting matter to flow therein from its sewers and drains, prior to the 1st day of October, 1907. The contention is that the attempt to transfer jurisdiction from the state sewerage commission to the state board of health was nugatory because not within the title of the supplement of April 16, 1908 (P. L. 605). With this contention I disagree. I concede that the complainant's right to maintain this suit must rest upon the validity of the act last mentioned, for, surely, if the state board of health was not authorized to abate the nuisance of pollution of the Delaware river on September 24, 1908, its bill filed on that day would not lie. The question, therefore, resolves itself into this: Could the Legislature by the supplement of April 16, 1908 (P. L. p. 605), transfer from the state sewerage commission to the state board of health the right to enforce the provisions of the original act to which it was a supplement, and which original act clothed the state sewerage commission with the power sought to be enforced in this suit by the state board of health? I think it could, and for this reason: While the Constitution (article 4, § 7, pl. 4) provides that "every law shall embrace but one object, and that shall be expressed in its title," it was held in *Onderdonk v. Plainfield*, 42 N. J. Law, 480, that:

"The leading subject of a statute should be fairly expressed in the title, but the means or instruments by which the general purpose is to be attained, or matters merely incidental to it, are not a necessary part of the title."

Although the word "subject" is substituted for "object" in the syllabus, "object" is the word intended, as appears from an examination of the opinion, and "object" is the language of the constitutional provision; but this is quite immaterial, as "subject" and "object," with reference to this constitutional provision, have come to be regarded as synonymous. *Sawyer v. Schoenthal*, 83 N. J. Law, 499, 500, 501, 83 Atl. 1004. The act under consideration in *Onderdonk v. Plainfield* was entitled:

"An act to lay out and open streets in the township of North Plainfield, in the county of Somerset, and in the city of Plainfield, in the county of Union."

The act provided for its being carried into effect through the instrumentality of certain commissioners. This was in the body of the act; no mention of the commissioners—the instrumentality for carrying out the act—being made in the title. The Supreme Court said, at page 483 of 42 N. J. Law:

"It was therefore manifest to all that the object sought could only be gained through the creation of new instrumentalities, and the expression of a purpose of enabling streets to be laid necessarily implied the adoption of new machinery. These were merely incidental to the general object of the act."

In *Bumsted v. Govern*, 47 N. J. Law, 368, at page 373, 1 Atl. 835, at page 838, Mr. Justice Dixon, speaking for the Supreme Court, said:

"The constitutional provision is that 'every law shall embrace but one object, and that shall be expressed in the title.' It is not necessary to review the numerous decisions involving the application of this and similar clauses. It is on all hands agreed that its purpose is to require the title of a bill to be such as will inform the public and the members of the Legislature of the object of the enactment, and that this purpose is accomplished when the title fairly indicates the general object, although it does not indicate the means or methods of attaining this object."

And again on page 374 of 47 N. J. Law, on page 839 of 1 Atl.:

"The question then is whether this title was fairly adapted to apprise the public and the members of the Legislature of the general object of the law. I think it clearly was. \* \* \* That was the general object of the act, and that alone was necessary to be expressed in the title. For the particular method of reaching the end every one was legally bound to examine the body of the statute."

To the same effect are *State v. Town of Union*, 33 N. J. Law, 350, *Johnson v. Asbury Park*, 58 N. J. Law, 604, 33 Atl. 850, and *Drew v. West Orange*, 64 N. J. Law, 481, 45 Atl. 787.

Now, if it is only necessary to express the general object of a statute in its title, and that in expressing it it is not necessary to indicate the means or method of attaining that object, or name the instrumentality for carrying it out, then, surely, even if such minor or incidental matters are included in the title of a given statute, they cannot operate to deprive the Legislature of its power to amend the given act, in reference to those minor and incidental matters, through amendments of, and supplements to, the original act, appropriately reciting that act's title.

Let me illustrate: If the act under consideration had been entitled "An act to prevent the pollution of the waters of this state," and stopped there, it would have been just as efficacious for the attainment of the legislative purpose as the title which was adopted containing these superadded words, "by the establishment of a state sewerage commission, and authorizing the creation of sewerage districts and district sewerage boards, and prescribing, defining and regulating the powers and duties of such commission and such boards." If the short title just suggested had been employed, and in the body of the act alone had provision been made for the instrumentality for carrying out the act, namely, the creation of the state sewerage commission, then surely that instrumentality could have been changed by the abolition of that

commission and the devolution of its powers upon the state board of health by an act which could have been entitled "A supplement to an act entitled 'An act to prevent the pollution of the waters of this state.'" It is no answer to say that because the Legislature chose to embrace in the title of the original act a description of the instrumentality through which its general purpose was to be carried out, therefore in any amendment, having for its object a change of that instrumentality, it would be necessary to express the particular change in the title of the amending act, because the instrumentality originally created was described in the original title; for this reason, and it is all-sufficient: That no such trammel rests upon the Legislature, unless it is to be found in a mandate of the Constitution, and there is none such.

Anciently statutes had no titles and the practice of prefixing them to acts of the English Parliament probably commenced in the reign of Henry III (*State v. Town of Union*, supra); and doubtless they might be omitted from legislative bills in this state but for the constitutional provision that the object of every act shall be expressed in its title.

A case quite in point is that of *Drew v. West Orange*, supra. There the act whose constitutionality was attacked was entitled "An act authorizing the inhabitants of townships to purchase or erect a building for township purposes." 3 Gen. St. 1895, p. 3646. And Mr. Justice Dixon, speaking for the Supreme Court, said (64 N. J. Law, at page 482, 45 Atl. at page 787):

"The second objection is that the title of the act does not constitutionally express the object of the law, since the title states that the inhabitants are to be authorized to purchase, etc., while in the body of the act they are only empowered to authorize the township committee to purchase, etc. We think the object of the law is correctly expressed in the title, the feature of the act above adverted to merely pointing out the agency through which the authority delegated to the inhabitants shall be exercised."

In that case it will be observed the general object expressed in the title was to authorize the inhabitants of townships to acquire buildings for township purposes. In the title the inhabitants of the townships were the agency or instrumentality described as having power to make the acquisition. In the body of the act quite another agency or instrumentality was set up, namely, township committees, after authorization by the inhabitants of the townships. This title was held good because the Supreme Court did not regard the description of the agency to carry out the object of the act as necessary to be stated in the title, and it seems to me, held in effect that the agency might be incorrectly described in the title, because, in that case the fair intendment of the language used in the title was to point out the inhabitants of townships (in their collective capacity in town meetings, doubtless) as the agency authorized

to purchase or erect township buildings, when in fact in the body of the act those agencies were only authorized to effectuate the object of the law by delegating authority to another instrumentality.

[1] To sum it up: On this head of the argument I deduce the rule to be that when in an act of the Legislature, which can constitutionally have but one object, and that object must be expressed in the title, superadded words are inserted in the title, describing instrumentalities and other minor or incidental matters, such words cannot operate to foreclose the Legislature from afterwards amending the body of the act in such a way as to affect those instrumentalities, minor and incidental matters, under and by a title which expressly amends the original act appropriately reciting its title. In other words, because an act in its title expresses objects minor and incidental to its general object, it cannot thereby raise those minor and incidental matters to the dignity and importance of the main object, so as to restrain and limit the Legislature from dealing with that act by way of amendment or supplement relating to those minor and incidental matters, unless they, too, be mentioned in the title of the later act, and thus create a constitutional restriction which does not, in fact exist.

In this case I think I may pertinently paraphrase the remarks of Mr. Justice Swayze, speaking for the Court of Errors and Appeals in *Sawter v. Schoenthal*, supra, 83 N. J. Law, 489, at page 503, 83 Atl. 1004, at page 1005, and say: Every one must, according to our legal maxim, be presumed to know that an act of the Legislature constitutionally can have but one object, and that that object must be expressed in its title, but that if minor and incidental matters are expressed in the title they cannot be held to restrict the lawmaking body in legislating with reference to those minor or incidental matters in subsequent acts, amending or supplementing the original act by reference to its original title only, without expressing in the title of the amending or supplementing act the change proposed to be made with reference to those minor and incidental matters. With this knowledge no one could help inferring that the object of the supplement of April 16, 1908 (P. L. p. 605), was to probably change some minor or incidental provision of the original act, and, possibly, the instrumentality through which it was to be enforced, although that object was not expressed in the title of the supplement.

Mr. Justice Swayze goes on to remark that in the known state of the law with which he was dealing the title of the act then under consideration gave notice, not only of its immediate object clearly expressed, but of its ultimate object clearly implied. I cannot paraphrase this observation in the case at bar for want of analogous facts, nor is it necessary. A supplement in a certain sense gives no intimation of its object. It

is expressed to be a supplement to the original act, reciting the title of that act. The only notice contained in the title of a supplement is that something germane to the original act is therein enacted. Now, as we have seen in *Drew v. West Orange*, the title of an original act may incorrectly describe a minor or incidental matter contained in the body of the act, namely, the instrumentality through which the act itself is to be effectuated and carried out. By analogy, the original act "to prevent the pollution of the waters of this state by the establishment of a state sewerage commission," etc., might as lawfully have provided for the carrying out of the object of the act, namely, the prevention of pollution, by making the state board of health the instrumentality for carrying it out, instead of the state sewerage commission, although the state sewerage commission, and not the state board of health, was mentioned in the title, at least so far as any constitutional requirement is concerned. The general object of the act (to prevent pollution of the waters of the state) being expressed in the title, the language in the title, pointing out the agency through which the delegated authority should be exercised, expressing something merely incidental, was unnecessary, and, although expressed in the title, its presence there could not control or restrict the enacting clauses. Again, the general object of the act being expressed in the title, namely, to prevent the pollution of the waters of this state, all persons interested in that subject would be obliged to look at the enacting clauses to see what provisions were made for carrying the act into effect (quite aside from the instrumentality created), and it could make no difference to them if they found that the Legislature had, in the body of the act, departed from its gratuitously expressed intention with reference to the instrumentality for effectuating its objects as expressed in the title, that being minor and incidental to the general and paramount object, which was, I repeat, the prevention of the pollution of the waters of this state, no matter how; and they would be charged with knowledge, too, even if they did not look into the act, that the Legislature might make such departure from expressed intention between title and enacting clauses, in a minor matter, one not referable to the *general object*, or at least not *necessarily* involved in it.

[2] Holding, as I do, that the supplement of April 16, 1908, is valid and efficacious to transfer from the state sewerage commission to the state board of health the right to enforce the provisions of the original act to prevent the pollution of the waters of this state, it is unnecessary to decide whether the act approved April 17, 1909 (P. L. p. 215) to change and amend the title and body of the supplement of April 16, 1908, which act of 1909 also vests in the state board of health the powers and duties there-



tofore vested in the state sewerage commission, constitutionally affected the change contended for by the complainant. For the same reason it is unnecessary to decide whether the same result was accomplished by the act of April 1, 1912 (P. L. p. 547), to also amend the title of the original act so that the same shall indicate the object of the act to vest in the state board of health all the powers and duties theretofore exercised by the state sewerage commission. It would seem that these last-mentioned acts of 1909 and 1912 were passed because of some doubt as to the validity of the title of the supplement of 1908 so far forth as changing the instrumentality to enforce the principal object of the original act was concerned. Whether so or not, I think the doubts, if they existed, were illusory; but, if not, the transfer of power by one or the other, or both, of these acts (1909 and 1912) may be saved upon the doctrine enunciated by the Court of Errors and Appeals in *Sawter v. Schoenthal*, supra. But that question, also, it is unnecessary to decide.

The defendant contends that, quite irrespective of the question just considered, the complainant is impotent to enforce the statute against it because the legislation in question does not extend to and comprehend the Delaware river. The act, as has been observed, is "one to prevent the pollution of the waters of this state." These words are in the title and body of the act. In the supplement of 1907 (P. L. p. 360) giving authority to bring an injunction suit, it is provided in section 3:

"Waters of this state," as used in this act and the act to which this is a supplement, shall include the ocean and its estuaries, all springs, streams and bodies of surface or ground water, whether natural or artificial, within the boundaries of this state or subject to its jurisdiction."

Chancellor Runyon held in *Attorney General v. Delaware & Bound Brook R. R. Co.*, 27 N. J. Eq. 1:

"The Delaware river became, by conquest, the boundary between the states of New Jersey and Pennsylvania; and, being such, and the original property being in neither of them, and there being no convention between them in regard to it when, in 1783, the King of Great Britain relinquished all claims to government, proprietary, and territorial rights in the United States, each state, by the rule of international law, had dominion to the middle of the stream."

And also:

"New Jersey has no *jus privatum* in the soil of the Delaware river above tide water; that is in the riparian owners, subject to the public easement of navigation, and to such regulations by the Legislature of the waters as the public right of navigation may require. As to the jurisdiction and power of the state over it, the river above tide water is to be regarded as a navigable stream."

[3] This is a direct decision to the effect that New Jersey controls the Delaware river to the middle of that stream. This case was affirmed by the Court of Errors and Appeals

(27 N. J. Eq. 631), the third syllabus laying it down that:

"The bed of the Delaware river above tide water, from the easterly bank ad flum medium aquæ, passed by the grant from Charles II, to the Duke of York, dated March 12, 1664, and is private property."

And in the opinion, Mr. Justice Dixon, speaking for that court, said, at page 641 of 27 N. J. Eq.:

"Of this class, then, is the Delaware river above the tide; the title to the bed is in the private owner, but is subject to the paramount public right to use the river as a common highway, in which is included the right to so control and change the bed as to preserve and improve the navigability of the water."

If, then, while the title to the bed of the Delaware river above tide water is in the private riparian owners, subject to the paramount public right of user, that use can as well be directed toward purification of the stream as to control for the purpose of navigation.

*Wilson, Attorney General, v. Hudson County Water Co.*, 76 N. J. Eq. 543, 76 Atl. 560, was a case dealing with the state's ownership of land lying under tide water, but holds, upon authority, that this ownership extends to arms of the sea within its boundaries and to the center of waters which are the boundary line between this state and New York (76 N. J. Eq. 547, 76 Atl. 560). It of course follows that where this state does not own, but controls, waters within its boundaries, as in the case of nontidal waters, control extends ad flum medium aquæ to all waters dividing this from any other state. And such is the situation at Phillipsburg within this state, situate as it is on the east bank of the Delaware river above tide water. This holding is not inconsistent with any of the provisions of the compact of 1783 between the states of New Jersey and Pennsylvania settling jurisdiction over the Delaware river. 4 Comp. St. 1910, p. 5368. It was expressly decided by this court in *Attorney General v. Delaware & Bound Brook R. R. Co.*, 27 N. J. Eq. 631, supra, that the objects and purposes of the compact were merely to secure the administration of justice and the use of the river as a public highway, the provisions for concurrent jurisdiction having reference to the former only, and were a mere police regulation. This holding was in no wise modified in the Court of Errors and Appeals. See *Id.*, 27 N. J. Eq. 631.

The language of Chancellor Runyon on this particular question in the *Delaware & Bound Brook R. R. Case* is so illuminative and dispositive of it, that I feel justified in quoting from his remarks at some length. He said (27 N. J. Eq. at page 12 et seq.):

"In 1817, differences arose between the states in regard to wing dams and obstructions placed in the river on the New Jersey side by riparian owners, of which Pennsylvania complained on the ground that they were injurious to the navigation. The report of a committee of the General Assembly of this state to that body on the subject is evidence of the construction which had been put upon the compact of 1783. It



was presented by the chairman, Isaac H. Williamson, and it distinctly asserts the right of each state to authorize, without the concurrence of the other, the erection of mills and wing dams on its own shores, and within its own jurisdiction, not injurious to navigation. Min. of Assembly of 1817. And still further, the commissioners appointed by this state to settle, in conjunction with those appointed by Pennsylvania, the differences above mentioned, were William S. Pennington, David Thompson, and Elliot Tucker. In their first written communication, dated September 15, 1817, to the commissioners of Pennsylvania, they say: 'It appears to us that the respective Legislatures of Pennsylvania and New Jersey, notwithstanding the agreement of 1783, have a right to give their assent to, and to regulate by law, the erection, on their respective shores, of all useful piers, docks, wharves, banks, and even milldams, or other buildings for the beneficial use of the respective shores, but that in the exercise of this authority they are bound, as well by public law as by the agreement of 1783, to preserve the navigation of the river. We consider the agreement of 1783 nothing more than a declaration that the river Delaware, within the limits prescribed, then was, and should continue to be, a public navigable river, in contradistinction to a private river, and that it must be subject to the same law as all other public navigable rivers that are deemed public highways. We apprehend it to be a mistaken opinion, however extensively it may have spread itself, that the whole bed of the river is sacred, and cannot be touched without a violation of the rights of the state we represent. The soil of the river to the midway thereof, at least at and above the falls of Trenton, if not below, is vested by law in the owners of the adjoining land. It is true the same principle of law that vests this private right in the owners of the adjacent soil also vests in the public the rights of unobstructed navigation. We admit that this private right must be so exercised as not to injure the public right of navigation. It is not every erection on the bed of the river that becomes a nuisance, and is to be construed as a violation of the agreement of 1783; if this was the case, all the piers and docks erected in the river must be destroyed. Docks and wharves judiciously placed on the river, are useful to commerce; in which case they are innocent and lawful erections. But, should they become so far extended as to obstruct navigation, they would become public nuisances, be unlawful, and liable to prostration. We apply the same reasoning to milldams, and other erections on the river. Their lawfulness or unlawfulness depends on the fact whether they are or are not obstructions to navigation. We have been more particular in disclosing our opinions on this head, that we might, at one view, enable you to understand the reasoning that led to certain legislative acts of New Jersey relative to wingdams.'

'The commissioners close a subsequent communication to the commissioners of Pennsylvania, dated September 17, 1817, as follows: 'Whether the English doctrine, conferring the bed of the river to the middle thereof, on the owners of the adjacent soil, is adopted in this country or not is a question wholly immaterial in the present inquiry. Whether it is in the owners of the adjoining land, the representatives of the original proprietors, or the state, is a question to be settled in each state by the laws thereof, and has no bearing on the subject under investigation. It is sufficient that it is in one or another of them. We contend that the agreement of 1783 did not touch the soil, but was confined to questions of jurisdiction and navigation, and that the bed of the Delaware river to the midway thereof, from the first settlement of the country to this hour, has belonged to the state of New Jersey, or some of the

citizens thereof, and that the commonwealth of Pennsylvania never had, and, as we believe, never pretended to have, any title thereto.'

'It appears from these public documents, which respectively have the sanction of two eminent names of the past generation, the first Gov. Pennington and Gov. Williamson, that 35 years after the making of the compact the theory of joint ownership of the river was not entertained by this state, and was not regarded as an implication from the compact. It has never been recognized since then. The act of March 1, 1820, to 'prevent obstructions to the navigation of the river Delaware' (Rev. Laws, 708) cited in support of it, does not recognize it. The objects and purposes of the compact were merely to secure the administration of justice, and to secure to the contracting parties the use of the river as a public highway. The provision for concurrent jurisdiction had reference to the former only. It was a police regulation merely, and gave to neither of the states any dominion or authority whatever, over, or right in, or control of, that part of the soil of the river which, by the law of nations, belonged to the other. The construction put by the Court of Appeals of New York, in *People v. Central Railroad Co. of New Jersey*, 42 N. Y. 283, upon the compact made in 1833, between this state and the state of New York (Nix, Dig. [4th Ed.] p. 965), is in point. By the third article of that compact it was declared that New York should have and enjoy exclusive jurisdiction of and over all the waters of Hudson river lying west of Manhattan Island, and to the south of the mouth of Spuytenduyvel creek, and of and over the lands covered by the said waters, to the low-water mark on the westerly or New Jersey side thereof, subject to certain designated rights of property and jurisdiction of New Jersey, among which was the exclusive right of property in the land under water lying west of the middle of the bay of New York, and west of the middle of that part of Hudson river which lies between Manhattan Island and New Jersey, and exclusive jurisdiction of and over the wharves, docks, and improvements made, or to be made, on the shores of this state, and of and over all vessels aground on the shore, or fastened to any such wharf or dock, except that such vessels were to be subject to the quarantine or health laws of New York. The suit was brought by the Attorney General, in behalf of the state, to abate as nuisances, and cause the removal of certain wharves, bulkheads, piers, and railroad tracks, and other erections which the defendants had placed in the harbor of New York, and extending into the harbor and the Hudson river about a mile from the New Jersey shore. The complaint claimed that the erections were within the limits and jurisdiction of New York, and were an obstruction to navigation, and injurious to the public health, and were constructed without lawful authority. They were all placed on the west of the designated boundary line. It was held that the jurisdiction conferred upon New York over the waters of the river and bay was a qualified and limited jurisdiction, for police and sanitary purposes, and to promote the interests of commerce in the use and navigation of those waters, and was not designed to confer or create control over the lands or domains of New Jersey, or to give to New York any right to interfere with the complete political or governmental jurisdiction of this state, as a sovereign state, of and over her own soil, and its appurtenances, and of and over every description of property of any appreciable value, within her territorial limits.

'The appositeness of the conclusion expressed in that case to the case now under consideration will be all the more noticeable when it is observed that by the compact just referred to, *exclusive* jurisdiction was given to New York, not only over the waters, but over the lands covered by the waters, while, by the compact with Pennsylvania, concurrent jurisdiction is given

to the contracting parties, and such jurisdiction is *expressly confined to the waters*.

"The compact of March 28, 1785, between Maryland and Virginia, among other things, provides that the Potomac river shall be considered as a common highway for the purposes of navigation and commerce to the citizens of those states, and of the United States, and to all other persons in amity with Maryland and Virginia, trading to or from either of those states; and it establishes concurrent jurisdiction in those states over that river, and provides for concurrent legislation, also for the preservation of fish, and for the performance of quarantine, and keeping open the channel and navigation by preventing the throwing out of ballast, or making any other obstruction. Laws of Maryland, 1785, c. 1. It has been held that the compact was confined exclusively to matters of jurisdiction and navigation, and left the territorial rights of the parties to it untouched. *Binney's Case*, 2 Bland (Md.) 99, 126, 127.

"The compact of 1783, gives no jurisdiction to Pennsylvania over the soil of the Delaware within the territorial limits of this state, nor does it confer on her any right therein."

As power to conserve the potable waters of the river Delaware by legislation, enforceable on, in, and under the waters flowing within the boundary and subject to the jurisdiction of the state of New Jersey, was not included in the enumeration of rights, to be exercised conjointly by the states of New Jersey and Pennsylvania in the compact of 1783, that power was retained by this state by as clear an implication as though it was, by express language, so reserved in the pact.

It is idle for the defendant to ask of what avail it would be to stop the town of Phillipsburg from discharging its sewage in the Delaware, when the sewage of the city of Easton opposite, and the polluting flow of the Lehigh, are discharged into the same stream in the same locality.

[4] Vice Chancellor Stevens, said, in construing a similar statute, in *State Board of Health v. Diamond Mills Paper Co.*, 63 N. J. Eq. 111, at page 117, 51 Atl. 1019, at page 1022:

"The language here used is plain and unambiguous. The prohibition is against placing in the water of the river anywhere above the point from which the city obtains its supply any factory refuse which will either impair or tend to impair its quality. If, at the place of discharge, the factory refuse put into the river impairs it, or even tends to impair it, the prohibited act is done."

And I said, when vice chancellor, in *State v. Town of Phillipsburg*, 71 Atl. 750, 752:

"Because Easton is polluting the river much more than Phillipsburg (which is regrettable) is no ground for denying an injunction, even if the issuance of the writ would be 'futile or inequitable,' as claimed by the defendant. The act in question has been construed in this court, and held to extend to a case of refuse which will impair, or tend to impair, the quality of the water" (citing *State Board of Health v. Diamond Mills Paper Co.*, supra).

The authority given to the state sewerage commission (now vested in the state board of health) in the act which is being pursued in this case, authorizes the board, if it finds

that any of the waters of this state are being polluted in such manner as to cause or threaten injury to any of the inhabitants of this state, either in health, comfort, or property, to apply (after certain preliminary proceedings) to this court for an injunction to prevent violation or to enforce the provisions of the act. So that, as in the statute under consideration in the *Diamond Mills Paper Co. Case*, the injury need not be actual, but only threatened. In that case the inhibited act was pollution by refuse which would "impair or tend to impair the quality of the water," and in this case it is if any waters of this state "are being polluted in such manner as to cause or threaten injury to any of the inhabitants." Under neither act does actual injury have to be demonstrated.

A word as to the facts: The waters of the Delaware river are used by the inhabitants of this state for potable purposes, and this is so with reference to the supply of drinking water at Trenton. Voluminous testimony was taken, and to my mind it conclusively shows that if the waters of the Delaware river at Trenton are not polluted by infusion of sewage at Phillipsburg in such manner as to cause injury to the inhabitants of Trenton, at least injury to those inhabitants is threatened from that pollution, and therefore the case, on the facts, is brought directly within the purview of the statute.

The result reached is that a mandatory injunction must issue in accordance with the prayer of the bill, to compel the town of Phillipsburg to cease its unlawful act of polluting the waters of the Delaware river by permitting sewage and other polluting matter to flow therein from its sewerage systems and drains, and to make such disposal thereof as shall be approved by the state board of health.

(33 N. J. Eq. 594)

# TRENTON TRUST & SAFE DEPOSIT CO. v. MOORE et al.

(Court of Chancery of New Jersey. Aug. 25, 1914.)

## 1. WILLS (§ 634\*)—VESTED REMAINDERS.

The primary direction of the will to the trustee on the death of the equitable life-right holder, to pay over and convey the remainder to H. and A., in equal portions, being a distinct and positive gift, absolute in terms, and unconditional that either be then living, creates a vested estate; it enabling them at any time the life estate becomes vacant, which is a certainty, to enjoy the gift, and giving a present right of future enjoyment; the only uncertainty being as to whether they will ever actually enjoy it.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.\*]

## 2. WILLS (§ 634\*)—VESTING OF ESTATE—POSTPONEMENT OF PAYMENT.

Postponement of time of payment, being for the single purpose of allowing the life-right

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

holder to enjoy the estate, does not make the remainder contingent.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1488-1510; Dec. Dig. § 634.\*]

### 3. WILLS (§ 636\*)—VESTED REMAINDERS—DIVESTMENT.

The vested gift in remainder to H. and A. is not divested as to H., by the further conditional direction of the will to turn over the corpus of the estate, on the death of the life tenant to A. and the issue of H. if A. survives, and H. predeceases, the life tenant, where H. leaves no issue, though predeceasing, while A. survives, the life tenant.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1514-1518; Dec. Dig. § 636.\*]

### 4. WILLS (§ 636\*)—VESTED REMAINDERS—DIVESTMENT.

The vested gift in remainder to H. and A., respectively daughter and wife of E., the life tenant, is not divested as to H. by the further conditional direction of the will to turn over the corpus of the estate, on the death of the life tenant, to C., if E. dies without issue surviving and survives A., where he, though dying after H., and without surviving issues, predeceases A.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1514-1518; Dec. Dig. § 636.\*]

### 5. WILLS (§ 636\*)—REMAINDERS—POWER OF SALE.

The naked power of sale given by a will to the trustee not being exercised till after death of a vested remainderman, her share of the real estate passed to her heir.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1514-1518; Dec. Dig. § 636.\*]

Bill by the Trenton Trust & Safe Deposit Company, substituted trustee, against Joseph H. Moore and others, for instructions. Instructions given.

James & Malcolm G. Buchanan, of Trenton, for complainant. Scott Scammell, John T. Temple, Charles E. Gummere, Linton Satterthwait, all of Trenton, and McDermott & Enright, of Jersey City, for defendants.

BACKES, V. C. The complainant, substituted trustee under the last will and testament of Lydia A. Moore, deceased, prays for instructions and directions as to the proper course to be taken in the distribution of funds, which involves the construction of a portion of the will, which reads as follows:

"Fourth: All the rest and residue of my estate, both real and personal, I give, bequeath and devise to William S. Gummere, of the city of Trenton, in the county of Mercer and state of New Jersey, his heirs, executors and administrators, upon and for the trusts hereinafter mentioned, that is to say: upon trust that he the said William S. Gummere do and shall pay over all the rents, interest, dividends and annual produce of the said residue of my real and personal estate to my beloved sons Eckford and Charles in equal shares, so long as they shall live; that upon the death of my son Eckford, said trustee do and shall assign and pay over the one-half part of the said residue of my personal estate, and convey the one-half part of the said residue of my real estate to his daughter Helen B. Moore and to his wife Annie S. Moore, in equal portions; and in case his said wife

should die during the lifetime of my said son Eckford then that, at the death of my said son Eckford, said trustee do and shall assign and pay over the said half part of the said residue of my personal estate, and convey the said half part of the said residue of my real estate to the said Helen B. Moore, daughter of my said son Eckford; and in case the said wife of my said son Eckford shall survive him, and his said daughter shall die during his lifetime, then that at the death of my said son Eckford, the said trustee do and shall assign and pay over said one-half part of the said residue of my personal estate, and convey the said one-half part of the residue of my real estate to my said son's said wife Annie S. Moore and to the issue of his said daughter Helen B. Moore in equal shares, the one moiety thereof to the said Annie S. Moore and the other moiety thereof to the issue of the said Helen B. Moore; and in case my said son Eckford shall survive his said wife, and shall die without issue surviving him, then that, at his death, the said trustee shall assign and pay over the said one-half part of the said residue of my personal estate, and convey the said one-half part of the said residue of my real estate to my son Charles and his heirs."

The trustee was authorized and empowered to make sale of the real estate at public or private sale. All of the parties mentioned in the will survived the testatrix. Both life-right holders are dead. Charles Moore died before Eckford, without issue, testate, leaving his estate to his widow, Eliza A. Moore. Helen B. Moore died in the lifetime of Eckford, her father, without issue and intestate. Eckford Moore was survived by his widow, Annie S., to whom he gave his estate. Annie S. Moore has since died testate, leaving her property to her sister Cornelia V. Temple. Lydia A. Moore's only heirs, at law and next of kin at the time of her death were her two sons. Descendants of deceased brothers and sisters also survived her.

[1, 2] The controversy relates to that portion of the estate which was given to Helen B. Moore, and the propositions submitted for determination are whether she took a vested or a contingent equitable remainder—contingent upon her surviving her father—and if a vested remainder, whether it was divested by reason of the happening of certain contingent events mentioned in the executory gifts. The primary direction to the trustee to pay over and convey the remainder to Helen B. and Annie S., the daughter and the wife of Eckford, in equal portions, it will be observed, is a distinct and positive gift, absolute in terms, and unconditioned that either Helen or her mother should be living at the death of Eckford, the equitable life-right holder. This disposition is such as to have enabled them at any time the life estate became vacant, which was a certainty, to enjoy the gift. It gave a present right of future enjoyment; the only uncertainty being as to whether they would ever actually enjoy it. That this creates a vested estate is well settled. *Security Trust Co. v. Lovett*, 78 N. J. Eq. 445, 79 Atl. 616. It is contended by some

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of the defendants that the remainder is contingent, because the gift is to be found only in the directions to the trustee to "assign and pay over and convey" at a future time. It clearly appears, however, that the time of payment was postponed for the single purpose of allowing the life-right holder to enjoy the estate. If the postponement of division or payment is merely on account of the position of the property, if, for instance, there is a prior gift for life, or a bequest to trustees to pay debts, and a direction to pay upon the decease of the legatee for life, or after payment of the debts, the gift in remainder vests at once. *Theobald on Wills*, 584. *Post v. Herbert's Ex'rs*, 27 N. J. Eq. 540; *Howell v. Gifford*, 64 N. J. Eq. 180, 53 Atl. 1074; *Potter v. Nixon*, 81 N. J. Eq. 338, 86 Atl. 444.

[3] Both remaindermen having survived the testatrix and the gift having immediately vested upon her death, it remains to be considered whether the further provisions of the will and the happening of events worked a divestment. These further and mutually exclusive and conditional directions to the trustee are that he turn over the corpus of the estate upon the death of the life tenant to: (1) Helen B. Moore, if Annie S. Moore predeceases the life tenant; (2) Annie S. Moore and the issue of Helen B. Moore equally, if Annie S. Moore survives and Helen B. Moore predeceases the life tenant; (3) Charles Moore and his heirs, if the life tenant should die without issue surviving, and should survive Annie S. Moore. With the first and third we have no concern. The contingencies therein mentioned did not come to pass, because Annie S. Moore survived the life tenant. The second contingency upon which the gift over was made exists (Helen B. predeceased her father without leaving issue), except for the fact that Helen died without issue, and the questions which arise are whether, as to Helen's share, the testatrix died intestate, or whether all of the contingencies upon which the gift over was based, not having happened or being impossible of performance, the primary disposition to Helen and her mother stands undefeated. The testatrix undoubtedly contemplated that Helen B. would die leaving issue, and intended that only in the event of her dying before her father, in the lifetime of her mother, leaving such issue, that the portion of the estate which had been previously given to her should pass from her and to such issue. Helen's children were to take in substitution. I can regard this executory gift in that light only, and it having failed for want of issue in Helen the original gift remains unimpaired. 2 *Jarman on Wills* (R. & T.) 493; *Cook v. McDowell*, 52 N. J. Eq. 351, 30 Atl. 24; *Security Trust Co. v. Lovett*, *supra*.

There is another rule of construction supported by formidable authority, by which this same result is reached. Helen having

died without issue in the lifetime of her father, the gift over to her issue is incapable of taking effect. If a devise be made to A., to be divested on a given event in favor of persons unborn or unascertained, it will not be affected by the happening of the event described, unless also the objects of the substituted gift come in esse and answer the qualification which the testator has annexed thereto. 2 *Jarman on Wills* (R. & T.) 443. The point was expressly ruled by Vice Chancellor Pitney in *Dusenberry v. Johnson*, 59 N. J. Eq. 336, 45 Atl. 103, and is controlling in this case. There a legacy was given in trust to pay the income to the two grandchildren of the testator until they arrived at the age of 21, when it was to be divided between them or go to the survivor, and, further, that if the two grandchildren died before attaining their majority, the legacy was to be paid to their father, the testator's son. The father died in the lifetime of his children, both of whom died during minority, and it was held on the authority of *Drummond v. Drummond*, 26 N. J. Eq. 234, and the cases there cited, that the death of the father of the two grandchildren in their lifetime prevented the divesting of the legacy by their death before attaining 21 years, and that the survivor died vested of it. *Groves v. Cox*, 40 N. J. Law, 40.

[4] The contingency, mentioned in the third executory gift, that in case Eckford should die without leaving a wife or issue, then the estate was to go over to his brother Charles and his heirs might be indicative of testatrix's intention that the primary gift to Helen should not become absolute unless she survived her father, were it not for the circumstances that the first gift to her and her mother is distinct and positive, and that the three alternative contingencies upon which the remainder was to go over do not exhaust every possible event; for there is no specific provision made for the contingency of Eckford surviving his wife and daughter, but leaving other issue him surviving, nor for the contingency which has actually happened, viz., the death of Helen B. without issue, prior to the death of Eckford and the subsequent death of Eckford leaving Annie S. him surviving. *Jarman on Wills*, 494.

[5] All of the real estate has been converted into cash. None had been sold at the time Helen died, and as the trustee had but a naked power of sale, the real estate (now proceeds) to the extent of her share passed to her father as her heir at law, and is payable to his executor. *Herbert v. Tuthill*, 1 N. J. Eq. 141. At her death her father, as next of kin, became entitled to her personality, which will be ordered paid to his executor, unless her administrator shows some reason why it should pass through his hands. Helen has been dead upwards of 15 years, and it is highly improbable that at this date there are any outstanding debts.

(112 Me. 196)

## STATE v. CUMBERLAND CLUB.

(Supreme Judicial Court of Maine. Sept. 26, 1914.)

## 1. INTOXICATING LIQUORS (§ 260\*)—NUISANCES—“PLACE OF RESORT.”

Rev. St. c. 22, § 1, provides that all places of resort where intoxicating liquors are kept, sold, given away, drank, or dispensed in any way not provided by law are common nuisances. *Held*, that a “place of resort” does not mean a place to which the public generally may resort, but includes places to which resort is had by a limited class, and hence included a clubhouse to which members and their guests were admitted, and who drank their own liquor there, kept in lockers which were their own property.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 399; Dec. Dig. § 260.\*]

## 2. INTOXICATING LIQUORS (§ 260\*)—DISPOSITION—CLUBS.

Rev. St. c. 22, § 1, provides that all places of resort where intoxicating liquors are kept, sold, given away, drank, or dispensed in any manner not provided by law are common nuisances. *Held*, that since there is no statutory prohibition of drinking liquor, nor of giving it away, the qualifying phrase “in any manner not provided by law” could not be held to qualify the preceding words “kept, sold, given away and drank,” and hence a clubhouse to which members and their guests resorted and there drank their own liquor, which was kept in their own lockers at such club, was a nuisance within the statute.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. § 399; Dec. Dig. § 260.\*]

Agreed Statement from Superior Court, Cumberland County.

Action by the State against the Cumberland Club to abate defendant as a liquor nuisance. On agreed statement. Case to stand for trial.

Argued before SAVAGE, C. J., and CORNISH, HALEY, and HANSON, JJ.

Samuel L. Bates, Co. Atty., of Portland, for the State. William C. Eaton, of Portland, for respondent.

SAVAGE, C. J. By Revised Statutes, c. 22, § 1:

“All places of resort where intoxicating liquors are kept, sold, given away, drank or dispensed in any manner not provided by law, are common nuisances.”

The defendant has been indicted for a violation of this statute. The case has come before the court upon an agreed statement of facts, with a stipulation that if the facts therein set forth constitute the offense charged in the indictment, the case is to stand for trial; otherwise the respondent is to be discharged.

The agreed statement of facts shows, besides other things not material, that:

“The defendant is a corporation chartered in 1878, for the purpose of establishing a clubhouse in the city of Portland, and of promoting literary and social intercourse among its members. It has the power to fix and limit the right of members in and to the corporate property, and the manner in which the same shall determine. Since 1878 the club has owned and maintained a clubhouse in Portland. The clubhouse at the time of the alleged offense was a three-story

building, containing reception and reading room, dining rooms, kitchen, pantries, refrigerating room, card rooms, billiard room, sleeping rooms, etc. The club also maintained a “locker room.” In this room were two sideboards and 250 “lockers.” The lockers were built of practically uniform size, 12 inches high, 12 inches wide, and 18 inches deep. These lockers were not rented, but, excepting those which were empty and unused, each of these lockers had been purchased and was owned by an individual member of the club, and would remain his property so long as he continued a member. Each locker was fitted with a lock and key, and no two keys were interchangeable, nor was there any master key nor any method of unlocking except by means of the key of the owner. The two sideboards were equipped with glasses and mixing utensils. In the center of the room was a large circular table, and the room was otherwise furnished with several small tables and chairs. It was usual and customary for such members as owned lockers to keep intoxicating liquors therein, and to drink the same in this room and in the dining room, when they so desired. The locker room was most used by members of the club on week days between the hours of 4 and 7 in the afternoon, and on Saturday evenings, during which time the average number of members present in the room would be 10. On rare occasions, not exceeding three or four times a year, the number of members present in this room at one time would be as high as 20.”

“On the 15th day of November, 1913 [a time within the period covered by the indictment], 146 lockers were owned and used by members of the club, and contained in the aggregate 1,008 bottles, each bottle containing more or less intoxicating liquor. These liquors consisted of whisky, gin, vermouth, rum, champagne, wine, beer, ale, and other liquors, the property of the respective owners of the lockers. It is agreed that the condition so existing on said November 15th is a fair example of the condition there existing during all the period covered by the indictment.”

“Any and all intoxicating liquor so kept and drank in the club during the period covered by the indictment was purchased and owned by respective members of the club, and no officer, agent, servant or employé of the club participated in any way in the purchase or sale of such liquor or in the payment therefor. During the period covered by the indictment there has not been in the said clubhouse, nor anywhere on the premises of the club, any intoxicating liquor except such as was owned by an individual member thereof, and kept by him in his individual locker, as aforesaid, nor during said period has there been in the clubhouse, or anywhere on the premises of the club, any intoxicating liquors sold or kept with intent to sell by any person, copartnership, or corporation whatsoever.”

“During the period covered by the indictment, each member of the club who bought or sent intoxicating liquor to the clubhouse to be placed in his locker paid to the club a service charge of 25 cents a bottle for spirituous liquors and 4 cents a bottle for beer and malt liquors. This service charge was imposed and collected as payment for ice, sugar, the use of glasses and mixing utensils and attendance of servants.”

“During the period covered by the indictment, the number of resident members has been approximately 160, of nonresident members, 95, and of army and navy members, 5; and at least 40 per cent. thereof, during said period, have neither kept nor drank intoxicating liquors on the premises of the club.”

“The rules and regulations adopted by the club relative to the introduction to the clubhouse of nonmembers are rigidly and impartially enforced.”

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Though the house rules were made a part of the agreed statement, the court has not been furnished with a copy. But we deem them to be immaterial for present consideration. The grounds of decision will be found within a narrow compass.

[1] Inasmuch as it is admitted that the place complained of was kept and maintained by the defendant, the only remaining questions are whether the place was a "place of resort" within the meaning of the statute, and if so, whether intoxicating liquors were there kept, or sold, or given away, or drank, or dispensed in any manner not provided for by law. If both questions be answered in the affirmative, the offense is made out. For it cannot be doubted that it was resorted to in part for the purpose of drinking intoxicating liquors, whether it was a statutory "place of resort" or not.

The defendant contends that the clubhouse, in legal contemplation, was not a place of resort, for two principal reasons: First. Because it is not a public place to which the public generally resorted or had a right to resort. And, secondly, because the members who actually did go to the place by virtue of their membership essentially owned the place; that they used it as members, but did not in legal meaning resort to it; that in the language of *State v. Dodge*, 78 Me. 439, 6 Atl. 875, "the building may be, and is, *used* by the occupant or keeper. It is *resorted* to by other persons." We think neither ground is tenable.

It is unnecessary to discuss the fine distinctions suggested by counsel. In the statute, there are no such limitations upon the meaning of the phrase "place of resort" as counsel seeks to incorporate. The statute is clear and plain. It does not say "all places of public resort." It says "all places of resort." It does not say "all places of resort, except those to which admission is limited to members of the corporation keeping them." It says "all places of resort." It would be a perversion of terms to say that a clubhouse is not a place of resort merely because it was resorted to only by members of the club owning and maintaining it. What is a club? Why is a club formed and maintained but to furnish a common meeting ground to which the members may resort? Words in a statute are to be taken in their common and popular sense, unless the context shows the contrary. If a clubhouse is not a place of resort in the ordinary acceptance of the term, it is difficult to conceive what can be. To constitute a place of resort it is not necessary that it be open to every one. It is enough if it be resorted to by a limited class, as for instance, the members of a club, or by certain individuals not constituting a class.

The defendant clubhouse was a place of resort, not only with respect to the persons who resorted there, but also with regard to the manner and frequency of their resorting

there. One well-recognized definition of "place of resort"—and there are others—applies particularly well in this case, namely, a place to which persons commonly and habitually resort. *State v. Kapicsky*, 105 Me. 127, 73 Atl. 830, 23 L. R. A. (N. S.) 737; *State v. Fogg*, 107 Me. 177, 77 Atl. 714.

[2] As to the remaining question, the case shows that the defendant's clubhouse was a place of resort where intoxicating liquors were kept and were drank. It was resorted to for that purpose, in part. But the defendant contends that they were not kept or drank in any such way as to bring the case within the teeth of the law. Its learned counsel argues that the phrase "in any manner not provided for by law" qualifies and limits not only the word "dispensed," which it immediately follows, but also the preceding words "kept," "sold," "given away," and "drank," and that the phrase in that connection is equivalent to "in violation of law" or "unlawfully," so that the statute should be interpreted to mean that "all places of resort where intoxicating liquors are unlawfully kept, or unlawfully sold, or unlawfully given away, or unlawfully drank, or unlawfully dispensed, are common nuisances." And upon this premise it is argued that if the keeping, the drinking, or the giving away, etc., were lawful, the place where it is done is not a nuisance.

We think the fallacy of this argument is patent when we consider that there is no such thing as the unlawful drinking or the unlawful giving away, or the unlawful dispensing, except by sale, of intoxicating liquors. There is no statutory prohibition of drinking liquor, nor of giving it away. The qualifying phrase that is used is applicable to liquor that is kept or sold, but not to that which is drank or given away, and the statute should not be construed so as to make it applicable. It would seem that the Legislature, having named certain specific conditions which would render a place of resort a nuisance, deemed it wise to add a sweeping clause to cover all contingencies, and to say that all places of resort where intoxicating liquors are "dispensed in any manner not provided for by law" are nuisances. By this construction the statute is rendered harmonious and effective. It is in harmony, also, with what may be supposed to be the purpose of the statute, or one of its purposes. *State v. Kapicsky*, supra.

The evils which it seems this statute seeks to remedy are not those of merely drinking or giving away of intoxicating liquors. They are rather the evils which may follow from drinking or giving away liquors at a place of resort, to which men commonly and habitually resort, where men socially inclined are apt to congregate for that purpose. If each member of this club drank his own liquor and only his own, the clubhouse would still be a place of resort where intoxicating liquor was drank. But the universal conduct of men under such circumstances goes to show that

ordinarily drinking at such a place is not so limited.

The court are of opinion that the facts agreed upon describe a statutory nuisance.

In accordance with the stipulation,  
Case to stand for trial.

(77 N. H. 344)

**WILSON v. FRANKFORT MARINE, ACCIDENT & PLATE GLASS INS. CO.**

(Supreme Court of New Hampshire. Coos.  
June 27, 1914.)

**1. STIPULATIONS (§ 14\*)—OPERATION AND EFFECT — JUDGMENT ON APPEAL — DEFENSES AVAILABLE.**

Where a case was transferred to the Supreme Court on a stipulation that judgment should be for plaintiff if there was any evidence to support it, a defense that the interest of assured was not correctly stated in the application, in that the business was operated by a partnership, whereas plaintiff stated that he was the sole owner, was unsustainable; plaintiff having testified in his own behalf that he was the sole owner.

[Ed. Note.—For other cases, see Stipulations, Cent. Dig. §§ 24-37; Dec. Dig. § 14.\*]

**2. INSURANCE (§ 560\*)—EMPLOYER'S LIABILITY POLICY—DEFENSES—ESTOPPEL.**

Where, after a loss under an employer's liability policy, plaintiff, or those interested for him, called on defendant's counsel, but failed to leave a copy of the writ, and such counsel appeared in court at the return of the writ and conducted the defense, without giving plaintiff notice that defendant would repudiate liability because the copy of the writ served was not sent to defendant immediately, defendant was estopped from thereafter urging such defense.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1393-1404; Dec. Dig. § 560.\*]

**3. EVIDENCE (§ 71\*)—NOTICE—MAILS—PRESUMPTIONS.**

While proof that a letter, properly addressed and stamped, was posted, gives rise to a presumption that it was received in due course, proof that no such letter was received raises a presumption that it was never posted.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 92; Dec. Dig. § 71.\*]

**4. INSURANCE (§ 385\*)—EMPLOYER'S LIABILITY POLICY—PROVISION AGAINST WAIVER—APPLICATION—ESTOPPEL.**

A provision of a policy that no change or waiver of any of its provisions should be valid, unless indorsed on or added to the policy and signed by insurer's United States manager, related only to the contract which the parties entered into, and had no application to a controversy concerning the performance of the contract with reference to which the insurer was estopped by conduct.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1020-1023; Dec. Dig. § 385.\*]

Transferred from Superior Court, Coos County; Sawyer, Judge.

Action by Frank L. Wilson against the Frankfort Marine, Accident & Plate Glass Insurance Company on an employer's liability insurance contract to recover the amount of a judgment rendered against plaintiff for an injury to an employé admitted to be within the terms of the policy. At the close of plaintiff's evidence, defendant moved for a nonsuit which was granted, subject to ex-

ception, on defendant's agreement that judgment should be for plaintiff if the order was not sustained, and the case was transferred to the Supreme Court. Judgment for plaintiff.

Sullivan & Daley and Ira W. Thayer, both of Berlin, for plaintiff. Rich & Marble, of Berlin, and H. Robert Bygrave, of Boston, Mass., for defendant.

**PEASLEE, J.** Two defenses to this suit are set up:

[1] 1. It is claimed that the interest of the assured was not correctly set out in the application for insurance, in that the concern was a partnership, whereas the plaintiff stated that he was the sole owner. It is not necessary to consider whether this would be a good defense, if proved. The case is here upon an agreement that, if there was any evidence for the jury to pass upon, there shall be judgment for the plaintiff. Upon this issue the plaintiff testified that he was the sole owner of the business. This was sufficient to support a verdict to that effect, and disposes of the defense claimed.

[2] 2. The policy provides that, when suit is brought against the assured, the copy of the writ served upon him shall be sent to the insurer immediately. This was not done in the present case, but there is evidence sufficient to support a finding that the defendant is now estopped to complain of the omission. The defendant's counsel took charge of the matter immediately after the accident happened, and before suit was brought had done the customary work taking statements of witnesses and parties, and had held conferences with the injured servant looking toward an adjustment. When the writ was served, the present plaintiff, or those interested for him, called upon the defendant's counsel, but failed to leave the copy. Counsel continued to act in the matter, appeared at the return of the writ in court, and conducted the defense, without giving the plaintiff notice of the claim now made. Having thus assured the plaintiff that he could rely upon its liability until all opportunity to make defense in his own behalf was lost, the defendant is plainly estopped to now take an inconsistent attitude. *Perry v. Insurance Co.*, 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668.

But the defendant seeks to avoid this conclusion by showing that it attempted to notify the plaintiff of the position it assumed, and that therefore it is not estopped, because it was not conscious that its course of conduct amounted to a representation that it did not rely upon this defense. Assuming that this is a correct statement of the law, the defendant must fail here because of the state of the proof. Its Boston attorney claimed to have written a letter to the plaintiff, in which the position now taken



was fully set out. The plaintiff denied having received the letter. From this the defendant argues that it is not estopped, because it supposed the plaintiff knew the whole situation.

[3] One error in this argument is the assumption that the jury must find that the letter was written and mailed. The presumption arising from the known regularity of the United States mail service is as available for the supposed receiver of a letter as for the alleged sender thereof. If proof that a properly addressed and stamped letter was posted gives rise to a presumption that it was received in due course (1 Wig. Ev. § 95), so proof that no letter was received warrants a finding that it was never posted. If this plaintiff's testimony denying the receipt of the letter was believed, the jury would be warranted in going further and finding that the letter was not posted. As in the first defense set up, the defendant fails to present a case which raises the question it argues. The question here is not how the jury ought to be instructed, or what issues should be sent to them, but whether the evidence warrants a submission of the case to them upon any theory. As the affirmative of this proposition plainly appears, there is no occasion to consider whether the case might also be submitted upon other theories.

[4] The provision of the policy that no change or waiver of any of its provisions shall be valid unless an indorsement is added to the policy and signed by the United States manager of the company has no application to the present situation. That provision relates to the contract the parties entered into. This controversy is concerning the performance of a contract whose terms are not in dispute. The question is not of altering a contract, but of estoppel by conduct. "The law does not say that the procedure was perfect, but that the question is not open." *Blake v. Insurance Co.*, 12 Gray (Mass.) 285, 272. Upon this point the case is identical with and governed by *Perry v. Insurance Co.*, 67 N. H. 291, 33 Atl. 731, 68 Am. St. Rep. 668.

According to the stipulation of the parties, the plaintiff is entitled to judgment.

Judgment for the plaintiff.

PLUMMER, J., was absent. The others concurred.

(77 N. H. 323)

**SALTER v. PHILBRICK et al.**

(Supreme Court of New Hampshire. Rockingham. June 27, 1914.)

**WILLS (§ 601\*)—CONSTRUCTION—ESTATE DEVISED—FEE SIMPLE OR DETERMINABLE FEE.**

A fee simple, explicitly and with technical accuracy devised to H. on the sole condition that she survive the life tenants, F. and C., is not made a fee simple determinable on her death without issue living by the concluding part of the succeeding clause, "But if \* \* \* H. should die before either \* \* \* F. and C. and

leave no issue living, \* \* \* then I give \* \* \* said property \* \* \* at the decease of the survivor of [F. and C.] or at the decease of \* \* \* H., should she survive them and leave no issue living at her death, unto my heirs"; it being impossible to give effect to all the self-contradicting limiting clause, giving effect to the latter part requiring rejection of the distinct provision by which the gift to the heirs is conditioned on H.'s failure to survive the life tenants, and the rule as to a later clause or branch of a clause being deemed to show testator's intention with more certainty than a prior clause being subject to the rule that, in case of conflicting clauses or language, those parts expressed with technical precision have greater weight than those less formal.

[Ed. Note.—For other cases, see *Wills*, Cent. Dig. §§ 1340-1350, 1608; Dec. Dig. § 601.\*]

Transferred from Superior Court, Rockingham County; Young, Judge.

Petition for partition by Huldah Salter against Lizzie B. Philbrick and others. Facts found by the court, and case transferred from the superior court. Case discharged.

The plaintiff is the only grandchild of Eliza P. Philbrick. The defendants are Lizzie B. Philbrick (widow of Frank A. Philbrick), William E. Carter (widower of Fannie W. Carter), a large number of persons designated as the next of kin of Eliza, and George T. Hughes, guardian ad litem for all minors and others interested as heirs at law or next of kin of Eliza who are incapacitated to take care of their estate, agent for all persons out of the state or unknown who may have an interest in the property as such heirs or next of kin, and also agent for those not now in being, if any there be. All the next of kin of Eliza are parties and were notified of this proceeding.

Eliza P. Philbrick died testate in 1893. Her heirs at law were a son, Frank A. Philbrick, and two daughters, Fannie W. Carter and Carrie P. Philbrick. Paragraph 7 of her will is as follows:

"I give, devise, and bequeath unto my said daughters, Fannie W. Carter and Carrie P. Philbrick, as joint tenants and to the survivor of them, for the term of their lives and the life of the survivor of them, my undivided one-third interest, which I own with my son, Frank A. Philbrick, in the real estate and all personal property known as the Farragut and Atlantic House property, consisting of the Farragut and Atlantic Houses and the grounds (excepting a lot of land conveyed to St. Andrews Church), together with all other houses, outbuildings, stables, sheds, and structures of whatever kind thereon situated and connected with the business which I and my son, Frank A. Philbrick, have carried on there in the name of J. C. Philbrick & Son, and also the furniture, utensils, fixtures, and apparatus, together with the personal property of every kind therewith connected and made use of in conducting said business, excepting the horses, carriages, robes, blankets, and other personal property connected with the stables or belonging thereto which have heretofore been bequeathed unto my said son, Frank A. Philbrick, by this will; and upon the decease of my said daughters, Fannie W. Carter and Carrie P. Philbrick, I give, devise, and bequeath the said undivided third part of the Farragut and Atlantic House property, the fur-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



niture and personal property thereto belonging, unto my grandchild, Huldah Salter, if she be then alive, or to her child or children if she should leave any surviving her then living, and to her and their heirs; but if my said grandchild, Huldah Salter, should die before either of my said daughters, Fannie W. Carter and Carrie P. Philbrick, and leave no issue living at the decease of the survivor of my said daughters, then I give, devise, and bequeath said property, real and personal, at the decease of the survivor of my said daughters, or at the decease of said grandchild, Huldah Salter, should she survive them and leave no issue living at her death, unto my heirs, to be distributed according to law."

Carrie P. Philbrick subsequently married one Sweet and died in 1897, without issue. Fannie W. Carter, wife of William E. Carter and mother of Huldah Salter, died in 1911. Frank A. Philbrick died without issue in 1901, leaving a widow, Lizzie B. Philbrick. Huldah Salter is now 34 years old and unmarried. Eliza P. Philbrick died seised of one undivided third part of the Farragut and Atlantic House property, real and personal, located in North Hampton. Huldah Salter inherited one-third of this property through her mother from Frank A. Philbrick, and now owns the same subject to the life estate of William E. Carter; and the question transferred relates to her title to the one-third passing under the will of Eliza P. Philbrick.

Hamilton, Gregory & Freeman, of New York City, and Eastman, Scammon & Gardner, of Exeter, for plaintiff. Robert Doe, of Dover, for guardian ad litem.

**PARSONS, C. J.** The primary question is the character of the title of the petitioner, Huldah Salter, to one-third of the property of which partition is asked. Does she own that one-third in fee simple, or a less estate therein? The determination of this question involves the construction of the will of her grandmother, Eliza P. Philbrick, under which Huldah claims title.

"The end to be attained in interpreting a will is to effectuate the testator's intention as indicated by the weight of competent evidence, which is not required to come from any given source, or to be of any given weight, if it is relevant to the issue. 'The whole will must be taken together, and such construction be put upon it as will carry into effect the purposes the testator had in view' (Claggett v. Hardy, 3 N. H. 147, 151); and this construction does not depend upon the order of sentences, or the part of the instrument where qualifying or restrictive words are found." *Stevens v. Underhill*, 67 N. H. 68, 70, 36 Atl. 370.

"Contracts, wills, and statutes are the makers' intentions, proved by competent evidence. \* \* \* The evidence of intention may include various inherent probabilities and the probative force of many circumstances, as well as the literal sense of the words used. When the meaning is found by giving due weight to everything that legally tends to prove it, it is not a matter of discretion whether it shall be adopted or rejected." *Opinion of the Justices*, 66 N. H. 629, 651, 33 Atl. 1076, 1088.

"The construction of the will is the ascertainment of the testator's expressed intention—what he meant by what he said—which is to be determined by the court as a question of fact and

not by the application of arbitrary rules of law. \* \* \* The situation of the testator, the surrounding circumstances, his family and relatives, the devisees and legatees, the nature, amount, and situation of his property, facts tending to place the court in the position of the testator, constitute evidence competent for our consideration upon the issue of what he meant by the words used." *Stratton v. Stratton*, 68 N. H. 582, 583, 586, 44 Atl. 699, 700.

"It is not necessary that the intention of any written instrument should be expressed in a particular form of words, or by the use of technical terms. \* \* \* Decisions 'which have in so many cases defeated the intention of testators by substituting, through the application of an artificial and technical rule of law, a different estate from that which the testator intended' (*Eaton v. Straw*, 18 N. H. 320, 329, 330), are not now followed here." *Hayward v. Spaulding*, 75 N. H. 92-94, 71 Atl. 219, 220.

The will of Eliza P. Philbrick disposes of a large amount of property. It bears the marks of the professional scrivener and plainly was not committed to writing by the testatrix. A part of the estate owned by the testatrix and disposed of by the will consisted of the Farragut and Atlantic House property, as it is called, summer resort hotels upon the seacoast, including the real estate and personal property used in operating them. This property formerly belonged to the testatrix's husband, John C. Philbrick. In the settlement of his estate, one-third became the property of the testatrix, while two-thirds fell to her son, Frank A. Philbrick. After John's death the hotel business was conducted by the testatrix and her son as partners, under the firm name of John C. Philbrick & Son. At the making of the will, the testatrix's immediate relatives were her son, Frank A., two daughters, Fannie W. Carter and Carrie P. Philbrick, and a granddaughter, Huldah Salter, the petitioner, a daughter of Fannie W. Carter. These persons and no others are mentioned in the will; the two daughters being made residuary legatees.

The primary purpose expressed by the testatrix was the division of all her property among these immediate connections, her children and grandchild. With a single exception, the clauses of the will are clearly expressed and easily understood. The difficulty arises from a single clause in the seventh paragraph. By that paragraph the testatrix, having disposed of all her other property by specific gifts to the son and daughters and by making the daughters residuary legatees, as above stated, proceeds to dispose of her one-third interest in the hotel property. This she gives explicitly to the two daughters, "as joint tenants and to the survivor of them, for the term of their lives and the life of the survivor of them," describing the property as:

"My undivided one-third interest, which I own with my son, Frank A. Philbrick, in the real estate and all personal property known as the Farragut and Atlantic House property, consisting of the Farragut and Atlantic Houses and the grounds (excepting a lot of land conveyed to St. Andrews Church), together with all

other houses, outbuildings, stables, sheds, and structures of whatever kind thereon situated and connected with the business which I and my son \* \* \* have carried on there under the name of J. C. Philbrick & Son, and also the furniture, utensils, fixtures, and apparatus, together with the personal property of every kind therewith connected and made use of in conducting said business, excepting the horses, carriages, harnesses, robes, blankets, and other personal property connected with the stables or belonging thereto which have heretofore been bequeathed unto my said son, Frank A. Philbrick, by this will."

This bequest to Frank last mentioned was made by the third item of the will, but was made upon the condition that Frank's interest in certain other personal property should be given by him to the testatrix's daughters or the survivor of them.

This hotel business had been a family affair, carried on by the husband and father, and by his widow and son after the death of the original owner. The testatrix's purpose was to keep the ownership of all the property, real and personal, so that the business might be carried on after her death in a similar manner. Having given her daughters only a life estate in the property, the testatrix provides for the remainder after the termination of those estates in the following language:

"And upon the decease of my said daughters, Fannie W. Carter and Carrie P. Philbrick, I give, devise, and bequeath the said undivided third part of the Farragut and Atlantic House property, the furniture and personal property thereto belonging, unto my grandchild, Huldah Salter, if she be then alive, or to her child or children if she should leave any surviving her then living, and to her and their heirs."

This language explicitly, unmistakably, and technically conveys to Huldah the estate in fee simple, upon the sole condition that she survive her mother and aunt. Having so survived—performed the condition—Huldah claims the estate. Whether the testatrix intended she should have the estate so explicitly and technically given is the main question in controversy.

As the will is written to this point, the only question open was the disposition of the estate in case neither Huldah nor any child of hers survived the testatrix's daughters, who had already been made residuary legatees. The clause naturally to be expected in the will is a provision for the possible contingency of Huldah's childless death during the existence of the life estates. For this the will proceeds to provide:

"But if my said grandchild, Huldah Salter, should die before either of my said daughters, Fannie W. Carter and Carrie P. Philbrick, and leave no issue living at the decease of the survivor of my said daughters, then I give, devise, and bequeath said property, real and personal."

This condition upon which the gift over is made to depend (the prior death of Huldah without children surviving) having failed, ordinarily the inquiry to whom the testator intended in that event to give the property would be useless and unnecessary. *Holt v. Burns*, 77 N. H. 271, 90 Atl. 969. Having

stated the condition upon which the gift over depended and the time when the gift was to take effect, by the word "then" introducing the clause, the will proceeds, "at the decease of the survivor of my said daughters"—words which serve no useful purpose and to which no particular significance could have been attached. The draftsman then inserts, "or at the decease of said grandchild, Huldah Salter, should she survive them and leave no issue living at her death," following with the designation of the beneficiaries, "unto my heirs."

Upon this clause is raised the doubt as to the title intended to be given to Huldah. It is claimed that the effect of it is to cut down the fee simple explicitly given her and to make the estate a fee determinable upon her death without issue living, in which case the gift over was to take effect. But this construction cannot be adopted without rejecting the distinct provision of the same clause by which the gift to the heirs is conditioned upon Huldah's failure to survive the life tenant. There is no language in the will which can be construed to constitute Huldah a tenant for life, or, except in case of Huldah's decease during the life tenancy, to make a devise to her children. The estate claimed to be created is a peculiar one, if there can be such, and the existence of a title of such a character would be likely to hamper the harmonious conduct of the business as a family enterprise, as contemplated by the testator. If there had been a purpose to create such a title, with the wealth of detail in technical expression elsewhere found in the will, it is probable such purpose would have been definitely set forth at length in the clause making the gift to Huldah. The weight of the explicit language giving a fee, as evidence of the testator's purpose, is not overcome by the contradictory terms of the clause whose expressed purpose was to dispose of the estate in case Huldah did not get it.

In support of the opposite conclusion, it is said that effect must be given to every word and clause of a will. But no construction can give effect to all the self-contradictory limiting clause, as has already been suggested. It is also suggested that:

"The last clause, or branch of a clause, is deemed to show the intention of the testator with more certainty than a prior clause in the will." *Sheafe v. Cushing*, 17 N. H. 508, 512.

But in this early case the rule is modified by the suggestion that:

"In construing a will which contains conflicting clauses or language, those parts expressed with technical precision may be regarded as declaring the testator's intention with greater certainty than those which are less formal." *Id.* 511.

Here the estate in fee is created with technical accuracy. A possible determinable fee is inferable only from language inaccurately used when another subject was under consideration. The value of the rule might be

left upon what has already been said in general terms, but the weight to be given this particular rule has heretofore been considered by the court:

"When two words or clauses are contradictory and irreconcilable, and there is no other evidence than their relative position to indicate which the testator intended should control the other, their relative position may have some tendency to prove that, during the time elapsing between the writing of the first and the writing of the second, he changed his mind, and that the second was intended to express the change. This evidence of a fact cannot be turned into a rule of law without an exercise of legislative power. The law prescribes the evidence from which, and the tribunal by which, the meaning of Constitutions, statutes, wills, and written contracts shall be determined. An inference of fact drawn from the positions of irreconcilable provisions, or from any other proof contained in a writing, may be safely called a rule of construction, or a rule of evidence, if due care is taken to see that the dubious name does not destroy or weaken the distinction between the evidence from which the proper judicial tribunal ascertains the author's mind, and a rule of law established by legislative authority." *Sanborn v. Sanborn*, 62 N. H. 631, 644.

The conclusion that the express language making the gift in this case is not controlled by the subsequent contradictory clause referring thereto is supported by the same conclusion in similar cases:

"I hold it to be a rule that admits of no exception, in the construction of written instruments, that, where one interest is given, where one estate is conveyed—where one benefit is bestowed in one part of an instrument by terms clear, unambiguous, liable to no doubt, clouded by no obscurity, by terms upon which, if they stood alone, no man breathing, be he lawyer or be he layman, could entertain a doubt, in order to reverse that opinion, to which the terms would of themselves and standing alone have led, it is not sufficient that you should raise a mist; it is not sufficient that you should create a doubt; it is not sufficient that you should show a possibility; it is not even sufficient that you should deal in probabilities; but you must show something in another part of that instrument which is as decisive the one way as the other terms were decisive the other way, and that the interest first given cannot be taken away either by tacitum, or by dubium, or by possible, or even by probable, but that it must be taken away, and can only be taken away, by *expressum et certum*." *Lord Broughman in Thornhill v. Hall*, 2 Cl. & F. 22, 36; *Goodwin v. Finlayson*, 25 Beav. 65, 68; *Gifford v. Choate*, 100 Mass. 343, 344; *Byrnes v. Stilwell*, 103 N. Y. 453, 460, 9 N. E. 241, 57 Am. St. Rep. 760; *Benson v. Corbin*, 145 N. Y. 351, 359, 40 N. E. 11; *McIsaac v. Beaton*, 37 Can. Sup. Ct. 143, 3 Ann. Cas. 611, 615, note.

As *Huldah* takes an estate in fee simple, nothing can pass to "my heirs" under the concluding clause of paragraph 7 of the will, and it is unnecessary to consider the question, which has been elaborately argued, whether the testatrix meant as devisees those who were her heirs at her death, or her next of kin when the event occurred.

All persons claiming under those who were *Mrs. Philbrick's* heirs at her death and all who are now next of kin have been made

parties and have had notice of the proceeding. In the superior court, a guardian ad litem was appointed for all minors and an agent for all persons unknown or unborn who may have an interest in the question, and their claims have been very fully presented by counsel in this court. Authority is not lacking for the conclusion that by force of such appearance, or upon other grounds, all rights are necessarily adjudicated in a proceeding so conducted. But whether this is so or not, it appears that there are parties before the court adversely interested, so as to require the court to pass upon the question of title.

Case discharged.

YOUNG, J., did not sit. PLUMMER, J., was absent. The others concurred.

(77 N. H. 330)

### CAVERHILL v. BOSTON & M. R. R.

(Supreme Court of New Hampshire. Rockingham. June 27, 1914.)

#### 1. MASTER AND SERVANT (§ 179\*)—DEATH OF SERVANT—RAILROADS—FEDERAL EMPLOYERS' LIABILITY ACT—NEGLIGENCE OF FELLOW SERVANT.

In an action for death of a railroad employé engaged in interstate commerce under the federal employers' liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), the fact that decedent was killed because of the negligence of a fellow servant is no defense.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 354-358; Dec. Dig. § 179.\*]

#### 2. TRIAL (§ 125\*)—ARGUMENT OF COUNSEL—MISCONDUCT.

Since there is nothing in the federal employers' liability act (Act April 22, 1908, c. 149, 35 Stat. 65 [U. S. Comp. St. Supp. 1911, p. 1322]), making defendant's ability to pay material on the question of liability for the death of an employé engaged in interstate commerce, or the amount, argument of plaintiff's counsel in such an action that the verdict was not a very serious matter to the railroad, "taking from them a few coppers, but it means a good deal to" plaintiff, constituted prejudicial error, and was not rendered innocuous by a further statement that it was "another way of saying that money could never bring back plaintiff's husband to her," and that was all counsel meant by it.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 303-307; Dec. Dig. § 125.\*]

Exceptions from Superior Court, Rockingham County; Young, Judge.

Case by *Jennie S. Caverhill*, as administratrix of *Henry Caverhill*, deceased, against the *Boston & Maine Railroad*, for causing the death of decedent, who was employed as a section man by defendant. Plaintiff had a verdict, and the case was transferred on defendant's exceptions to the denial of motions for nonsuit and for the direction of a verdict in its favor, and to remarks of plaintiff's counsel in closing argument. Plaintiff relied on the federal employers' liability act. It appeared that decedent was struck and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

killed by one of two of defendant's trains which met and passed a spot where decedent was at work, and that if the engineer of either train had exercised ordinary care, the accident would not have occurred. Exceptions sustained, and new trial granted.

Eastman, Scammon & Gardner, of Exeter, for plaintiff. Kelley & Hatch and Page, Bartlett & Mitchell, all of Portsmouth, for defendant.

**PARSONS, C. J.** By the federal statute, whose application to the case is understood to be conceded, the defendants, common carriers by railroad, were made liable, "while engaging in commerce between any of the several states, \* \* \* to any person suffering injury while he is employed by such carrier in such concern, or, in case of the death of such employé, to his or her personal representative, \* \* \* such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employées of such carrier." 35 U. S. Stat. p. 65, § 1.

[1] There was evidence that the intestate's death was due to the careless operation of the meeting trains by the engineers in charge of them. The federal act abolishes the defense of fellow service; and whatever risks the deceased assumed as to the defendants' method of doing business, he did not assume the risk of injury from the negligence of another employé. For an injury so caused, the statute expressly makes the employer liable. There was therefore no error in the refusal to order a nonsuit or to direct a verdict because of the absence of evidence of negligence for which the defendants were bound to respond as a cause of the injury. The contention that the deceased was not employed in commerce between the states has not been argued here, is understood to be abandoned, and has not been considered.

[2] The argument of the plaintiff's counsel to the jury, that the verdict asked was not a very serious matter to the railroad, "taking from them a few coppers, \* \* \* but it means a good deal to her," exceeded the limit of legitimate advocacy. Exception was duly taken. The statement, "That is another way of saying that money can never bring back her husband to her, \* \* \* that is all I mean by it," was not a withdrawal of the intimation that the damages asked were a small amount to the defendants. Whatever the rule of damages may be, or to what extent that rule may differ from that prescribed by New Hampshire legislation (P. S. c. 191, § 12), there is nothing in the federal statute making the defendants' ability to pay material upon the questions of liability or amount. It does not appear that evidence upon this point was admitted or offered. If offered, it would have been

excluded as incompetent. The argument was plainly intended to mislead the jury, and to lay before them facts which could not be in evidence.

Whether it was easy or difficult for the defendants to pay, whether the amount claimed was to them mere loose pocket change, "a few coppers," or their entire estate, were matters foreign to the issues before the jury. The defendants protected their rights by the exception. It then rested with the plaintiff to explicitly withdraw the improper suggestion and to obtain a finding of fact from the trial court that the trial was not thereby rendered unfair. *Bullard v. Railroad*, 64 N. H. 27, 32, 5 Atl. 333, 10 Am. St. Rep. 367; *Story v. Railroad*, 70 N. H. 364, 48 Atl. 288.

Defendants' exception sustained; new trial granted.

**YOUNG, J.**, did not sit. The others concurred.

(245 Pa. 507)

**COMMONWEALTH ex rel. RILEY, Burgess, v. DURKIN et al.**

(Supreme Court of Pennsylvania. May 22, 1914.)

**ELECTIONS (§ 186\*)—BALLOTS—DESIGNATION OF CANDIDATES FOR FULL AND FOR UNEXPIRED TERMS.**

Where the electors at an election to choose six councilmen, two to fill unexpired terms and four for full terms, failed to designate on their ballots, as required by Act of May 22, 1895, P. L. 109, § 4, that they voted for two of the candidates for the unexpired terms, so that it was impossible to tell who of the six were elected for the unexpired terms, the election was ineffective.

[Ed. Note.—For other cases, see *Elections*, Cent. Dig. § 159; Dec. Dig. § 186.\*]

Appeal from Court of Common Pleas, Luzerne County.

Quo warranto by the Commonwealth, on the relation of John Riley, Burgess of the borough of Sugar Notch, to oust Thomas Durkin and others from the office of borough councilmen. From judgment for relator, defendants appeal. Affirmed.

At the municipal election of 1913, in the borough of Sugar Notch, there were six councilmen to be elected; two for a term of two years, to fill unexpired terms, and four for the term of four years.

The defendants demurred to the suggestion for the writ of quo warranto; the court overruled the demurrer and entered judgment for the commonwealth.

Argued before **BROWN, MESTREZAT, POTTER, STEWART, and MOSCHZIS-KER, JJ.**

Thomas F. Farrell, John McGahren, and H. L. Freeman, all of Wilkes-Barre, for appellants. Evan C. Jones, John T. Lenahan, R. B. Sheridan, and M. F. McDonald, all of Wilkes-Barre, for appellees.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

**PER CURIAM.** At the election held in the borough of Sugar Notch on November 4, 1913, two of the councilmen to be elected were to fill unexpired terms caused by death. By section 4 of the act of May 22, 1895 (P. L. 109) it was necessary for the qualified electors to designate on their ballots that they voted for two persons named thereon to fill unexpired terms. This was not done, and it was impossible to tell from the ballots cast who of the six receiving the majority of the votes cast had been elected for the unexpired terms. These were to be filled in accordance with the provisions of the act of 1895. The act of June 19, 1911 (P. L. 1047) makes none for them. This was the correct view of the learned court below, and the judgment of ouster is affirmed.

(245 Pa. 534)

**MYERS v. PENNSYLVANIA R. CO.**

(Supreme Court of Pennsylvania. May 22, 1914.)

**RAILROADS (§ 222\*)—OPERATION—DAMAGE TO ADJOINING LANDOWNER—RIGHT TO RECOVER.**

An adjoining landowner could not recover for damage from smoke, soot, noise, or vibrations resulting from the operation of a railroad, where it was conceded that the engines were equipped with all known appliances to reduce the amount of smoke and soot, and there was no evidence of negligent or unskillful operation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 720-724; Dec. Dig. § 222.\*]

Appeal from Court of Common Pleas, Blair County.

Trespass by Allen S. Myers against the Pennsylvania Railroad Company to recover for damages caused by smoke. From a judgment of nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

E. L. Dively, of Altoona, for appellant. Daniel J. Neff, J. D. Hicks, and A. J. Riley, all of Altoona, for appellee.

**PER CURIAM.** This appeal is from the refusal of the court to take off a nonsuit, entered in an action to recover damages alleged to have been caused to plants in plaintiff's greenhouses by the emission of smoke, soot, and gas from the defendant's engines. On the line of a branch road, and in front of plaintiff's houses, the defendant maintained a siding, on which engines at times stood while the engineers were awaiting orders. The smoke and soot, especially when the standing engines were coaled, was deposited on the glass of the houses, and obstructed the light and interfered with the growth of plants. It was conceded at the trial that the engines were equipped with all the known appliances in general use to reduce the

amount of smoke and soot, and there was no evidence that would sustain a finding of negligent or unskillful operation. An adjoining landowner cannot recover for inconvenience or loss occasioned by smoke, noise, or vibrations, which result from the operation of a railroad in a lawful manner without negligence, unskillfulness or malice. *Penna. Railroad v. Marchant*, 119 Pa. 541, 13 Atl. 690, 4 Am. St. Rep. 659.

The judgment is affirmed.

(245 Pa. 551)

**YOUNG v. PENNSYLVANIA R. CO.**

(Supreme Court of Pennsylvania. May 22, 1914.)

**APPEAL AND ERROR (§ 1064\*)—HARMLESS ERROR—INSTRUCTIONS—AMOUNT OF RECOVERY.**

A plaintiff, dissatisfied with the amount of a verdict in his favor, could not complain on appeal that the instructions directed the jury that plaintiff could not recover more than the amount of damages claimed in the declaration.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4219, 4221-4224; Dec. Dig. § 1064; \* *Fraudulent Conveyances*, Cent. Dig. § 1002; Trial, Cent. Dig. §§ 475, 525, 528, 553.]

Appeal from Court of Common Pleas, Blair County.

Trespass by Blair B. Young against the Pennsylvania Railroad Company to recover damages to growing timber by fire. From a judgment for plaintiff for less than claimed, he appeals. Affirmed.

Argued before FELL, C. J., and BROWN, ELKIN, and MOSCHZISKER, JJ.

Marion D. Patterson, of Hollidaysburg, for appellant. Daniel J. Neff, A. J. Riley, and J. D. Hicks, all of Altoona, for appellee.

**PER CURIAM.** The plaintiff is dissatisfied with the amount of the verdict which he obtained in an action for damages for injury to growing timber by fire, and has assigned as error the instruction by the court that the verdict should not exceed the amount of loss claimed in the declaration. It is not urged in support of the assignment that a recovery could have been sustained for an amount larger than that claimed in the declaration, but that any reference to the amount was prejudicial to the plaintiff and ground for reversal. This view is based on a misconception of the reasons for reversals on appeals by defendants in cases where the plaintiff's counsel or the court has directed the attention of the jury to the amount of damages claimed in the declaration, and in which it has been said that such claims do not furnish a proper measure of damages, and the statement of them tends to mislead the jury by suggesting an amount not supported by the evidence. These decisions have no application to this case.

The judgment is affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(245 Pa. 501)

**PODONA v. LEHIGH VALLEY COAL CO.**

(Supreme Court of Pennsylvania. May 22, 1914.)

**1. APPEAL AND ERROR (§ 1039\*)—HARMLESS ERROR—STATEMENT OF CLAIM.**

That plaintiff's statement of claim alleged that defendant was negligent in failing to provide a safe place of ingress and egress to and from the mine where plaintiff, the employé of an independent contractor, was injured did not require a reversal, where defendant's counsel understood that by the word "safe" was meant "practical reasonably safe," and the case was tried on the theory of the furnishing of a reasonably safe place.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4075-4088; Dec. Dig. § 1039.\*]

**2. MASTER AND SERVANT (§ 332\*)—EMPLOYÉ OF INDEPENDENT CONTRACTOR—NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.**

Where, in an action by the employé of an independent contractor for injuries from his head coming in contact with the low frame of a door in a mine while he was being brought from his work on defendant's car, there was evidence that frequently the doorframe could not be seen because of smoke, and plaintiff testified that because of smoke and steam he had never seen it, the question whether defendant was negligent in respect to the construction of the doorframe, was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.\*]

**3. PLEADING (§ 817\*)—BILL OF PARTICULARS—ACTION FOR INJURIES FROM NEGLIGENCE.**

Where plaintiff's statement of claim does not sufficiently specify the particulars relating to the negligence complained of as the cause of his injury, the defendant should demand a bill of particulars setting forth the information desired.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 954-962; Dec. Dig. § 317.\*]

**4. MASTER AND SERVANT (§ 321\*)—EMPLOYÉ OF INDEPENDENT CONTRACTOR.**

Where a mining company undertakes to convey the employé of an independent contractor to and from his work in a mine, it owes him the same duty to furnish a reasonably safe means of ingress and egress that it owes to its own employés.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1262; Dec. Dig. § 321.\*]

**5. TRIAL (§ 191\*)—INSTRUCTIONS—ASSUMPTION OF FACTS.**

Where, in an action for injuries to an employé of an independent contractor from his head striking against a doorframe while he was being brought from work in a mine on defendant's car, the plaintiff testified that by reason of smoke and steam in the passageway he had no opportunity to observe the height of the doorframe, an instruction which assumed that he had such opportunity was properly refused.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 420-431, 435; Dec. Dig. § 191.\*]

**6. MASTER AND SERVANT (§ 332\*)—EMPLOYÉ OF INDEPENDENT CONTRACTOR—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.**

Where, in an action for injuries to an employé of an independent contractor from striking his head against a doorframe while he was being brought from work in a mine in defendant's car, plaintiff testified that he had no knowledge of the height of the frame, the question whether he was guilty of contributory neg-

ligence in raising his head to a dangerous point was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1274-1277; Dec. Dig. § 332.\*]

Appeal from Court of Common Pleas, Luzerne County.

Trespass by John Podona against the Lehigh Valley Coal Company, for personal injuries. From judgment for plaintiff, defendant appeals. Affirmed.

The facts appear in the following opinion of Garman, J., sur defendant's motion for a new trial and for judgment n. o. v.:

The plaintiff, John Podona, was employed, on 29th March, 1909, for the Portland Contracting Company, in a gangway of the defendant's mine. He worked at loading rock and had been employed there for about three weeks.

To get to his place of work, he was taken into the mine down a slope in a car, and when going home from work was taken up the slope in the car. On said date when he was being taken up the slope, his head collided with the doorframe and he sustained very serious injuries. He claims that he never saw the doorway because at all times when he had passed it, it was full of smoke.

The motion for new trial is based on the following reasons: First, the verdict is against the law; second, the verdict is against the evidence; third, the court erred in refusing to affirm defendant's points. The motion for judgment non obstante veredicto is based upon our refusal to give binding instructions.

The defense relies upon certain propositions.

[1] First, "No negligence was alleged or shown." The objection that no negligence was alleged is based upon the language of plaintiff's statement which, in so far as it relates to defendant's negligence is as follows: "That it became and was the duty of the said defendant company to provide a safe ingress and egress for all who were lawfully employed in the said mine." "The said company was negligent in not so constructing the said door that the frame thereof would not injure one lawfully ascending or descending the said slope." "The plaintiff alleges that the defendant was negligent in not furnishing a proper car for persons lawfully ascending and descending the said slope."

While the language of the statement is undoubtedly too broad, still it was not submitted to the jury and the case was tried on the theory of the master furnishing to the servant a reasonably safe place. As counsel for defendant understood that the legal "safe place" is the practical reasonably safe place, no harm could be done to the defendant by the breadth of the claim. The cases cited to sustain defendant's contention are where the trial court submitted to the jury the question of safety without qualification. The difference is wide; in such cases the jury might infer absolute safety to be the rule; here counsel for both plaintiff and defendant knew otherwise. It would be the excess of technicality and a practical denial of justice to deprive plaintiff of his action merely because his counsel in his statement used the language quoted, when the language included plaintiff's claim and no one was injured by the form of expression.

[2] As to the allegation that proper car was not furnished by defendant to the persons lawfully ascending and descending the slope, we find that on the trial no evidence was offered to sustain the allegation, and it cannot be seriously argued that because it was alleged and not proved the plaintiff is out of court. But, defendant argues that, even conceding, "for the sake of argument only, that the declaration aver-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

red the failure of the defendant to furnish the plaintiff with a reasonably safe ingress and egress to be used in connection with his place of work, there was no proof offered by the plaintiff tending to establish such a charge." Defendant's reason for this statement is based upon the theory that whether the door was or was not reasonably safe could only be determined by comparison. It was not claimed by plaintiff that in form and detail the door differed from other doors in mines, nor that ordinarily it would not be reasonably safe; but it was urged that as the door was located with respect to smoke and escaping steam which frequently concealed the door, the construction was not reasonably safe. In other words, that the particular circumstances must determine the reasonable safety of construction, there being a higher degree of care required when the danger could not be seen and guarded against than when the danger was apparent. The plaintiff and some of his witnesses, as did some of defendant's witnesses, testified that frequently because of smoke the door could not be seen, and the plaintiff testified that because of smoke and steam he had never seen the door. We said to the jury: "The plaintiff's case will therefore rest clearly upon his own testimony with respect to his knowledge of the height of the door and his going under it. If you find that he knew it, and that he allowed himself to be transported up in the car where, by raising his head a few inches, he was liable to have it knocked off, then it may be concluded that he assumed the risk of his employment and, in our judgment, he would not be entitled to recover in this case. But if he did not know that at that point it was lower than the rest of the gangway, or slopeway, whatever name be proper for it, and could not see it, and if that in your judgment was a negligent construction under the circumstances, then we say to you that he might recover." It will be noticed that the plaintiff's statement is that defendant "was negligent in not so constructing the said door that the frame thereof would not injure one lawfully ascending or descending the said slope." This proposition must be true if the frame was to be concealed from observation, and the evidence on both sides shows that it was frequently so concealed by steam and smoke.

[3] If from the language cited the particulars relating to the negligence of construction could not be determined, the defendant might have demanded a bill of particulars and obtained exact information as to the full import of the language of the statement. Defendant could not place its own construction on the language, rest its case upon it, and then hold plaintiff to the defendant's interpretation, if the language were broad enough to include another interpretation.

[4] That the plaintiff was not an employé of defendant we think is immaterial. If the defendant undertook to convey plaintiff upon and down the slope, defendant owed to plaintiff the same duty as to employés. The doctrine of *Hagan v. Steel Co.*, 240 Pa. 222, 87 Atl. 574, does not apply to this case.

[5] Second. Defendant urges that plaintiff assumed the risk of his employment and cannot recover, and that its first point should have been affirmed. The point is as follows: "The plaintiff, by contracting for the performance of hazardous duties, must be held to have assumed such risks as were incident to their discharge from causes open and obvious, the dangerous character of which he had opportunity to ascertain; and, having passed, on his way to and from his work twice daily for three weeks, the door by which he was injured in the same car in which he was riding when injured, or in a car

of similar construction, and having had ample opportunity to observe the height of the door-frame, as was the case with his fellow servants, he must be held to have seen what they observed, and to have assumed the risk of the accident which befell him." This point could not be affirmed because it assumes that the plaintiff had "ample opportunity to observe the height of the doorframe, as was the case with his fellow servants." The opportunity to observe is positively denied by plaintiff and was for the jury. What his fellow servants might have opportunity for observing depends upon so many elements, such as length of service, points of observation, positions in the car, that obviously their knowledge could not be attributed to him, unless their opportunity and his were found to be identical.

It is undoubtedly true that in getting in defendant's car to be carried out of the mine plaintiff assumed the risks apparent, but he had also the right to assume that defendant would carry him with reasonable safety as to appliances and construction. As shown by the portion of our charge hereinbefore quoted this question depended upon the findings of the jury as to plaintiff's knowledge of the "height of the door and his going under it."

[6] Third. The defendant contends that on the ground of contributory negligence plaintiff should not be permitted to recover. This question was submitted to us by defendant's fifth point which we answered thus: "We cannot affirm that point as drawn; but we say to you that if you find that the plaintiff had knowledge of this condition and himself was careless, then the plaintiff cannot recover." We had also said in our main charge: "It may be possible that this plaintiff raised his head thoughtlessly at a dangerous point and sustained his injury. If he were passing under a low bridge or under a low ceiling and happened by some impulse to raise his head and be hurt, as I have stated several times, if he had known of the condition, he could not recover even though it was low; because he assumed the risk when he undertook to work in a place like that." This we think left the question of contributory negligence to the jury where in our judgment it properly belonged.

Fourth. Defendant contends that the negligence, if any, was that of the mine foreman. This contention cannot be sustained. The evidence did not bring the mine within the exception of the act of June 2, 1891, wherein mine foremen are provided for.

Argued before BROWN, MESTREZAT, POTTER, STEWART, and MOSCHZISKER, JJ.

P. F. O'Neill and F. W. Wheaton, both of Wilkes-Barre, for appellant. James L. Lenahan, of Wilkes-Barre, James P. Costello, of Hazleton, and John T. Lenahan, of Wilkes-Barre, for appellee.

PER CURIAM. The complaints of the appellant are: (1) That the trial judge refused to direct a verdict in its favor; and (2) that its motion for judgment n. o. v. was denied. All the reasons urged in support of these complaints are sufficiently answered in the opinion of the court below refusing a new trial and overruling the defendant's motion for judgment in its favor.

Judgment affirmed.



(245 Pa. 554)

**COMMONWEALTH v. CROWL et al.**

(Supreme Court of Pennsylvania. May 22, 1913.)

**1. STATUTES (§ 110½\*)—TITLE AND SUBJECT-MATTER.**

The title of Act March 24, 1909 (P. L. 63), reading, "An act for the protection of the public health and to prevent fraud \* \* \* in the \* \* \* sale \* \* \* of adulterated or deleterious ice cream, fixing a standard of butter fat for ice cream," gives sufficient notice of the contents of section 4, which provides that "no ice cream shall be sold within the state containing less than 8 per centum of butter fat, except where fruits or nuts are used for the purpose of flavoring, when it shall not contain less than 6 per centum of butter fat."

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 139, 161, 162, 163; Dec. Dig. § 110½.\*]

**2. STATUTES (§ 109\*)—TITLE AND SUBJECT-MATTER.**

The title of a statute need not be an index to its subject-matter, but is sufficient where it comprehends the subject involved and fairly puts the inquirer on notice.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 136-139; Dec. Dig. § 109.\*]

**3. FOOD (§ 1\*)—ADULTERATION—VALIDITY OF STATUTE.**

Act March 24, 1909 (P. L. 63), fixing the standard of butter fat for ice cream, is within the police power of the state, though ice cream below the standard set is not injurious to health.

[Ed. Note.—For other cases, see Food, Cent. Dig. §§ 1, 2; Dec. Dig. § 1.\*]

**4. CONSTITUTIONAL LAW (§ 48\*)—CONSTRUCTION OF CONSTITUTION TO AVOID INVALIDITY.**

The courts should not declare a statute unconstitutional, unless it clearly appears that the constitutional power has been exceeded.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 46; Dec. Dig. § 48.\*]

**5. FOOD (§ 18\*)—ADULTERATION—PROSECUTION—RIGHT TO INSTITUTE.**

A prosecution for selling ice cream deficient in butter fat according to the standard fixed by Act March 24, 1909 (P. L. 63), need not be commenced by the dairy and food commissioner, but may be brought by any citizen.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 20; Dec. Dig. § 18.\*]

**6. FOOD (§ 5\*)—ADULTERATION—REPEAL OF STATUTE.**

Act May 13, 1909 (P. L. 520), relating to food, etc., does not repeal the ice cream act of March 24, 1909 (P. L. 63), which fixes the standard of butter fat for ice cream sold in the state.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 1; Dec. Dig. § 5.\*]

**7. STATUTES (§ 161\*)—REPEAL BY IMPLICATION.**

An earlier statute is repealed by implication by a later one only in so far as their provisions are irreconcilable.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.\*]

**8. STATUTES (§ 161\*)—REPEAL BY IMPLICATION—PRESUMPTION.**

The later of two acts passed at the same session of the Legislature will not be presumed to repeal the earlier act by implication.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230-234; Dec. Dig. § 161.\*]

**9. FOOD (§ 21\*)—ADULTERATION—EVIDENCE.**

Where, in a prosecution for selling ice cream deficient in butter fat according to the standard fixed by the ice cream act of March 24, 1909 (P. L. 63), it was shown that a pint of ice cream for the sale of which defendant was prosecuted had been analyzed and found deficient in butter fat, it was not error to exclude the evidence of experts to show that samples taken from other parts of the same can might show different percentages of butter fat.

[Ed. Note.—For other cases, see Food, Cent. Dig. § 22; Dec. Dig. § 21.\*]

**Appeal from Superior Court.**

A. B. Crowl and another were convicted of selling ice cream deficient in butter fat, in violation of Ice Cream Act March 24, 1909 (P. L. 63), and from a decree of the Superior Court, affirming the conviction, they appeal. Affirmed.

The opinion of the Superior Court, by Henderson, J., was as follows:

[1, 2] The first proposition presented by the appellant is that the title of the act of March 24, 1909 (P. L. 63), does not comply with the requirements of section 3 of article 3, of the Constitution of Pennsylvania, in that it does not give sufficient notice of the provisions of section 4 of the statute under which the indictment was drawn. The title to the act is: "An act for the protection of the public health, and to prevent fraud and deception in the manufacture, sale, offering for sale, exposing for sale, and having in possession with intent to sell, of adulterated or deleterious ice cream, fixing a standard of butter fat for ice cream, providing penalties for the violation thereof, and providing for the enforcement thereof." The fourth section provides that: "No ice cream shall be sold within the state containing less than eight per centum butter fat, except where fruits or nuts are used for the purpose of flavoring, when it shall not contain less than six per centum butter fat." We need not refer to the numerous cases which hold that it is not necessary that the title to an act be an index of the subjects legislated about. It is sufficient if it comprehended the subject involved and fairly puts the inquirer on notice. This act has a single subject, and the title covers it with a comprehensiveness more complete than is usual in legislation. It declares the purpose of the act and gives notice that penalties are provided for a violation of its terms. One of the things particularly brought to the notice of the reader is that it fixes a standard of butter fat for ice cream, and it was for the violation of the law with reference to this provision that the defendant was convicted. We have no doubt that all of the provisions of the statute are cognate with the title.

[3] It is next contended that the enactment is not within the police power of the state in so far as it fixes a standard of butter fat for ice cream. We do not understand that there is any contention that that portion of the fourth section which forbids the manufacture or sale of adulterated or deleterious ice cream is not a proper subject of legislation. We are only concerned, therefore, with the inquiry whether a statute which fixes a standard of quality for ice cream is within the police power. The purpose of the act was to suppress false pretenses and to secure honest dealing in the sale of an article of food. That ice cream is in general use is admitted; that it is largely composed of milk and cream is shown by the evidence in the case. Its name implies the use of cream in its composition, and all of the authorities to which the learned counsel for the appellant refer show

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



that milk and cream are constituents in its composition. It enters so largely into the food supply of the public as to have become a proper subject of legislation, especially in view of the opportunities which its manufacture affords to practice imposition. In the popular understanding it is largely composed of milk of which butter fat is an important constituent. If by the exercise of ingenuity and by the practice of unwarranted thrift a product can be put on the market having the name and appearance of ice cream, but lacking the chief element which gives it value as an article of food, a large opportunity would be afforded to dealers in that article to profit by deception and it is the opportunity for such deceit of which the police power takes notice and seeks to take away. It is not necessary that injury has been done or a wrong perpetrated. The possibility that such results may take place warrants legislative intervention under the police power. We are not concerned with the wisdom of legislation under this power. Our only inquiry is whether the power exists. Sovereignty is in the people and is expressed through their legislative representatives by the enactment of their will into laws. Their authority is general except as restrained by the Constitution of the commonwealth or the Constitution of the United States, and among legislative capacities one of the largest is the exercise of the police power. It is more easily described than defined, but that it extends to the protection of the lives, health, and property of the citizens and to the preservation of good order and the public morals cannot be questioned, and these objects are to be provided for by such legislation as the discretion of the lawmaking body may deem appropriate. It is not a successful denial of the exercise of these powers to say that the prohibited article is wholesome and not injurious to the consumer. The wholesomeness of the prohibited thing will not render the act unconstitutional. The temptation to fraud and adulteration may be a consideration leading to regulative or prohibitive legislation. If it were not so courts would become the triers of the expediency of such legislation, and the authority which the people committed to the Legislature would be transferred by judicial action to the courts.

[4] Where a statute is clearly and palpably violative of the Constitution, it is the duty of the courts to declare it invalid in the respects in which it is repugnant to this supreme law; but the presumptions are all in favor of the validity of legislative enactments, and the burden is on him who asserts the contrary to make it clear beyond doubt that the constitutional power has been exceeded. It has been the policy of this state to legislate on the subject of milk and milk products, and statutes have been enacted which made it unlawful for any person to sell milk which contained less than a fixed percentage of butter fat and less than a fixed percentage of milk solids, making it unlawful to sell cream which contained less than a fixed percentage of butter fat, which classified cheese and fixed the percentage of butter fat which the various classes of cheese should contain; and similar legislation has been enacted in other states. *State v. Campbell*, 64 N. H. 402, 13 Atl. 585, 10 Am. St. Rep. 377; *Commonwealth v. Waite*, 93 Mass. (11 Allen) 264, 87 Am. Dec. 711; *State v. Smyth*, 14 R. I. 100, 51 Am. Rep. 344. Legislation of a like character is found in the act of May 21, 1901 (P. L. 275), forbidding the sale of vinegar which contains less than 4 per cent. of absolute acetic acid. If the sale of pure milk containing less than 3¼ per cent. of butter fat may be prohibited, it is not apparent why the same principle does not apply to ice cream. Milk is a natural product—wholesome and useful for food. The milk of many cows contains less than 3¼ per cent. of butter fat. The owners of such cattle have

a constitutional right to sell the product of their dairies; but this right has been held to be subordinate to the public welfare, and this welfare demands that a fixed minimum standard of butter fat shall exist in the whole milk sold in this commonwealth. The known disposition of some dealers to cheat, and the opportunity afforded them by the absence of some regulation of the business, is the justification of such legislation under the police power. Through such laws the consumers have the assurance that that which they buy is what it is called and what it appears to be, and the opportunity for imposition in selling an adulterated or inferior article of food for that which is wholesome and of a supposed standard of quality is removed. The integrity of the act is not affected by the provision that, where fruits and nuts are used for flavoring, 6 per cent. of butter fat shall be required in ice cream. It is obvious that the addition of fruits and nuts to a given quantity of ice cream would diminish the percentage of butter fat, and it was apparently a consideration of this fact which caused the distinction between ice cream flavored with extracts and that to which nuts or fruits were added. No discrimination is made between individuals or preference given to particular manufacturers by this legislation, and no substantial reason is advanced which would make such a regulation destructive of the whole statute.

[5] It is not an objection to the prosecution that it was not commenced by the dairy and food commissioner. That functionary was specially charged with the enforcement of the provisions of the statute, but that did not disable any citizen of the commonwealth from appearing as a prosecutor. The offense is a misdemeanor, and a prosecution for a violation of the act might be instituted by any person inclined so to do.

[6-8] The appellant further contends that the act under consideration was repealed by the act of May 13, 1909 (P. L. 520), relating to food, defining food and providing for the protection of the public health and the prevention of fraud and deception, etc. A comparison of the two acts shows that the latter contains no provision with reference to the quantity of butter fat necessary in ice cream, nor any provision which is inconsistent with the fourth section of the act of March 24, 1909 (P. L. 63), and as there is no express repeal, none arises by necessary implication. An earlier statute is repealed only in those particulars wherein it is clearly inconsistent and irreconcilable with later enactments. The antagonism must be so great as to convince the mind that the last enactment repealed the former. The objects of the two statutes are not the same, and, if so, both can stand, though they may refer to the same subject. Moreover, both of these acts were passed at the same session of the Legislature and the latter only a few weeks after the former. Under such circumstances, there is a presumption against an implied repeal.

[9] We do not regard the examination suggested in the twelfth and thirteenth assignments as permissible. The evidence of the experts as to the possibility that samples of ice cream taken from different parts of a can might or would exhibit a variation of butter fat content would not aid the jury in determining what were the constituents of the sample which the prosecuting witness bought and which the chemist for the commonwealth analyzed. Mr. Pelton, a witness for the commonwealth, testified that he bought a pint of chocolate ice cream from the defendant, that he asked for chocolate ice cream, and that the defendant delivered to him a pint of ice cream which had the appearance of chocolate ice cream. It was this pint of ice cream which was analyzed, and for the sale of which the defendant was prosecuted. It was shown to have had less than 3 per cent. of butter fat. Theories

about what might have been found in some other part of the can from which the witness got his pint would not throw any light on the case. We are unable to obtain a point of view of the case from which we can observe any error in its trial. It was fairly presented by the learned trial judge, and the law expounded in accordance with the principles which govern the case on the undisputed facts.

The assignments are overruled, the judgment is affirmed, and the record remitted to the court below, to the end that the sentence may be carried into execution.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Walter Jeffreys Carlin, of New York City, and Gerry T. Kincaid, of Corry, for appellants. A. H. Woodward, of Clearfield, and J. Orin Wait, Dist. Atty., and M. Levant Davis, both of Erie, for the Commonwealth.

PER CURIAM. The judgment of the Superior Court is affirmed, on the opinion of Judge Henderson.

(245 Pa. 552)

STEPHENS-ADAMSON MFG. CO. v. ARM-STRONG.

(Supreme Court of Pennsylvania. May 22, 1914.)

PLEADING (§ 348\*)—WANT OF SUFFICIENT AFFIDAVIT OF DEFENSE—RIGHT TO JUDGMENT—WAIVER.

A plaintiff's right to judgment for want of a sufficient affidavit of defense is not waived by the entry of a rule on defendant to file an affidavit of defense and a plea, though an affidavit and a plea be filed pursuant to such rule.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1065, 1066; Dec. Dig. § 348.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Assumpsit by the Stephens-Adamson Manufacturing Company, a corporation, against N. Bruce Armstrong. From judgment for plaintiff for want of sufficient affidavit of defense, defendant appeals. Affirmed.

From the record it appeared that the plaintiff in its statement of claim alleged that the defendant was liable as indorser on a bill of exchange accepted by the Armstrong Engineering Company. The defendant filed an affidavit of defense. Subsequently, by leave of court, the plaintiff filed an amended statement of claim, alleging that the defendant was liable as surety for the Armstrong Engineering Company, and in obedience to a rule of court ruled the defendant to file an affidavit of defense and a plea. The defendant filed an affidavit of defense and a plea. The plaintiff then took a rule for judgment for want of a sufficient affidavit of defense, which was made absolute by the court below, and judgment was accordingly entered for the plaintiff and against the defendant in the sum of \$1,563.29.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZIS-KER, JJ.

Daniel R. Rothermel, of Philadelphia, for appellant. Alfred T. Steinmetz, George Wentworth Carr, and Robert A. Beggs, Jr., all of Philadelphia, for appellee.

PER CURIAM. The statement of the question involved is:

"Did the plaintiff waive its right to move for judgment for want of a sufficient affidavit of defense by entering a rule on the defendant to plead, and plea filed in pursuance thereof?"

This question has been decided adversely to the appellant in the recent case of Dreifus v. Logan Iron Co., 91 Atl. 239. It is the only question on which the appellant is entitled to be heard. *Lincoln v. Wakefield*, 237 Pa. 97, 85 Atl. 133; *Fellin v. Philadelphia*, 241 Pa. 164, 88 Atl. 421, and cases there cited.

The judgment is affirmed.

(245 Pa. 539)

LITTLE et al. v. THROPP.

(Supreme Court of Pennsylvania. May 22, 1914.)

1. PLEADING (§ 281\*)—SUPPLEMENTAL AFFIDAVIT OF DEFENSE.

A supplemental affidavit of defense, setting up a defense different from that presented by the original affidavit, and not merely explanatory thereof, will be viewed with suspicion.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 844; Dec. Dig. § 281.\*]

2. PLEADING (§ 156\*)—DEFENSE—FRAUD.

Where defendant relies on fraud, the affidavit of defense must specifically state the facts constituting the fraud, and positively aver that they exist.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 312; Dec. Dig. § 156.\*]

3. PROPERTY (§ 9\*)—TITLE—WHAT CONSTITUTES.

The fact that a person is in possession of land and paying the taxes does not of itself vest him with title, or justify an inference of title.

[Ed. Note.—For other cases, see Property, Dec. Dig. § 9; Evidence, Cent. Dig. § 2457.]

4. TRUSTS (§ 200\*)—DEED FROM TRUSTEES—WARRANTIES.

The grantees in a deed from trustees are entitled to no covenants other than that the grantors have done no act to incumber the estate.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 267-269; Dec. Dig. § 200.\*]

5. TRUSTS (§ 200\*)—CONSTRUCTION—"GRANT, BARGAIN, AND SELL."

Under the express provisions of Act May 28, 1715 (1 Smith's Laws, 94), the words "grant, bargain, and sell" are simply a special covenant that the grantor has done no act to incumber or defeat the estate, and when used by trustees they imply no personal undertaking.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 267-269; Dec. Dig. § 200.\*]

For other definitions, see Words and Phrases, First and Second Series, Grant, Bargain, and Sell.]

6. VENDOR AND PURCHASER (§ 814\*)—ACTION FOR PURCHASE MONEY—AFFIDAVIT OF DEFENSE—SUFFICIENCY.

An original and supplemental affidavit of defense in an action on a purchase-money mort-

gage given to plaintiffs as trustees, and for which they had given a deed containing no covenant of general warranty, stated that the mortgage was given for the purchase price of a large tract owned by plaintiffs; that defendant, on attempting to take possession, found others in possession and claiming a superior title to a large portion thereof, and that their claims were the subject of pending actions of ejectment; that the land covered by their claims was of a value equal, or nearly equal, to the amount unpaid on the mortgage; that defendant had reason to believe that the title of claimants was superior to his own; and that plaintiffs knew at the time of the sale that their title was defective, and that claimants were in possession and paying taxes, and fraudulently concealed such facts, and represented that they had a good title. The affidavit failed to state under what right those in possession respectively claimed, or when they took or how long they had held possession, and did not support the allegation of fraud by any averments or specific facts, or describe the land which defendant claimed to have purchased, or place a value upon each of the several pieces of such land, or state whether the value alleged was estimated at the time of the purchase or date of the pleading, or allege that there had been an actual eviction. *Held*, that plaintiffs were entitled to judgment for want of a sufficient affidavit of defense.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 920-927; Dec. Dig. § 814.\*]

**7. VENDOR AND PURCHASER (§ 308\*)—ACTION FOR PURCHASE MONEY—DEFENSES—BURDEN OF PROOF.**

Where, in an action for the purchase price of land, defect of title is set up as a defense by defendant, who continues to hold possession, he must show that the title accepted by him was positively bad, and that there was a superior and undisputable title in another person asserting the same.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 862, 877-899; Dec. Dig. § 808.\*]

**8. EVIDENCE (§ 390\*)—PAROL OR EXTRINSIC EVIDENCE—CONTRACT OF SALE—MERGER IN ACCEPTED DEED.**

In the absence of fraud, all prior conversations, understandings, or dealings concerning the subject-matter of a purchase of land are merged in and satisfied by the deed accepted by the purchaser.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1719-1721, 1723-1728; Dec. Dig. § 390.\*]

Appeal from Court of Common Pleas, Huntingdon County.

Scire facias by Henry C. Little and another, trustees for the bondholders of the Broad Top Coal & Iron Company, against Joseph E. Thropp, to enforce a purchase-money mortgage. From an order discharging rule for judgment for want of sufficient affidavit of defense, plaintiffs appeal. Reversed and rendered.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZISKER, JJ.

John D. Dorris, of Huntingdon, and A. L. Cole, of Du Bois, for appellants. H. H. Waite, of Huntingdon, and A. L. Little, of Bedford, for appellee.

MOSCHZISKER, J. The plaintiffs sued to recover the balance due upon a purchase-money mortgage, and the defendant filed an affidavit of defense. The sufficiency of the latter was attacked on a rule for judgment, and this appeal is from an order refusing to make such rule absolute.

The scire facias states: That the mortgage sued upon was dated November 10, 1907. That it was given by the defendant to the plaintiff, "as trustees for the bondholders of the Broad Top Coal & Iron Company," for the principal sum of \$47,775. That, although the time for the payment of the principal had "long since elapsed," only \$5,000 had been paid thereon, and the balance, with interest from November 1, 1912, was due and unpaid.

The defendant averred: That on "November 1, 1907, he purchased from the plaintiff certain real estate situated in the counties of Huntingdon and Bedford" for \$97,500, all of which was paid in cash, except the amount secured by the mortgage in suit. That subsequently he paid \$5,000 on account of this mortgage, and interest to November 1, 1912. That the property was described in his deed as follows:

"All the real estate in Huntingdon and Bedford counties, in the state of Pennsylvania, containing 2,778 acres more or less, with all personal property, corporate rights, and franchises, formerly belonging to the Broad Top Coal & Iron Company, which are now held by said trustees, being the same premises which \* \* \* trustees in foreclosure proceedings of the lands and franchises of the Broad Top Coal & Iron Company, by deed dated May 27, 1869, and recorded, \* \* \* conveyed to \* \* \* as trustees for the bondholders \* \* \* under a certain declaration of trust \* \* \* recorded, \* \* \* and reference is hereby made to said deed or the record thereof for a full and particular description of the premises hereby conveyed or intended so to be."

That at the time the "said plaintiffs represented to affiant" the land contained "2,800 acres." That when the defendant "attempted to take possession \* \* \* he found there other persons in possession and claiming title to large portions of the land embraced within the deed, \* \* \* claiming to be the owners of the legal title thereto and also claiming to have a superior title to that acquired by the affiant." That one of these persons claimed "200 acres of land which is included in the deed of plaintiffs to affiant," another "343 acres," another "120 acres" "embraced within the description of the land sold by plaintiffs to affiant," and another 101 acres "covered by said mortgage." That he (the defendant) has brought an action of ejectment against the first of these claimants at February term, 1913. That the other claimants had either brought similar actions against him at May term, 1913, or had threatened so to do. That the land covered by these claims "is of a value equal to, or nearly equal to, the amount

that remains unpaid on said mortgage." That the defendant "has reason to believe the title to the lands claimed \* \* \* is superior to that which was acquired by affiant by deed from the plaintiffs." That the latter knew at the time they made the sale to him "that their title was defective," and that these several claimants "had superior titles \* \* \* and were in possession \* \* \* and had been paying taxes." That "they [the plaintiffs] fraudulently concealed these facts from the affiant, and fraudulently represented to the affiant, at the time they sold the land to him, that they had a good and marketable title thereto." That he (the defendant) had no knowledge at that time that these several parties claimed a superior title. Finally, the defendant avers that he "has reason to believe" the respective claimants will succeed in their assertions of title, but adds that, if they should not, then he would pay the balance due on the mortgage, and suggests that, in the meantime, it would be inequitable and unjust to compel him so to do.

[1] An original and a supplemental affidavit of defense were filed; but the averments of fraud appear only in the last. "There is no rule that a supplemental affidavit of defense is to be confined to an explanation of the original, and cannot set up a new and different defense; such a course, however, is suspicious and requires that the new defense should be closely scrutinized." *Callan v. Lukens*, 89 Pa. 134.

[2] While the second affidavit avers fraud in a general way, yet it states no specific facts which in themselves would constitute the offense charged; furthermore, the defendant does not say directly, or aver facts from which the inference could be drawn, that the person who "fraudulently represented that they [the plaintiffs] had a good and marketable title" made the representation when acting as trustee, nor does he aver just what, in point of fact, the plaintiffs, or either of them, really said or did that constituted the alleged fraudulent representations or concealment. "To different minds, different acts might be considered fair or fraudulent; hence the necessity of the rule which requires that an affidavit of defense shall 'state specifically and at length' the 'nature and character' of the defense, so that the court may be able to see that there is a defense that calls for a trial. If fraud is the defense, it must appear in what it consisted. \* \* \* The facts constituting the defense must be stated. \* \* \* So, too, the facts must be positively averred to exist. \* \* \*" *Sterling v. Mercantile M. I. Co.*, 32 Pa. 75, 77, 72 Am. Dec. 773. In the affidavits before us, not only are these particular facts not presented, but, as we shall later point out, the facts essential to prove the alleged outstanding superior titles are not adequately averred.

[3] In this connection, it may not be out of place here to note that being "in possession" and "paying taxes" do not in themselves, without more, constitute title to land, or justify an inference of title. For the reasons stated, the defendant's allegations of fraud must be dismissed; and, therefore, that element is out of the case.

The question of fraud being removed, we come to the averments concerning the deed and its covenants, and to a consideration of the breaches alleged, with the defendant's rights thereunder. Neither of the affidavits of defense gives a copy of the deed; but reference is made thereto, stating its place of record, and the appellants print the instrument in their paper book. Since both sides presented the case to us upon the basis of a profert of the deed as a whole, we shall treat it accordingly.

[4] To begin with, this is a deed from trustees, and the only covenant as to title which it contains is the usual special one against acts done or committed by the grantors themselves. "From fiduciary grantors \* \* \* the grantee is entitled to no covenants but that the grantor has done no act to incumber the estate." *Fallon's Pa. Law of Conveyance*, p. 193; *Williams' Real Property* (6th Ed.) 447; *Shontz v. Brown*, 27 Pa. 123, 134.

[5] The words "grant, bargain and sell," with us, under the Act of May 28, 1715 (1 *Smith's Laws*, p. 94), simply amount to a special covenant "that the grantor has done no act, nor created any incumbrance, whereby the estate granted by him might be defeated; that the estate was indefeasible as to any acts of the grantor. \* \* \* The act intended to give the vendee the benefit of two distinct covenants: A covenant of seisin as regards defeasibility from the acts of the vendor, and a covenant for quiet enjoyment against disturbance by the vendor and those claiming under him": *Fallon*, supra, p. 196; *Gratz v. Ewalt*, 2 Bin. 95; *Seitzinger v. Weaver*, 1 Rawle, 377, 382-385; *Knepper v. Kurtz*, 58 Pa. 480, 484; *Waslee v. Rossman*, 231 Pa. 219, 228, 80 Atl. 643. Also see *Rawle on Covenants*, etc., 489, 490. When used by trustees, the words "grant, bargain, and sell" imply no personal undertaking." *Shontz v. Brown*, supra, 27 Pa. 134.

[6] The deed under consideration contains no covenant of general warranty, and the defendant does not aver any act done by the plaintiffs that would tend to impair his title or disturb his possession. In fact, the affidavits of defense do not state under what right those alleged to be in possession respectively claim, or when they took, or how long they have held such possession. The defendant not only fails to aver the character of the title of these claimants, but he does not even go so far as to aver his belief that any of them has one superior to his own. The utmost length to which he goes in this respect is the statement that "he has reason to be-

Neve" that their titles are superior, and for aught that appears his "reason" may have no justification at all. Hence, if the affidavits be viewed as though they were a declaration in an action upon the special covenants contained in the deed, or implied by its grant, the defense averred fails.

[7] But the appellee claims the benefit of a special rule of law, established in this state, to whose advantages every defendant in an action to recover purchase money is entitled as a matter of right, when he properly presents a good defense of failure or partial failure of title. This rule is stated in the leading case of *Steinhauer v. Witman*, 1 Serg. & R. 437, 441, by Chief Justice Tilghman, as follows:

"A distinction has been established between purchasers who have paid, and who have not paid, the purchase money. Those who have paid have no relief (where they only have a covenant of special warranty and the facts do not bring the case within such covenant); but those who have not paid are relieved in a case of eviction or manifest failure of title."

That was a suit upon a purchase-money mortgage, and the mortgagor was permitted to prove that he had been evicted from a part of the premises by a paramount title. In *Cross v. Noble*, 67 Pa. 74, 78, Judge Sharewood says:

"The doctrine of *Steinhauer v. Witman* is that, if the consideration money has not been paid, the purchaser, unless it plainly appear that he has agreed to run the risk of the title, may defend himself in an action for the purchase money, by showing that the title was defective, either in whole or in part, whether there was a covenant of general warranty, or of the right to recover, or quiet enjoyment, by the vendor, or not."

It is not necessary in all instances that there be an actual eviction to entitle one to the defense referred to in the cases just cited; furthermore, the defense in question prevails whether the suit be a direct action for purchase money, or one instituted on a purchase-money obligation. *Sager v. Patterson*, 15 Pa. Super. Ct. 147, 150. But where the defendant continues to hold possession, and this equitable defense is relied upon, he must offer to show "that the title he had accepted was positively bad, and that there was a superior and indisputable title in another person, asserting such title." *Bradford v. Potts*, 9 Pa. 37. In speaking upon this subject, in *Ludwick v. Huntzinger*, 5 Watts & S. 51, 58, Kennedy, J., said:

"The right of the plaintiffs \* \* \* to demand and receive the amount of the [purchase-money] obligation is a perfectly clear legal right, \* \* \* whereas the defense set up is \* \* \* only an equitable defense, and before it can prevail must be made out by evidence tending to prove it clearly and distinctly. \* \* \* It is not sufficient, in such case, to offer to give evidence merely to show that the title which the purchaser has got is doubtful, or not merchantable; but he must show that it is positively bad, by proving a superior indisputable title to the land in a third person, \* \* \* who is asserting his right thereto by virtue of such title. \* \* \* In order to make such outstand-

ing title a good defense, \* \* \* it must be clearly shown to be indubitably good, and that the land is actually claimed under it."

Also see *Crawford v. Murphy*, 22 Pa. 84, 87, and *Rawle on Covenants for Title*, p. 67.

Here the defendant offers no such defense as required by these authorities, and upon that ground alone we might hold his affidavits insufficient. But since the amount involved is large, and we feel obliged to enter a final judgment for the plaintiff, it seems proper to call attention to other material weaknesses in the defense as averred. The deed at bar grants the property it purports to cover without metes or bounds, or precise location of any kind; and while it refers to a former deed for a fuller description, yet it nowhere appears upon the record that this other instrument contains a more detailed description than the one before us. In the present conveyance, however, we find these significant words, "Together with \* \* \* all the estate, right, title, interest, property, claim and demand whatsoever of them, the said grantors, in law, equity or otherwise;" and it appears that the grantors were mere trustees appointed in a foreclosure proceeding to take over the assets of a corporation. When the facts averred are viewed as a whole, they strongly suggest this as an instance of the purchase of whatsoever rights the plaintiff trustees might have had in the premises, rather than of certain defined pieces of real estate; particularly is this the case when we consider the form of the deed, and that, admittedly, years after its delivery, at a time when there is no pretense that the affiant did not know all the facts now depended upon as a defense, he paid \$5,000 on account of the purchase money, with interest on the mortgage to November 1, 1912. In other words, the circumstances, as they appear, indicate that what the defendant bargained for was not a good title to all property comprehended by the general description in his deed, but such "right, title, property, claim and demand" as these plaintiffs had in the premises; and we find no direct averment in the affidavits that this was not the case, or that the defendant would not have made the purchase had he been fully informed of the facts relating to the alleged partial failures of title concerning which he now attempts to complain. It looks strikingly like an instance where the purchaser took the risk of title, "being presumed to have been compensated in the collateral advantages of the bargain." See *Seitzinger v. Weaver*, 1 Rawle, 377, 384; *Ludwig v. Huntzinger*, supra; *Ross' Appeal*, 9 Pa. 491, 496; *Crawford v. Murphy*, supra, 22 Pa. 87; *Murphy v. Richardson*, 28 Pa. 288, 292; *Youngman v. Linn*, 52 Pa. 413, 416, 417.

Moreover, there is no averment whatever describing in any definite way just what property the defendant claims to have purchased, or the precise lands as to which he al-

leges a failure of title. True, the defendant states that the several pieces of land claimed by others were "embraced within his deed"; but this is merely the averment of a conclusion. The defendant should have outlined the property he believed to be covered by his deed, and then pursued the same course regarding the particular pieces of land as to which he attempts to assert a failure of title. The court would then have been in a position intelligently to pass upon and adjudicate the merits of his defense. If, as suggested, the actual facts of description were averred, they might show some of the latter tracts to be "embraced" within the land sold to the defendant and others not. As the matter stands, we have no way of knowing what the actual facts are, or what they would tend to prove. It is not necessary for a defendant to state the evidence he proposes to produce, but it is essential that he should unequivocally aver the facts upon which he relies (*Sterling v. Mercantile M. I. Co.*, 32 Pa. 75, 77, 72 Am. Dec. 773); and this the present defendant has not done.

The affidavits of defense present another material insufficiency, and that is in the averment concerning the value of the property alleged to be claimed by others. Instead of placing a value upon each of the several pieces of land, the defendant makes a general averment that all of them put together are of a value "equal to, or nearly equal to, the amount that remains unpaid on such mortgage." Such an averment is totally insufficient in a case of this character; for it might well be, if the facts were properly stated, they would show a defense as to certain pieces, and not as to others. Again, the averment in question is bad, because it fails to state whether the value alleged is estimated as of the time of the purchase, or as of the date of the pleading, nearly six years later. "The standard of damage is the value of the land at the time of making the con-

tract" or purchase. *Rawle on Covenants for Title*, p. 73; *Bender v. Fromberger*, 4 Dall. 436, 445, 1 L. Ed. 898; *Cathcart v. Bowman*, 5 Pa. 317, 319.

[8] Finally, the presumption of law is that, in the absence of fraud, all prior conversations, understandings, or dealings concerning the subject-matter of the purchase were merged in and satisfied by the deed accepted by the defendant. *Seltzinger v. Weaver*, 1 Rawle, 377, 384. The affidavits of defense aver a "breach of the covenants of warranty contained in the aforementioned deed," but, as before stated, the deed has no covenant of general warranty; if it had, however, under the circumstances disclosed at bar, the defendant would be obliged to aver an actual eviction, and his assertion that he had been "dispossessed substantially," would not be sufficient. *Wilson v. Cochran*, 46 Pa. 229; *Stewart v. West*, 14 Pa. 336, 339; *Clarke v. McNulty*, 3 Serg. & R. 364, 371.

We have gone into this case at some length, in order to point out the numerous material weaknesses in the affidavits of defense, which render them insufficient to prevent judgment. When able counsel have had two opportunities to state a defense, and have not succeeded in properly averring facts sufficient for that purpose, it strongly suggests the probability that there is no substantial answer to the plaintiff's cause of action; and this presumption is strengthened in the present instance by the circumstance that, although more than six years have elapsed since the defendant's purchase, yet during that time no effort seems to have been made by him to speed a final legal determination of any of the alleged outstanding claims upon his title.

The assignment of error is sustained, the order of the court below is reversed, and judgment is here entered for the plaintiff; the damages to be assessed when the record is returned to the common pleas.

(112 Me. 209)

## MAY v. LABBE.

(Supreme Judicial Court of Maine. Oct. 3, 1914.)

## 1. ENTRY, WRIT OF (§ 21\*)—PLEAS—NUL DISSEISIN—PRIMA FACIE CASE.

In a real action tried on a plea of nul disseisin, a warranty deed to plaintiff, or to the one from whom plaintiff has a quitclaim deed, is sufficient prima facie evidence of title in plaintiff to authorize a verdict in his favor, unless defendant proves a better title.

[Ed. Note.—For other cases, see Entry, Writ of, Cent. Dig. §§ 39-42; Dec. Dig. § 21.\*]

## 2. ENTRY, WRIT OF (§ 20\*)—PROOF OF TITLE—DESCRIPTION OF LAND.

Where in a real action plaintiff claimed title under a mortgage foreclosure, it was not material that the land described in the mortgage was not the same as that described in the writ, if the mortgaged land included that sued for and described.

[Ed. Note.—For other cases, see Entry, Writ of, Cent. Dig. §§ 34-38; Dec. Dig. § 20.\*]

## 3. ENTRY, WRIT OF (§ 21\*)—EVIDENCE—PRESUMPTIONS—OCCUPATION.

A grantee's occupation, in the absence of evidence to the contrary, is presumed to be under and in accordance with his deed, and coextensive with the premises therein described.

[Ed. Note.—For other cases, see Entry, Writ of, Cent. Dig. §§ 39-42; Dec. Dig. § 21.\*]

## 4. ENTRY, WRIT OF (§ 21\*)—EVIDENCE—SUFFICIENCY—DESCRIPTION OF LAND.

Where, in a suit to recover real property, plaintiff claimed under a warranty deed and a foreclosed mortgage, evidence held to show prima facie that the land described in the writ was included within the boundaries specified in the mortgage and deed.

[Ed. Note.—For other cases, see Entry, Writ of, Cent. Dig. §§ 39-42; Dec. Dig. § 21.\*]

Exceptions from Supreme Judicial Court, Arrostook County, at Law.

Writ of entry by Levi H. May against Docite Labbe. At the close of plaintiff's case, the court directed a verdict for defendant, and plaintiff brings exceptions. Sustained.

Argued before SAVAGE, C. J., and SPEAR, CORNISH, KING, HALEY, HANSON, and PHILBROOK, JJ.

James D. Maxwell, of Island Falls, for plaintiff. J. A. Laliberte, of Bangor, and A. S. Crawford, of Ft. Kent, for defendant.

KING, J. This action is a writ of entry to recover a tract of land in the town of Ft. Kent, Arrostook county. The plaintiff claims to own the westerly part of that portion of lot 18 south of the St. Francis road, and the defendant owns the easterly part thereof. Their ownerships adjoin, and the real controversy between the parties is the location of the line, extending from the St. Francis road southerly to the south line of lot 18, which marks the eastern bound of the plaintiff's land and the western bound of that of the defendant.

The demanded premises are thus described in the writ:

"Commencing at an iron pin driven near the center of Campbell brook at the bridge where the St. Francis road crosses said brook; thence

southerly parallel with the east line of said lot 18 to the south line of said lot 18; thence westerly along the south line of lot 18 forty-eight rods to the southwest corner of lot 18; thence northerly along the west line of lot 18 to the St. Francis road; thence easterly along the line of the St. Francis road to the place of beginning."

The defendant filed a disclaimer as to all the premises demanded except a strip 183.8 feet wide on the easterly side thereof, between the two lines as claimed on the one side and the other as the true line, and as to that strip he pleaded nul disseisin.

The plaintiff introduced several deeds of conveyance to himself, and to others under whom he claimed, and also the testimony of two surveyors each of whom had made certain surveys and a plan of the premises, and rested his case; whereupon, on motion therefor, a verdict was directed for the defendant, and the case is before this court on exceptions to that ruling.

[1] There was no evidence of actual possession of the demanded premises by the plaintiff or those under whom he claimed title. But in a real action tried upon a plea of nul disseisin a warranty deed to the plaintiff, or a warranty deed to one from whom the plaintiff has a quitclaim deed, is sufficient prima facie evidence of title in the plaintiff to authorize a verdict in his favor, unless the defendant proves a better title. *Rand v. Skilkin*, 63 Me. 103.

The plaintiff introduced, among others, two conveyances to himself containing full covenants of warranty, one a warranty deed from Susan R. Mitchell, and the other a warranty mortgage deed from Charles Wiles which had been foreclosed.

But the defendant contends that there was no sufficient proof to identify the land described in the writ as the same land described in those warranty deeds to the plaintiff. In both of them the description of the land conveyed is substantially the same, and in the mortgage deed it is as follows:

"The west part of lot (road) No. (18) eighteen, being my homestead on which I now live, and bounded on the northerly side by the St. John river, on the easterly side by land occupied by Docite Labbe, on the southerly by the rear line of said lot No. 18, and on the westerly side by land of John White."

It is suggested that neither of the boundaries of the land as described in the mortgage is the same as the corresponding boundary of the lot as described in the writ, but we apprehend that the defendant relies chiefly on his claim that the eastern line in the mortgage description is not shown to be the same as the eastern line in the writ description. We will, however, briefly refer to each of the boundaries.

[2] 1. An examination of the plan shows that lot 18 is bounded on the north by the St. John river, and that the St. Francis road crosses the lot from east to west some distance south of the river. The tract describ-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 91 A.—59

ed in the mortgage is the west part of lot 18, extending the length of the lot from its rear on the south to the St. John river on the north, while the lot described in the writ extends only from the south line of lot 18 to the St. Francis road. If, however, the land described in the mortgage includes that described in the writ, it cannot be a material objection that it includes more than that.

2. It seems certain that the southerly line of the tract described in the writ is the same as the southerly line of the tract described in the mortgage; for the writ description bounds it on the south by "the south line of lot 18," and the mortgage description bounds it on the south by "the rear line of said lot No. 18" and that must be the south line of the lot.

3. In the writ description the tract is bounded on the west by "the west line of lot 18"; while in the mortgage description the language is "and on the westerly side by land of John White." But in the mortgage the tract described as conveyed is called "the west part" of lot 18. Where is the westerly boundary of the "west part" of lot 18? Is it not the west line of the lot? We think it should be so inferred, *prima facie* at least. And the fact that the mortgage description specifies the westerly boundary of the lot as land of John White is not inconsistent with the fact that it is also the west line of lot 18. The writ tract is bounded on the west by the west line of lot 18, and we think the mortgage tract is so bounded on the west, by a fair construction of its description.

4. In the writ the easterly line of the lot is described as follows:

"Commencing at an iron pin driven near the center of Campbell brook at the bridge where the St. Francis road crosses said brook, thence southerly parallel with the east line of said lot 18 to the south line of said lot 18."

In the mortgage the tract is bounded on the east "by land occupied by Docite Labbe." No evidence was introduced to show the western line of Labbe's occupation at the time the mortgage was given, July 31, 1896. But the plaintiff introduced Labbe's deed (a warranty deed to him dated September 28, 1881), containing the following description:

"A parcel of land in Ft. Kent, being a part of lot No. 18 of the St. John river lots, and bounded as follows: Commencing at the southeast corner of lot No. 18; thence running northerly on the east line of lot No. 18 to the Campbell brook; thence in a southerly course of said brook to a post on the south side of the county road; thence southerly parallel with the east line of said lot No. 18 to the rear line of said lot; thence easterly to the first-mentioned bound."

[3] A grantee's occupation, in the absence of evidence to the contrary, is presumed to be under and in accordance with his deed, and coextensive with the premises therein described. *Moulton v. Edgcomb*, 52 Me. 31. In the absence of any evidence in this case showing that Labbe was in occupation of any land west of the line described in his deed, that

line is presumed to be the line of his occupation. It follows, then, that the tract described in the mortgage to the plaintiff is bounded on the east by the west line of the tract as described in Labbe's deed. Where is that line? Is it substantially the same as the east line of the lot described in the writ? Each line extends from a point at the county road, called also the St. Francis road, "southerly parallel with the east line of said lot" to the rear or south line of the lot. Do those lines commence at the same point? From a study and consideration of the deeds, the plans of the surveyors and their testimony, we think the reasonable conclusion is that they do commence at substantially the same point.

The northeast corner of the land described in the Labbe deed is at the point where the east line of lot 18 crosses the Campbell brook, and the plan shows that point to be not far south of the St. John river. From that point the boundary called for in the deed, taken in connection with the deed therein referred to and introduced, is *up the brook* in a southerly or southwesterly course "to a post on the south side of the county road." The plan shows the location of the Campbell brook and from that it clearly appears that the brook crosses the St. Francis road only at one point. It follows, therefore, from the description in the Labbe deed, considered in connection with the plan, that the location of the post called for in the deed as on "the south side" of the county road is at the place where the road crosses the brook. The iron pin called for in the writ description is also at the place "where the St. Francis road crosses said brook." In the deed the post is designated as on the "south side" of the road, and in the writ the "pin" is described as driven "near the center" of the brook. It is true that it is not shown that the location of the pin is identical with that of the post, but, if their locations are not precisely the same, they cannot be but a few feet apart; for they are both where the road crosses the brook, and the brook is quite small.

It seems perfectly clear that the northwest corner of Labbe's lot as described in his deed is at the junction of the road and brook, and from that point his west line runs southerly parallel with the east line of lot 18. It is equally clear that the northeast corner of the lot described in the writ is also at the same junction of the road and brook, and that from there its east line also runs southerly parallel with the east line of lot 18. And we think it is a proper inference, from all the evidence in the case, and in the absence of any proof to the contrary, that the west line of the Labbe lot is substantially the same as the east line of the lot described in the plaintiff's writ.

[4] It is therefore the opinion of the court, after a careful examination of the deeds introduced, considered in the light of the facts disclosed by the plan and the testimony of the



surveyors, that there was at least prima facie evidence that the plaintiff had title to the disputed strip or to some part of it.

Accordingly the entry must be:  
Exceptions sustained.

(112 Me. 202)

### PERRY v. AMES.

(Supreme Judicial Court of Maine. Oct. 3, 1914.)

#### REFERENCE (§ 99\*)—REPORT—CONCLUSIONS OF LAW.

Where the parties by agreement under rule of court submitted the case to a referee after the adoption of Supreme Judicial Court Rule 48 (70 Atl. xiii), providing that no stipulation should be allowed for a review by the court of the decision of the referee on any question of law or fact submitted, the award cannot be reviewed by the court for errors of law shown by the terms of the report itself, even though the award is contrary to law, in the absence of a showing of fraud, prejudice, or mistake, which means more than mere error in judgment on the part of the referee.

[Ed. Note.—For other cases, see Reference, Cent. Dig. §§ 148-156; Dec. Dig. § 99.\*]

Exceptions from Supreme Judicial Court, Knox County, at Law.

Action by Oliver G. Perry against Fred Y. Ames. To the ruling of the presiding justice accepting the report of a referee, the defendant excepts. Exceptions overruled.

Argued before CORNISH, BIRD, HALEY, and HANSON, JJ.

Frank H. Ingraham, of Rockland, for plaintiff. A. S. Littlefield, of Rockland, for defendant.

CORNISH, J. Exceptions by appellant to the ruling of the presiding justice accepting the report of the referee to whom the pending cause had been referred by agreement of the parties and under rule of court in the ordinary form.

The objection raised by the appellant to the acceptance of the report is that "the referee made an error in law in his decision holding the defendant liable," and he states the reasons for his contention, based upon the terms of the report itself. But this objection, even if true, is unavailing. In the absence of fraud, prejudice, or mistake on the part of the referee his finding is conclusive on questions both of law and fact. This rule has been reiterated in a long line of decisions from *Smith v. Thorndike*, 8 Me. (8 Greenl.) 119, down to *Armstrong v. Munster*, 103 Me. 29, 67 Atl. 573, and *Stewart v. Leonard*, 103 Me. 128, 68 Atl. 638. The reason for the rule is that the parties, having submitted their cause without reservation to a tribunal of their own choosing, are bound by a decision of that tribunal, and should not be permitted to afterwards return to the tribunal which they once abandoned and seek there a correction of the award on the ground that the referee has made an erroneous decision.

The award must stand even though it is contrary to law. *Portland Mfg. Co. v. Fox*, 18 Me. 117; *Brown v. Clay*, 31 Me. 518; *Mitchell v. Dockray*, 63 Me. 82; *Deering v. Saco*, 68 Me. 322.

Whether or not the referee states in his report his findings of law, and whether upon examination the court might deem them unsound, is entirely immaterial. The finality of the award upon questions of both law and fact rests, not upon whether the grounds of the decision are discoverable, and if so reviewable, but upon the fact that the independent tribunal, from which no appeal lies to the court, has determined the issues and that determination, in the absence of fraud, prejudice or mistake, must stand. The word "mistake" used in this connection does not mean an error in judgment either upon the facts or the law, but some unintentional error, as, for instance, in a mathematical computation. It is used in much the same connection as in R. S. c. 91, § 1, par. 7, authorizing the court to grant reviews. *Pickering v. Cassidy*, 93 Me. 139, 44 Atl. 683.

It was formerly the frequent practice to refer cases under a rule of court, both parties reserving the right to except in matters of law. This practice, however, was prohibited by the rule of court adopted in 1908 (rule 45 [70 Atl. xiii]), which reads:

"In references of cases by the court no stipulation will be allowed for a review by the court of the decision of the referee upon any question of law or fact submitted; but the referee may find the facts and report questions of law for decision by the court."

In the case at bar, the reference was made without reservation in compliance with this rule of court, and the referee reported no question of law for decision by the court.

The parties were therefore bound by the award, and the report was properly accepted.

Exceptions overruled.

(112 Me. 204)

### SHACKFORD v. NEW ENGLAND TELEPHONE & TELEGRAPH CO.

(Supreme Judicial Court of Maine. Oct. 3, 1914.)

#### 1. APPEAL AND ERROR (§ 927\*)—REVIEW—DIRECTED VERDICT.

In considering exceptions to the direction of a verdict for defendant, the court is not to weigh conflicting evidence, but only to determine whether the evidence considered most favorably for the plaintiff would have warranted a verdict in his favor.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2912, 2917, 3748, 3758, 4024; Dec. Dig. § 927.\*]

#### 2. TELEGRAPHS AND TELEPHONES (§ 15\*)—RIGHT TO USE OF HIGHWAY—LOCATION OF POLES.

Where a permit, given pursuant to Laws 1885, c. 378, for the placing of telephone poles and wires along a highway, did not fix specifically the location of the poles, the company is bound to exercise reasonable care in selecting locations for them within the limits of the road

so as not unreasonably to interfere with travel, and whether it had exercised such care or not is a question for the jury.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 9; Dec. Dig. § 15.\*]

**3. TELEGRAPHS AND TELEPHONES (§ 20\*)—ACTIONS AGAINST COMPANIES—BURDEN OF PROOF—LOCATION OF POLES IN HIGHWAY.**

In an action for personal injuries caused by plaintiff's wagon striking a guy wire alleged to be so attached to a telephone pole of the defendant as to constitute a dangerous obstruction to travel upon a public road, the burden is upon the plaintiff to show that the guy wire was within the road limits.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 13; Dec. Dig. § 20.\*]

**4. TELEGRAPHS AND TELEPHONES (§ 20\*)—ACTIONS AGAINST COMPANIES—SUFFICIENCY OF EVIDENCE.**

In such action, evidence held not sufficient to warrant the jury in finding that the guy wire was within the road limits as originally established, or as broadened by prescription.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 13; Dec. Dig. § 20.\*]

**5. TELEGRAPHS AND TELEPHONES (§ 10\*)—CONSTRUCTION—HIGHWAY BY PRESCRIPTION—EXTENT OF RIGHTS ACQUIRED—GUY WIRES.**

While a highway may be established or widened by prescription, the rights of the public therein are limited to the land used prescriptively, and a telephone guy wire two feet outside the traveled way cannot be upon a prescriptive highway.

[Ed. Note.—For other cases, see *Telegraphs and Telephones*, Cent. Dig. § 6; Dec. Dig. § 10.\*]

Exceptions from Supreme Judicial Court, Cumberland County, at Law.

Action by Robert F. Shackford against the New England Telephone & Telegraph Company. From a verdict directed for the defendant, the plaintiff excepts. Exceptions overruled.

Argued before SAVAGE, C. J., and CORNISH, HALEY, HANSON, and PHILBROOK, JJ.

William Lyons, of Westbrook, for plaintiff. Payson & Virgin, of Portland, for defendant.

SAVAGE, C. J. Action on the case to recover for personal injuries sustained by the plaintiff, July 15, 1908. The writ is dated May 20, 1913. At the conclusion of the evidence the presiding justice directed a verdict for the defendant, and the case comes before this court on the plaintiff's exceptions to that direction.

[1] In considering exceptions of this kind, it is not the province of the court to weigh conflicting evidence and ascertain its comparative value, but only to determine whether the evidence, considered most favorably for the plaintiff, would have warranted a verdict in his favor. *Johnson v. N. Y., N. H. & H. R. R.*, 111 Me. 263, 88 Atl. 988.

[2] The plaintiff alleges that on the day

of the accident he was driving southerly on the road from White Rock to South Windham, and that at a point in the road at the top of Ward's Hill in Gorham, while passing a standing automobile, his horse became frightened and shied, so that the off forward wheel of his wagon ran against and locked into a guy wire placed there by the defendant to sustain one of its poles, whereby he was violently thrown from the wagon and injured. The guy wire was stretched from the top of the pole to the ground about six feet towards the traveled part of the road from the bottom of the pole. The plaintiff further alleges that the pole and guy wire were within the limits of the road; and he contends that the bottom of the guy wire was placed so near the wrought or traveled part of the road as to constitute a dangerous obstruction to travel upon the road.

The defendant pleaded the general issue, and, further, by way of brief statement, that pursuant to the provisions of chapter 378 of the Public Laws of 1885 it had obtained, on June 1, 1895, a written permit from the selectmen of Gorham to erect and maintain poles and wires thereon upon all the streets and highways in Gorham, and that if the guy wire complained of was within the limits of the road on which the plaintiff was traveling, it was a legal structure, by virtue of the permit so obtained.

The statute referred to in the plea provided that no telephone company should "construct lines upon and along the highways and public roads of any city or town, without first obtaining a written permit, signed by the mayor and aldermen, or selectmen, specifying where the posts may be located, the kind of posts, and the height at which and the places where the wires may be run." The case shows that the selectmen of Gorham issued a permit to the defendant to "erect and maintain poles and wires thereon on all streets and highways in the town of Gorham."

We have no occasion now to pass upon the validity of this permit, but if we assume that it was sufficiently specific as to places where poles might be erected upon and along the roads and streets, the defendant should unquestionably be held to the exercise of reasonable care in so placing them within road limits as not unreasonably to interfere with the rights of travelers upon the road. The selectmen were vested with the power of prescribing the precise location of each pole and the necessary sustaining structure like a guy, and a pole and guy placed as so prescribed would, without any question, be a legal structure, and the defendant would not be liable for the consequences of maintaining it as prescribed. But where, as in this case, the permit was general, and the location of poles not specific, the company erecting the poles would be bound to exer-

cise reasonable care in selecting places so as not unreasonably to obstruct public travel. And in this case, assuming that the guy complained of was within the limits of the road, it was a question for the jury to say whether the defendant had exercised reasonable care and judgment in placing the guy where it was. A verdict for the defendant should not have been directed on that ground.

[3] But the plaintiff's right to recover, if he may be entitled to a verdict in other respects, depends in the end upon whether the guy wire was within the road or without it. If the guy was within the road, or if upon the evidence a jury would have been warranted in so finding, then the direction of a verdict for the defendant was erroneous. In such a case the question of liability is for the jury under proper instructions. But if the guy was outside the road limits, upon private property, or if a jury would not have been warranted in finding that it was within the road limits, then, under the circumstances of this case, the plaintiff is not entitled to a verdict. If the defendant is liable at all, it is because he has interfered with the rights of the plaintiff as a traveler upon the road. This is conceded, and requires no discussion.

The burden was on the plaintiff, then, to show that the guy was within the road limits. He introduced evidence, which the jury might believe that the bottom of the guy was placed within about two feet outside of the traveled or wrought part of the road. We think it cannot be said that it was within two feet of the direct line of travel up and down the road, but of the line of travel widened as it may have been at that point by the intersection of a crossroad. He also introduced evidence of other features in the situation, such as the ditch by the side of the road and so forth. Some of that evidence is disputed.

The plaintiff offered no evidence of the original location of the road, but seems to have relied upon such inferences as to road lines as might be drawn from the location of the wrought portion of the road with respect to the guy, and from general appearances. And as to general appearances, it may be said that there is little or nothing at this point, outside of the traveled part of the road, to indicate where the road lines are. There are no fences by the roadside. There are no monuments of any kind. There are no physical aspects which help to decide the question. The adjacent field extends in appearance to the shoulder of the road ditch. Northerly of the point in question there are or have been fences on both sides of the road, but it is not shown whether their location would, or not, throw any light upon the location of the road lines at the point of the accident.

[4] The defendant contends that in fact

the guy was placed 2.7 feet outside the road limit and on private property. It produced at the trial the record of the original laying out of the road by metes and courses, by the selectmen of Gorham in 1820. It has surveyed and retraced, as it claims, the lines of the original location, and its engineers testified their survey shows that the original road line was, as we have stated, 2.7 feet inside of the guy, and thus that the guy is excluded from the road. But they also testified that they depended upon the statements of men, subject to the defects of human memory, for the location of certain monuments not now in existence, that some lines had to be shortened and others lengthened to fit the supposed termini of the lines as located; that some courses had to be changed for the same reason; and that the variation of the compass seemed to be uneven, less in some places than in others. All this seems to indicate that either the original survey or the one made by the defendant's engineers is inaccurate. And it is more likely that this is true of the former. *Magoon v. Davis*, 84 Me. 178, 24 Atl. 809. The engineers also testified that in some places they found the wrought or traveled road outside the location on one side, and in some places on the other, which indicates that the position of the wrought road is no certain evidence of where the side lines are.

But without further discussion of the defendant's survey, we will say that we do not think that even an admittedly accurate resurvey of the old line, as recorded, nearly four miles long, as this was, with the conditions and results already named, imports such an absolute verity as to the original line of the road as actually laid out, within 2.7 feet, as would justify the court in taking the question from the jury, if there were any credible evidence opposed to it. In this case there is no such evidence. The plaintiff does not admit the correctness of the defendant's survey, but he does not show wherein it is wrong in any respect. And we think that if the public right, which includes the plaintiff's right, depends upon showing that the guy was within the road lines as located in 1820, the plaintiff cannot maintain this action. With all its imperfections, the evidence of the original location, unexplained, and without modification, is too certain to be disregarded by court or jury.

[5] But the plaintiff says that the limits of the original location afford no certain criterion of the limits of the plaintiff's rights. He says, and it is true, that a highway may be proved by prescription or dedication. *Commonwealth v. Old Colony & F. R. R. Co.*, 14 Gray (Mass.) 93. And where there is a located way, as in this case, its limits may be enlarged by prescriptive use. The public may appropriate by use land adjoining an

existing highway. It may widen the road by prescription. But the prescriptive rights of the public extend only as far as they have used the land prescriptively. Not only has the plaintiff failed to show that the guy was within the limits of the road as originally laid out, but he has not shown that it was within the limits of any land acquired by the public by prescription, if any such there is. The testimony introduced by the plaintiff himself shows that the guy was about two feet outside of the line of public travel, and so outside of any rights which the public may have acquired by prescription. In no aspect of the case has the plaintiff sustained the burden of showing that the guy was within the limits of the public way. The direction of a verdict for the defendant was right.

Exceptions overruled.

(88 N. J. Eq. 656)

DEWEY LAND CO. et al. v. STEVENS et al.  
(No. 99.)

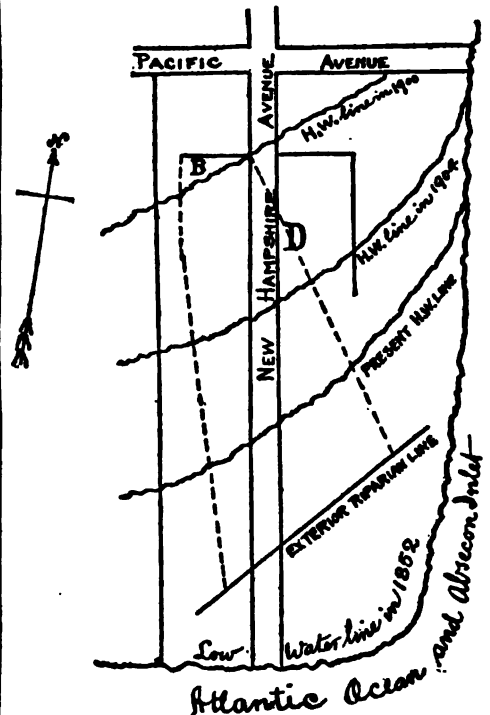
(Court of Errors and Appeals of New Jersey.  
July 6, 1914.)

Concurring opinion.

For majority opinion, see 90 Atl. 1040.

WHITE, J. So far as is essential to an understanding of this case, the facts appear to be that in 1852 Robert B. Leeds owned the entire tract shown on the following diagram, all of which was then fast land. In 1856 after some of it had been lost by the erosion of the ocean, he conveyed it to John McClees, describing it in the deed as bounding on the "edge of Absecon Inlet." After much further erosion McClees in 1897 conveyed it to the Atlantic Beach Front Improvement Company by description also bounding on the ocean and inlet. In 1900 the high-water line was as shown on the diagram, and in that year Wm. H. Bartlett, the owner of lot marked "B," to which he derived title from the Atlantic Beach Front Improvement Company, procured, as such owner, a riparian grant from the state for the land then under water included, as shown, within the dotted lines. In 1904 by reason of accretions the high-water line was as shown on the diagram, and that year complainant received a grant of lot D, title to which also came from the Atlantic Beach Front Improvement Company. Still further accretions have since occurred and the high-water line is now as shown. In 1911 and 1912 complainant took quitclaim deeds from John McClees and from the heirs of Robert B. Leeds, respectively, for or including the triangle bounded by New Hampshire avenue, the eastwardly dotted line of the riparian grant to Bartlett, and the exterior line of the riparian commissioners, and that triangle is the locus in quo. Defendants are the gran-

tees from Bartlett of lot B and of the lands granted to him by the riparian grant above mentioned.



I agree with what is said in the foregoing opinion regarding Attorney General v. Sooy Oyster Co., 78 N. J. Law, 394, 75 Atl. 211, and also with what was said as to the grounds stated for the decree from which this appeal is taken. I also agree with what is said to the effect that the recent quitclaim deeds to complainants from the heirs of Robert B. Leeds and from John McClees, respectively, conveyed nothing. *Yard v. Ocean Beach Ass'n*, 49 N. J. Eq. 306, 24 Atl. 729.

What is further said in the opinion to the effect that the state acquires title to former fast land by reason of its having become submerged as the result of gradual erosion by the ocean is not, as it seems to me, involved in this case, and while true under certain circumstances and within certain limitations, seems to me to be stated so broadly as to be misleading. If McClees, for instance, had never granted away any of his fast land, but all of it, instead of only a portion of it, had wasted away by the gradual erosion of the ocean, and then, after one or two or three years, or in fact any period short of that which would vest title in the state or its grantee by adverse possession, it had reappeared, the question would then be presented whether the new land belonged to McClees, or belonged to the state, or, as in *Ocean City Ass'n v. Shriver*, 64 N. J. Law, 550, 46 Atl. 690, 51 L. R. A. 425, to the state's independent grantee, if there was one, and

doubtless in such case the decision would be, as in the Shriver Case, that it belonged to McClees.

In the present case, however, all of the McClees fast land did not wash away, and the defendants, as well as the complainants, claim under the grant made in 1897 from McClees to the Atlantic City Beach Front Improvement Company of the portion which had not washed away when he made the grant, and the grant bounded on the "high-water mark of the ocean." Complainants now own part of the fast land included in this grant, or part of the subsequent accretions thereto, and defendants another part of such fast land adjoining complainant's land on the west, and extending to the ocean. It is true that defendants acquired from their predecessor in title, Bartlett, the riparian grant which he had received from the state, but this grant was made to Bartlett as the owner of part (now owned by defendants) of the McClees fast land, and at the time the grant was made it was bounded by side lines at right angles or substantially so, to the then shore line at this point, which so far as the evidence indicates (and subject to the possible objection hereinafter suggested, but not involved under the amended complaint in this case) would seem to have been an equitable guide for the division of accretion gains should they occur. No question arises in this case, therefore, of a conflict between the accretions to which an owner of the shore is entitled and land of an independent grantee of the state in front thereof. It will be quite time enough to decide the rights of such a conflict when it shall have occurred.

In *Stevens v. Paterson & Newark R. R. Co.*, 84 N. J. Law, 532, 544 (3 Am. Rep. 269) this court said, speaking in an opinion by Chief Justice Beasley:

"From these authorities and many others which might be cited, it appears to me to be plain that, by the rules of the ancient law, the owner of the land along the shore was entitled to no right as an incident of such ownership, except the contingent ones before referred to of alluvion and dereliction."

And again:

"If such a right [to build a wharf out beyond the high-water line without a riparian grant from the state] existed by force of the common law, as an incident of property, it is obvious it could not be destroyed or substantially impaired by the legislative power without compensation."

I take it, therefore, that instead of the Stevens Case being an authority to the effect that the state may make a grant to an independent grantee in conflict with the common-law right of the owner of the ripa to accretions, it in effect says that the right to such accretions is incident to the ownership of the ripa, and that as such it cannot be taken away by the Legislature without compensation, and such I understand to be the law in this state. *Bell v. Gough*, 23 N. J. Law, 624. In apparent recognition and confirmation of

this view the Legislature has provided, as I take it, that before an independent grantee from the state may fill the land under water in front of the land of a riparian owner who has failed to take out a state grant after notice, such independent grantee must extinguish such riparian owner's right to accretions by paying to him the value thereof to be fixed by the riparian commissioners, subject to an appeal to the Supreme Court and to a trial by jury. The theory of this legislative provision would seem to be that the independent grantee from the state of land under water takes what the state had, viz., an *ambulatory boundary*, shifting with the high-water line as erosion or accretion takes place, but upon the exercise of the granted right to fill, the riparian owner's right to accretions would, for the first time, be invaded, and that then, and then only, its owner becomes entitled to compensation. Comp. Stat. 4889, § 20.

In *Ocean City Ass'n v. Shriver*, supra, the strip of fast land retained by the Ocean City Ass'n when it granted lot No. 849 to Howell in 1884, and which intervened between such lot and the ocean, had *entirely* wasted away by the erosion of the ocean in 1895, so that the ocean washed upon the front part of Howell's lot. If it is entirely true, as stated, as I think, obiter, in the foregoing opinion in the case sub judice, that fast land "lost by erosion is lost forever," and "becomes the property of the state, not while it remains under water, but absolutely," it is difficult to see why Howell's, or his grantee, Shriver's lot (No. 849) did not become endowed with the ownership of the ripa and as such entitled to accretions and to take out a riparian grant from the state, and yet this court held in an opinion by Chief Justice Depue: (1) That it had not become entitled to the accretions which formed by the receding of the ocean; (2) that the riparian grant which the state made to Shriver was void; and (3) that the Ocean City Ass'n's land which had gradually entirely washed away and had been from three to five years under the ocean, so far from having been "lost forever" and from having "become the property of the state, not while it remained under water, but absolutely," not only did not pass by the state's grant of it, but actually belonged to the Ocean City Ass'n, its former owner, when within the period involved in that case it reappeared by accretion, and this in spite of the fact that such former owner had nothing in the way of fast land to which the accretions could attach, and had received no grant from the new "absolute owner," the state. The only view consistent with such a result would seem to be the one stated by Chief Justice Depue in that case as the solemn determination and adjudication of this court, viz., "that by the submergence the owner of the land does not *entirely* lose his property in the soil." Does not *entirely* lose it! Clearly this intimates that something is lost, and says that some-

thing is not lost. What is it that is, and what is it that is not, lost? I take it that what the owner *has* lost is his *possession* of his land, which has passed into the *adverse possession* of the state. I think the state's possession is adverse because it consists, under what is called the New Jersey doctrine, not only of the public rights of navigation, fishery, etc., upon and in the waters which overflow the submerged land, and which the state holds in trust for the use of the general public, but also of the emblem or sign of that ownership of the soil under navigable waters which was anciently part of the private regalia of the King of England (until abridged by Magna Charta, after which it was supposed it might be exercised by Parliament), and which, as may be considered as now settled in this state, is vested in the state of New Jersey, and is within the exercise and control of its Legislature. *Stevens v. Paterson & Newark R. R.*, supra; *Paul v. Hazleton*, 37 N. J. Law, 106; *Wooley v. Campbell*, 37 N. J. Law, 163; *Hoboken v. Penna. R. R. Co.*, 124 U. S. 656, 8 Sup. Ct. 643, 31 L. Ed. 543.

I think that what the owner has not lost is his right, within the statutory period in this state, to toll the running of such adverse possession and defeat its ripening into absolute ownership, by regaining possession of his land, not by bringing an action of ejectment, because such would be inadequate, now as in the days of King Canute, to stay the action of nature, but by actually ejecting the ocean from his land and restoring it by artificial means to its former condition as dry or fast land, or by having it, within the like period, restored to him through the voluntary action of nature should the ocean within that time recede. *Ocean City Ass'n v. Shriver*, supra. Such a view, taken in connection with the other familiar doctrine which saves the rights of the public against loss from adverse possession (*Hoboken Land & Imp. Co. v. Hoboken*, 36 N. J. Law, 540), would return to the use of the public upon its reappearing from the sea, for instance, the portion of New Hampshire avenue south of a point about 300 feet south of Pacific avenue, to which point the high-water line had encroached in 1900 when the state made a riparian grant for, *inter alia*, what was, before it was submerged, the bed of New Hampshire avenue south of that point. New Hampshire avenue was dedicated as a public street to a distance of 1,500 feet or more south of Pacific avenue by the ancient deed and map ("Rowland's") of dedication of April 15, 1853, executed by Robert B. Leeds and others at a time when the fast land extended 1,500 feet south of Pacific avenue. If it be true that in 1900, when this fast land had so wasted away that only about 300 feet of the 1,500 remained, the state became the owner, not merely while it remained under water, but "absolutely," of the land so submerged, and, while such owner granted the submerged bed of New Hamp-

shire avenue in 1900 to the predecessor in title of the defendants in this case, it is difficult to see just how the public has regained its rights in the portion (now about 600 feet in length and continually increasing) of such bed so granted, which has now been restored by the recession of the ocean, and is used and improved as a public street.

But however that might be, and returning to the question of whether there is involved in this case a conflict between the accretion rights of an owner of the shore and rights under a state riparian grant to an independent grantee of land in front of such shore, no one pretends that in the present case the riparian grant by the state to the defendants' predecessor in title, Bartlett, was intended as or was a grant of any land under water not in front of and adjacent to the grantee's high land at the time the grant was made. It was expressly made to depend upon his ownership of such high land. In other words, it was expressly confined in its limits to the area which in case of natural accretions would become a part of such highland by virtue of the law of accretions according to the location of the high-water line *as it existed at the time of the grant*. *Gould on Waters*, § 163; *Clark v. Campau*, 19 Mich. 327; *Stone v. Boston Steel & Iron Co.*, 14 Allen (96 Mass.) 230. Of course, changes are constantly taking place in the high-water lines and in the direction thereof. A shore which one year was concave in its contour may a year later have become convex. The resultant effect upon lines projected at right angles to it at various points during the process of transition, to determine boundaries between neighboring accretion gains is hopelessly confusing and the consequent state of uncertainty in titles most injurious. A practical working system is necessary for the good of all, and where such a system has been established its fairness must be more than questioned, in fact, must be clearly overthrown, before the courts will feel justified in intervening. Such a working system seems to have been adopted by the riparian commission under its appointment by, and within the discretion vested in it by, the sovereign power of the state. Under this working system it takes the line of general contour of the shore in the vicinity, and, disregarding local or trivial or temporary indentations or excrescences, runs its division lines at right angles, or as nearly at right angles as is equitable under the circumstances, to such general line of contour *at the time it takes up the subject of making riparian grants in such vicinity*, and then subsequently adheres as nearly as possible, or as is equitable, to the general division lines thus established, without regard to the fact that subsequent shifting of angles and locations of the high-water line may have brought about a condition which, if it had existed originally, would have produced different results in the direc-

tions of such division lines. Not only do I fail to see any unfairness in this working system, but, on the contrary, I cannot see how any other could be practical. Where, therefore, as here, the riparian commission has made a grant the bounding division or side lines of which run at right angles, if that is equitable, or, if not, at such angle as, under the circumstances, is equitable, to the general contour of the shore at the time of the plotting or surveying of the vicinity for riparian granting, such lines will, I think, be upheld by the courts as a *practical and legal ascertainment* of the boundary lines of subsequent accretion gains to the adjacent highland should such gains occur. Gould on Waters, §§ 162, 163. This is so, I take it, not because the state, through the riparian grant, has vested in its grantee a title to land under water which survives when the land *by accretions to the adjacent highland* has ceased to be under water, but because the riparian grant, as here made, is by its very authority confined to the land under water in front of the grantee's adjacent highland, viz., to the land which would become his by accretion to such highland should natural accretions occur, and consequently the division boundary lines defined in the grant are an authoritative ascertainment by the granting tribunal of the boundary lines of those accretion gains should they occur. Gould on Waters, § 162.

That this must be so seems to me apparent from the fact that the law under which riparian grants are made secures to the owner of the ripa the first right, during a stated period after notice, to receive a grant for the land under water in front of his highland. Surely if one, owning land fronting on the ocean, in taking out a grant from the state of land under water in front of it, instead of having the side lines of the grant run substantially at right angles to the shore line, should have them run at an angle of 10 degrees with the shore line and in front of the shore land of his neighbor, who had received no notice and opportunity to take out his riparian grant in front of his land, such neighbor would have a perfect right to complain that he had been deprived of the privilege which this law secured to him, and of his common-law right to the natural accretions to his land, without compensation, and, of course, to that extent the grant would be void. I take it, therefore, that now that new fast land has been formed by accretions to defendants' upland, the riparian grant in this case can only lawfully include the portion of such fast land which, under the law of accretions, might properly have become the property of the defendants without such riparian grant.

Whether, under this view, the state's grant to Bartlett is valid in so far as it includes land on the opposite side of New Hampshire

avenue from the location of the grantee's, highland at the time the grant was made is not before the court, because complainant sets up no title thereto except the recent McClees and Leeds' heirs deeds, and these obviously conveyed nothing. If complainants have any title to the locus in quo it must be by virtue of its being an accretion to their highland on the east side of New Hampshire avenue, and the efficacy of such a claim of title would necessarily depend upon whether the owner of the former fast land as it existed in 1853, in then dedicating and opening a public street, New Hampshire avenue, across the same, to and at right angles to the ocean, had so divided his land into two parts and fixed the natural side lines of accretion gains for those parts, respectively, as to have rendered it inequitable for the state to have disregarded the lines so fixed in making its subsequent survey and grant. *Valentine v. Piper*, 22 Pick. (Mass.) 85, 33 Am. Dec. 711. But, as before stated, that question is not, in my judgment, involved in, and is therefore not decided by, this case.

I concur, therefore, in so much of the foregoing opinion as holds that complainants are not entitled to a decree in their favor, because the only title they set up, viz., the recent Leeds' heirs and McClees deeds, has no substance, as the grantors in those deeds had nothing to convey (which I think is the only point involved in this case), but for the reasons herein stated I dissent from so much of that opinion as says (as I think, obiter), without proper qualification, that land "lost by erosion is lost forever," and "becomes the property of the state, not while it remains under water, but absolutely." If these assertions had been pertinent to the issue involved in this case, I take it that the first one, that land "lost by erosion is lost forever," should have been qualified by the insertion after the word "erosion" of the words "and remaining submerged by tide water for 20 years," or words to that effect, and that the second one, that such land "becomes the property of the state, not while it remains under water, but absolutely," should have been qualified by adding thereto what is stated in an earlier part of that opinion, viz., that such ownership is of course subject to invasion by accretions to the adjacent highland, which, should they occur, would belong to the owner of the ripa, unless he had been deprived of the right to them by proper proceedings and upon due compensation.

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VOSS v. DELAWARE, L. & W. R. CO.

(Supreme Court of New Jersey. Feb. 24, 1913.)  
RAILROADS (§ 278\*)—INJURIES TO THIRD PERSONS—TRESPASSERS—ASSUMED RISK.

That plaintiff had been authorized to get coal from defendant's cars did not confer authority for him to obtain coal at night from a car that was on a track where cars were being

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

drilled, and plaintiff, having been thrown from the car under such circumstances and injured, assumed the risk.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 891-900; Dec. Dig. § 278.\*]

Action by Theodore Voss against the Delaware, Lackawanna & Western Railroad Company. On rule to show cause why a verdict in favor of plaintiff should not be set aside. Rule absolute.

Argued November term, 1912, before SWAYZE, VOORHEES, and KALISCH, JJ.

Tennant & Haight, of Jersey City, for plaintiff. Edwards & Smith, of Jersey City, for defendant.

**PER CURIAM.** The verdict for the plaintiff is against the clear weight of the evidence. He is himself the only witness in his own behalf as to the accident. It occurred 16 years before the trial. His delay in bringing the case on is inexplicable. The credibility of his testimony is affected, if not destroyed, by the fact that the important facts to which he testifies were observed by him after he was run over and while he was pinned down by the wheel of the car. His testimony that he saw that the car had been marked by an inspector as having a defective brake while he was in that position and in the condition caused by the accident is quite incredible. It is far more likely to be the result of his imagination dwelling for years on his injury than on his actual recollection.

We think, also, that he fails to show that he was rightfully upon the coal car. Assuming that he had been authorized to get coal from the cars of the company, it does not follow that he was authorized to get it at any hour of the night from a car upon a track upon which cars were then being drilled. In the absence of special circumstances not shown in this case, he assumed the risk of getting coal from a car in that dangerous location. He seems, moreover, to have been guilty of negligence himself in not heeding the warning given, when, if the defendant's witnesses are to be believed, he had time to get off the car before the impact of the other cars.

The rule must be made absolute.

(245 Pa. 535)

**COMMONWEALTH, to Use of STEHLE, v. AMERICAN BONDING CO. et al.**

(Supreme Court of Pennsylvania. May 22, 1914.)

**1. GUARDIAN AND WARD (§ 176\*)—GUARDIAN'S BOND—RELEASE.**

Since an approved guardian's bond is held in trust for all persons interested, it cannot be released, even by the court, without the consent of all parties in interest.

[Ed. Note.—For other cases, see *Guardian and Ward*, Dec. Dig. § 176.\*]

**2. GUARDIAN AND WARD (§ 177\*)—GUARDIAN'S BOND—REDUCTION OF AMOUNT—LIABILITY.**

Where a guardian's bond for \$25,000 was never surrendered, canceled, or changed, and no application was made by the bonding company to have it reduced in amount, the bonding company was liable for the guardian's default in the sum of \$14,000, though the court had granted the guardian's application for a reduction of the bond to \$4,000.

[Ed. Note.—For other cases, see *Guardian and Ward*, Cent. Dig. §§ 607-619; Dec. Dig. § 177.\*]

Appeal from Court of Common Pleas, Blair County.

Action on a guardian's bond, by the Commonwealth, for the use of John H. Stehle, against Matthias Stehle and the American Bonding Company of Baltimore, Md. From a judgment for plaintiff, the Bonding Company appeals. Affirmed.

On July 9, 1906, John H. Stehle, a minor son, over 14 years, of Caroline Stehle, deceased, presented his petition to the orphans' court, praying for the appointment of a guardian, and the court appointed Matthias Stehle; his father, as guardian, and directed said guardian to enter security in the sum of \$25,000. On August 6, 1906, the said guardian presented his bond, with the American Bonding Company of Baltimore, Md., as surety, in the sum of \$25,000, which was approved by the court on said day. On October 1, 1906, the guardian presented his petition to the court, setting forth that only about \$2,000 of personal property would come into his hands, that the balance of the estate of the ward consisted of a one-seventh interest in real estate, and when that was sold the guardian would file a bond in the sum of \$21,000 to secure the forthcoming of that fund, and praying the court to reduce the bond of the guardian to \$4,000. Whereupon the court entered a decree reducing the bond of the guardian from \$25,000 to \$4,000, with leave to the guardian to file a new bond for money realized from the sale of the ward's interest in the real estate. The guardian filed a first and final account showing a balance in his hands of \$14,398.76, which account was confirmed absolutely on January 8, 1913. The guardian having failed to pay over said amount to the ward after demand, the ward instituted an action upon the bond against the guardian and his surety. The guardian made no defense, and judgment was taken against him for the amount of plaintiff's claim. The American Bonding Company filed an affidavit of defense, admitting liability in the sum of \$4,000, but denying liability for the balance of plaintiff's claim. Upon the trial the court gave binding instructions for plaintiff, and the jury accordingly found a verdict against the defendant in the sum of \$14,916.70. The American Bonding Company, defendant, made a motion for judgment non obstante veredicto, which



was overruled by the court, and judgment was entered upon the verdict.

Argued before FELL, C. J., and BROWN, ELKIN, STEWART, and MOSCHZIS-KER, JJ.

R. A. Henderson, of Altoona, for appellant.  
J. F. Sullivan and J. Austin Sullivan, both of Altoona, for appellee.

ELKIN, J. [1] From no point of view can we regard this appeal as having any merit. A bond given by a guardian and approved by the court shall be deemed to be held in trust for all persons interested. Newcomer's Appeal, 48 Pa. 43. Even the court has no authority to release the bond without the consent of all parties in interest. Com. v. Rogers, 53 Pa. 470. The judgment of the learned court below might very well be rested on the authority of the two cases just cited. The case at bar cannot be distinguished in principle from those cases, nor should it be, because the doctrine there announced is an aid to the wholesome administration of the law where trust estates are involved.

[2] In the present case the bonding company became surety on the bond of the guardian in the penal sum of \$25,000, and this is the bond upon which suit was brought. The bond as executed was never surrendered or canceled by the court, nor changed by the parties in interest. The bond itself remains just the same as it was at the time it was signed by the surety. The bonding company never made any application to the court, either to have the bond released or reduced in amount, nor did it ask at any time that the guardian be required to give additional security. Under these facts it is difficult to see how the bonding company is in position to ask that it be released from a considerable part of its liability as surety on the ground that the guardian did some act to relieve it from its voluntary obligation. The guardian did make application to court to have the amount of the bond reduced, on the ground that it was larger than necessary to protect the personal estate; but in this he was clearly mistaken and must have misled the court. There is no doubt that the will worked a conversion of the real estate and that the entire estate which belonged to the ward must be regarded as personalty. The amount of the original bond was fixed upon this basis, and the bonding company undertook to insure a faithful accounting by the guardian of the entire trust estate. All that is demanded now, and this is what the learned court below held, is that the surety be made answerable according to its undertaking. What the court did by way of attempting to reduce the bond at the instance of the guardian, and without the consent of other interested parties, must be regarded as having been improvidently done under the authority of the cases above cited. We are not consid-

ering a case in which the original bond was canceled and surrendered, and a new security taken, with the consent of all interested parties and the approval of the court. Nothing done in the present case was sufficient to relieve the surety on the original bond, which is still in full force and effect, from the whole or any part of its obligation.

Judgment affirmed.

(245 Pa. 529)

#### IN RE CHRISTY'S ESTATE

(Supreme Court of Pennsylvania. May 22, 1914.)

#### 1. WILLS (§ 506\*)—CONSTRUCTION—"HEIRS"— —"HEIRS OF THE BODY."

The words "heirs" or "heirs of the body" will be presumed to have been used in a will as words of limitation of the estate, not as words of purchase, and to refer to quantity of estate and descent, not to individuals.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1090-1099; Dec. Dig. § 506.\*

For other definitions, see Words and Phrases, First and Second Series, Heirs, Heirs of the Body.]

#### 2. WILLS (§ 607\*)—CONSTRUCTION—RULE IN SHELLEY'S CASE.

Under a will devising the proceeds of certain real estate to testator's son for life and directing that after his death it should go to his heirs unincumbered by any debts of his except for developing mines, and providing that, "If my son \* \* \* should die without heirs, I leave my sister \* \* \* the one-fourth of my estate \* \* \* the other three-fourths to my brothers, \* \* \*" the son took an estate in fee tail under the rule in Shelley's Case which, by the act of April 27, 1855 (P. L. 368), was converted into an estate in fee simple; the use of the word "heirs" implying that the testator meant a class of heirs not including his sisters and brothers.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1368-1371; Dec. Dig. § 607.\*]

#### Appeal from Superior Court.

In the matter of the estate of John T. Christy, deceased. From a decree of the Superior Court affirming a decree of the orphans' court dismissing an exception to the auditor's report, Francis J. Christy and others appeal. Affirmed.

Porter, J., in the Superior Court filed the following opinion:

[1] "This appeal is from a decree of the court below making distribution of a fund consisting of the royalties accruing under certain leases for mining coal upon lands in Cambria county, of which John T. Christy died seised. The question we have to decide is one of title to the land, the nature of the estate which Francis M. Christy acquired under the will of his father, the testator. The testator, by his will, first made provision for his wife, Mary A. J. Christy, by devising to her certain property in fee, and then devised to her a life estate in the residue of his property, which included the tract in question, by a clause in the words following, viz.: 'And the one-third of all the rents and income of my estate, as long as she remains my widow. \* \* \* If Francis, my son, should die before marriage his mother shall be his heir during her widowhood.' The testator then proceeded to make provision for Francis, his only son, by devising to him certain real estate in

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

fee to be presently enjoyed, and following these devise come the clauses of the will which are material to the consideration of this case, being the only clauses of the will making disposition of the Cambria county lands after the death or remarriage of Mary A. J. Christy, the widow. This devise was in the following words: 'He shall have the two-thirds of all my lands in Gallitzin Township, Cambria Co., the income of rent liens during his mother's widowhood. After he shall have all the proceeds during his lifetime. After his death it shall go to his heirs free and unincumbered by any debts of his except for developing mines, etc.— If my son Francis should die without heirs I leave my sister Sarah Inlow the one-fourth of my estate (her husband nothing). The other three-fourths to my brothers and their heirs, except Josiah's daughter Elizabeth shall have no interest. The heirs of Mrs. Agnes Burk, deca, and Mrs. Lucy Ann Riffe shall not inherit any part of my estate.' This will was executed and the testator died long prior to the approval of the act of July 9, 1897 (P. L. 213), and that statute can have no effect upon its construction. Mary A. J. Christy, the widow of testator, died on September 26, 1905. Francis M. Christy, the son, married during the lifetime of the widow, and, having survived her, died on January 30, 1910, without issue. He, by his last will and testament, since duly probated, devised the lands in question to his widow, Mary R. Christy, the appellee. The fund for distribution has accrued as royalties from the mining operations conducted since the death of Francis M. Christy. If Francis M. Christy took an estate in fee in the lands, under the will of his father, the appellee is entitled to receive the royalties in question; if, on the contrary, he took but a life estate, then the appellants are entitled to take, under the devise over to the sister and brothers of testator.

[2] "Francis M. Christy having not only married but outlived the widow of the testator, the contingency upon which the widow was to take, during her widowhood, the share of the estate devised to Francis never happened; that devise fell. We have therefore only to consider the clauses of the will disposing of the remainder after the termination of the particular estate which testator created in order to make provision for his widow during her widowhood. There can be no doubt, under the provisions of the will, that the intention of the testator was that the land should go, after the death of the widow, to Francis during his lifetime, and that the remainder, after the life estate of Francis, should 'go to his heirs free and unincumbered by any debts of his except for developing mines.' The devise over, 'If my son Francis should die without heirs,' is to the sister and brothers of the testator and their heirs. This language clearly implies that he did not intend his sister and brothers, or their heirs, to take, unless those whom he calls the heirs of his son should fail, and as the devise over, after failure of heirs of his son, is to his own sister and brothers and their heirs, he must necessarily have meant a class of heirs amongst whom his own sister and brothers could not have been enumerated, for otherwise he would be making a gift over which could not take effect until after the extinction of the persons to whom it would have been given. This being so, it is well settled that the proper construction of the will is to take the word 'heirs' to mean 'heirs of the body.' Doeblers Appeal, 64 Pa. 9; Bassett v. Hawk, 118 Pa. 94, 11 Atl. 802. The language of the testator can only be construed to mean that he intended to vest a life estate in Francis, and that the remainder should go to the heirs of Francis; that is, the heirs of his body. The words 'heirs' or 'heirs of the body,' are words of limitation of the estate, and not

words of purchase. To those words the law attaches a definite meaning. When used by a testator, the law presumes that he used them in their legal sense; that he intended not individuals, but quantity of estate, and descent. Whenever they are employed, therefore, the burden is thrown upon him who contends that they are words of purchase, to rebut that presumption, and to show that they were used in the particular grant or devise to designate persons. The intent not to use the words in their legal sense must be unequivocal, and must be gathered from the language of the grant or devise. Doeblers Appeal, 64 Pa. 9; Guthrie's Appeal, 37 Pa. 9; Graham v. Abbott, 208 Pa. 68, 57 Atl. 178; Arnold v. Muhlenberg College, 227 Pa. 321, 76 Atl. 30; Hastings v. Engle, 217 Pa. 419, 66 Atl. 761; Shapley v. Diehl, 203 Pa. 566, 53 Atl. 374; Roth v. Cohn, 236 Pa. 534, 84 Atl. 904. There is nothing in this will to warrant the construction that it was the intention of the testator that those who were to take the remainder were to take otherwise than as heirs of the body of the life tenant. Under all our numerous authorities the life estate of Francis was, by force of the rule in Shelley's Case, enlarged into an estate entail, which, by operation of the act of April 27, 1855 (P. L. 868), was converted into a fee-simple estate. This was the conclusion reached by the court below, and the specifications of error must be overruled.

"The decree of the court below is affirmed and the appeal dismissed at cost of the appellants."

Before FELL, O. J., and BROWN, POTTER, ELKIN, and STEWART, JJ.

D. B. Dufton, R. Edgar Leahey, and Albert W. Stenger, all of Johnstown, for appellants. W. L. Pascoe, of Tyrone, for appellee.

PER CURIAM. The decree of the Superior Court is affirmed at the cost of the appellant on the opinion of Judge Porter.

(245 Pa. 585)

#### SIMON v. MAJESTIC APARTMENT HOUSE CO.

(Supreme Court of Pennsylvania. May 22, 1914.)

#### MORTGAGES (§ 465½\*)—JUDGMENT—PRIORITIES—DETERMINATION OF—TEMPORARY INJUNCTION—APPEAL.

The granting, in a mortgage foreclosure suit, of a preliminary injunction to restrain the enforcement of judgments against mortgaged property, pending the determination of the question of priority between the judgments and mortgage, could not be disturbed on appeal, where it appeared that the judgment creditor was deprived of none of his rights, and was fully protected therein by an injunction bond.

[Ed. Note.—For other cases, see Mortgages, Dec. Dig. § 465½.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Bill by the Real Estate Trust Company of Philadelphia, trustee, against C. Herbert Simon and another, to foreclose a corporation mortgage and to restrain execution under judgments alleged to be subsequent to the mortgage. From a decree awarding a preliminary injunction, Simon appeals. Affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

At the hearing of the motion it appeared that the Majestic Apartment House Company was incorporated for the purpose of purchasing land and building thereon an apartment house and hotel and conducting a general apartment house and hotel business.

The property of the company was subject to two mortgages, the first to the Real Estate Trust Company of Philadelphia, trustee, to secure the company's \$1,000,000 bond issue of March 20, 1910, and the second executed on January 25, 1909, to the Security Trust Company of Camden, N. J. to secure its second bond issue of \$500,000 of January 25, 1909, and conveying the same property conveyed in the first mortgage, and subject to the lien of the first mortgage.

On December 13, 1913, C. Herbert Simon obtained a judgment against the company for the sum of \$9,625.82, and on the same day issued an execution directed to the sheriff of Philadelphia county, to levy on the stock, fixtures, and household furniture of the hotel and apartment house, and on December 15, 1913, Joseph R. Wainright secured a judgment against the company for \$15,220, and caused execution to be issued, which was levied upon the same property. It was contended by the execution creditors that the mortgage did not cover the personal property and fixtures of the company.

On January 14, 1914, on application of a stockholder of the company, the court appointed receivers, who were operating the apartment house and hotel. Subsequently, on February 17, 1914, the court directed the trustee to institute foreclosure proceedings on the first mortgage. The trustee filed the foreclosure bill on March 10, 1914, and averred, *inter alia*, that the execution judgment creditors above mentioned claimed that the furniture and fixtures in said hotel property were not covered by the mortgages, and prayed that an injunction be granted restraining such creditors from proceeding further with their execution. The court entered the following decree:

And now, to wit, May 11, 1914, upon consideration of the bills for restraining orders filed in the above-entitled causes by the Real Estate Trust Company of Philadelphia, trustee, etc., praying *inter alia* that C. Herbert Simon and the sheriff of Philadelphia county should be restrained as to the execution levied upon certain personal property of the Majestic Apartment House Company, in the cause entitled "C. Herbert Simon v. Majestic Apartment House Co., C. P. No. 2, September term, 1913, No. 3536," and after due hearing in open court by this court in conjunction with the president judge of the court of common pleas No. 2, and at the conclusion of such hearing, by consent of counsel, the said cause, entitled in the court of common pleas No. 2, as above, was transferred to this court to the cause of the first of the above-entitled numbers, it is ordered that C. Herbert Simon and A. Lincoln Acker, high sheriff of Philadelphia county, be, and they hereby

are, restrained from proceeding further to execution under the writ of *fiery facias* issued under the judgment in the cause entitled "C. Herbert Simon v. Majestic Apartment House Co., C. P. No. 2, September term, 1913, No. 3536," which was levied upon the stock, fixtures, and household furniture and contents of the Majestic Apartment House Company, and more particularly from proceeding further with the sale of such property advertised to take place upon May 13, 1914; and that such writ shall be retained in the hands of such sheriff as unreturned until the final disposition of the fund realized by the sale of said property so levied upon at the hands of the Real Estate Trust Company of Philadelphia, trustee, etc., under its above-entitled foreclosure bill, as set forth in said bill, such lien upon said property so levied upon as the said C. Herbert Simon acquired by virtue of said levy to be maintained and relegated and attached to the fund to be produced by the trustee's sale aforesaid, the decision of all questions of rights in said fund priority, and order of lien and awards thereunder, to be decided at the time of the distribution of such fund, the proceeds of the property levied upon under said writ to be earmarked in the hands of such trustee, and to be distributed as a separate fund, representing in all respects, as to rights of participation therein, the property itself, as though the liens thereon had not been discharged by the sale.

This order to be conditioned upon the Fidelity Title & Trust Company of Pittsburgh, the holder of all the bonds of the Majestic Apartment House Company, secured by the mortgage to the Real Estate Trust Company of Philadelphia, trustee, stipulating and agreeing of record in this cause that it will bid, or cause to be bid, at the sale by such trustee as aforesaid, under the decree of foreclosure, of such property so levied upon, a sum of at least \$30,000, and upon entering the usual injunction bond in the sum of \$12,000.

Argued before FELL, C. J., and BROWN, POTTER, ELKIN, and MOSCHZISKER, JJ.

Walter Biddle Saul, of Philadelphia, for appellant. Joseph de F. Junkin, of Philadelphia, for appellee Real Estate Trust Co.

**PER CURIAM.** The decree appealed from was made in the exercise of the chancery powers of the court. It does not deprive the appellant of his right to have his execution satisfied out of the proceeds of the sale of the personal property of the Majestic Apartment House Company, if he has such right. The bond given by the Fidelity Title & Trust Company insures the payment for said property of a sum largely in excess of what will be required to pay the appellant, if he has the preference which he claims. Whether he has such preference can be determined by the court after due consideration upon final hearing or on distribution of the proceeds of sale made by the receiver.

We have not been persuaded that we should depart from the rule as to noninterference with preliminary injunctions, and the appeal is dismissed without prejudice to any rights of the appellant; the cost to be disposed of on final hearing.

(245 Pa. 567)

**McLENNAN v. PUBLIC UTILITIES  
CONST. CO.**(Supreme Court of Pennsylvania. May 22,  
1914.)**GARNISHMENT (§ 87\*)—FOREIGN ATTACHMENT—  
SUFFICIENCY OF AFFIDAVIT.**

An affidavit to the cause of action in foreign judgment proceedings was insufficient, where it was not positive but concluded with the words "all of which facts are true to the best of deponent's knowledge and belief."

[Ed. Note.—For other cases, see Garnishment, Cent.Dig. §§ 156-159, 163-166; Dec.Dig. § 87.\*]

Appeal from Court of Common Pleas, Erie County.

Rule by D. McLennan against the Public Utilities Construction Company, a corporation, to show cause why a foreign attachment should not be dissolved. From a judgment making the rule absolute, plaintiff appeals. Affirmed.

The affidavit to the cause of action concluded, "All of which facts are true to the best of deponent's knowledge and belief." The plaintiff filed an amended statement of demand and an affidavit thereto which had the same conclusion as the affidavit to the original statement. The court made absolute the rule to dissolve the attachment.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Clark Olds, of Erie, for appellant. Frank Gunnison, of Erie, for appellee.

**PER CURIAM.** The rule to show cause why the foreign attachment issued in this case should not be dissolved was made absolute for the reason that the affidavits to the cause of action were not positive. As early as 1789 it was decided in *Miltenerberger v. Lloyd*, 2 Dall. 79, 1 L. Ed. 297, that foreign attachments would be dissolved, if under the same circumstances, in the case of a *capias*, common bail would be ordered. In *Jacoby v. Gogell*, 5 Serg. & R. 450, it was held that it was not sufficient for a plaintiff in a foreign attachment to swear to facts from which a jury might or might not infer a contract, and that the oath must be positive as to the making of the contract or to facts from which a contract would be necessarily implied. In *Hallowell v. Tenney Canning Co.*, 16 Pa. Super. Ct. 60, it was said by Rice, P. J., that:

"Upon a rule to show cause of action, a positive affidavit must be filed, such as would, if false, subject the affiant to indictment for perjury; therefore the plaintiffs' unsworn statement of claim will not be looked to by the court to supply fatal omissions from the affidavit."

Whether a supplemental affidavit should be considered by the court, on the hearing of a rule to show cause of action, it is unnecessary to consider, since the one offered was no more positive than the original. The

averment in each, as to the cause of action, was to the truth of the facts set forth "to the best of deponent's knowledge and belief."

The order appealed from is affirmed.

(245 Pa. 568)

**In re HERSPERGER'S ESTATE.**(Supreme Court of Pennsylvania. May 22,  
1914.)**1. WILLS (§ 55\*)—ISSUE DEVISAVIT VEL NON  
—TESTAMENTARY CAPACITY—SUFFICIENCY  
OF EVIDENCE.**

Evidence, on an issue of devisavit vel non, held to show that testator possessed testamentary capacity at the time of the execution of the will.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-153, 161; Dec. Dig. § 55.\*]

**2. WILLS (§ 111\*)—EXECUTION—SUFFICIENCY.**

Where testator, on account of physical weakness and being confined to his bed and not having a pen with which he was familiar, was unable to write his name legibly, and at his attorney's suggestion made his mark, after which the will was witnessed by the attorney and two other witnesses, the execution was sufficient.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 267-275; Dec. Dig. § 111.\*]

Appeal from Orphans' Court, Erie County.

In the matter of the estate of Amand Hersperger, deceased. From a decree refusing issue devisavit vel non, and dismissing an appeal from probate of will, Joseph Hersperger appeals. Affirmed.

Walling, P. J., filed the following opinion in the orphans' court:

The will of Amand Hersperger was regularly proved and admitted to probate by the register of Erie county, and from that decree one of the sons of the said Hersperger has brought appeal to this court and asked for an issue. The principal question raised is as to the testamentary capacity of Amand Hersperger at the time of the execution of the alleged will.

[1] We have carefully read and considered all the testimony offered upon that question, and we are clearly satisfied that he was competent to make the will in question. There is a presumption of competency, which is supported by the clear and satisfactory evidence of the attorney who prepared the will, and who was well acquainted with Mr. Hersperger, had long been his legal adviser, and conversed with him freely and fully in his own language. From the clear and satisfactory account of the transaction given by the attorney, who had exceptional opportunities for knowing the mental condition and ability of the testator, we are fully satisfied of his testamentary capacity. Mr. Curtze has had large experience in the preparation of wills, and is of such high standing at our bar that we necessarily give to his testimony much weight. His testimony is also corroborated by that of Father Bender, the spiritual adviser of Mr. Hersperger, and who saw and conversed with him, as we recall the testimony, twice each day during his sickness, and also by the testimony of the attending physician, Dr. Weibel, who saw and conversed with Mr. Hersperger twice a day during such sickness. These three witnesses are entirely disinterested. They are corroborated, however, by the testator's two daughters, who attended upon him during his last sickness, but who are of course interested in the result of this case.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Mr. Hersperger was taken sick on Sunday morning, with what is called senile pneumonia, and died on Thursday morning. On the advice of Father Bender, he sent for Mr. Curtze on Monday and then gave details as to the preparation of the will. Mr. Curtze returned with the will on Tuesday, and it was then executed. Now all the evidence for proponents is to the effect that, up until Wednesday afternoon or evening, Mr. Hersperger was in his right mind, and that thereafter he became delirious and died, as above stated, on Thursday morning.

On behalf of the contestants we have the testimony of a number of Mr. Hersperger's children and grandchildren to the effect that they saw him on different days during his last sickness, beginning, perhaps, with Sunday evening, and that he was delirious and irrational and unfit to transact any business. They reached this conclusion largely from the fact that they were in the room with him and he did not converse with them. Some say he failed to recognize them. Some say he raved and showed other evidences of delirium; but, from all the evidence in the case, we are satisfied that their testimony is not reliable. They are all interested, directly or indirectly, in having the will set aside. Their opportunities of knowing Mr. Hersperger's mental condition are not very satisfactory. Mr. Hersperger was about 80 years of age, sick in bed, and undoubtedly suffering more or less from the disease, and the witnesses who only saw him casually might easily mistake his moanings for ravings, especially as they had very little, if any, talk with him.

It is a matter of common experience that men in sickness do not all act alike. Some sick men do not wish to talk or be talked to, and Mr. Hersperger's disinclination to talk with some of his children and grandchildren during his sickness may be more the result of an inclination not to talk than evidence of mental unsoundness. Some importance is attached to his alleged repeated statements that he wished to get out of bed. Perhaps he did, and, in any event, too much importance should not be attached to what he said as to that.

As to whether or not a man is delirious is a matter of opinion; but, supposing all the witnesses on both sides are entirely candid, then it appears that notwithstanding the show of delirium, as testified to by the contestants' witnesses, he still was of sound mind, had a clear conception of his property, how he wished to dispose of it, and was fully competent to make and did make a valid will. Having considered all the evidence, it is so strongly in favor of his competency that a verdict against the will could not be sustained, and an issue should not be awarded.

[2] On account of physical weakness, of being in bed, and of not having a pen with which he was familiar, the testator seemed to be unable to write his name legibly, and therefore, at the suggestion of the attorney, made his mark. The will was witnessed by the attorney and by two other citizens who speak the German language, all three of whom made due proof of the execution of the will before the register. When their testimony was taken on this rule, the two witnesses, aside from the attorney, failed to remember all of the matters necessary to a proper execution of the will, but as to that the testimony of the attorney is full and satisfactory, and there is other testimony tending to sustain the testimony of the subscribing witnesses, and we believe that, taking all the testimony, it clearly shows a due execution of the will; and as to that we believe the case is ruled in favor of the proponents by the case of Rice's Estate, 173 Pa. 298, 33 Atl. 1100. There is no evidence whatever of undue influence or of any improper conduct on behalf of the principal beneficiaries, and, on the whole case, we are

clearly satisfied that an issue should not be ordered.

And now, July 14, 1913, the rule for an issue in the above case be and the same is hereby refused, and the appeal of Joseph Hersperger from the probate of said will by the register in above case is hereby dismissed, at his costs.

The court refused the rule for an issue devisavit vel non and dismissed appeal from the probate of the will by the register. Joseph Hersperger appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Charles A. Mertens and P. D. Hyner, both of Erie, for appellant. O. L. Baker, of Erie, for appellees.

PER CURIAM. The order appealed from is affirmed on the opinion of Judge Walling.

(245 Pa. 580)

#### In re DOWNER'S ESTATE.

##### Appeal of JOHNSON.

(Supreme Court of Pennsylvania. May 22, 1914.)

#### CONVERSION (§ 16\*)—DIRECTIONS IN WILL.

A will which, after a specific bequest, appointed an executor "with power to sell as he may think best any realty of which I may die seized, to execute deeds therefor, and to make distribution of the proceeds thereof as personalty, and of all personalty of which I may die possessed, to those legally entitled thereto according to the intestate laws of the state of Pennsylvania," worked an equitable conversion into personalty of all of testatrix's realty.

[Ed. Note.—For other cases, see Conversion, Cent. Dig. §§ 38-40, 42, 43; Dec. Dig. § 16.\*]

Appeal from Orphans' Court, Fayette County.

Adjudication of the Estate of Caroline A. Downer, deceased. From a decree dismissing exceptions to the adjudication, David D. Johnson appeals. Affirmed.

From the record it appeared that Caroline A. Downer died, leaving the following will:

"I, Caroline A. Downer, of Uniontown, Fayette county, Pennsylvania, hereby make my last will and testament: First: I direct my executor, hereinafter named, securely to invest the sum of fifteen hundred (\$1500.00) dollars out of my estate, the interest thereof to be used to keep in repair the family cemetery lot in Oak Grove Cemetery, Uniontown, Pennsylvania, and to keep in proper repair the tomb stones thereon. Second: I appoint David D. Johnson of Uniontown, Pennsylvania, executor hereof, without bond, and with power to sell as he may think best any realty of which I may die seized, to execute deeds therefor, and to make distribution of the proceeds thereof as personalty, and of all personalty of which I may die possessed, to those legally entitled thereto according to the intestate laws of the state of Pennsylvania. In witness whereof, I have hereunto set my hand and seal, this 15th day of January, 1910, Caroline A. Downer. [Seal.]"

Testatrix left surviving her 9 first cousins of the blood of her father and 15 other first cousins of the blood of her mother. The controversy in this case arose over the distribution of the net proceeds of the sale of

certain real estate, title to which testatrix held by descent from her father and from certain of her brothers and sisters in such manner that it retained its character as ancestral property, which, in case of intestacy, would have descended to the heirs who were of the blood of testatrix's father. The auditing judge held that the will worked a conversion into personalty of the entire real estate and awarded the fund to the 24 first cousins in equal shares. The nine first cousins *ex parte* paterna, of whom the appellant, David D. Johnson, was one, filed exceptions to the adjudication, claiming the whole fund as real estate. The court dismissed the exceptions.

Argued before BROWN, MESTREZAT, POTTER, ELKIN, and STEWART, JJ.

W. J. Sturgis, Charles A. Tuit, and Lee Smith, all of Uniontown, for appellant. D. M. Hertzog, of Uniontown, for appellees.

**PER CURIAM.** The clearly expressed intention of the testatrix is that her entire estate is to be distributed as personalty. After authorizing her executor to sell any real estate of which she may die seised, her explicit direction is that the proceeds of the sale of the same shall be distributed as personalty "to those legally entitled thereto according to the intestate laws of the state of Pennsylvania." The learned court below correctly held that "all of the essentials of an equitable conversion are set forth in this will."

Decree affirmed, at appellant's costs.

(245 Pa. 583)

**BUDNAR v. MINERAL R. & MINING CO.**

(Supreme Court of Pennsylvania. May 22, 1914.)

**MASTER AND SERVANT (§ 239\*)—DEATH OF SERVANT—CONTRIBUTORY NEGLIGENCE.**

Where a coal mine employé was killed from walking beneath a descending elevator when it was but three or four feet above him, at a place which was well lighted and with which he was familiar, he was guilty of contributory negligence, barring recovery for his death.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 749, 750; Dec. Dig. § 239.\*]

Appeal from Court of Common Pleas, Northumberland County.

Trespass by Annie Budnar against the Mineral Railroad & Mining Company, for death of plaintiff's husband. From an order refusing to take off nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and MOSCHZISKER, JJ.

W. H. Unger and A. L. Snyder, both of Shamokin, for appellant. W. H. M. Oram, of Shamokin, for appellee.

**BROWN, J.** Appellant's husband was a miner in the employ of the appellee, which owned and operated a coal mine in Northumberland county, this state. The defendant company had two cages at the mine for letting down and bringing up men working in it, for hoisting coal, and for lowering empty cars. These cages were so operated that, when one of them ascended to the mouth of the mine, the other descended to the bottom of the shaft. In going into the mine on the morning of July 12, 1912, the appellant's husband descended in the south cage, coming out of it on the east side. A little while afterwards he lighted his lamp and started apparently for his work, when he was crushed to death by the descent of the north cage upon him. In this action, brought by his widow, the court below directed a nonsuit, on the ground of the contributory negligence of her husband, and, from the refusal to take it off, she has appealed.

Any presumption that the deceased had been exercising due care when the cage descended upon him was so clearly overcome by the testimony of three coemployés that the trial judge was constrained to hold there could be no recovery. These three witnesses were with the deceased at the bottom of the shaft at the time he was killed. It was well lighted, one of the witnesses testifying "there was enough lights there to see plainly all around"; and the deceased was thoroughly familiar with the situation and all its surroundings, having worked there every day for the six preceding weeks. While two of the witnesses did not see the cage descending upon him, and were therefore not able to tell just how the accident happened, the third, who saw it, clearly and unmistakably describes just how the unfortunate death occurred. His testimony was that the deceased, after lighting his lamp, went directly towards the cage and walked right into the sump, a slight depression at the foot of the shaft, under the cage, and that, when he got under the cage, it was descending upon him but four or five feet above him. Under this testimony, the contributory negligence of the deceased was not a question of fact for the jury, but a necessary legal conclusion, from which the court could not escape. The very instant the deceased stepped into the sump the consequences of his negligence were brought home to him. *McDonald v. Iron & Coal Co.*, 135 Pa. 1, 19 Atl. 797. Further discussion is unnecessary.

Judgment affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

(112 Me. 214)

## STATE v. LITTLEFIELD.

(Supreme Judicial Court of Maine. Oct. 5, 1914.)

## 1. COMMERCE (§ 40\*) — HAWKERS AND PEDDLERS (§ 3\*)—INTERSTATE COMMERCE—WHAT CONSTITUTES—LICENSES.

Accused, a local merchant, took orders in an adjoining town for the delivery of goods with the understanding that the orders were to be filled by persons outside of the state. Thereafter a large shipment was made to accused, who sorted out the goods required to fill the orders and reshipped them to the adjoining town. *Held*, that he was engaged in interstate commerce and was not an itinerant dealer or peddler required by Rev. St. c. 45, § 1, to procure a license.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. §§ 29, 30; Dec. Dig. § 40; \*Hawkers and Peddlers, Cent. Dig. §§ 3-6; Dec. Dig. § 3.\*]

## 2. HAWKERS AND PEDDLERS (§ 3\*)—WHO ARE —"ITINERANT VENDOR"—"BUSINESS."

Where accused, a general storekeeper, after taking orders from residents of an adjoining town to be filled without the state, shipped the goods, which had been consigned to him, with others, to the place of sale for delivery, and some of the purchasers repudiated their orders, accused thereupon selling the uncalled for goods from the car in which they were carried, he was not an itinerant vendor, within Rev. St. c. 45, § 15, declaring that an itinerant vendor is a person engaged in transient business either in one locality or in traveling from place to place selling goods, and who, for the purpose of carrying on such business, sells goods at retail from a car, for the term "business" signifies employment, and accused was not employed in the business of selling small quantities of goods from the car.

[Ed. Note.—For other cases, see Hawkers and Peddlers, Cent. Dig. §§ 3-6; Dec. Dig. § 3.\*]

For other definitions, see Words and Phrases, First and Second Series, Business, Itinerant Vendor.]

Report from Supreme Judicial Court, York County, at Law.

John G. Littlefield was charged with doing business as an itinerant vendor without having procured the license required by law. On report. Judgment for defendant.

Argued before SAVAGE, C. J., and SPEAR, KING, HALEY, HANSON, and PHILBROOK, JJ.

Hiram Willard, Co. Atty., of Sanford, for the State. Cleaves, Waterhouse & Emery, of Biddeford, for respondent.

HALEY, J. This is a complaint and warrant against the defendant for conducting business as an itinerant vendor in the town of York in the county of York, by selling from a car, at retail, goods, wares, and merchandise, without having procured the licenses required by chapter 45 of the Revised Statutes, and is before this court upon report.

Section 1 of said chapter reads as follows:

"Every itinerant vendor who shall sell or expose for sale, at public or private sale, any goods, wares and merchandise without state

and local licenses therefor, issued as hereinafter provided, shall be punished for each offense.

Section 15 of the same chapter defines the words "itinerant vendor" as follows:

"The words 'itinerant vendors' for the purposes of this chapter shall be construed to mean and include all persons, both principals and agents, who engage in a temporary or transient business in this state, either in one locality or in traveling from place to place selling goods, wares and merchandise, and who, for the purposes of carrying on such business, hire, lease or occupy any building or structure for the exhibition and sale of such goods, wares and merchandise, or who sell goods, wares and merchandise, at retail from a car, steamer or vessel."

The facts are undisputed, and it is agreed that the evidence may be considered an agreed statement of facts.

The defendant, at the time complained of, was a citizen of Wells, an adjoining town to the town of York, in the county of York, and was, and had been for a number of years, engaged in the grocery business at said Wells, and as a part of that business sold at retail and at wholesale flour, grain, sugar, and feed. For a number of years prior to 1913, he had been selling flour, sugar, and feed in car load lots to Mr. Plaisted, a merchant of York, but in the spring of 1913 Mr. Plaisted gave up the handling of those goods, and about six weeks prior to April 1st the defendant went to York and solicited and took orders from residents of that town for grain, flour, sugar, and feed, in quantities to load a freight car, with the understanding that defendant was to send the orders out of the state to be filled. The defendant sent the orders out of the state for goods enough to fill the orders taken in York and other places and for his business at Wells, three or four car loads in all. The goods arrived at Kennebunk on the tracks of the Boston & Maine Railroad, and the defendant sorted out of the goods, those to fill the orders taken in York, placed them all in one car, and forwarded them to York village, some 12 to 15 miles distant, by the Atlantic Shore Line Railway. The goods arrived at York village on April 3d, and the defendant delivered from the car to the parties in York the goods ordered by them, and was paid the price agreed upon, the bills varying from \$50 to \$170 for each party, except that, as the goods did not arrive in York as early as expected, some of the parties who had given orders did not call for the goods, and those goods the defendant sold from the car, selling to one Ralph Merrill two 100-pound bags of sugar, to Gilbert H. Martin two 100-pound bags of sugar and one barrel of flour and two or three bags of grain, and to Charles Blake one 100-pound bag of sugar. The state claims a conviction for two reasons:

First. The delivery from the freight car by the defendant of the goods ordered by the parties who received them; they having

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 91 A.—80

been ordered to be shipped from another state, and having been so shipped and delivered by the defendant.

Second. The sale and delivery to the three persons above named, who purchased the goods ordered by parties who did not call for them.

[1] First. The acts of the defendant in soliciting orders for the goods, and delivering them from the car to the parties ordering them, were not unlawful. The facts upon this branch of the case are practically the same as in *Stewart v. Michigan*, 232 U. S. 665, 34 Sup. Ct. 476, 53 L. Ed. 786, in which case the defendant was convicted in the state court under a statute for doing, without a license, similar acts to the acts done by the defendant in this case, without a license, and it was held on a writ of error that the conviction was error. By the rules of law declared in that case and in *Crenshaw v. Arkansas*, 227 U. S. 389, 33 Sup. Ct. 294, 57 L. Ed. 565, the acts of the defendant were not unlawful. The soliciting of orders for goods to be shipped from another state, their shipment from another state to this state, and the delivery of the goods to the persons who ordered them was interstate commerce, and the state cannot burden interstate commerce by compelling persons engaged in that commerce to pay a special tax for the privilege of engaging in such commerce.

[2] Second. Did the sale, to the three persons above named, of goods that had been ordered by other parties from the defendant to be shipped them from another state, which they did not receive by reason of not having called for them, render the defendant an itinerant vendor, within the provisions of chapter 45? The allegations of the complaint and warrant are in substance that the defendant did engage in a temporary or transient business in York, and did, for the purpose of carrying on such business, sell goods, etc., at retail from a car. The goods were sold from a car, and we must determine what the statute means by the words "temporary or transient business." Section 4 of said chapter provides that every itinerant vendor, desiring to do business in this state, shall make a deposit with the secretary of state and take out a state license. Section 6 provides that every application for a local license shall be signed by the holder of the accompanying state license, and shall specify the kind and line of goods then in stock in such town, with the name of the town in which said goods were last exposed or offered for sale. Such local license fee shall be computed and collected in each town, respectively, in which said goods shall be successively offered or exposed for sale.

The defendant had no line of goods in stock in the town of York. The words "in stock," as used in the statute, mean on hand for sale. All the goods he had on hand in York had been bargained for and sold. They

were in York for the purpose of delivery only. The statute means that, whenever a stock of goods is moved into a town for the purpose of being put upon sale and sold in the town, the owner or person having them in possession for that purpose must obtain the licenses specified by chapter 45 before he engages in the business of selling them. The goods were not in stock for sale. They were not taken to York for sale, but were there to be delivered to the parties who had ordered them, and for whom they had been shipped from another state, and the sale of them, when the persons, on whose orders they had been shipped from another state, did not come for them, was a mere incident of the lawful business of the defendant; that is, the delivery of goods brought into the state by interstate commerce, and not the business of an itinerant vendor.

"Business, in a legislative sense, is that which occupies the time, attention, the labor of men for the purposes of livelihood or for profit, a calling for the purpose of a livelihood." *State v. Boston Club*, 45 La. Ann. 585, 12 South. 895, 20 L. R. A. 186.

Webster: "Business, that which busies, or that which occupies the time, attention, or labor of one as his principal concern, whether for a longer or shorter time; employment; occupation."

Business is the word that signifies and "denotes the employment or occupation in which a person is engaged to procure a living." *Godard v. Chaffee*, 2 Allen (Mass.) 395, 79 Am. Dec. 796.

It is a "synonym of employment, signifying that which occupies the time, attention, and labor of men for the purposes of a livelihood or profit." *Martin v. State*, 59 Ala. 36.

In *Hays v. Commonwealth*, 107 Ky. 658, 55 S. W. 425, the respondent was prosecuted under a statute which prohibited all itinerant persons from vending various articles, and names, among other goods, wares and merchandise. The defendant was a driver of an oil wagon owned by the Standard Oil Company, and the general agent of said company at Lexington had arranged, with customers at Nicholasville, to send an oil tank wagon to their places of business and to deliver them oil in wholesale quantities and at wholesale prices fixed by said company from time to time; that said oil tank should come as often as was necessary to keep said customers supplied for their retail trade; and that the company sent its oil tanks regularly to Nicholasville for said purpose about every five days. The defendant sold and delivered to one Hendron oil, who was not one of the regular customers of said company, and he also sold and delivered to one Klein, at the request of his clerk, who told defendant that his house sold oil; that said arrangement was made with said oil dealers in Nicholasville, because it was more convenient for them to get their oil in this way than to let it come from Lexington from time to time and have it shipped by rail. The above testimony was excluded, and the court said:

"We are clearly of opinion that the court erred in refusing to admit the testimony of-



ferred. Such testimony was competent, and, if believed by the jury, would have entitled the appellant to a verdict of not guilty, for the reason that, if true, it clearly showed that the defendant was not an itinerant person engaged in the selling of oil as a business or occupation. It would hardly be contended that a merchant of Nicholasville, having in charge a load of goods being hauled or shipped from Lexington to Nicholasville, might not on one occasion sell a few articles of goods on the road between the two points without violating the statute under consideration."

And the judgment appealed from was reversed.

The court in the above case said:

"It is undoubtedly true that, in order to constitute a person a peddler, he must not only be an itinerant person, but must be engaged in vending or selling the articles mentioned in the prohibitory statute as a business or occupation. It is not, however, necessary that it should be his sole business, or even his principal business, but it must, nevertheless, be a considerable part of his occupation, business, or vocation."

The acts of the defendant upon this branch of the case, when judged by the above definitions and authorities, do not show that he was engaged in business as an itinerant vendor, within the meaning of chapter 45, R. S. Without deciding whether the sales were at retail or not, it is clear that the acts complained of do not show that he was engaged in the selling of the goods as a business, occupation, or vocation, and the defendant is entitled to judgment, and the mandate must be:

Judgment for defendant.

(112 Me. 220)

#### STATE v. INTOXICATING LIQUORS.

DONDIS v. HURLEY, Judge, et al.

(Supreme Judicial Court of Maine. Oct. 6, 1914.)

#### INTOXICATING LIQUORS (§ 251\*)—SEIZURE—CLAIMS TO SEIZED LIQUORS.

The statute authorizing the owner to make claim for liquors under seizure and secure their release contemplates an appearance by the real owner personally or by a properly authorized representative, and hence the manager of bottling works, in which liquors, when seized, were in storage awaiting the time when, augmented by further orders and collections, they should be shipped to their real owners outside the state, was not entitled to claim the liquors, as he was not such a party in interest as the law contemplated nor a properly authorized agent of such a party.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 889, 890; Dec. Dig. § 251.\*]

Report from Supreme Judicial Court, Knox County, at Law.

Libel by the State against Intoxicating Liquors claimed by Joseph Dondis, appealed from the police court of the city of Rockland, and also a writ of certiorari by Joseph Dondis against William P. Hurley, judge of such court, and another. On report. Appeal dismissed, and writ quashed.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Philip Howard, Co. Atty., of Rockland, for the State. M. A. Johnson, of Rockland, for respondent.

HANSON, J. These cases are before the court on report, and are to be considered together. The first is an appeal from the order of the police court of the city of Rockland condemning certain liquors described in the libel, in which the claimant attacks the validity of the warrant, libel and monition, and the jurisdiction of the court.

The second case is based upon errors claimed to exist in the record below, and the writ was issued upon the assumption that the errors assigned in the petition existed in fact, and that the petitioner was entitled to relief.

The record presents two alleged records of the Rockland police court in a search and seizure process, and a libel and monition growing out of the same. The first record is that of the recorder of that court, who issued the warrant and libel, assuming to act under authority of the act creating that court.

The other record is furnished by the judge of that court, and is inconsistent with, and in some respects a denial of, the truth of the record made by the recorder, and counsel for the claimant relies to a great extent on the record and statements of the judge to sustain his contentions in both cases.

While it is the stated purpose of the report to determine all matters in dispute in these cases, and the desire of the court as well to end litigation, we are confronted at the outset by a serious challenge of the truth of the original record, and the claimant presents, as a true record, copies of a record claimed to have been made by the judge of the same court, which are at variance with the record of his own recorder, and which, we must say, are not without fault, however erroneous the acts or records of the recorder may have been. We are not able, with the report before us, to determine which is the correct record, or if either is valid. An inspection of the original papers, and an examination of the witnesses involved, would be necessary to a complete understanding of the cases, and meet the ends of justice, if injustice has been done.

Without passing further upon the validity of the proceedings, we do find, however, a grave objection to the maintenance of the appeal or the writ of certiorari. The claimant urges his right to maintain both in the following language:

"And now comes Joseph Dondis, of Rockland, in said county, who says that he is the agent and general manager of the Knox County Bottling Works, whose business is that of bottlers of soda, uno beer, and what is known as small beers, all nonintoxicating, at said Rockland, and specifically claims, as said agent and general manager, the right, title, and possession in the items hereinafter named as hav-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

ing, as said agent and general manager, a right to the possession thereof at the time when the same were seized. And the foundation of said claim is that they were collected in from various sources and places in the building of said Knox County Bottling Works for storage, from which they were seized, and that they were to be shipped, when further orders were obtained out of the state, to their real owners thereof, and that in said capacity he had the right to the possession thereof at the time when the same were seized, and that they were taken from his lawful possession on the 29th day of March, 1912, from the frame building, additions thereto, outbuildings and appurtenances thereof occupied by said Knox County Bottling Works as a manufactory and storehouse, stated in the libel as a store, and situate on the north side of Sea street, in said Rockland, by one Frank F. Harding, city marshal of said Rockland, and this claimant declares that they were not so kept or deposited for unlawful sale as is alleged in the libel of said Frank F. Harding and in the monition issued thereon."

The claimant discloses no direct personal interest in the liquors in question. He says he is the manager of the Knox County Bottling Works, and as such manager had the right to possession of the liquors; that the liquors were in storage awaiting the time when, augmented by further orders and collections, they should be shipped to their real owners outside the state.

The statute establishing the right of an owner to make claim for liquors under seizure, and secure their release, contemplated a case where the "real owner" should appear, either personally or by properly authorized representative, and make claim and produce proof sufficient to satisfy the court having jurisdiction of the justice of his claim, and of his lawful possession and ownership in fact.

The claimant in this case does not measure up to the requirements of the statute. *State v. Intoxicating Liquors*, 69 Me. 524. He is not such a party in interest as the law contemplates, nor does he show agency. He cannot prevail in either contention. *Levant v. County Commissioners*, 67 Me. 429; *State v. Intoxicating Liquors (Eastern Steamship Co., Claimant)* 91 Atl. 175 (July 9, 1914).

The entry will therefore be:

Appeal dismissed.

Writ quashed.

(112 Me. 227)

**SOUTHARD v. BANGOR & A. R. CO.**

(Supreme Judicial Court of Maine. Oct. 8, 1914.)

**NEW TRIAL (§ 108\*)—NEWLY DISCOVERED EVIDENCE—ACTION FOR PERSONAL INJURIES.**

Where plaintiff recovered a verdict on testimony that, as a result of his injuries, he was suffering from an incurable disease, was physically wrecked, and was able to do but little, if any, manual labor, newly discovered evidence that soon after the trial he went on a hunting trip, and later engaged in heavy work, and in dancing, being sufficient to render it probable that the verdict would be different on another trial, required the granting of a new trial.

[Ed. Note.—For other cases, see *New Trial*, Cent. Dig. §§ 226, 227; Dec. Dig. § 108.\*]

On Motion from Supreme Judicial Court, Aroostook County, at Law.

Action by Theodore R. Southard against the Bangor & Aroostook Railroad Company. Verdict for plaintiff, and defendant moves for a new trial. New trial granted on the question of damages only.

Argued before SAVAGE, C. J., and BIRD, HALEY, HANSON, and PHILBROOK, JJ.

F. W. Halliday, of Newport, for plaintiff. Stearns & Stearns, of Bangor, Powers & Guild, of Fort Fairfield, and Joseph F. Gould, of Bangor, for defendant.

SAVAGE, C. J. The plaintiff recovered a verdict of \$8,500 against the defendant for personal injuries. The only question submitted to the jury was that of damages, for the defendant admitted liability. The defendant filed a general motion for a new trial, also a motion based on newly discovered evidence.

As to the general motion, we think it only necessary to say that the verdict seems excessive. But we will not undertake now to discuss the question, for we think the motion based on newly discovered evidence should be sustained.

At the trial the vital question was: What was then the plaintiff's physical condition, so far as it had been affected by the acts for which the defendant was responsible? Knowing this, the jury could determine past damages and draw reasonable inferences as to future damages. The claim of the plaintiff, which his testimony tended to support, was that, as a result of his injuries, he was suffering from an incurable disease, that he was physically wrecked, and able to do but little, if any, manual labor.

The newly discovered evidence comes from several witnesses and relates to the acts and doings of the plaintiff after the trial, but nearly related to the time of the trial of such a character that, if this testimony is true, the plaintiff at that time could not have been suffering as he claimed, and could not have been in the physical condition he said he was. Since the evidence must be submitted to a jury, we do not analyze it, but it tends to show that in the very next month after the trial he went into the woods on a hunting trip; that within three or four months after the trial he engaged in heavy work, went to dances, and danced, and did other things indicating that his physical condition was good, and it is strongly contradictory of what the plaintiff claimed at the trial.

That evidence of things happening after the trial may be regarded in some cases as newly discovered is settled in *Mitchell v. Emmons*, 104 Me. 76, 71 Atl. 321. We think the evidence in this case should be regarded as newly discovered. Though it is evidence of acts which did not occur until after the trial, it is evidence of a condition which existed at

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Ref'r Index

the trial, and throws newly discovered light on that condition.

We think that justice requires that the defendant should have an opportunity to submit this evidence to a jury to be considered by them, together with any evidence the plaintiff may have to rebut it, and with such other relevant evidence as may be offered by either party on the question of damages. The evidence brings the case within the condition applicable to the granting of new trials on the ground of newly discovered evidence, namely, that it seems "probable to the court that the verdict will be different when the case is submitted anew with the additional evidence." *Parsons v. Railway*, 96 Me. 503, 52 Atl. 1006.

Motions sustained.

New trial granted on the question of damages only.

(112 Me. 384)

HALL et al. v. HALL.

(Supreme Judicial Court of Maine. Oct. 8, 1914.)

**1. LIMITATION OF ACTIONS (§ 35\*)—ACTIONS FOR PENALTIES.**

An action under Rev. St. c. 97, § 5, providing that a tenant in common, who cuts timber without giving notice to his cotenants, shall forfeit three times the amount of damages, is not a penal action, within Rev. St. c. 83, § 97, limiting the commencement of actions for penalties or forfeitures by an individual to one year, and by the state to two years, since the right of action is given to the injured party only, and the increased damages are incidental to the general right of recovery, notwithstanding the fact that the statute uses the word "forfeit."

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 109, 158-167; Dec. Dig. § 35.\*]

**2. ASSIGNMENTS (§ 120\*)—ACTIONS—PLAINTIFFS—STATUTORY PROVISIONS.**

Rev. St. c. 84, § 146, permitting the assignee of a chose in action to sue in his own name, provided he files a copy of the assignment with the writ, does not prevent the assignee from bringing suit in the assignor's name, as he might do at common law, without filing a copy of the assignment.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 206-209; Dec. Dig. § 120.\*]

**3. TENANCY IN COMMON (§ 38\*)—ACTIONS BETWEEN COTENANTS—GENERAL ISSUE—LIENSE.**

An action under Rev. St. c. 97, § 5, to recover treble damages against a cotenant for cutting timber on the common property, is essentially in the nature of an action of trespass, and the defendant cannot, under plea of the general issue, show permission or license to cut the timber, since a defendant must plead justification or excuse for an act which would otherwise be unlawful.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 100-104, 107-118; Dec. Dig. § 38.\*]

**4. APPEAL AND ERROR (§ 87\*)—REVIEW—DISCRETION OF TRIAL COURT—AMENDMENT OF PLEADING.**

The granting or refusal of leave to defendant to amend his pleadings at the trial, so as to set up a justification by license, is a

matter of discretion, to the exercise of which exceptions do not lie.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 559-569, 577-596; Dec. Dig. § 87.\*]

**5. TENANCY IN COMMON (§ 38\*)—ACTIONS BETWEEN COTENANTS—ADMISSION OF EVIDENCE.**

In an action by a tenant in common to recover for the cutting of timber by a cotenant, testimony by the defendant that he and the plaintiff had hired money for the benefit of the place was properly excluded as irrelevant and immaterial.

[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. §§ 100-104, 107-118; Dec. Dig. § 38.\*]

Exceptions from Supreme Judicial Court, Knox County, at Law.

Action by Fred F. Hall and Newton A. Hall against Albert W. Hall. Verdict for plaintiffs, and defendant excepts. Exceptions overruled.

Argued before SAVAGE, C. J., and BIRD, HALEY, HANSON, and PHILBROOK, JJ.

E. B. Burpee, of Rockland, for plaintiffs. Rodney I. Thompson, of Rockland, for defendant.

SAVAGE, C. J. This cause is brought under R. S. c. 97, § 5, which provides, so far as is necessary to state here, that if a tenant in common of undivided lands cuts down or carries away timber or wood, without first giving 30 days' written notice to his cotenants, he shall forfeit three times the amount of damages; also that any one or more of the cotenants, without naming the others, may sue for and recover their proportion of such damages. Joseph Hall, dying in 1895, left five sons, of whom the plaintiffs are two and the defendant is one. Fred F. Hall was then a minor, and by his father's will was to have a living on the place until he should become 21 years old, which would be on July 1, 1908. The land upon which the cutting was done came, we assume, from their father, and was undivided and owned by them in common. The defendant cut wood and timber on the premises both before and after Fred F. Hall became 21 years old; the latest cutting being in 1910. He gave no written notice as the statute requires. In 1912 Newton A. Hall conveyed his interest in the land, and assigned his claim for the cutting, to his brother, Fred F. Hall. This suit was brought September 15, 1913, in the names of Fred and Newton jointly to recover two-fifths of the damages. The defendant pleaded the general issue and the statute of limitations, nothing else. The trial resulted in a verdict for the plaintiffs, and the case comes up on the defendant's exceptions.

[1] I. The first question presented relates to the statute of limitations. The defendant relies on the special statute (R. S. c. 83, § 97), which provides that:

"Actions and suits for any penalty or forfeiture on a penal statute, brought by a person

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

to whom the penalty or forfeiture is given in whole or in part, shall be commenced within one year after the commission of the offense; and, if no person so prosecutes, it may be recovered by suit, indictment or information, in the name and for the use of the state, at any time within two years after the commission of the offense, and not afterwards."

The contention is that the statute (R. S. c. 97, § 5), under which this action is brought, allowing, as it does, treble damages to the injured cotenants, is a "penal statute," within the meaning of chapter 83, § 97, and that actions under it, if not brought within one year after the doing of the damage, are not maintainable. The presiding justice overruled the contention. We think the ruling was right.

This question has been several times adjudicated by this court, in construing statutes essentially like this one, in that they authorized the recovery of double, treble, or quadruple damages for acts forbidden by statute. In *Palmer v. York Bank*, 18 Me. 166, 36 Am. Dec. 710, the court said:

"As it (the statute then under consideration) gives four times as much damage as is allowed by law for the detention of the other debts, it is certainly penal in its character. But as it is given to the party injured, who seeks the recovery of a just debt, to which these increased damages are made an incident, we are not satisfied that it is to be regarded properly as a penal action."

In *Frohock v. Pattee*, 38 Me. 103, an action under a statute to recover double damages for knowingly aiding a debtor in the fraudulent transfer or concealment of his property, the same special statute of limitations was set up in defense as has been in this case. The court, holding the double damage statute to be remedial and not penal, said that under R. S. 1841, c. 146, §§ 15 and 16, which are now R. S. 1903, c. 83, § 97, being the special statute of limitations invoked in this case, only such statutes were to be considered penal statutes as would authorize the commencement of a suit, indictment, or information in the name and for the use of the state, and that the double damage statute was not such a statute. In *Black v. Mace*, 66 Me. 49, it was held that a statute (R. S. c. 97, § 11) giving treble damages for trespassing upon grass lands was remedial and not penal. *Quimby v. Carter*, 20 Me. 218; *Philbrook v. Handley*, 27 Me. 53; *Thacher v. Jones*, 31 Me. 528; *Reed v. Northfield*, 13 Pick. (Mass.) 94, 23 Am. Dec. 662. A statute giving a right to recover multiplied damages may be remedial or it may be penal, within the meaning of this statute of limitations. If the right of action be given to the injured party, and the increased damages are only incidental to the general right to recover, the statute and action are remedial. And it is immaterial whether the statute says that the injured party may recover, or that the offending party shall forfeit to the injured party; the meaning is the same. But, if the right of action be given to others than the injured party, the statute and action are penal. See

*Cole v. Groves*, 134 Mass. 471; *In re Barker*, 56 Vt. 14. R. S. c. 97, § 5, under which this action was brought, clearly is a remedial statute to which the one-year limitation pleaded does not apply.

[2] II. In the next place, the defendant contended that a recovery could not be had of Newton A. Hall's one-fifth. This contention was overruled, and properly. Newton A. Hall, before suit was brought, assigned his claim to the other plaintiff, and the contention is that a copy of the assignment should have been filed with the writ under the provisions of R. S. c. 84, § 146, which was not done. At common law an assignee of a chose in action was obliged to sue in the name of the assignor. The statute in question permits an assignee to sue in his own name, but provides that in such case he must file with the writ the assignment or a copy thereof. Notwithstanding the statute, an assignee, if he chooses, may still sue in the assignor's name, and, if he does so, he is not required to file a copy of the assignment. *Rogers v. Brown*, 103 Me. 478, 70 Atl. 206.

[3] III. The defendant did not plead justification or license, but he offered to show in evidence that his operations had been in accordance with a mutual understanding between him and the plaintiffs, which would be of course by license or permission. The evidence was excluded on the ground that this defense had not been pleaded. The exclusion was right. The rule is without exception, we think, that when a defendant would justify or excuse an act which is unlawful, unless justified or excused, he must plead the justification. *Daggett v. Adams*, 1 Greenl. 198; *Rawson v. Morse*, 4 Pick. (Mass.) 127; *Ruggles v. Lesure*, 24 Pick. (Mass.) 187; 38 Cyc. 1092. In an action of trespass *quare clausum fregit*, the defendant may show, under the general issue, that he is tenant in common with the plaintiff, because presumably in such case he would have good right of entry. But in the case at bar, which is essentially in the nature of an action of trespass, the statute has limited the rights of tenants in common, and presumably one has not the right to cut wood or timber upon the common land without giving written notice to the others. The act is presumably unlawful. Hence justification must be pleaded.

[4] IV. The defendant at the trial asked leave to amend his pleadings so as to set up a justification by license. The presiding justice declined to allow the amendment. The allowance by the trial court is a matter of discretion, to the exercise of which exceptions do not lie. *Appeal of Clark*, 111 Me. 399, 89 Atl. 245.

[5] V. The defendant was asked by his counsel whether he and his brother Fred, the plaintiff, had hired money for the benefit of the place. The answer was properly excluded as irrelevant and immaterial.

We have examined the other suggestions

made by counsel, but find no merit in them. No error appearing, the entry will be:

Exceptions overruled.

(113 Me. 245)

**INHABITANTS OF TOWN OF FRENCHVILLE v. GAGNON.**

(Supreme Judicial Court of Maine. Oct. 8, 1914.)

**1. DEEDS (§ 155\*) — CONSTRUCTION — CONDITION SUBSEQUENT.**

Courts are reluctant to declare a forfeiture, and will not construe the language in a deed into a condition subsequent, unless the language, construed strictly against the grantor, will admit of no other reasonable interpretation.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. § 155.\*]

**2. DEEDS (§ 155\*) — CONSTRUCTION — CONDITION SUBSEQUENT.**

Even the use of apt words to create a condition subsequent in a deed will not be construed to do so, if the language of the whole instrument shows a contrary intent of the parties.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. § 155.\*]

**3. DEEDS (§ 155\*) — CONSTRUCTION — CONDITION SUBSEQUENT.**

A condition subsequent may be created in a deed without the use of either a forfeiture clause or a clause of re-entry.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 488-495; Dec. Dig. § 155.\*]

**4. DEEDS (§ 145\*) — CONSTRUCTION — CONDITION SUBSEQUENT.**

Where a deed conveyed premises to be used for school purposes, and stated that, in addition to the cash consideration, the conveyance was made "on condition and in consideration of the promise" of the grantee to keep the lot fenced, the language at least leaves it doubtful whether the parties intended to create a condition or a covenant, and the doubt must be resolved in favor of the covenant.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. § 471; Dec. Dig. § 145.\*]

Report from Supreme Judicial Court, Aroostook County, at Law.

Trespass by the Inhabitants of Frenchville against Michael Gagnon. On report from the Supreme Judicial Court. Judgment entered for the plaintiff.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Hersey & Barnes, of Houlton, for plaintiff. Peter O. Keegan, of Van Buren, and Madigan & Pierce, of Houlton, for defendant.

**SAVAGE, C. J.** Trespass quare clausum. The case comes before this court on report, with a stipulation that, if the plaintiff is entitled to recover, the damages shall be assessed at \$20. The premises in question were conveyed by the defendant to the plaintiff town in 1898 for a schoolhouse lot by a warranty deed which contained, between the description and the habendum, the following language:

"In addition to the consideration of \$225 paid by the inhabitants of the town of French-

ville as aforesaid, the above piece or parcel is conveyed on condition and in consideration of promise made by said inhabitants that a good and substantial fence shall be forever maintained by them inclosing the said premises."

The plaintiff contends that the foregoing language should be regarded as a covenant merely, for breach of which an action would lie. On the other hand, the defendant says that it is a condition subsequent. And, acting upon that assumption, in 1912 he entered and took possession of the premises, as for a breach of condition, with the intention of re-vesting title in himself. This constitutes the trespass complained of. Whether the language in the deed constitutes a covenant or a condition, in either event the case shows a breach. It follows that if it be a covenant, and not a condition, the title remains in the plaintiff, even though there has been a breach, and the town is entitled to judgment. On the contrary, if it be a condition subsequent, the title is in the defendant; he committed no trespass; and he must have judgment.

[1-3] Courts are reluctant to declare forfeitures. Conditions subsequent as the basis of forfeiture are not favored in law. This is the rule in this state and everywhere else. *Bray v. Hussey*, 83 Me. 329, 22 Atl. 220. Language in a deed will not be construed into a condition subsequent, unless the terms of the grant will admit of no other reasonable interpretation. The language is to be construed strictly against the grantor. No language will be construed into a condition subsequent, contrary to the intention of the parties, when the intent can be gathered from the whole instrument, read in the light of surrounding conditions. *Wier v. Simmons*, 55 Wis. 637, 13 N. W. 873. The strongest words of condition will not work a forfeiture of the estate, unless they were intended so to operate. *Bragdon v. Blaisdell*, 91 Me. 326, 39 Atl. 1036. Apt words, from which a clear implication arises, are necessary for the creation of a conditional grant, but the use of apt words does not always create a condition. *Bray v. Hussey*, supra. The intention shown by the whole deed controls. Sometimes the use of words, such as "null and void," indicative of an intention of forfeiture, or the insertion of a clause of re-entry, are held conclusive on the question of intention. But a condition subsequent may be created without either a forfeiture clause or clause of re-entry. *Thomas v. Record*, 47 Me. 500, 74 Am. Dec. 500.

[4] In the clause under consideration, the words "on condition" are apt words to create a condition; but the additional words "and in consideration of promise made by said inhabitants" are not. In a deed, they are words appropriate to covenant. When the language in a deed makes it doubtful whether a condition or a covenant be meant, it is always to be construed as a covenant. *Bragdon v. Blaisdell*, supra; *Hoyt v. Kimball*, 49

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

N. H. 322; Woodruff v. Woodruff, 44 N. J. Eq. 349, 16 Atl. 4, 1 L. R. A. 380.

It is sufficient, for the purposes of this case, to say that the language used, if it be not construed strictly as a covenant, leaves it in doubt whether the parties intended to create a condition or a covenant; whether they intended the grantor's remedy for breach should be by forfeiture, whereby the town would lose not only the land, but the school-house, if any, upon it; or whether it should be by ordinary action at law for damages. In accordance with the principles already stated, that doubt must be resolved in favor of a covenant and against a condition, so as to avoid forfeiture.

Judgment for plaintiff for \$20.

(113 Me. 222)

### ROSS v. REYNOLDS.

(Supreme Judicial Court of Maine. Oct. 3, 1914.)

#### 1. FRAUD (§ 12\*)—FRAUDULENT REPRESENTATIONS—PROMISE.

In an action for deceit in the sale of a secondhand automobile, the buyer cannot recover for a breach by the seller of his agreement to overhaul the car and put it in first-class shape.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 14; Dec. Dig. § 12.\*]

#### 2. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—IRRELEVANT TESTIMONY.

Irrelevant testimony if not prejudicial is no ground for reversal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

#### 3. CONTRACTS (§ 28\*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

When the terms of an oral contract are in dispute, the whole conversation concerning the trade and the various negotiations leading up to it are, as a rule, admissible in evidence, though much that is said may not bear directly upon the disputed points.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 133-140, 1755, 1782-1784, 1785½, 1820, 1821; Dec. Dig. § 28.\*]

#### 4. APPEAL AND ERROR (§ 1048\*)—HARMLESS ERROR—QUESTION NOT ANSWERED.

Where the defendant objected to a question asked by the plaintiff for a specific purpose, and the court ruled the evidence admissible for that purpose, an exception to the ruling will not be sustained where the question was not answered and no further question on that line was asked at that time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4140-4145, 4151, 4158-4160; Dec. Dig. § 1048.\*]

#### 5. APPEAL AND ERROR (§ 1050\*)—HARMLESS ERROR—ADMISSION OF EVIDENCE—IMMATERIAL EVIDENCE.

In an action for fraud in the sale of a secondhand automobile, testimony by the plaintiff that defendant wanted a mortgage on certain real estate for security, though immaterial, was not harmful.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153-4157, 4166; Dec. Dig. § 1050.\*]

#### 6. FRAUD (§ 53\*)—ACTIONS—ADMISSIBILITY OF EVIDENCE.

In an action for fraud in the sale of an automobile which the seller agreed to overhaul and put in first-class condition, testimony by the plaintiff that he took the car to defendant's garage on account of some newly discovered defect was relevant to show that the representation that the car was in good running order was false.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 49; Dec. Dig. § 53.\*]

#### 7. EVIDENCE (§ 182\*)—SECONDARY EVIDENCE—PRELIMINARY PROOF—RECEIPT OF LETTER.

Proof that a letter properly addressed to the defendant was mailed establishes prima facie its delivery to the addressee, and evidence of the contents of the letter is not inadmissible because of failure to show that the defendant received it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 601-604; Dec. Dig. § 182.\*]

#### 8. EVIDENCE (§ 220\*)—SELF-SERVING LETTER.

In an action for fraud in the sale of an automobile, a letter written by the buyer to the seller, stating that he had misrepresented the car, though self-serving in a sense, is admissible as being calculated to evoke a reply so as to afford an inference of the truth of the charge if no reply was made.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 771-785; Dec. Dig. § 220.\*]

#### 9. WITNESSES (§ 372\*)—IMPEACHMENT—BIAS.

A witness may be asked on cross-examination if he had not, during the preceding year, been in litigation with the opposite party, in order to show his bias or prejudice.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1192-1199; Dec. Dig. § 372.\*]

#### 10. FRAUD (§ 18\*)—ACTIONABLE MISREPRESENTATION—AGE OF AUTOMOBILE.

A representation, made as an inducement in the sale of a secondhand automobile as to its age, or the length of time it had been used, is material and, if false, is actionable.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 16; Dec. Dig. § 18.\*]

#### 11. FRAUD (§ 11\*)—MISREPRESENTATIONS—STATEMENT OF OPINION—CONDITION OF AUTOMOBILE.

A representation, made as an inducement in the sale of a secondhand automobile, that it was in good running order, while not actionable if the statement was a mere expression of opinion, might be a statement of a fact, and if, being fairly susceptible of being so understood, it was understood by the buyer as a statement of fact, the misrepresentation is actionable.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 12, 13; Dec. Dig. § 11.\*]

On Motion and Exceptions from Supreme Judicial Court, Washington County, at Law. Action by George W. Ross against Foster S. Reynolds. Verdict for plaintiff, and defendant excepts and moves for a new trial. Exceptions and motion overruled. Argued before SAVAGE, C. J., and CORNISH, BIRD, HANSON, and PHILBROOK, JJ.

H. E. Saunders, of Lubec, W. R. Patten-gall, of Waterville, and R. J. McGarrigle, of Calais, for plaintiff. J. E. Gray, of Lubec, for defendant.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

SAVAGE, C. J. Action for deceit in the sale of an automobile. The verdict was for the plaintiff, and the case comes up on the defendant's exceptions and motion for a new trial.

[1] In his writ the plaintiff alleged that the defendant in making the sale to him deceived him in three respects, namely, that he said the car had not been in use for more than a year, and that it was in good running order and condition, and that the defendant agreed that he would give the car a thorough overhauling and put it in first-class shape. The presiding justice properly ruled that no recovery could be had in this case for failure to keep this agreement.

The exceptions are eight in number and relate to the admission and exclusion of evidence.

[2, 3] 1. The plaintiff testified that in one of the conversations he had with the defendant relative to the purchase of the car, the defendant suggested that he make a trade with a Mr. Calkins with regard to the security to be given. Exception was taken to the admission of this testimony. This evidence may not be relevant to the issue of deceit, but it is not perceived how it can be regarded as prejudicial. To secure the reversal of a ruling, on exceptions, it is necessary to show, not only that the ruling was erroneous, but also that it was harmful. *Bath v. Reed*, 78 Me. 276, 4 Atl. 688. Besides, when the terms of an oral contract are in dispute, it is proper, as a general rule, to let in the whole conversation concerning the trade, and the various negotiations leading up to the trade. Though much that is said may not bear directly upon the disputed points, it may nevertheless throw valuable light upon the inquiry; it may help to strengthen the probabilities and improbabilities, the one way or the other. When a witness is asked to narrate a conversation which ended in a contract, it is impossible to tell in advance how much of it may be wheat, and how much chaff. It must be left to the discretion of the court to keep the witness within as narrow limits as reasonably may be, for the eliciting of the truth and the whole truth. It is within bounds to say that few verdicts could stand if the admission of merely irrelevant evidence were a good ground for reversal.

[4] 2. There were certain obvious defects in the car, which the plaintiff knew about and which he alleges the defendant agreed to repair. His counsel was asking him about them in detail, for the purpose, as he stated to the court, of explaining why the plaintiff took the car immediately to the defendant's garage. The defendant then objected. The court ruled the evidence admissible for that purpose. But no answer was made to the question objected to, and no further question on this line was asked at that time.

[5] 3. The defendant objected to the plain-

tiff testifying that he, the defendant, wanted a mortgage on certain real estate for security. Though the evidence was immaterial, it could not have been harmful.

[6] 4. The plaintiff was permitted to testify that he took the car to the defendant's garage to be overhauled. Whether it was because of the agreement to make repairs, or because of some newly discovered defect in the car, the record fails to disclose. If the car was taken to the garage on account of some newly discovered defect, the evidence of it would be relevant to the alleged false representation that the car was in good running order and condition. If the car was taken to the garage for the repair of defects as agreed to be made, the evidence of it was immaterial, but, in view of the express ruling of the court, not prejudicial.

[7] 5. The plaintiff was permitted to testify as to the contents of a letter which he said he wrote to the defendant, to the effect that he had misrepresented the car; that it was in bad condition, and not in running order. The letter itself was not produced, and notice to produce was waived. The defendant objected that it was not competent to show the contents of the letter, until it was shown that the defendant received it. And in this contention the defendant was right. But the plaintiff testified that he mailed the letter properly addressed to the defendant. That is prima facie evidence of delivery by due course of mail to the addressee. *Chase v. Surrey*, 88 Me. 468, 34 Atl. 270; *Johnson v. N. Y., N. H. & H. Railroad*, 111 Me. 263, 88 Atl. 988.

[8] 6. The next exception is to the contents of the letter itself. Such a letter is clearly admissible. Though in a sense self-serving, it is admissible because, if the charge contained in it is untrue, it is calculated to evoke a reply. If no reply is made, that fact, unexplained, may afford an inference that the charge is true.

7. The subject-matter of this exception is the same as that stated under exception 4, and this exception must fall with that one.

[9] 8. The plaintiff, on cross-examination of one of the defendant's witnesses was permitted to draw out from him the fact that he had within the preceding year been in litigation with the plaintiff. This was admissible to show bias or prejudice in the witness. It is a common and proper mode of impeachment.

No one of the defendant's exceptions should be sustained.

We will briefly discuss the motion for a new trial. The false representations relied upon as alleged are that the car had not been in use for more than one year, and that it was in good running order and condition. The trade was in 1912. The plaintiff claims that the defendant told him that the car was one year old then, and that in fact it was two years old. The defendant admits that

the car was a 1910 car and claims that he told the plaintiff so. The plaintiff claims that the defendant represented that the car was in good running order and condition, and that in fact it was not. The defendant admits that he told the plaintiff that the car was in good running condition; and claims that it was so in fact. These are the issues.

[10, 11] A representation made as an inducement in the sale of an automobile, as to its age or the length of time it has been in use is undoubtedly material as affecting value; and, if false, it is actionable. A representation under like circumstances that it is in good running order may be the expression of an opinion, or it may be the statement of a fact. If the former, it is not actionable; if the latter, and false, it is actionable. If the representation is capable of being understood either as an expression of opinion or as a statement of fact, which it is must be determined in accordance with the understanding of the parties. If it was made as a statement of fact and was so understood, it lays the basis for an action of deceit. So, if the statement was fairly susceptible of being understood to be a statement of fact, and not a mere opinion; and the other party did so understand it. *Hotchkiss v. Coal & Iron Co.*, 108 Me. 34, 46, 78 Atl. 708. If an automobile is represented to be in good running condition, when in fact, as is claimed in this case, there are hidden defects which prevent its proper operation, it is difficult to see why the representation may not be deemed to be a statement of fact, so far as those defects are concerned.

A careful examination of the evidence leads us to conclude that a jury would be warranted in finding for the plaintiff upon either issue presented. It cannot be said, we think, that the verdict is so manifestly wrong as to require or permit the interference of the court.

Motion and exceptions overruled.

(112 Me. 238)

#### FARNSWORTH v. KIMBALL et al.

(Supreme Judicial Court of Maine. Oct. 8, 1914.)

#### 1. DESCENT AND DISTRIBUTION (§ 128\*)—LIABILITY OF HEIR — BREACH OF ANCESTOR'S WARRANTY.

An heir is liable for breach of her ancestor's warranty of title to land conveyed, to the extent of the property and assets which came to her as such heir.

[Ed. Note.—For other cases, see Descent and Distribution, Cent. Dig. §§ 473-477; Dec. Dig. § 128;\* Covenants, Cent. Dig. § 92.]

#### 2. COVENANTS (§ 121\*) — CONCLUSIVENESS—PERSONS CONCLUDED—HEIRS — BREACH OF ANCESTOR'S WARRANTY.

Where a real action was brought as to real property which had been conveyed to the defendant therein by petitioner's ancestor, whose property and assets she had inherited, and she was vouched in to defend the suit by reason of her ancestor's warranty of title, but failed to do so, she was bound by the judgment.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. §§ 221-223; Dec. Dig. § 121.\*]

#### 3. REVIEW (§ 13\*) — CAPACITY TO SUE — STATUTES.

Rev. St. c. 91, § 1, cl. 3, provides that a review in civil actions may be granted on petition of a party in interest who was not a party to the record, setting forth the fact of such interest, and on filing a bond, etc. *Held*, that where petitioner inherited the assets of a grantor under a warranty, and a real action was brought against the party succeeding to her ancestor's title, and he vouched petitioner to defend, but she failed to do so, and judgment was rendered against such grantee, petitioner was authorized by such section to file a writ of review.

[Ed. Note.—For other cases, see Review, Cent. Dig. § 14; Dec. Dig. § 13.\*]

#### 4. REVIEW (§ 8\*)—GROUNDS—"FRAUD, ACCIDENT, MISTAKE, OR MISFORTUNE."

The words "fraud, accident, mistake, or misfortune," as used in Rev. St. c. 91, § 1, cl. 7, providing that a writ of review may be granted where, through fraud, accident, mistake, or misfortune, justice has not been done, import something outside of petitioner's own control, or at least something which a reasonably prudent man would not be expected to guard against or provide for, and hence do not justify the issuance of such writ to review a judgment in a real action where petitioner had been seasonably vouched to defend under her ancestor's covenant of warranty, but omitted to defend because of her own personal neglect.

[Ed. Note.—For other cases, see Review, Cent. Dig. § 8; Dec. Dig. § 8.\*]

#### 5. MORTGAGES (§ 226\*)—MORTGAGEE IN POSSESSION—CONVEYANCE—EFFECT.

Where a mortgagee in possession conveys the property by deed, the deed will operate as an assignment of the mortgage the same as if the mortgage debt was assigned or transferred with the deed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 457, 611-617; Dec. Dig. § 226.\*]

#### 6. MORTGAGES (§ 274\*)—MORTGAGEE OUT OF POSSESSION—CONVEYANCE.

A deed by a mortgagee, not having made entry and being out of possession, conveys no title, unless accompanied by a transfer of the mortgage debt, since until entry the mortgagee's interest is a chattel interest and not realty.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 718-724, 728; Dec. Dig. § 274.\*]

#### 7. MORTGAGES (§ 292\*)—TRANSFER OF PROPERTY — ACTION BETWEEN OWNER OF EQUITY AND GRANTEE—DEFENSES.

In a real action by the owner of the equity of redemption in mortgaged premises against a grantee of the mortgage before entry and while out of possession, such grantee for that reason being a mere stranger to the title, it was no defense that he had a claim against petitioner for breach of his grantor's covenant of warranty.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 762-771, 790; Dec. Dig. § 292.\*]

Report from Supreme Judicial Court, Hancock County, at Law.

Petition by Lucy A. Farnsworth for a writ of review of a former action by Samuel S. Kimball and another against George B. Dorr, in which defendants Kimball and another recovered judgment. Petition denied.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.



White & Carter, of Lewiston, and Hale & Hamlin, of Ellsworth, for petitioner. Deasy & Lynam and E. S. Clark, all of Bar Harbor, for defendants.

**SAVAGE, C. J.** This is a petition for a review of a real action in which the present defendants, Kimball and Coffin, were plaintiffs and one George B. Dorr was defendant, and comes before this court on report. That case was tried and went to judgment at the April term, 1913, of the Supreme Judicial Court in Hancock county. It is admitted that during the pendency of that action and before trial or judgment, the record title of Dorr, the defendant, passed to the Bar Harbor Water Company, and that the title of Kimball and Coffin, the plaintiffs, had been bought and paid for by the Bar Harbor Water Company and had been conveyed to a trustee for the benefit of that company. So that the water company at the time of the trial owned in law, or in equity, all the title of all the parties of record in the suit. It is also admitted that the suit was prosecuted to judgment by that company, at its expense; and inasmuch as it owned also the defendant's title, it is a fair inference that the same company maintained the defense. Except as the judgment might furnish the basis for ulterior proceedings against this present petitioner, it was entirely a moot case.

[1, 2] The Dorr title was deraigned from the warranty deed of William A. Farnsworth, the petitioner's father, and the petitioner, as she is the sole living heir of her father, and the owner of property and assets which came to her as such heir, and thus liable upon the covenants of warranty, if broken, was sufficiently vouched in to defend the original suit, but failed to do so, and is accordingly bound by that judgment, as it now stands.

[3] It will be noticed that the petitioner was not a party of record in the original suit, and that Dorr, who was a party there, is not made a party to this proceeding. For her right to institute the proceeding, the petitioner relies upon R. S. c. 91, § 1, cl. 3, which provides that a review in civil actions may be granted "on petition of a party in interest who was not a party to the record, setting forth the fact of such interest, and upon filing a bond" and so forth. The petitioner's right to petition is not challenged, but we deem it proper to say that we think that her case fairly comes within the provision of the statute. It is probable that by strict construction the original defendant, Dorr, should have been made a party to this proceeding, but the point has not been made. And as he, as well as his former adversaries, are represented by the Bar Harbor Water Company, their grantee, which is making this defense, and makes no point of want of proper parties, we will pass the question.

We merely mention the situation that it may not serve as a precedent.

It should be stated further, as preliminary to a discussion of the questions involved, that the Bar Harbor Water Company, the present defendant in interest, has commenced an action against her as heir, upon her father's covenant of warranty, and the action is now pending.

[4] A review may be granted "where through fraud, accident, mistake or misfortune, justice has not been done." R. S. c. 91, § 1, cl. 7. But the words "fraud, accident, mistake or misfortune" are not without limitation. This court said in *Pickering v. Cassidy*, 93 Me. 139, 44 Atl. 683, that:

"The words \* \* \* ordinarily import something outside of the petitioner's own control, or at least something which a reasonably prudent man would not be expected to guard against or provide for. It has long been regarded as essential to public order, security, and confidence that, when parties have had their full day in court, \* \* \* they should abide the result. \* \* \* It cannot have been the intention of the Legislature to destroy this rule and destroy all reliance upon court judgments, by requiring or even authorizing the court to open them as often as the defeated party discovers some new evidence or argument."

Following this rule, a review is denied when it appears that the petitioner's predicament is due to his own fault and want of reasonable diligence. Mere mistakes in opinion or judgment do not bring a case within the statute.

The petitioner was seasonably vouched to defend. She then had in her possession all the evidence that she has now, for want of which, as she claims, an erroneous order of judgment was made. She showed it to her personal counsel. She furnished copies of it to the counsel defending the Dorr title. She says she was advised by her attorney that it was not necessary for her to respond to the voucher, and that the attorneys for Dorr had told her attorney that they would do all they could in defense. If we should assume that her attorney did not give her good advice, as we do not, that would not be such mistake or misfortune as the statute contemplates. The statute certainly does not mean that when a lawyer gives poor advice it is a cause for review. But the record leads us to think that disinclination to be at any expense about it was the prime reason for failing to appear and defend. Notwithstanding the advice which she says was given her, she undertook to employ a firm of Ellsworth attorneys, but, being unable to get them to name a price for which they would take care of the suit for her, she seems to have decided to let the matter go. For these reasons we might properly hold, we think, that the failure of the petitioner to act after being vouched was due to her own personal, palpable neglect, for which the statute of reviews affords no remedy. But there are reasons why we think it proper to consider the

case on its merits, and we will do so. The same result will be reached either way.

The case shows that the land in question was once owned by Randall S. Clark. On January 8, 1855, he conveyed it to Charles Goodwin and George N. Severance. On the same day, Goodwin and Severance mortgaged it to Andrew H. Hall to secure the payment of three notes aggregating \$2,500. The deed of conveyance and mortgage were both recorded January 12, 1855. Hall assigned the mortgage to Sarah H. Gilmore, March 26, 1858, and the assignment was recorded May 23, 1859. On May 18, 1863, J. A. Deane, by an assignment purporting to be made by him, as attorney for Sarah H. Gilmore, assigned the mortgage to William A. Farnsworth, Henry Morse, and Merrill Austin. The assignment was recorded the same day. No power of attorney appears of record, and none can now be found. Previously in the same month Sarah H. Gilmore gave a warranty deed to Deane, and Deane gave one to Farnsworth and his associates. The counsel for petitioner in argument speaks of these as covering the land in question. This is denied by the defendants, and the case does not show it. From the evidence and admissions in the case we think it may fairly be inferred that, so far, the mortgage notes were transferred from party to party with the assignments of the mortgage. And we may say here, as well as anywhere, that we think that the circumstances indicate that the notes have never been paid, and we so find. And for the purposes of this case we shall assume that Deane had authority to assign the mortgage and transfer the notes to Farnsworth, Morse, and Austin.

It appears then that in May, 1863, Goodwin and Severance were mortgagors and owned the equity of redemption. William A. Farnsworth—and we need speak only of him—was the mortgagee, or had the interest of a mortgagee. His associates by conveyance drop out of the case. Afterwards, in 1865 and 1868, it is said, and having no other title than that of mortgagee, Mr. Farnsworth gave warranty deeds of the land to two persons. At the commencement of the action in the case of Kimball and Coffin against Dorr, it is admitted that the plaintiffs, by mesne conveyances, held the title of Goodwin and Severance, mortgagors, the defendant, Dorr, held the title, such as it was, of the grantees in the warranty deeds of Farnsworth, and, as we shall see presently, the petitioner's rights were those of the mortgagee.

The petitioner's contention is based upon the claim that the chain of conveyances from the warranty deeds of Farnsworth down to Dorr gave the latter some title, namely, the mortgage title of Farnsworth. And upon this assumption she urges that if the mortgage deed and notes had been offered in evidence in the original action of Kimball and

Coffin v. Dorr, they would have disclosed the defendant's mortgage title, and have furnished at least an equitable defense to the action, on the ground that a real action by the owner of the equity of redemption will not lie against the mortgagee or one having the interest of a mortgagee. *Woods v. Woods*, 66 Me. 206; *Rowell v. Mitchell*, 68 Me. 21.

[8, 6] The weakness of the petitioner's contention lies in the fact that it does not appear that the defendant had any valid title whatever. He claimed under the warranty deed of a mortgagee. It is not doubted that if a mortgagee in possession makes a conveyance by deed, the deed will operate as an assignment of the mortgage. The same result follows if the mortgage debt is assigned or transferred with the deed. But it is now well settled in this state that a deed by a mortgagee, not having made entry, and being out of possession, conveys no legal title to the land, unless accompanied by a transfer of the mortgage indebtedness. *Lunt v. Lunt*, 71 Me. 377; *Wyman v. Porter*, 108 Me. 110, 79 Atl. 371. The reason is that until entry, the interest of the mortgagee is not real estate. *Lunt v. Lunt*, supra. The mortgage is a personal chattel, a chose in action.

"It is but an incident attached to the debt, and, in reason and propriety, it cannot, and ought not, to be separated from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment." *Jackson v. Willard*, 4 Johns. (N. Y.) 42.

It is very evident that when Mr. Farnsworth gave these warranty deeds he did not transfer the mortgage indebtedness. He died in 1876. After this controversy arose, not only the original mortgage, but also two of the mortgage notes, and an execution issued on a judgment on the third note, were found by this petitioner among her father's papers. They apparently belong to his estate, of which she is the administratrix de bonis non. Nor is there any evidence that Mr. Farnsworth had made entry, and was in possession when he gave the deeds. The petitioner argues repeatedly that such was the fact, but the record does not show it. It shows, on the contrary, that efforts were made to ascertain whether Farnsworth had ever been in possession, and that the efforts were unavailing. The only thing in the case about possession is an admission in these words:

"It is also admitted that said land is and always has been wholly uncultivated, that it has never been fenced nor built upon; that the only use ever made of it has been an occasional cutting of wood, and that it has never been used as a wood lot belonging to a farm; and that there is now nothing upon it except a growth of wood."

And here the cutting of wood is the only thing that relates to the question. It does not state when it was cut, nor by whom. Surely here is not enough to warrant a finding that Farnsworth ever cut any wood, nor that he had ever been in possession.

[7] The result is that we are compelled to

find that the warranty deeds of Farnsworth conveyed no title. And if that is so, no title came to the defendant Dorr. It thus appears that the original action was a writ of entry by the owners of an equity of redemption against a stranger to the title. If the petitioner had been more diligent, had she assumed the defense, and offered in evidence the notes and mortgage, it would not have changed the situation. If a review should be granted, and she should offer them upon another trial, it would not change the situation. It would still be a suit by the owner of the equity against a stranger. Can it possibly avail in defense that the stranger has a claim against the petitioner for a breach of her father's warranty? We think not. Even suppose the petitioner should plead puis darrein continuance that the real plaintiff, the Bar Harbor Water Company, had become the owner in equity of the interest of the defendant Dorr, so that it had become the real defendant, and suppose for that reason the suit should abate. Will the situation of the petitioner be any different then from what it is now? Will she not then, as now, be the holder of an undischarged mortgage and entitled to hold it until the debt it secured is paid? And will she not then, as now, be liable for the breach of her father's covenants of warranty, to the extent of the assets received from him as heir? Her father warranted the title. If there is damage by reason of a breach, must she not pay? and entirely irrespective of the result of the Kimball and Coffin suit? She is indeed bound by that judgment. But what was that judgment? No more than this, so far as we are now concerned: It was adjudged that Kimball and Coffin had a title to the land, and that Dorr did not have one. And is not that precisely the state of the title as we now find it to be? The petitioner was not injuriously affected. Her rights under her mortgage were not adjudged nor affected. Her liability under the warranty was not changed.

The petitioner suggests as a reason why she ought to have a review granted that she is endeavoring to foreclose the mortgage, and wishes to be able, before the case is again tried, to effect a foreclosure, so that the title thereby effected will inure to the benefit of the grantees under her father's warranty. It hardly need be said that this does not furnish legal ground for a review. To speak of only one contingency, if she has a right to foreclose, the present owner of the equity has a right to redeem, and we must assume that it will do so. There will be nothing then to inure to the benefit of grantees. And the breach will remain unsatisfied.

To repeat. We think the petitioner has stated no ground that would serve as a defense if a review should be granted. It will therefore be useless to grant one.

Petition denied, with costs.

(245 Pa. 573)

McCABE v. BESSEMER & L. E. R. CO.

(Supreme Court of Pennsylvania. May 22, 1914.)

MASTER AND SERVANT (§ 240\*)—INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.

Where a railroad yard employé, while on an errand for his foreman and before entering a building, noticed an engine standing on the track, and, though on leaving the building his view of the engine was obscured by an open door, neglected to push the door back to see that the track was clear, and was caught between the side of the building and the engine, he was guilty of contributory negligence barring recovery for his injuries.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 751-756; Dec. Dig. § 240.\*]

Appeal from Court of Common Pleas, Crawford County.

Trespass by Michael McCabe against the Bessemer & Lake Erie Railroad Company for personal injuries. From an order refusing to take off a compulsory nonsuit, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Samuel Y. Rossiter, of Erie, for appellant. George F. Davenport and Frank J. Thomas, both of Meadville, for appellee.

BROWN, J. The appellant was an employé of the appellee. He had been in its service a number of years before he was injured, during the last five months of which he worked at its Greenville yards. On October 31, 1905, while working there, he was directed by his foreman to go into the north part of what was known as the sand house and get a stove. On each side of this house there were tracks of the defendant company, five or six of them being on the west side, the nearest of them about 3½ feet from the building and parallel to it. A door 4 feet in width opened outward from the west side of the building, and, when open at right angles to it, extended about six inches over the nearest rail, cutting off a view of the tracks to the south. Appellant entered the sand house through this doorway, and, having failed to find the stove, started for another part of the building, passing out through the same doorway, the door of which extended at right angles to the building about a half foot over the nearest rail. As he turned around the door and was about to proceed south towards another room in the building, he found in front of him an engine of the defendant company, coming towards him on the track nearest the building. To avoid being run over he pressed himself up against the building, but the side of the engine extended so far over the rail that he was caught and severely squeezed in the narrow space between it and the building. From the refusal of the court below to take off the nonsuit, in the action which he brought to

recover for the injuries so sustained, he has taken this appeal.

The nonsuit was directed on the ground of the contributory negligence of the plaintiff, and the motion for it could not have been denied. The appellant had been familiar for months with the situation within the Greenville yards. He had worked there constantly and knew that trains were at all times passing in and out. He admitted he knew that the engines were wider than the tracks and projected beyond them. He further admitted that, shortly before he went into the sand house, he saw a train moving on the track nearest to it, and that when he entered it the engine which injured him was standing at an ash pit to the south. While it does not appear in the testimony who opened the door in such a way that all view to the south was cut off as the appellant came out of the building, it is admitted in his history of the case that he himself had so opened it. Without such admission, the presumption would be that he had opened it in carrying out the direction of his employer to go into the building for the stove. His vision to the south when he came out of the building was thus obstructed by his own act; but, even assuming that some one else had opened the door, his manifest duty, when he left the building and started to go south, was to look and see whether the track was clear. This he could readily have done by closing the door or pushing it against the building. Instead of exercising this ordinary prudence, which would have given him a clear view to the south, he did not even stop to look before passing around the door, but went south several feet, with the engine almost upon him. With his knowledge that it projected beyond the rails, he took the risk of being crushed by it when he pressed himself against the wall. He heedlessly placed himself in a position of danger, which he could have avoided by the exercise of but ordinary care when he left the building.

Judgment affirmed.

(245 Pa. 570)

In re NEAFIE'S ESTATE.

Appeal of WHITAKER et al.

(Supreme Court of Pennsylvania. May 22, 1914.)

# 1. JUDGMENT (§ 717\*)—RES JUDICATA—SALE OF STOCK—SURCHARGE OF TRUSTEE.

A decision of the Supreme Court, reversing a decree of the orphans' court removing a testamentary trustee because he had made an unprofitable sale of stock, and determining that the sale was properly made, being *res judicata* on a subsequent adjudication of the trustee's account, authorized the orphans' court's refusal to surcharge the trustee for the loss alleged to have resulted from the sale.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1248; Dec. Dig. § 717.\*]

## 2. TRUSTS (§ 824\*)—TESTAMENTARY TRUSTEE—ALLOWANCE OF COMMISSION—RIGHT TO OBJECT—WAIVER.

Where the trustees' commissions on income were stated and charged in accounts rendered to the life tenant, without objection on her part, she could not, on an accounting thereafter, object to the allowance of such commissions.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 482; Dec. Dig. § 824.\*]

## 3. EXECUTORS AND ADMINISTRATORS (§ 495\*)—SALES OF REALTY—RIGHT TO COMMISSION.

An executor was entitled to the usual commissions allowed him in prior accounts, on sales of realty, where such sales were made while he remained in office performing the duties thereof, without reason to suppose that he would not be compensated therefor.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 2089-2104, 2108; Dec. Dig. § 495.\*]

Appeal from Orphans' Court; Philadelphia County.

Adjudication in the matter of the estate of Jacob Neafie, deceased. From a decree dismissing exceptions to the adjudication, Mary E. Whitaker and others appeal. Affirmed.

The facts appear in Neafie's Estate, 199 Pa. 307, 49 Atl. 129, and in the following opinion of the lower court by Gest, J.:

The core of this case, the center about which everything revolves, is the contract made by the executors on March 29, 1898, for the sale to Somers N. Smith of the testator's shares of stock of the Neafie & Levy Ship & Engine Building Company. The exceptants seek to surcharge the accountants with the par value of the bond of Somers N. Smith, the purchaser, or rather the two-thirds thereof belonging to this estate, which is now worthless, but carried among the assets at a valuation of \$270,000, on the ground that said sale of the stock by the executors to Smith (whose bond represents the purchase money) was an unauthorized investment, for making which the executor, and for continuing which the trustees, are responsible. The principal contention is whether this act of the executors was done in the exercise of a sound discretion and by lawful authority. But we do not think the matter is debatable, inasmuch as the Supreme Court passed upon it in Neafie's Estate, 199 Pa. 307, 49 Atl. 129. There the life tenant, one of the present exceptants, sought to have the executor removed as trustee under the act of April 9, 1868 (P. L. 785; Stew. Purd. § 52, p. 4893), alleging her want of confidence in him as a result of his having made this very sale. This court dismissed the trustee, and its decree was reversed by the Supreme Court in an elaborate opinion by Mr. Justice Mestrezat, who concluded that the trustee had done what his duty required him to do and what the interest of the estate committed to his care demanded of him.

[1] It is argued by the learned counsel for the exceptants that express authority to make this sale was not given by the court to the executors, and the sale itself was only incidentally considered by the Supreme Court. We cannot agree with counsel in this, as our examination of the record leads to the exactly opposite conclusion. There were, it is true, other grounds of dissatisfaction alleged, but this one would have been vital, had the Supreme Court considered it substantial; and it may be that the subsequent history of the case shows that the sale was unfortunate, but that is not to the point. We are of the opinion that this court

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cannot now hold the executor and trustee blameworthy for having done that which the Supreme Court, shortly after it had been done, held to have been proper.

If this is true in the case of the trustee, who, as one of the executors, made the contract, it is true a fortiori in the case of the cotrustee subsequently appointed. This trust company had absolutely nothing to do with the making of the contract, and we fail to see what could have been done by it to better the situation that was presented. It was a condition, and not a theory, that confronted it. There is no sufficient evidence to show that anything could have been done by the cotrustee which would have averted the ruin of the Neafie & Levy Company, which, as the auditing judge finds, was due, at least chiefly due, to its undertaking to build ships at a price below their actual cost. The retention of the Somers N. Smith bond as an "investment" of the estate was unavoidable; for the obvious reason that the trustees could not have disposed of it. Thus retained, the asset was not marketable. There was no testimony to show that any purchaser could have been found for it. Indeed, it would be difficult to imagine such a possibility, and the evidence shows that, up to the time of the receivership of the company, the trustees collected all that was due on the bond.

We have not thought it necessary to discuss in detail many other matters of less importance elaborated by the learned counsel for the exceptants in their able and forcible argument, for, as stated by us in the beginning, they all depend directly or indirectly upon the contract of March 29, 1893. We have, however, examined them, in the light of the testimony presented at the audit, and entirely agree with the findings of fact, as stated by the auditing judge, and his conclusions of law applicable thereto.

[2] So far as the allowance of the trustees' commissions upon income is concerned, it appears that these were stated and charged in the accounts rendered to the life tenant from time to time, without objection on her part. The auditing judge accordingly held that it was too late for her afterwards to object, and we think that his views are sustained, not only by the reasons which he has given, but by the opinion of Judge Hare, in *Lodge v. Heron*, 3 Phila. 356.

[3] The exceptions to the adjudication of the fourth account of the executor relate to the allowance made to him of commissions at the rate of 3 per cent. upon the sales of real estate. We are of opinion that, under the circumstances of the case, the auditing judge was right in refusing to strike them from the account. So long as the accountant remains in his office as executor and performs the labor of his office without being given any reason to suppose that he was not to be compensated therefor, he should be allowed the usual commissions that were allowed him in prior accounts. The auditing judge, however, has left open the question of the allowance of commissions on future sales.

We are not inclined to think that a recommitment of the account of the trustees to the auditing judge and its postponement until the final decree of the Supreme Court in *Cornell v. Seddinger* would result in any revision of our opinion, and the petition is dismissed.

The court dismissed the exceptions to the adjudication. Mary E. Whitaker, J. G. Neafie Whitaker, and Anna M. Mitchell appealed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

George Quintard Horwitz, of Philadelphia, and Max L. Mitchell, of Williamsport, for appellants. John G. Johnson, Eli K. Price, and Maurice Bower Saul, all of Philadelphia, for appellee Seddinger. John G. Johnson, Edward H. Bonsall, and Maurice Bower Saul, all of Philadelphia, for appellee Land Title & Trust Co.

PER CURIAM. The decree appealed from is affirmed on the opinion of Judge Gest.

(245 Pa. 561)

Appeal of CARLISLE & M. S. RY. CO. et al. (Supreme Court of Pennsylvania. May 22, 1914.)

1. COURTS (§ 180\*)—JURISDICTION—COURT OF QUARTER SESSIONS—VALIDITY OF MUNICIPAL ORDINANCE.

Since the jurisdiction of the court of quarter sessions is limited by Act April 3, 1851 (P. L. 326) § 27, as amended by Act May 22, 1883 (P. L. 40) § 2, to a review of ordinances and regulations done or purporting to be done in the exercise of some power conferred on the borough by statute, such court has no jurisdiction to review an ordinance imposing conditions on a street railway company pursuant to the authority conferred by Const. art. 17, § 9, providing that no street passenger railway shall be constructed without the consent of the local authorities.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 412, 437, 439-447, 449-455, 457, 458, 460-464, 467, 468; Dec. Dig. § 180.\*]

2. STREET RAILROADS (§ 24\*)—FRANCHISE—RIGHT TO IMPOSE CONDITIONS.

Const. art. 17, § 9, providing that no street railway shall be constructed in a municipality without the consent of the local authorities, authorizes a borough to impose conditions on a street railway company as a consideration for the consent given.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 34-38, 43, 50-55, 69-76; Dec. Dig. § 24.\*]

Appeal from Court of Quarter Sessions, Cumberland County.

Appeal from borough ordinance by the Carlisle & Mechanicsburg Street Railway Company and the Valley Traction Company. From a decree of the Superior Court affirming a decree of the quarter sessions dismissing the appeal, the companies appeal. Affirmed.

The opinion of the Superior Court by Porter, J., was as follows:

The borough of Mechanicsburg was incorporated by the special act of April 12, 1823 (P. L. 308), and by appropriate action became subject to the general borough act of April 3, 1851 (P. L. 320). The Cumberland Valley Electric Passenger Railway Company was duly incorporated, on September 11, 1893, under the provisions of the act of May 14, 1889 (P. L. 211), and the supplements thereof, by the commonwealth of Pennsylvania, to construct a street railway from the borough of Carlisle to and through the borough of Mechanicsburg, and having obtained the consent of the local authorities constructed and subsequently operated, on the public highways, the street railway authorized by said charter. The rights and franchises of this company subsequently became vested in the Carlisle & Mechanicsburg Street Railway

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Company and the Valley Traction Company, the appellants, and the latter companies became subject to the duties and liabilities of the corporation to which they had thus succeeded. The consent of the borough of Mechanicsburg to the construction and operation within its limits of the street railway in question was by ordinance No. 133, approved August 6, 1900, and the street railway company duly accepted the said ordinance, and under the provisions thereof constructed its railway. The provision of said ordinance, which is material to the determination of this case, was as follows, viz.: "That the said railway company, in consideration of the rights and privileges granted by this ordinance, shall pay to the borough the sum of \$50 per annum, said payment to begin two years after the completion of said railway, and to continue for three years, at the expiration of which term the said annual payment shall be increased to the sum of \$100, which latter annual sum shall continue for the period of five years, at the expiration of which period the council reserves the right to regulate and determine the future annual payment." The period of ten years following the completion of the railway expired on March 1, 1911, and the appellant companies and the corporation, to the rights of which they had succeeded, made the annual payments during that period for which the amounts had been by the ordinance definitely fixed. Upon the expiration of that period the council of the borough duly passed the ordinance entitled "Ordinance No. 226. Fixing the annual payment to the borough of Mechanicsburg, Pa., by the Valley Traction Company, successors to the Cumberland Valley Electric Passenger Railway Company, for the rights and privileges granted in ordinance No. 133." This ordinance recited some of the provisions of ordinance No. 133, *inter alia*, that the earlier ordinance had provided for the annual payment of a fixed sum during the period specified and had reserved to the council of the borough the right to determine the annual payment to be made after the expiration of that period, and then ordained, in its first section, that the appellants, successors to the passenger railway company, should pay annually to the borough, from March 1, 1911, the sum of \$1,200. The second section of the ordinance is as follows: "That said annual payment of \$1,200 be considered solely for the rights and privileges granted in ordinance No. 133, to the Cumberland Valley Electric Passenger Railway Company, and shall in no way preclude or debar the borough of Mechanicsburg from collecting fines for the violation of ordinances or any acts of assembly now enacted, or that may be enacted relative to the same or levying additional taxes for police and street regulations." The appellant companies, after the enactment of this ordinance, presented their petition to the court of quarter sessions, praying leave to appeal to that court "from said ordinance No. 226," and that the said court order and decree that the said ordinance was unreasonable, illegal, and void. The court below made an order formally allowing the appeal. The borough filed an answer and the appellants a replication, but, as to the material facts, there was no dispute. The learned judge who heard the case in the court below, after full consideration, filed an opinion holding that, because of the subject-matter of the ordinance and the nature of the power exercised by the borough authorities in its enactment, the court of quarter sessions was without jurisdiction to review the action of the borough council, and dismissed the petition. The petitioners appeal from that decree.

[1] The court of quarter sessions is not vested with general equity jurisdiction, and its authority to review the action of the council of a borough and declare an ordinance invalid is entirely dependent upon statute. The Act of April 3, 1851 (P. L. 326) § 27, as amended by

the Act of May 22, 1883 (P. L. 40) § 2, conferred jurisdiction upon that court to review the action of the borough council, upon complaint of any person aggrieved "in consequence of any ordinance, regulation or act done, or purporting to be done, in virtue of this act, and the determination and order of said court thereon shall be conclusive." The jurisdiction of the court is limited to the review of ordinances and regulations done, or purporting to be done, in the exercise of some power conferred upon the borough by the statute.

The provisions of ordinance No. 226 expressly negative the intention to impose the charge in question under the police power of the borough "for police and street regulations," and, when the borough undertakes to collect this charge, it must be prepared to sustain it upon the ground that it is "solely for the rights and privileges granted in ordinance No. 133." The ordinance No. 133, after fixing the annual payments during the first ten years, contained this explicit provision: "At the expiration of which period the council reserves the right to regulate and determine the future annual payment." If the borough, in granting its consent, had the right to reserve the power to fix, at some future date, the amount of subsequent annual payments to be made by the street railway company for the right to occupy the streets, then the ordinance No. 226 can only be considered as an attempt made by the borough, at the proper time, to exercise the power so reserved. In determining the validity of this ordinance, only two questions arise: (1) Did the borough have power, as a condition of its consent to the construction of the street railway, to reserve the right to determine at a future time the amount of the annual payments subsequently to be made by the company for the privilege to occupy the streets? (2) If it had that power, then, was the ordinance No. 226 a proper exercise of the power reserved by ordinance No. 133?

[2] The right of the borough to exact any compensation from the street railway company for the privilege of entering upon the streets was not conferred by any statute. The ordinance which imposes the charge does not purport to be the exercise of any power conferred by statute. The only assertion of authority for this charge, upon the part of the borough, is founded upon article 17, § 9, of the Constitution of the commonwealth: "No street passenger railway shall be constructed within the limits of any city, borough or township, without the consent of its local authorities." This provision is peremptory and without express limitations of any kind. "It is a gift directly from the Constitution to the local bodies, and needs no help, nor permits any interference from the Legislature. If any limitations are to be implied by the courts, the implication must arise from clear necessity, as absolute, as peremptory, and as unavoidable as the constitutional mandate itself. \* \* \* He who can consent or refuse without reason does not make his consent or his refusal either better or worse by a good or bad reason. The same principle applies to the present subject. It is conceded that the local authorities may impose some conditions, such as those relative to the police power, but where is the grant to any other body to supervise and limit the conditions, or say what they shall be? The Legislature clearly cannot do it. The very purpose of the provision was to put an end to the Legislature's interference." *Allegheny City v. Railway Co.*, 159 Pa. 411, 28 Atl. 202. The municipality, having the absolute power to give or withhold consent, has the matter in its own hands and may protect its interests by giving its consent upon condition. When the consent is given upon conditions clearly expressed, and the street railway company accepts the terms, a contract relation arises, and the rights of the parties are

to be determined in accordance with their agreement. *Plymouth Township v. Railway Co.*, 168 Pa. 181, 32 Atl. 19; *Norristown v. Norristown Passenger Railway Co.*, 148 Pa. 87, 23 Atl. 1060, 1062; *Allegheny City v. Gas & Pipeage Co.*, 172 Pa. 632, 33 Atl. 704; *Minersville Boro. v. Railway Co.*, 205 Pa. 402, 54 Atl. 1053; *Millcreek Township v. Erie Street Railway Co.*, 216 Pa. 132, 64 Atl. 901; *Cochranon Borough v. Telephone Co.*, 41 Pa. Super. Ct. 146. This constitutional provision does not deprive the Legislature of all power over the public highways; it may prohibit the construction of a street railway upon any highway of the commonwealth, but it is without power to authorize the construction of a street railway upon any highway without the consent of the local authorities. The Legislature has power to change the form of government in municipalities, but, under any form of government devised, the local authority to which is committed the control of the highways, and upon which responsibility for their maintenance is cast, will, by the Constitution be vested with discretion to determine whether a street railway shall or shall not be constructed upon the highways. The Legislature might abolish the offices of supervisor in townships, council, and burgess in boroughs and mayor and councils in cities, and provide a commission form of government for each of them, but the local authorities having control of the highways would, because of that control, by force of the constitutional provision, have the right to determine whether any street railway should be constructed. The ordinance in question was not, nor did it purport to be, an exercise by the borough of any authority conferred by statute, and the learned judge of the court below properly held that the court of quarter sessions was without jurisdiction to declare it invalid.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

S. B. Sadler, of Carlisle, W. K. Sharpe, of Chambersburg, and Lyman D. Gilbert, of Harrisburg, for appellants. E. M. Biddle, Jr., of Philadelphia, and Harry M. Zug, of Mechanicsburg for appellee.

**PER CURIAM** The order of the Superior Court is affirmed on the opinion of Judge Porter

(77 N. H. 309)

**PAGE BELTING CO. v. F. H. PRINCE & CO.** et al.

(Suprem. Court of New Hampshire Merrimack. June 2, 1914.)

**1 EXCHANGE OF PROPERTY (§ 13\*)—RESCISSION—FRAUD—RETURN OF CONSIDERATION.**

W. contracted to sell 870 shares of certain corporate stock to C. & S. at \$85 a share and to buy from them \$150,000 of the bonds of Santa Cruz at par and \$150,000 of the bonds of Ironwood at \$105. One-half of the stock was to be delivered on each lot of bonds. The Santa Cruz bonds were delivered to W., who turned over 435 shares of the stock and paid the balance of the price in cash. There was delay in the issue of the Ironwood bonds, and, as a part of the contract, the stock so turned over was put in the hands of P. & Co. as security for the future delivery of those bonds. C. & S. had not paid for the Santa Cruz bonds, and, being insolvent, never did pay for them, and, in proceedings to enforce the bonds, a settlement was arrived at by which a discount was allowed to the city of \$80,000 interest. *Held*, that such facts were sufficient to establish fraud

on the part of C. & S. in the exchange, entitling W. to rescind without being required to surrender the bonds or their proceeds.

[Ed. Note.—For other cases, see *Exchange of Property*, Cent. Dig. §§ 25-29; Dec. Dig. § 13.\*]

**2 LIMITATION OF ACTIONS (§ 84\*)—RUNNING OF STATUTE—SUSPENSION—ABSENCE OF PARTY FROM STATE.**

Pub. St. 1901, c. 217, § 8, declares that, if the defendant in a personal action was absent from and residing out of the state at the time the cause of action accrued, the time of such absence shall be excluded in computing the time limited for bringing the action. *Held* that, where W. was induced by the fraud of C. & S. to exchange certain stock for municipal bonds and neither C. & S. nor their representative from the time of the exchange until the appearance of their receiver in the present litigation had been within the state, such receiver could not claim the benefit of the statute.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 439-448; Dec. Dig. § 84.\*]

**3 EQUITY (§ 71\*)—LACHES—QUESTION OF FACT.**

Whether delay in asserting an equitable claim is unreasonable is a question of fact.

[Ed. Note.—For other cases, see *Equity*, Cent. Dig. §§ 204-211; Dec. Dig. § 71.\*]

**4 EQUITY (§ 94\*)—LACHES—DUTY TO SUE IN FOREIGN STATE.**

One who has been induced by the fraud of nonresidents to exchange certain stock for municipal bonds is not required to go into another state and there sue for a rescission on pain of being held guilty of laches, but, in the absence of a change in the circumstances, may wait until there is an opportunity to pursue his equitable remedy in the courts of his own state.

[Ed. Note.—For other cases, see *Equity*, Dec. Dig. § 84.\*]

**5 APPEAL AND ERROR (§ 1008\*)—FINDINGS—CONCLUSIVENESS.**

A finding by the trial court that a bill of interpleader was not collusively instituted as between complainant and one of the claimants of the property, based on sufficient evidence, is conclusive on exceptions.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3955-3960, 3962-3969; Dec. Dig. § 1008.\*]

**6 INTERPLEADER (§ 23\*)—BILL—EVIDENCE.**

Where the issues raised by a bill of interpleader and various answers were fully tried and all parties in interest appeared and were heard, whether the bill is maintainable depends on the proof, and not on the pleadings, which if not technically correct may be amended to conform to the proof.

[Ed. Note.—For other cases, see *Interpleader*, Cent. Dig. §§ 47, 51; Dec. Dig. § 23.\*]

**7 INTERPLEADER (§ 8\*)—RIGHT TO RELIEF.**

Where several parties claimed title to certain corporate stock and the corporation had been notified of such claims by demands for dividends and was a mere stakeholder, it was entitled to maintain a bill of interpleader to determine the lawful ownership, regardless of the fact that it had no doubt of its right to pay the dividends to one of the claimants.

[Ed. Note.—For other cases, see *Interpleader*, Cent. Dig. §§ 8, 9, 11; Dec. Dig. § 8.\*]

**8 INTERPLEADER (§ 23\*)—BILL—ALLEGATIONS OF OWNERSHIP.**

Allegation in a bill of interpleader that one of the claimants had title to the property, instead of an allegation that both claimed title, was immaterial, where no one was misled, and

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r indexes 91 A.—61



especially after the overruling of a demurrer to the bill.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 47, 51; Dec. Dig. § 23.\*]

9. INTERPLEADER (§ 19\*) — PARTIES — INTERVENTION—RECEIVERS.

Where a receiver of one of the parties to a fraudulent exchange of bonds for corporate stock was permitted to intervene in an interpleader suit to determine the ownership of the stock at his own request, and he thereupon became a party to the suit and claimed the stock and dividends, and the case was ultimately tried between him and the original owner of the stock as the real claimants of the title, the receiver became a complete party to the proceedings, and the court had jurisdiction to render judgment against him.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. § 41; Dec. Dig. § 19.\*]

10. PLEDGES (§ 6\*)—FRAUD—EFFECT.

Rescission of an original exchange of certain stock for municipal bonds, for fraud, invalidates a later pledge of the stock by the party to whom it was delivered in the exchange.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 16; Dec. Dig. § 6.\*]

Transferred from Superior Court; Merrimack County; Wallace, Judge.

Bill of interpleader by the Page Belting Company against F. H. Prince & Co. and others. Facts found, and case transferred from the superior court. Exceptions overruled.

See, also, 74 N. H. 262, 67 Atl. 401.

After the decision overruling the demurrer of Prince & Co., they filed an answer disclaiming any beneficial interest in the 435 shares of Page Belting Company stock and the accrued dividends thereon here in litigation, and alleged that they held title to the same as trustees under an agreement between E. G. & E. Wallace and Coffin & Stanton. Thereafter William B. Hord, a receiver of the insolvent estate of Coffin & Stanton, appeared and by leave of court became a party to the suit and claimed title to the property. The court permitted the Wallaces to amend their answer by adding a claim for unliquidated damages growing out of the sale of the two lots of bonds hereinafter referred to. The receiver excepted to the allowance of the amendment, and also to the overruling of his demurrer, which was based upon the grounds that the amended bill states that the title is in the Wallaces, and that the claim for damages to be satisfied out of the stock, being of a different nature and character from the claims of Prince & Co. and of the receiver, is therefore not a proper subject for a bill of interpleader.

The facts found were in substance as follows: In August, 1894, E. G. & E. Wallace made a contract whereby they sold 870 shares of the stock of the Page Belting Company to Coffin & Stanton for \$85 a share, and bought from Coffin & Stanton \$150,000 of the bonds of the city of Santa Cruz, Cal., at par, and \$150,000 of the bonds of the city of Ironwood, Mich., at \$105. One-half the stock was to be delivered on each lot of bonds. The Santa

Cruz bonds were delivered to the Wallaces, who turned over 435 shares of stock and paid the balance of the agreed price in cash. There was delay over the issue of the Ironwood bonds, and as a part of the contract the first 435 shares of stock were put in the hands of Prince & Co., as security for the future delivery of those bonds. During these transactions the Wallaces knew that the stock was worth only \$30 a share, but they made no representations on the subject and were not guilty of any fraud or wrongdoing. At the time of these transactions, Coffin & Stanton were hopelessly insolvent and knew they were about to fail. They fraudulently concealed from the Wallaces the fact that they had received the Santa Cruz bonds from the city without paying for the same, and that there was likely to be litigation on that account. There was also fraud in the sale of the Ironwood bonds, which sale was never consummated. Coffin & Stanton failed in October, 1894, and in the ensuing litigation over the Santa Cruz bonds the Wallaces expended over \$22,000. After the final decision that the bonds were valid in the hands of bona fide purchasers for value (*Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552), the Wallaces settled with the city for the face value of the bonds, discounting about \$60,000 interest. This was done, as one of the parties testified, because the city was poor and unable to pay more, and this was the best that could be done. There has been no communication between Coffin & Stanton and the Wallaces on the subject since the failure. The Wallaces have always understood that they owned the stock, and asserted this claim to the corporation in 1899 and to Prince & Co. at a later date, when they demanded a transfer of the stock. Neither the Wallaces nor the receivers have intended to abandon their respective claims to the stock, neither has done any act indicating such intention, and there has been no change in the circumstances affecting the rights of either. Prince & Co. continued to collect the dividends until 1903, when payment was stopped upon the order of the Wallaces. They are not acting in collusion with the corporation in this matter.

At the close of the evidence for the Wallaces, the receiver moved that the bill be dismissed for lack of jurisdiction, upon the following grounds: (1) The amended bill states that the property belongs to the Wallaces, so that it appears the plaintiff is not in doubt as to the title. (2) Collusion is conclusively shown. (3) It conclusively appears that Prince & Co. have title as trustees and are entitled to receive the dividends. (4) The Wallaces' claim for unliquidated damages is of a different nature from those of Prince & Co. and the receiver. At the close of all the evidence, the receiver moved for a decree that he owned the stock, upon the ground that on the pleadings and evidence such fact

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



conclusively appeared. He also renewed his motion to dismiss for want of jurisdiction. Both motions were denied, subject to exception. Upon the facts found, it was held that the Wallaces were entitled to claim the stock and dividends because of the fraud in the sale of the Santa Cruz bonds. There was also an alternative holding that the bonds be applied to make up the loss caused to the Wallaces by the fraud as to the Ironwood bonds. The receiver excepted to these conclusions and also to a refusal to find that collusion was conclusively shown.

Elwin L. Page, of Concord, for plaintiff. Jones, Warren, Wilson & Manning, of Manchester, for defendant F. H. Prince & Co. Streeter, Demond, Woodworth & Sulloway, of Concord, for defendants Wallace. Remick & Jackson and Hollis & Murchie, all of Concord, for defendant Hord.

PEASLEE, J. The exceptions transferred, so far as they are material in the view here taken, involve these questions: (1) Whether there was evidence to justify a finding of fraud in the contract as to the Santa Cruz bonds; (2) whether the Wallaces can rescind without returning those bonds; (3) whether the right of rescission is barred by lapse of time; (4) whether it conclusively appears that there was collusion between the plaintiff and the Wallaces; (5) whether upon the amended pleadings the bill can be maintained.

[1] 1. Upon the issue of fraud in the sale of the Santa Cruz bonds, it is found that Coffin & Stanton concealed the fact that the bonds were not, and would not be, paid for. It is argued that this is immaterial, because Coffin & Stanton had good title, and in the litigation over the bonds which followed the defense that they were not paid for was not set up. The decision in *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552, turns upon the fact that the plaintiff represented parties who were bona fide holders for value of the bonds in question. It thus appears that the facts as to Coffin & Stanton's relation to the property, aside from the naked proposition of title in the narrower sense, was material in the transaction with the Wallaces. It was of consequence whether Coffin & Stanton were or were not bona fide holders for value.

The fact that the bonds had not been paid for was material in other respects. If litigation arose over the legality of the issue, a city might escape liability if it had gained nothing from the transaction, when, on the other hand, if it had received the proceeds of the issue, it might be held liable on a theory of unjust enrichment. The materiality of these facts in this litigation more fully appears in the report of the case in the lower federal courts. *Waite v. Santa Cruz* (C. C.) 89 Fed. 619; *Santa Cruz v. Walte*, 98 Fed. 389, 39 C. C. A. 106.

Again, as a business proposition every one knows that many western municipal obligations have been repudiated because the places have not prospered. Compromises of all sorts have been accepted. The fact that a small city like Santa Cruz had been deprived of the proceeds of a third of a million dollars worth of bonds would suggest to any investor the likelihood that a discount would be unavoidable. That the fact would injure the sale of the bonds is beyond dispute. There is sufficient evidence here that the loss of interest came directly from the facts which were concealed. One witness testified that the discount of about \$60,000 interest was made because the city was poor and unable to pay. The fact that Coffin & Stanton had caused the city a loss of several times this amount on these same bonds is significant of the cause of municipal poverty and the demand for a discount in this particular case. There is no error of law in the finding that the sale of the Santa Cruz bonds was induced by actionable fraud.

It is said that there is no evidence that Coffin & Stanton knew, or had reason to believe, that there would be trouble over the bonds. While there is no direct evidence of the fact, there is an abundance from which the inference might be drawn. The city had no authority to sell, except for cash. Coffin & Stanton took the bonds on credit. In the hands of one not a bona fide holder for value, these facts invalidated the bonds. *Waite v. Santa Cruz*, 184 U. S. 302, 22 Sup. Ct. 327, 46 L. Ed. 552. So far from having, as the receiver claims, an unimpeachable title, it appears that the title of Coffin & Stanton was worthless as between them and the maker of the bonds. They were men of large experience in these matters; and, when they disposed of property to which they had so imperfect a title, it is morally certain that they knew litigation was likely to follow. In any event, such a fact might be inferred from the evidence.

2. Because of this fraud, the Wallaces claim to exercise an equitable right of rescission. It is objected that this cannot be done because they have kept the bonds received by them as a part of the repudiated transaction. While by the strict common-law rule one could not rescind save by putting the other party in statu quo, the theory has been much broken in upon since the distinction between legal and equitable relief has come to be largely disregarded; and the rule now in this jurisdiction is that the rescinding party is only required "to do what equitably he ought to do." *Mead v. Welch*, 67 N. H. 341, 342, 39 Atl. 970; *Thorpe v. Packard*, 73 N. H. 235, 60 Atl. 432. See, also, *Sipola v. Winship*, 74 N. H. 240, 66 Atl. 962.

In view of the fact that the Wallaces have made a substantial loss in the transaction, even after retaining the bonds, it seems plain

that equity would not require that the bonds or their proceeds be given up. This conclusion is combatted upon the ground that in this sale the Wallaces were themselves guilty of gross fraud. The finding to the contrary is attacked as not being supported by the evidence. The claim is that it conclusively appears that the Wallaces deceived Coffin & Stanton as to the value of the stock here in litigation. The only evidence of this is the fact that the stock was sold for much more than it was worth. However persuasive this may be in favor of the result claimed, it certainly is not conclusive. The conclusion rests upon inference alone; and, where inferences are to be drawn, the question is one of fact unless one conclusion is certain and uncontrovertible. *Lyman v. Railroad*, 66 N. H. 200, 20 Atl. 976, 11 L. R. A. 364.

[2] 3. It is next claimed that the right to rescind is barred by the statute of limitations, or by laches. The right accrued nearly 20 years ago and would be barred at the same time as other suits for the same wrong would be; that is, in six years. But the statute runs only in favor of those who are within the state.

"If the defendant in a personal action was absent from and residing out of the state at the time the cause of action accrued, or afterward, the time of such absence shall be excluded in computing the time limited for bringing the action." P. S. c. 217, § 8.

The defense of the statute is here set up in the interest of the estate of Coffin & Stanton; and, as neither they nor their representative have been in the state until the appearance of the receiver in this litigation, it follows that they cannot claim the benefit of the statute. *Quarles v. Bickford*, 61 N. H. 425, 13 Atl. 642; *Howard v. Fletcher*, 59 N. H. 151.

Upon the question of laches there is no specific finding by the trial court. None was requested by either party; the receiver relying upon his general exception to the order made upon the facts found.

[3] Whether delay in asserting an equitable claim is unreasonable is a question of fact. *Alden v. Gibson*, 63 N. H. 12; *Ashuelot R. R. v. Elliot*, 52 N. H. 387, 400.

"When a suit is brought within the time fixed by the analogous statute, the burden is on the defendant to show, either from the face of the bill or by his answer, that extraordinary circumstances exist which require the application of the doctrine of laches." *Kelley v. Boettcher*, 85 Fed. 55, 62, 29 C. C. A. 14, 21; 5 Pom. Eq. Jur. § 20.

As the matter is one of defense, the case stands as it would upon an affirmative finding that there was no unreasonable delay. The receiver can take nothing by the objection here, unless his position is conclusively established by the pleadings or the evidence.

[4] In one sense there has been a long delay, but in the legal sense there has been none. The delay referred to in the rule on the subject consists of a failure to assert a

right when one has the power to do so. But in this case there has been no opportunity for these citizens of this state to assert their rights in the local forum until this time. It is true that they might have gone to New York and litigated the question against the representatives of Coffin & Stanton there; but that is more than the law requires, certainly in ordinary cases. If there might be cases where on account of changing circumstances such extreme vigilance would be demanded, this is not one of them. It is found that there has been no change here. All things remain as they were when the sale was made. Under such circumstances, it may not be unreasonable for the injured party to wait until there is opportunity to pursue his equitable remedy in the courts of his own state. Any other conclusion would be out of harmony with the declared policy of the state as to the limitation of personal actions against nonresidents.

[5] 4. The claim that the proceeding is collusive, as between the plaintiff and the Wallaces, is based upon the facts that one of the Wallaces was president of the Belting Company, that they have at times been represented by the same counsel, that the company has from time to time acted upon the Wallaces' request, or order, in its dealings as to this stock with Prince & Co., and that after the Wallaces filed their original answer the plaintiff adopted it as a part of its bill. However significant these facts may be, they still fall short of concluding the matter. Inferences must be drawn from them in order to make out the defense alleged. It may be that in spite of all these facts the company acted of its own volition in filing the bill, and that the affidavit of noncollusion states the truth. Upon this issue, as upon others heretofore considered, the receiver's difficulty is that at the most he had a good case on the evidence. It was incumbent on him to procure from the trier of facts findings in accordance with the claims set up. Having failed in this, he has no further recourse along this line.

[6] 5. Finally, it is argued that upon the pleadings and facts the bill cannot be maintained. At times the receiver appears to rely upon the pleadings as determinative of this question, and at other times upon the evidence reported and the facts found. It can hardly be necessary to say that the latter position is the correct one in this jurisdiction. There was a controversy between some of these defendants. It has been fully and understandingly tried. All parties in interest have appeared and been fully heard. In this state of the case, it is wholly immaterial whether the pleadings are or are not technically correct. If they are not, they can now be made so.

[7] It is difficult to understand wherein there is any defect in the jurisdiction of the court to try this controversy. It is not a

case presenting a claim of title on one side and of damages to be satisfied out of the property on the other. There is a claim of such damages made, but the finding that the Wallaces have title is not based upon it. Their title is found to rest upon a rescission which they had the right to elect because of fraud. The issue of damages was here involved only so far as it was necessary to prove the fact as a basis for the exercise of the right to rescind. Both parties claim to own the stock, and are therefore properly impleaded by the disinterested corporation which issued the stock and is liable for the accrued dividends to whoever is legally entitled thereto.

It is said that the bill was originally sustained upon the allegation that Prince & Co. wrongfully held the stock (Page Belting Co. v. Prince, 74 N. H. 262, 67 Atl. 401), and that as this allegation was false the bill should be dismissed. But the demurrer was not overruled upon this ground alone. At that time both Prince & Co. and the Wallaces had made demand upon the corporation for the dividends. The conclusion was that:

"Since the defendants respectively made two distinct and inconsistent claims to the dividends, neither of which appears to be frivolous, manifest justice and equity require that they should litigate the matter between them for the protection of the plaintiff, who is merely an indifferent stakeholder." 74 N. H. 265, 67 Atl. 403.

Moreover, since the demurrer was overruled, another claimant has appeared and been allowed to set up his alleged title to the stock.

Nor is it certain, as claimed, that payment of the dividends to Prince & Co. would have discharged the liability of the plaintiff. It had been notified of the Wallaces' claim to the dividends, as owners of the stock. The matter was then in dispute between the parties, and the stakeholder was entitled to the protection which this proceeding affords to it.

[8] Of no more controlling importance is the claim next made by the receiver that the amended bill shows that the plaintiff had no doubt of its right to pay the dividends to the Wallaces. It may have believed that one party had title and yet be entitled to the protection of a decree against the claim set up by the other party. The question was not whether the plaintiff believed Prince was right, or the Wallaces were right, or whether it had no opinion on the matter. As pointed out in the former decision, the important fact is that conflicting claims are made and that it does not appear that the claims are frivolous. Farley v. Blood, 30 N. H. 354; 5 Pom. Eq. Jur. § 40, note 8. If the plaintiff erred in alleging that one party had title instead of merely stating that both claimed title, the error misled no one. But the question is not an open one. This allegation was in the bill when it was considered upon demurrer and was not deemed of vital importance. While it is true that the receiver was

not a party when the former decision was announced, yet that opinion stands like any other recent declaration of the law upon the subject.

A part of the receiver's argument on this question appears to be based upon the assumption that the amended answer of the Wallaces was made a part of the bill. The record does not show this. The original answer was adopted as a part of the complainant's allegations, but the company took no such action after the amended answer was filed. The motion that allegations of facts set out in the answer be added to the bill was made in 1906, four years before the amended answer was filed. The bill, as amended by the addition of the original answer of the Wallaces, has not been changed in any respect since the demurrer of Prince & Co. was overruled.

[9] The receiver also urges that there is no jurisdiction over him. But he can take nothing by the mistaken impression (if he had it) that he could come into this jurisdiction and interpose technical objections, and at the same time escape being subject to the jurisdiction according to the usual course of procedure here. At his own request he was permitted to intervene, to become a party to this suit, and to claim the stock and dividends. At that time Prince & Co. had disclaimed any beneficial interest in the stock, and the case was in order for trial between the real claimants of title, the receiver on one side and the Wallaces on the other. The receiver's motion for leave to appear and litigate his claim of title, and the order granting the motion, had precisely the same effect upon the litigation as an allegation of his claim in the original bill and his appearance and answer thereto would have had.

After the decision upon the demurrer, the case was in order for a trial between Prince, claiming title as trustee under the pledge contract, and the Wallaces, claiming an absolute title to the stock. The receiver was not a party to the proceeding. There had been no attempt to make him a party or to secure a judgment which would bind him. If he had refrained from taking part in the litigation, his rights would not have been concluded by what was done in this suit; but, when he intervened as a party to the suit, his situation was changed. Assuming that he may be correct in his contention that his submission to the jurisdiction was at first "temporary," the questions he then sought to raise were properly decided against him. His demurrer goes upon two grounds. The first, that the bill as amended could not be maintained, had already been decided adversely to him. The second, that the Wallaces claimed damages only, is contrary to the fact, and the case is disposed of without considering that aspect of the contention.

If the receiver's position, that jurisdiction to render a judgment against him was lack-

ing, had been well taken in the first instance, it could not now be insisted upon. If he could at the same time become a party so far as to defeat the bill, and yet not a party so as to be compelled to litigate his claim, he did not undertake such a course. When his demurrer was overruled he did not rely upon his exception to the ruling. He then set up his claim of title and proceeded to litigate the same. As before pointed out, this had the same effect upon the proceedings as would have resulted from his being a party whose claim was set up in the bill and over whom the court had complete jurisdiction.

His further contention, that he did not discover the alleged deficiencies in the case until during the progress of the trial, does not alter the situation. He did not then elect to withdraw from his contest on the facts and ask the court to relieve him from the effects of what he had done. On the contrary, he continued to participate in the trial as the only opponent of the Wallaces. He introduced evidence, argued and submitted his case on the facts, and is bound by the result. If the trial court could have permitted him to withdraw upon the ground of misapprehension or deception, it did not do so. No request for such relief was made; the only suggestion along that line being that his demurrer was to have the same effect as though filed before he answered to the merits. As to his other motions and exceptions, he stands like any party over whom full jurisdiction has been obtained.

[10] There is no error of law in the conclusion reached in the superior court that the Wallaces have title to the stock by virtue of their rescission of the contract by which title was transferred from them to Coffin & Stanton. There is no occasion to consider the claim that they have a lien upon the stock by virtue of a later transfer thereof by Coffin & Stanton to Prince & Co., as security for an obligation undertaken toward the Wallaces. The rescission of the original sale invalidates the later pledge by the vendee and renders the facts as to that transaction, and the possible rights growing out of it, wholly immaterial.

Exceptions overruled. All concurred.

(124 Md. 153)

PATTERSON et al. v. MAYOR & CITY  
COUNCIL OF BALTIMORE et al.  
(No. 24.)

(Court of Appeals of Maryland. June 25, 1914.  
Motion for Reargument and Modification  
Denied Oct. 7, 1914.)

1. MUNICIPAL CORPORATIONS (§ 278\*)—OPENING STREETS—ASSESSMENTS—ESTABLISHING GRADE.

Before property can be assessed for the opening of a street, its grade must be established.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 734-738, 744; Dec. Dig. § 278.\*]

2. EMINENT DOMAIN (§ 238\*)—OPENING STREETS—APPEAL FROM AWARD AND ASSESSMENT—COMMISSIONERS AS WITNESSES.

Under Acts 1912, c. 32, § 1, amending Code Pub. Loc. Laws, art. 4, § 179, providing that, on appeal from the award of damages and assessment of benefits by the commissioners for opening streets in Baltimore, the court "may require the commissioners \* \* \* to attend, and may examine them," they are competent witnesses, and may be examined as to the principles on which they acted.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 614, 619, 658-660, 666, 668, 669, 671, 673, 674, 687; Dec. Dig. § 238.\*]

3. EMINENT DOMAIN (§ 201\*)—OPENING STREETS—ASSESSMENTS AND AWARDS—CONSIDERATION OF OTHER PROCEEDINGS.

In assessing benefits and awarding damages for opening a street, the effect on the property of the opening of another street, authorized by another ordinance, but not yet carried to completion, may not be considered; the proceedings being separate.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 540½; Dec. Dig. § 201.\*]

4. EMINENT DOMAIN (§ 238\*)—OPENING STREET—APPEAL—QUESTIONS TO COMMISSIONERS.

A question to one of the commissioners, on appeal from the award and assessment by the commissioners for opening streets, to show on what his award was based, and his judgment of the value of one of the lots into which property was cut by the opening of the street, is proper.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 614, 619, 658-660, 666, 668, 669, 671, 673, 674, 687; Dec. Dig. § 238.\*]

5. EMINENT DOMAIN (§ 238\*)—APPEAL FROM AWARD—WITNESSES—QUALIFICATION—EVIDENCE TO ESTABLISH.

A question to a witness, on appeal from the award and assessment by the commissioners for opening streets, designed to establish his qualification to testify to the value of the property, should be allowed.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 614, 619, 658-660, 666, 668, 669, 671, 673, 674, 687; Dec. Dig. § 238.\*]

6. EMINENT DOMAIN (§ 96\*)—OPENING STREET—DAMAGES.

The award of damages for opening a street through one's land should include not only the market value of the land taken, but an allowance for any injury to the remainder of the tract.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 245-249; Dec. Dig. § 96.\*]

7. EMINENT DOMAIN (§ 239\*)—VIEW BY JURY.

As to the value of the property and the damage by the opening of a street, the jury sent by the court, on appeal from the award by the commissioners for opening streets, under the power contained in Acts 1912, c. 32, § 1, amending Code Pub. Loc. Laws, art. 4, § 179, to view the property condemned may consider not only the evidence introduced, but the effect on them of their view.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 615-620, 675, 676, 678, 680; Dec. Dig. § 239.\*]

Appeal from Baltimore City Court; H. Arthur Stump, Judge.

"To be officially reported."

Proceedings for the opening of a street in the city of Baltimore. From the assessment of damages and benefits by the com-

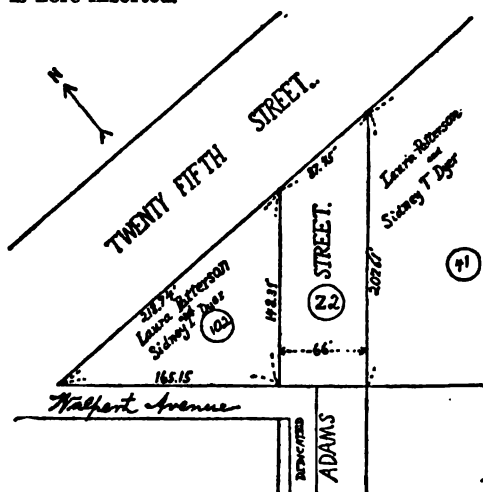
missioners for opening streets, Laura Patterson and another, property owners, appealed to the Baltimore city court, and from its rulings again appeal. Reversed, and new trial awarded.

Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, STOCKBRIDGE, and CONSTABLE, JJ.

Arthur W. Machen, Jr., of Baltimore, for appellants. Robert F. Leach, Jr., of Baltimore (S. S. Field, City Solicitor, of Baltimore, on the brief), for appellees.

BURKE, J. City Ordinance No. 109, approved May 27, 1912, authorized the opening of Adams street from the west side of Homewood avenue to the south side of Twenty-Fifth street. It provided for the opening of the street "to the south side of Twenty-Fifth street 100 feet wide as now in process of widening." The opening of Twenty-Fifth street had been authorized by an ordinance approved December 9, 1909.

The appellants are the owners in fee of a tract of land which extends northerly and easterly from Walbert avenue. For a clear understanding of the situation of the several streets and the location of the appellants' property with reference thereto, a diagram is here inserted.



The portion of the appellants' land actually taken for the bed street is designated upon the diagram as lot 22, and the adjoining lots as lots 41 and 102. By the return of the commissioners for opening streets the appellants were awarded \$1,174.50 for the lot actually taken, and were assessed \$1,168 as benefits—\$6.50 less than the damage. Lot 41 was assessed \$724 for benefits, and lot 102 \$444. A petition for a review of the award and assessment was filed in the Baltimore city court, where a trial was had upon the questions involved. The trial resulted in an inquisition which fixed the damages at \$1,174.50 and the benefits at the same figure. This appeal was taken by the appellants

from the rulings of the lower court made during the progress of the trial. The main questions in the case are: (1) The effect of the failure of the city to establish the grade of Adams street before making the award and assessment; (2) the competency of the present and prior commissioners for opening streets as witnesses; (3) the admissibility in this case of the ordinance and proceedings for the opening of Twenty-Fifth street.

There are some subsidiary questions presented upon the rulings upon the evidence and prayers which will be considered later.

[1] As to the first question: The grade of Adams street has never been established. It was decided in the recent case of the Mayor & City Council v. Johnson, 91 Atl. 156, January term, 1914, that the city cannot lawfully assess benefits against abutting property until the grade of the proposed street shall have first been established. In that case Judge Pattison, speaking for the court, said:

"When a public street or highway is to be opened, and land is to be condemned for the bed of the street or highway, it is but fair and equitable that the grade of such street or highway should first be established, in order that those who are to determine the benefits, if any, that the opening of such street or highway will be to the abutting lands may estimate the necessary costs of placing such abutting lands in a condition to receive the advantages of the street or highway as opened and graded; and the grade so established should be the one, so far as it can then be determined after a proper consideration of the rights and interests of the adjacent landowners, that for all times will best subserve the public interest and convenience. Not to establish a grade at the time when the street is open, but at such time to assess the benefits without regard to the costs and expenses to which the adjacent landowners may be subjected in cutting or filling their lands so as to enable them to receive the advantages of the road so opened, would, we think, be unfair and inequitable to them. The grade of the street is so materially involved in ascertaining the amount of benefits to be assessed against the abutting lands that it is right and proper, in our opinion, that a permanent grade, and not a tentative one, such as is here referred to by the city engineer, should be established before the city should be permitted to assess benefits to abutting lands, caused by the opening of such street or highway."

Under the authority of that case there was reversible error in refusing the appellants' sixth prayer, which asserted that there was no evidence legally sufficient to justify an assessment of benefits against lot No. 41, and in refusing their seventh prayer, which, for the same reason, declared that there could be no assessment for benefits against lot 102. The eighth prayer, for the same reason, should have been granted.

[2] Under section 179 Code Pub. Loc. Laws, art. 4, of the Acts of 1912, c. 32, § 1, the commissioners for opening streets were competent witnesses in the case. That section provided that, upon the appeal from the award and assessment, the court "may require the said commissioners, their clerk, surveyor, or other agents and servants, or

any of them, and all such other persons as the court may deem necessary, to attend, *and examine them on oath or affirmation,*" etc.

The city, in condemning and opening Adams street, was exercising through the commissioners for opening streets the power of eminent domain, and in *Consolidated Gas Co. v. Baltimore City*, 105 Md. 43, 65 Atl. 628, 121 Am. St. Rep. 553, the court said that:

"Ever since the case of *Tidewater Canal Co. v. Archer*, 9 Gill & J. 479, the practice in Maryland has allowed the examination of jurors, who sign the inquisition as witnesses, on return of such inquisition for confirmation, 'upon all subjects whatever relating to the controversy, as fully as any other persons who might be sworn as witnesses in the cause, that they may be examined as to the grounds and motives for their finding, in order to ascertain whether, in coming to their conclusions, they had not mistaken facts as well as the law.'"

This proceeding is analogous to the old proceeding by condemnation, and it is proper that the persons who made the award and assessment should be required to state the principle upon which they acted.

[3] We are of opinion that the questions of the opening of Twenty-Fifth street and their effect upon the appellants' property should not be injected into this case. That was a separate and independent proceeding, and it may never be carried to completion. If it should be, all grievances which the land-owners may have against the action of the commissioners may be remedied by an appeal to the court. Such questions are not properly open for determination in this case.

The record presents 20 bills of exceptions taken to the rulings of the court on evidence. It results from the views we have expressed that there was no error in the ruling embraced in the first, second, and third exceptions, which relate to the refusal of the court to admit in evidence the ordinance for the opening of Twenty-Fifth street; the record of proceedings in the opening of that street; and testimony as to the establishment of the grade of that street.

[4, 5] There was error in the rulings in the fourth and fifth exceptions. The question asked Mr. Grannan, one of the commissioners for opening streets, to show upon what his award of damages was based, and his judgment of the value of lot Z2, should have been answered. The question set out in the sixth exception has reference to the opening of Twenty-Fifth street, and we find no error in that ruling. Mr. Budnitz should have been allowed to answer the question embraced in the seventh and eighth exceptions, and the questions propounded to John L. Sanford in the ninth and tenth exceptions were likewise proper, and he should have been permitted to answer them. They were designed to establish the qualification of Mr. Sanford to testify to the value of the property. Had the answers to these questions established his qualification to speak as to values, he should have been permitted to answer the questions

embraced in the eleventh exception. But, as we do not know whether or not he was qualified, we cannot pronounce that ruling erroneous. The same observation, for the same reason applies to the twelfth exception.

The evidence proposed to be offered in the thirteenth exception was whether certain proceedings which had been taken for the opening of Twenty-Fifth street would affect the saleable value of lot ZA. The court refused to admit this evidence, and, for the reason above stated, there was no error in the ruling. The question propounded in the seventeenth exception related to the pending proceeding for the opening of Twenty-Fifth street, and the ruling was correct. Inasmuch as the city could not make an award and assessment of benefits until the grade of Adams street had first been established, the evidence proposed to be introduced in the nineteenth and twentieth exceptions to show the effect on the value of the lots by reason of the failure of the city to establish the grade was wholly immaterial. The evidence proposed to be offered in the fourteenth, fifteenth, sixteenth, and eighteenth exceptions had a tendency to enlighten the jury upon the question of damage. The court should be careful to see that the rights of the property owners are fully protected, and we do not think there are any well-founded objections to these questions.

[6] There remains for consideration the rulings of the court on the prayers. The sixth, seventh, and eighth prayers we have already passed upon. The appellants submitted 15 prayers. Their first and second were granted as offered. Their third, fourth, fifth, twelfth, and fourteenth were refused as offered, but were granted with modifications by the court. Their other prayers were refused. The appellants excepted to the refusal of their prayers as offered and to the modifications made by the court. Their third and twelfth prayers were upon the subject of "damages," and are here transcribed:

(3) In estimating the damages to be paid for condemnation of property, the jury must include in their award of damages not merely the market value of the land actually to be taken, but also a due allowance of damages for injury to the remaining land owned by the appellants, Laura Patterson and Sidney T. Dyer, if the jury shall find that any such injury will be caused.

(12) If the jury find that Laura Patterson and Sidney T. Dyer are the owners of the ground binding on the southernmost side of Twenty-Fifth street as proposed to be opened in the proceedings now pending for that purpose, and bounded northwardly by Twenty-Fifth street and southwardly by Walbert avenue and the dividing line between the land known as the Patterson Cold Stream property and the land known as the Walbert property, and if the jury further find that the opening of Adams street as proposed in this proceeding will be injurious to the petitioners, Laura Patterson and Sidney T. Dyer, in an amount greater than the present market value of the ground contained in lot No. Z2, shown on the plat marked A and B in evidence, then the jury, in as-

certaining the damages to be paid to said petitioners, are not confined to the market value of the ground contained in said lot No. 22, but they may and should award to the said petitioners as damages such sum of money as will fully compensate for all the injury which the jury shall so find will so be done to them by the opening of said Adams street as proposed in the present proceedings.

These prayers, as offered, should have been granted, as they stated the correct rule of damage.

[7] Under the power contained in section 179 of the Acts of 1912, c. 32, the court sent the jury of inquest to view the land condemned. There is a broad distinction between the nature and effect of a view of the premises by a jury in a condemnation case and that of an ordinary action at law. In the first class of cases the jury is not confined to the duties and limitations which the principles of the common law impose upon a common-law jury. This subject has been fully treated in *Tidewater Canal Co. v. Archer*, *supra*. While we are not to be understood as holding that all the principles announced in that case upon the subject we are now considering are applicable to this case, we do hold that the jury may be very properly influenced as to the value of the property and the damage that would be done by the opening of the proposed street by their view of the property.

In *Kurrie v. Baltimore City*, 113 Md. 63, 77 Atl. 373, the court said:

"In eminent domain proceedings, the jury goes upon the land for the purpose of *ascertaining its value*, and their view should have more effect than in ordinary cases where they are generally and primarily permitted to go to the locus in quo so as to better understand and apply the evidence."

The effect of the modifications made by the court to the appellants' third and twelfth prayers was to confine the jury to the evidence produced at the trial, and to shut out from their consideration the effect which the view of the property may have had upon their minds. In this the court fell into an error. The appellants have abandoned their exception to the refusal of their fourteenth prayer and to the modification thereto made by the court, and they do not insist upon their fifteenth prayer.

Their fourth, fifth, and thirteenth prayers relate to "benefits." As the question of benefits could not be determined under the circumstances of this case, there was no error in refusing these prayers, and they should not have been granted as modified. The tenth and eleventh prayers have reference to the opening of Twenty-Fifth street, and, for the reasons already stated, were properly rejected.

The record contains three prayers offered by the appellee. The first was modified by the court and granted as modified. It related to the question of "benefits." There was a special exception to this prayer, which

was overruled by the court. The exception was based upon the ground that there was no legally sufficient evidence to show that the property would be benefited. It results from what we have heretofore said that the exceptions should have been sustained and the prayer refused. We find no error in granting the second and third prayers of the appellee.

What we have said disposes of all the questions presented, and for the errors pointed out in the rulings of the lower court, the case must be remanded for a new trial.

Rulings reversed, and new trial awarded; the appellee to pay the costs.

(83 Conn. 528)

### WALSH v. CITY OF BRIDGEPORT.

(Supreme Court of Errors of Connecticut. Oct. 8, 1914.)

#### 1. APPEAL AND ERROR (§ 724\*)—ASSIGNMENTS OF ERROR—FINDINGS.

Where the allegations of a complaint and the findings of fact were materially different in several particulars, assignments of error assuming that the record showed that the allegations of the complaint had been found proven were improper.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 2997-3001, 3022; Dec. Dig. § 724.\*]

#### 2. MUNICIPAL CORPORATIONS (§ 199\*)—FIREMEN—SALARY—DEDUCTION FOR SICKNESS—ORDINANCES.

Bridgeport City Ordinance March 15, 1909, § 134, provides that the board of fire commissioners may continue, in their discretion, the salary of any officer or member of the fire department who shall have received any injury while in the performance of his duty, incapacitating him from performing his usual duties in the department. *Held*, that such provision gives rise to a conclusive inference that firemen will not be entitled to salary during absence because of incapacity to perform their duties not received while in the performance of duty.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 546; Dec. Dig. § 199.\*]

#### 3. MUNICIPAL CORPORATIONS (§ 199\*)—FIREMEN—ORDINANCES—REPEAL—SALARY.

Bridgeport City Ordinance March 15, 1909, § 134, provides for the regulation of the fire department of the city by a board of fire commissioners, prescribes the manner of paying their salaries, and declares that the board may continue the salary of a member of the department unable to perform his duties by reason of incapacity received while performing the usual duties of the department. In April, 1910, the city adopted an ordinance by which members of the fire department were divided into three classes, section 2 of which provided the yearly salaries of each grade, but made no reference to the method of compensation, the time when it was to be paid, or the power of the commissioners to continue the salary of a member when incapacitated from service. *Held*, that such later ordinance did not operate as an implied repeal of the former, so as to warrant payment of salary to a fireman while absent from duty because of illness not contracted in the service of the department.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 546; Dec. Dig. § 199.\*]

#### 4. MUNICIPAL CORPORATIONS (§ 116\*)—ORDINANCE—IMPLIED REPEAL.

Where a later ordinance contains no repealing clause, it will not repeal a former ordinance unless the later one is clearly intended as a substitute for the earlier, or there is an irreconcilable conflict between them, and then only so far as the inconsistency extends.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. §§ 268-271; Dec. Dig. § 116.\*]

#### 5. MUNICIPAL CORPORATIONS (§ 199\*)—FIRE DEPARTMENT—ORDINANCES—COMPENSATION OF FIREMEN—"SALARY"—"WAGES."

The word "salary," as used in a city ordinance providing for the compensation of firemen, is synonymous with "wages," though the word "salary" is sometimes understood to relate to compensation for official or other services, as distinguished from "wages," which is the compensation for labor.

[Ed. Note.—For other cases, see *Municipal Corporations*, Cent. Dig. § 546; Dec. Dig. § 199.\*]

For other definitions, see *Words and Phrases*, First and Second Series, *Salary*, *Wages*.]

Appeal from City Court of Bridgeport; Thomas C. Coughlin, Judge.

Action by Thomas Walsh against the City of Bridgeport, to recover money alleged to have been withheld from plaintiff's salary as a fireman. Judgment for defendant, and plaintiff appeals. Affirmed.

Hugh J. Lavery and Lawrence S. Finkelstone, both of Bridgeport, for appellant. John S. Pullman, of Bridgeport, for appellee.

**RORABACK, J.** This is an action brought by Thomas Walsh, a fireman of the city of Bridgeport. The plaintiff alleges in his complaint that there is a certain sum of money due him as a portion of his salary as a fireman of the defendant city, which it, through its board of fire commissioners, refused to pay. The record shows that this case was tried in the city court of Bridgeport at its March term, 1914; that the court, having heard the parties, found the issues for the defendant, and it was adjudged that the defendant recover of the plaintiff its costs. The plaintiff appealed, and the parties agreed to a finding of facts in the case, which the trial court adopted.

Upon appeal to this court the only errors assigned are:

(1) "That the court erred and mistook the law in ruling that, upon the allegations of the complaint alleged and proved, said Thomas Walsh was not a salaried public officer of the city of Bridgeport."

(2) "That the court erred and mistook the law in ruling that, upon the allegations of the complaint alleged and proved, the said Thomas Walsh was not entitled to his salary during the time he was absent from duty by reason of illness."

(3) "That the court erred and mistook the law in ruling that, upon the allegations of the complaint alleged and proved, the ordinance of the city of Bridgeport, which became effective on the 1st day of April, 1910, said ordinance regulating the pay of firemen of said city, did not repeal such portions of section 134 of the ordinances of the city of Bridgeport, as amend-

ed on March 15, 1909, as gives the fire commissioners the power to deduct pay from the salary of the said Thomas Walsh, while the said Thomas Walsh was absent from duty by reason of illness."

The plaintiff, in his assignment of errors, assumes that the record showed that the allegations of the complaint have been found to be proven. This assumption is not true. The record discloses no foundation for any such claim.

[1] The allegations of the complaint and the finding of facts in several particulars are materially different. Assignments of error should be supported by the record. *Palmer v. Hartford Dredging Co.*, 73 Conn. 182, 190, 47 Atl. 125.

The third reason of appeal, although improperly framed, we shall treat, as both parties have treated it, as if properly made for the purpose of considering the action of the trial court in holding that the ordinance which took effect in April, 1910, raising the firemen's pay, did not repeal section 134 of the ordinance of 1909, which requires "an accurate semimonthly pay roll of the officers and members of the fire department, in which shall be designated the date and period of service of each officer and member and the amount due each of them to the 1st and 16th days of each month, respectively."

The charter of the city of Bridgeport authorizes the common council to make, alter, and repeal orders and ordinances regulating the fire department and fixing the salaries of its members. Pursuant to this power the common council has from time to time passed ordinances changing the pay of the city firemen and regulating the manner in which the pay rolls of the fire department should be made up.

In May, 1907, the plaintiff was duly appointed a fireman of the city of Bridgeport, and is still a member of that department.

[2] On March 15, 1909, the ordinance upon this subject was amended to read in part as follows:

"Sec. 134. The board of fire commissioners shall keep a record of the officers and members of the department and of each separate company thereof. They shall also keep an accurate semimonthly pay roll of the officers and members of the fire department, in which shall be designated the date and period of service of each officer and member and the amount due each of them up to the 1st and 16th days of each month, respectively, and said pay roll shall be delivered to the city auditor on or before the 1st and 16th days of each month to be kept on file. The city clerk is hereby authorized and empowered to draw his order on the city treasurer on the 1st and 16th days of each month, respectively, for the amount of such pay rolls in favor of the clerk of the board of fire commissioners or of the president of the board of commissioners, and the amount so received by said clerk of the board of fire commissioners shall be disbursed by him to the officers and members of the fire department in the manner herein provided, but, in the absence or disability of said clerk, by the president of the board of fire commissioners or such person as

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the fire commissioners shall designate. On the 1st and 16th days of each month, respectively, said clerk of the board of fire commissioners shall pay to each officer and member of the fire department that sum of money which is due to each of them on said days, and when payment is so made said clerk shall take a receipt upon said pay roll of each officer and member so paid for the amount paid to him and said pay roll thus receipted shall be lodged with the city auditor and kept on file by him."

"The board of fire commissioners may continue, in their discretion, the salary of any officer or member of the fire department who shall have received any injury while in the performance of his duty incapacitating him from performing his usual duties in said department."

The last clause, which gives the board of commissioners power in their discretion to continue the salaries of members during their incapacity resulting from injuries received while in the performance of their duties, makes the inference conclusive that but for this provision they would not be entitled to their salaries during such incapacity nor during the time they failed to perform their duties because of incapacity not received while in the performance of their duties.

[3] This ordinance took effect April 1, 1909, and has never been repealed, unless by the adoption of a regulation made by the defendant city, which provided that:

"Section 1. After April 1, 1910, the premanent drivers, hosemen, stokers, linemen, ladder-men and tillermen shall be divided in three grades, the highest to be known as grade A, the next to be known as grade B, and the lowest to be known as grade C. All permanent drivers, hosemen, stokers, linemen, laddermen and tillermen appointed after this ordinance takes effect shall serve the first year in grade C, the next succeeding year in grade B, and each succeeding year thereafter in grade A. Each driver, hoseman, stoker, lineman, ladderman and tillerman, who is a member of the regular force on April 1, 1910, shall then be placed in that one of the grades herein provided for, to which his length of service preceding April 1, 1910, entitled him to belong. Drivers, hosemen, stokers, linemen, laddermen and tillermen may be reduced at the discretion of the board of fire commissioners from one grade to another lower grade as a punishment for any offense coming under the jurisdiction of the board of fire commissioners."

"Sec. 2. Commencing April 1, 1910, the yearly salaries of the members of the fire department, indicated below, shall be as follows: Captains, \$1,400; engineers, \$1,300; lieutenants, \$1,250. And grade A, drivers, hosemen, stokers, linemen, laddermen and tillermen, \$1,200. Grade B, drivers, hosemen, stokers, linemen, laddermen and tillermen, \$1,100. Grade C, drivers, hosemen, stokers, linemen, laddermen and tillermen, \$1,100."

"Sec. 3. This ordinance shall take effect April 1, 1910, and all ordinances or parts of ordinances heretofore enacted and inconsistent herewith are hereby repealed, to take effect April 1, 1910."

Under this ordinance the plaintiff became a member of grade A of the fire department, so called, and was entitled to a salary at a yearly rate of \$1,200.

On April 11, 1910, the plaintiff became ill from eczema, which did not arise out of his employment as fireman, and by reason of such

illness was incapacitated from duty and did not report for duty until April 25, 1910.

The bimonthly pay rolls of the fire department for the month of April, 1910 (as called for in section 134 of the ordinances), did not call for any payment to the plaintiff for services from April 11, 1910, to and including April 25, 1910. The omission of salary due to the plaintiff on the pay rolls from April 11, 1910, to April 25, 1910, was due to the fact that the plaintiff did not report for duty. The plaintiff would have received from the city the sum of \$46.66 more than he did actually receive for services in the month of April, 1910, if no deduction had been made in his pay roll for the two weeks he was off duty.

It is conceded that the controlling question in the case is as to the effect of the ordinance of April, 1910, upon section 134 of the ordinance of 1909. If the provisions of section 134 of the act of 1909 are repealed by the ordinance of 1910, the plaintiff has the right to recover. If not, this action cannot be maintained.

"All statutes, whether remedial or penal, should be construed according to the apparent intention of the Legislature, to be gathered from the entire language used, in connection with the subject and purpose of the law." *Bissell v. Beckwith*, 32 Conn. 509, 516.

The ordinance of April, 1910, embraces but one part of the general subject of the compensation of firemen. It deals with the different grades of firemen and the annual rates of compensation or salary. It makes no reference to the method of compensation, the time when it is to be paid, or the power of the commissioners to continue the salary of a member of the defendant when incapacitated from service. When the two acts are not in terms repugnant, yet if the later one covers the whole subject-matter of the former, and embraces new provisions plainly showing that it was intended as a substitute for the former, the latter will operate as a repeal of the former. *U. S. v. Tynen*, 11 Wall. 88, 20 L. Ed. 153. No such conditions exist in the present case.

There is no inconsistency or repugnancy between any of the provisions of the two acts. When the provisions of the act of 1910 are read in connection with the provisions of section 134 of the ordinance of 1909, it is apparent that there was no intention that the act of 1910 should in any way supersede the provisions of section 134 of the ordinance of 1909. They can both stand and have concurrent operation. The two ordinances can and must be read together that the defendant municipality may administer its finances relating to this department in an orderly and intelligent manner.

[4] It is plain that there is no repeal of section 134 of 1909, unless, as the plaintiff claims, by implication.

"Such repeals are not favored, and will not be extended beyond the reason therefor, nor

presumed where the old and new may stand together." *Windham County Savings Bank v. Himes*, 55 Conn. 433, 12 Atl. 517; *Bissell v. Dickerson*, 64 Conn. 61, 29 Atl. 226; *Kallahan v. Osborne*, 37 Conn. 488; *Central Ry. & E. Co.'s Appeal*, 67 Conn. 197, 35 Atl. 32.

"If both the earlier and the later statute can be reconciled, they must stand and have concurrent operation." *Goodman v. Jewett*, 24 Conn. 588; *Kallahan v. Osborne*, 37 Conn. 488; *Talcott v. Glastonbury*, 64 Conn. 575, 30 Atl. 764.

"The repugnancy between the two statutes must be clear and manifest, to warrant a court in holding that the later repeals the former." *Hartford Bridge Co. v. East Hartford*, 16 Conn. 149; *Middletown v. New York, N. H. & H. R. R. Co.*, 62 Conn. 492, 27 Atl. 119.

"A statute is not repealed by a later affirmative one containing no repealing clause, unless there is irreconcilable conflict, or the later statute is clearly intended as a substitute for the earlier." *Red Rock v. Henry*, 106 U. S. 596, 1 Sup. Ct. 434, 27 L. Ed. 251; *Henderson's Tobacco*, 11 Wall. 652, 20 L. Ed. 235.

"Repeals by implication extend to only so much of the prior statute as is within the reason of repeal. They are never extended further than the inconsistency compels." *New Haven and Fairfield Counties v. Milford*, 64 Conn. 568, 30 Atl. 768.

It is impossible to read the two ordinances together, and come to the conclusion that there was any intention, either express or implied, by the act of 1910 to change the method of regulating the compensation of the members of the fire department, or to deprive the board of fire commissioners of the discretionary power vested in them to disallow a claim for services which have never been rendered. The act of 1910 deals with no such subjects directly or indirectly.

[5] The word "salary" has not that inflexibility which the plaintiff claims for it. According to some lexicographers, the words "wages" and "salary" are synonymous. The words seem to be synonymous, convertible terms, though use and acceptance, under certain circumstances, may have given the word "salary" a significance somewhat different from the word "wages" in this: That the former is understood to relate to compensation given for official or other services, as distinguishable from "wages," the compensation for labor. In the present case it makes but little difference whether the distinction here suggested be recognized or not. We are dealing with a case where the board of fire commissioners of Bridgeport, in their discretion, had the right to continue the salary of a member of the fire department when it should appear that he was injured while in the performance of his duty.

The finding shows that Walsh became ill from eczema which did not arise out of his employment, and that, by reason of such illness, he did not report for duty or render any services during the time for which he now claims to recover for services. The omission of the city of Bridgeport to pay was on this account.

There is no error. The other Judges concur.

(33 Conn. 515)

NEW YORK, N. H. & H. R. CO. v. CELLA.  
(Supreme Court of Errors of Connecticut. Oct. 8, 1914.)

# 1. EVIDENCE (§ 372\*)—ADMISSIBILITY—ANCIENT DOCUMENTS.

In an action by a railroad company to recover possession of land condemned by it in 1833, in which defendant claimed that the company had abandoned its easement therein, conveyances of the land and distributions of it as a part of the estates of deceased owners, most of which were made more than 30 years prior to the trial, and none of which recognized any title in the railroad company, were admissible to prove possession by those claiming under the former owner, since a party will be required, and within the limits of sound reasoning permitted, to present the best and fullest case within his power to offer, and where the fact in question comes from a time beyond living memory placed at 30 years, there is an exception to the rule rejecting hearsay evidence allowed in cases of ancient possession and in favor of the admission of ancient documents in support thereof.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1613-1627; Dec. Dig. § 372.\*]

# 2. EASEMENTS (§ 36\*)—ABANDONMENT—EVIDENCE.

Mere nonuser and lapse of time does not constitute abandonment of an easement, but abandonment may be inferred from circumstances or presumed from long-continued neglect, and lapse of time and nonuser are competent evidence of an intent to abandon, and entitled to great weight when considered with other circumstances.

[Ed. Note.—For other cases, see Easements, Cent. Dig. §§ 77, 78, 88-93; Dec. Dig. § 36.\*]

# 3. RAILROADS (§ 82\*)—RIGHT OF WAY—ABANDONMENT—SUFFICIENCY OF EVIDENCE.

In an action by a railroad company to recover possession of land condemned in 1833, evidence held sufficient, in connection with the company's long-continued neglect, to assert any claim to the party to support a finding that it had abandoned its rights.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213-219; Dec. Dig. § 82.\*]

# 4. RAILROADS (§ 82\*)—OWNERSHIP OF LAND—EVIDENCE—ADMISSIBILITY—LETTERS AS NOTICE.

In an action by a railroad company to recover possession of land condemned by it in which defendant claimed that the company had abandoned its easement, a letter written by the company by a person acting for the then owner of the property offering it for sale to the company was admissible in connection with the company's reply asking for a sketch of the property to show notice to the company that a third party was then claiming the property.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 213-219; Dec. Dig. § 82.\*]

# 5. RAILROADS (§ 17\*)—AGENTS—AUTHORITY—EVIDENCE—PRESUMPTIONS.

Where a letter was addressed to the land agent of a railroad company and was answered the following day by a person assuming to act for the company, it should be presumed that the answer was made by one whose duty it was to act in the matter until the contrary appeared.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 36-38; Dec. Dig. § 17.\*]

# 6. APPEAL AND ERROR (§ 499\*)—RESERVATION OF GROUNDS OF REVIEW—QUESTIONS NOT RAISED BELOW.

An alleged error in admitting in evidence the contents of a letter, the loss of which it

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

was claimed was not sufficiently proved, could not be reviewed where the finding did not disclose that any claim was made in the trial court as to the insufficiency of the proof of loss, since, had such claim been made, other evidence would undoubtedly have been required.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2295-2298; Dec. Dig. § 499.\*]

#### 7. EJECTMENT (§ 147\*)—EVIDENCE—IMPROVEMENTS BY DEFENDANT.

Where, in a suit to recover the possession of land condemned by a railroad company, defendant in addition to pleading an abandonment of the railroad company's easement also made claim for improvements made upon the property in good faith, believing that he had an absolute title, evidence as to the length of time that defendant was engaged in constructing a building on the property and the amount expended in its erection was admissible under the claim for improvements.

[Ed. Note.—For other cases, see Ejectment, Cent. Dig. §§ 520, 521; Dec. Dig. § 147.\*]

Appeal from Superior Court, New London County; Howard J. Curtis, Judge.

Action in the nature of ejectment by the New York, New Haven & Hartford Railroad Company against Louis Cella. Judgment for defendant, and plaintiff appeals. Affirmed.

The land in controversy with the buildings thereon is situated in the village of Pawcatuck in the town of Stonington, county of New London, and is bounded northerly by West Broad street, easterly by Mechanic street, and southerly and westerly by the railroad tracks and abutments of a bridge belonging to the plaintiff company. The plaintiff alleged in its complaint that this land was a portion of its right of way which had been condemned for railroad purposes. The defendant's answer, in addition to a general denial, contained two special defenses: First, that he and his predecessors in title had acquired title to the property by adverse user; second, that if any right of entry and possession ever belonged to the plaintiff, it had abandoned it. The defendant pursuant to section 4052 of the General Statutes also claimed to recover for improvements that he had made upon the property before the commencement of this action, in good faith believing that he had an absolute title to the property. The superior court found for the defendant upon the question of adverse user and abandonment.

The finding states that the New York & Stonington Railroad Company (the plaintiff's predecessor in title) in 1853 condemned for railroad purposes a strip of land six rods in width through property then belonging to Thomas Noyes in the town of Stonington; that in addition to the strip six rods in width the railroad company also took from Thomas Noyes a strip of land two rods wide adjoining the six-rod strip on the east. This two-rod strip was taken in order to give an outlet to West Broad street from the property of one S. Dickinson, lying southerly of

the Noyes tract, which, without this driftway, so-called, would be isolated by the railroad embankment. This driftway later became the westerly part of Mechanic street, a public highway now paralleling the railroad embankment. This land was purchased by Thomas Noyes in 1800. The condemnation proceedings were completed on November 11, 1833, by the acceptance by Thomas Noyes of the amount of the award of the commissioners in the condemnation proceedings and the giving by him of a receipt. At the time of the condemnation, a small blacksmith shop stood on a portion of the land of Noyes so condemned, at the northeasterly corner thereof fronting on West Broad street, and also on the driftway when it was laid out.

The distribution of the estate of Thomas Noyes, after reciting that his death occurred on the 17th day of March, 1844, stated that he "died intestate, seised and possessed of divers parcels and pieces of real estate." Of this real estate it appears from the distribution that there was set to Henry Noyes, son of the deceased, the following: One lot with a blacksmith shop standing thereon, bounded northerly and easterly by the highways and southerly and westerly by the railroad abutment. This same land was distributed in 1850 to Phebe N. Wells, a sister of Henry Noyes, then deceased, at an appraised valuation of \$200. In 1870 Phebe N. Wells, the distributee mentioned in the preceding paragraph, for the consideration of \$800, conveyed this property to Giles Wilcox by warranty deed, which deed contained the usual covenants of warranty and seisin. The real estate so conveyed was described precisely as set forth in the preceding paragraphs. On October 1, 1877, James F. Sisson, as administrator of the estate of Giles H. Wilcox, conveyed this same land to Margaret A. Dickens. On December 6, 1879, Margaret A. Dickens conveyed it to the Mechanics' Savings Bank. In November, 1889, the Savings Bank quitclaimed its interest in this same property to James Carley for the consideration of \$500. The same consideration appears in a deed for the property given by James Carley to Thomas Crowley in December, 1899. On April 10, 1903, John H. Ryan, as administrator of the estate of Thomas Crowley, conveyed this same property to William H. Talmadge. The consideration expressed in this deed is \$1,071. Talmadge conveyed to the defendant in August, 1907, by warranty deed. The same description of the land in controversy appears in all the distributions and conveyances referred to in the preceding paragraphs. The blacksmith shop as used on this land was replaced by a store, which was used until 1908, when it was torn down and a modern store building and dwelling was then erected thereon by the defendant, Cella.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep't Indexes

The occupation of this part of the locus in quo after the same was condemned and taken as aforesaid was under the claim of Thomas Noyes and his successors in title, who were the owners of the fee. The present location of the Cella building is substantially the same as the blacksmith shop as used by Giles Wilcox. The plaintiff constructed a wing wall, when the abutment was built on West Broad street, which wing wall was so constructed as to clearly exclude the locus in quo from the land of the plaintiff. Cella was notified of the plaintiff's claim before he began to erect his building hereinbefore referred to.

The first abutments for a bridge were constructed for a single track road in 1835. These abutments were rebuilt in 1871, when they were changed from the original location. The land in controversy will be required for use by the railroad company if it shall four-track its road as it contemplates doing.

"There was room and space sufficient between the blacksmith shop and the abutments and wing wall for the railroad company to enter and make all repairs and do all construction which it became necessary at any time to do until the present building was erected up to and against the wing wall."

Several plans and maps, used upon the trial of the case in the superior court, were made a part of the finding, and were used upon the argument of the case before this court. Additional facts, so far as necessary, are stated in the opinion.

Hadlai A. Hull and Frank L. McGuire, both of New London, for appellant. Abel P. Tanner, of New London, and Herbert W. Rathbun, of Westerly, R. I., for appellee.

RORABACK, J. (after stating the facts as above). [1] The plaintiff excepts to certain facts found by the court. Among them are several which have an important bearing upon the plaintiff's case. It has been found that after the condemnation of the Thomas Noyes land by the railroad company in 1833 he continued in possession of the small parcel of land with the shop upon it; that the present location of the Cella building is substantially the same location as the blacksmith shop; that the occupation of it after it was so condemned was under the claim of Thomas Noyes and his successors in title; and that the defendant and predecessors in title have used and enjoyed this property adversely since 1800. It is urged that these facts are found without any evidence to support them. Under certain well-known principles of law this difficulty of making proof receives constant recognition by the court. The actor in any case will be required, and within the limits of sound reasoning permitted, to present to the court the best and fullest case that it is within his power to offer. In this respect the element of remoteness is an important one. It follows that where the fact in question comes to the

tribunal from a time beyond living memory, placed at 30 years, there is an exception to the rule rejecting hearsay evidence allowed in cases of ancient possession, and in favor of the admission of ancient documents in support of it. Chamberlayne on Evidence, vol. 2, § 1195, and cases cited in notes 1 and 5, bottom of pages 1515, 1516; 1 Green. Evidence (12th Ed.) page 163. Ancient documents are admissible to prove ancient possession. They are evidence of acts of ownership and of facts tending to prove ownership, and, in many cases involving ancient possession, they are the only evidence that the nature of the case permits. *Merwin v. Morris*, 71 Conn. 573, 575, 42 Atl. 855.

In *Foot v. Brown*, 81 Conn. 218, 70 Atl. 699, where the ownership and possession of land was the subject of discussion, this court said:

"A mere paper chain of title in the plaintiff does not establish his ownership of the land, unless his possession or that of his grantors is shown. But evidence of actual possession is unnecessary, if the jury is satisfied, by documentary or other evidence, of ownership by the plaintiff's predecessors in title, since title thus established draws with it possession in the absence of any evidence to the contrary."

See, also, *Wharton on Evidence* (3d Ed.) § 194; *Boston v. Richardson*, 105 Mass. 357, 371.

It is noticeable that most of the transfers of this property by deed and distribution were made more than 30 years prior to the trial of the case in the superior court. This state of facts amply justified the admission of this class of evidence as ancient documents, and the recitals made therein are admissible against the plaintiff.

The fact to be established was one of possession. The trial court has fairly found that the town records of the town of Stonington showed clear title to the locus in quo in the defendant by an ancient line of conveyances commencing with the deed of Thomas Noyes in 1800. In this connection it is of importance to notice that the distribution of his real estate made in 1844 stated that "he died seised and possessed" of this identical property. These conveyances defined the defendant's interest in the property; they were admissible to prove possession. They were evidence of acts of ownership and of facts to prove such ownership.

It appears that during all these years this property had a substantial market value. In 1850 the distributors of Henry Noyes' estate appraised the property at \$200. Twenty years later Phebe Wells, the distributee of the estate of Henry Noyes, by warranty deed conveyed this parcel of land with a blacksmith shop standing thereon for a consideration, as expressed in the deed, of \$800. None of these conveyances recognized any title in the property in the railroad company, or companies. The user was open and of such a character as to give notice of the ex-

tent of it to the plaintiff company and others engaged in the operation and maintenance of the railroad. It was under claim of right manifested by the deeds, recitals therein, and the records thereof. *Parker v. Hotchkiss*, 25 Conn. 321; *Water Commissioners v. Perry*, 69 Conn. 461, 463, 37 Atl. 1059; *Williams v. Wadsworth*, 51 Conn. 277. An examination of the land and probate records would have shown a clear title to the property in the predecessors in title of Cella. The railroad company's map of its layout in the Secretary of State's office in Hartford would not have furnished any satisfactory information as to the railroad company's right to this strip of land, as this exhibit was merely a map with a center line determined by courses.

At least three witnesses testified that the location of the defendant's business block is upon the same ground as that of the old blacksmith shop. These witnesses also described the changes which had taken place in the structures upon this land in later years.

[2] The reasons of appeal are numerous. There are several which involve the action of the trial court in finding that the plaintiff and its predecessors in title abandoned the locus in quo.

This case was before us at the October, 1912, term, when the judgment rendered upon a former trial was set aside. See 86 Conn. 275, 85 Atl. 521. In the opinion after it was written at that time the word "not" in the twelfth line from the bottom of page 279 of 86 Conn. (see page 522 of 85 Atl.) was inadvertently omitted. The opinion when it was written read as it should now read that:

"Mere nonuser and lapse of time, unaccompanied by any other evidence showing an intention to abandon, may not be enough to constitute abandonment."

It is almost unnecessary to call attention to this inadvertence, as the meaning of the court was too plain to be mistaken, and the general tenor of the opinion such that no one could be or has been misled by this omission. The law is, as the plaintiff contends, "that mere nonuser and lapse of time" is not enough to constitute abandonment. But abandonment may be inferred from circumstances, or may be presumed from long-continued neglect. *Derby v. Alling*, 40 Conn. 436; *Hartford Bridge Co. v. East Hartford*, 16 Conn. 173; *Railroad Co. v. Cella*, 86 Conn. 279, 85 Atl. 521.

Lapse of time and nonuser are competent evidence of an intent to abandon, and as such may be entitled to great weight when considered with other circumstances. *Derby v. Alling*, *supra*.

[3] The plaintiff contended, however, that there was no evidence to warrant a finding of such abandonment. The most important facts relating to this question were as follows: In 1833 when the land was condemned, and for a great many years thereafter, the railroad company had no use for it as a right

of way. A wing wall was so constructed as to clearly exclude this strip of land from the land of the plaintiff. In 1906 a letter was addressed to the plaintiff company which contained the following:

"Stonington, February 20th, 1906. To the Land Agent, New York, New Haven & Hartford Railroad Company, New Haven, Conn.—Dear Sir: As a representative of William H. Talmadge, who is the owner of the property adjoining the railroad in Pawcatuck, I take the liberty to write you relative thereto. Mr. Talmadge has decided to sell the same and asked me to dispose of it for him for \$1,500.00 with no intention to deviate from that price. The place is rented to Arthur R. Riley a plumber and he in turn sublets part of it to a shoemaker and the place brings in a rental of \$12.50 per month. I spoke to a real estate agent in Pawcatuck to put a sign on it offering the place for sale and after I did so, it occurred to me that if the railroad company four-tracked its system it would be another piece of property that it should own and perhaps it would be just as well for me to write and see what you think of it. After this town voted for license last fall I was offered a rental of \$70.00 per month for it, but Mr. Talmadge would not have a saloon there under any consideration. I have no doubt if other parties buy the place the company would want it in order to widen their road and for that reason I believe it would be policy to acquaint the company's representative before going further into the sale of it. In the meantime if I have an opportunity to dispose of it and in justice to the owner I shall do so. Very respectfully, John H. Ryan."

This letter was answered the following day, requesting a sketch of the property. This was furnished. Later in 1906 another letter was written to the railroad company relating to the same subject-matter, and the company replied that it was not interested in any land upon that side of the railroad.

In 1907 the defendant, before making a purchase of the property, ascertained that the land records of the town of Stonington showed a perfect title in his prospective grantor. He had no notice of an existing easement, but was informed at this time that the plaintiff made no claim to any land upon that side of the railroad.

In a letter to the defendant Cella in 1909 the plaintiff, through its attorneys, stated to the defendant:

"We are informed that you are making some improvements and expending money on the building owned by you, located on New York, New Haven and Hartford railroad property, at the corner of Mechanic street and West Broad street, in the village of Pawcatuck. The railroad company have use for this property now, and you will be obliged to remove your building. While the railroad company did not have actual use for the property they seem to have no objection to your building remaining on the ground, but now they will be obliged to use the ground, and they will have to ask you to remove your building. We are writing to you to save you any useless expense in repairing this building. Very respectfully, Hull, McGuire & Hull."

For over 75 years the claim now made had been discarded, and it is quite clear that it would never have been revived except for the possibility of increasing the track facilities of the plaintiff's road. Dur-

ing that time the defendant and others, through whom he claims, obtained title to this property without any notice whatever of an existing right to use this land for railroad purposes. Such long-continued neglect with the other evidence presented by the defendant in support of his contention as to adverse user was sufficient to justify the conclusion of the trial court as to abandonment.

In Washburn on Easements (3d Ed.) page 661, the author says:

"The owner of an easement may destroy his right to the same by actually abandoning the right as well as the enjoyment, especially if a third party become interested in the servient estate after such act of abandonment; and it would operate unjustly upon him if the exercise of the easement were resumed in favor of the dominant estate."

See, also, *Wescott v. Railroad Co.*, 152 Mass. 465, 466, 467, 468, 25 N. E. 840; *Bicknell v. Railroad Co.*, 161 Mass. 428, 429, 430, 37 N. E. 378; *Snell v. Levitt*, 110 N. Y. 595, 603, 18 N. E. 370, 1 L. R. A. 414.

An examination of the record fails to disclose that any material fact has been found without evidence; the finding therefore must stand.

Some of the errors assigned relate to certain evidential facts which the court incorporated in the finding, and which the plaintiff now claims are legally inconsistent with the ultimate conclusions of the court as to adverse possession and abandonment. It appears from the finding that there was always room on the locus for the railroad company to do all it had occasion to do in constructing and repairing its wing walls and abutments without interfering with the blacksmith shop or old building. The trial court has also found that the present building is constructed against the wing wall and shuts off all access to it. The changes in the location of the abutments at different times, the location of the blacksmith shop and of the Cella building in connection with other facts of which there was evidence to sustain, show that the finding is not materially inconsistent with the conclusions of the court upon the controlling questions in issue. A construction most favorable to the plaintiff upon this point would not be sufficient to substantiate its claim that it was entitled to claim possession of the entire lot in question. The evidence and claims of the plaintiff in this connection simply refer to a small strip of land back of the conceded location of the old blacksmith shop, which land it is said the railroad company could have used, if it desired, for the purpose of repairing or reconstructing its abutments and wing walls. Neither the width or length of this narrow

piece of land is ascertainable from the pleadings, evidence, or finding, from which this small portion of the Cella lot can be identified or described if the plaintiff should now be allowed to recover possession of it.

[4, 5] The receipt of the letter of February 20, 1906, from Ryan to the land agent of the defendant company, was acknowledged by a communication, which reads as follows:

"February 21, 1906. Dictated by A. C. Mr. John H. Ryan, Stonington, Conn.—Dear Sir: Yours of the 20th inst., offering for sale property owned by William H. Talmadge, at Pawcatuck, has been received and if you will send me a sketch showing the property with relation to the railroad, we will look into the matter.

"Yours truly, \_\_\_\_\_, Commissioner."

There was no error in admitting Ryan's letter in connection with the plaintiff's reply thereto. *Beach v. Travelers' Insurance Co.*, 73 Conn. 118, 120, 46 Atl. 867; *H. P. N. Co. v. Sears*, 77 Conn. 587, 594, 60 Atl. 133. The trial court properly overruled the plaintiff's claim that "it does not appear that it was addressed to anybody authorized in any way to waive or give away the rights of the plaintiffs." This letter was addressed to the land agent of the New York, New Haven & Hartford Railroad Company, and answered the day following by one assuming to act for the company. It should be presumed that this answer was made by one whose duty it was to act in this matter until the contrary appears. *State v. Main*, 69 Conn. 140, 37 Atl. 80, 36 L. R. A. 623, 61 Am. St. Rep. 30; *Cyc.* vol. 16, pp. 1076, 1077, 1078. This letter tended to show that notice had been given to the railroad company that a third party was claiming the property at that time. For this purpose only it was properly received in evidence.

[6] In its brief the plaintiff contends that the court erred in admitting evidence as to the contents of a letter said to have been lost, upon the ground that the loss of the letter had not been sufficiently proved. The finding does not disclose that this claim was made before the trial court. Had this claim been made at that time, undoubtedly further evidence would have been required upon that subject.

[7] The defendant, against the objection of the plaintiff, was allowed to testify as to the length of time that he was engaged in the construction of the building upon this property; also that he had expended about \$5,000 in the erection of the same. This evidence was plainly admissible under the issue raised upon the defendant's claim for improvements made upon the property before the commencement of this action.

There is no error. The other Judges concurred.

(113 Me. 270)

**BAK v. LEWISTON BLEACHERY & DYE WORKS.**

(Supreme Judicial Court of Maine. Oct. 19, 1914.)

**1. MASTER AND SERVANT (§ 121\*)—LIABILITY FOR INJURIES—GUARDING MACHINERY.**

Plaintiff was employed in defendant's bleachery and working near a starching machine, consisting in part of two iron rolls about 4 feet from the floor, which were geared together and ran upon each other. In front of such rolls and somewhat higher than the nip of the iron rolls was a wooden roll, not geared to the other rolls and not touching them, but running free. This was  $4\frac{9}{16}$  inches from the upper iron roll and a less distance from the lower roll. Plaintiff's duties were to tend the cloth as it fell into a box on the floor 3 feet from the nearest roll, and to carry starch from a tub at the end of the machine to the starch box situated under the rolls. There was evidence that the floor was starchy and slippery, and plaintiff, in going around the end of the box mentioned, slipped and threw his hand over and back of the wooden roll, between the iron rolls. *Held*, that defendant owed plaintiff no duty of guarding the nip of the iron rolls more than it was guarded, as he was not working at the machine and had no occasion to come into proximity with the rolls.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 228-231; Dec. Dig. § 121.\*]

**2. MASTER AND SERVANT (§ 217\*)—LIABILITY FOR INJURIES—ASSUMPTION OF RISK.**

Assuming that the place where plaintiff was working was unsafe and dangerous, he could not recover, where it appeared that he knew where the rolls were, the consequences of getting his hand between them, the condition of the floor, and the danger of slipping, and knew or should have known which way the rolls were turning, as an employé assumes the risk of obvious dangers and dangers incidental to the business, known to and appreciated by him, as well as all dangers that he ought to have known and appreciated.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 574-600; Dec. Dig. § 217.\*]

**3. MASTER AND SERVANT (§§ 101, 102\*)—LIABILITY FOR INJURIES—DEGREE OF CARE REQUIRED.**

A master is not an insurer of the safety of his servant, and is only bound to use reasonable care to have the place where the servant works in a reasonably safe condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

**4. MASTER AND SERVANT (§ 154\*)—LIABILITY FOR INJURIES—DUTY TO INSTRUCT SERVANT.**

A servant is not entitled to instructions and cautions about dangers which he already knows and appreciates.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 308, 309; Dec. Dig. § 154.\*]

On Motion from Supreme Judicial Court, Androscoggin County, at Law.

Action by Ignacy Bak against the Lewiston Bleachery & Dye Works. Verdict for plaintiff, and defendant moves for a new trial. Motion sustained.

Argued before SAVAGE, C. J., and SPEAR, CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Dana S. Williams, of Lewiston, for plaintiff. McGillicuddy & Morey, of Lewiston, for defendant.

SAVAGE, C. J. Case for personal injuries. The verdict was for the plaintiff, and the case comes before the court on the defendant's motion for a new trial.

[1, 2] The plaintiff was employed by the defendant in its bleachery. At the time of the accident he was about 17 years old, and had lived in this country about 4 months. To understand the nature of his duties and the way in which he received his injury, it is necessary to describe briefly the machine near which he worked, and in which he was injured. It was called a starching machine. The parts which it is necessary to mention now are, first, two large iron rolls, which were geared together and run upon each other, one being over the other. Then in front of these rolls was a wooden roll. It was not geared to the other rolls, and did not touch them. It ran free. The space between the wooden roll and the upper iron roll was  $4\frac{9}{16}$  inches. Between the wooden roll and the lower iron roll the space is less. The top of the wooden roll is 4 feet  $1\frac{1}{2}$  inches from the floor, and is somewhat higher than the nip of the iron rolls.

When the machine is in operation, long webs of wet cloth, sometimes starched, and sometimes not, are run between the iron rolls for the purpose of squeezing out the water. The free wooden roll serves to guide the cloth and keep it in position to pass through the nip of the iron rolls. After the cloth passes between the iron rolls it is brought back overhead by other rolls or contrivances, and falls into a box on the floor in front of the machine. The space between the box and the nearest roll is about 3 feet.

The plaintiff's duty was to tend the cloth as it fell into the box, so that it would lie compactly in rough plaits or folds, and not come to the floor, and in performing that duty he stood between the box and the machine. When goods were being starched, it was also his duty to take starch from a starch tub at the end of the machine and carry it in a pail or dipper to the starch box, which was a component part of the machine and situated under the rolls. In doing this starch commonly dripped upon the floor between the box and the machine, so that the floor became more or less slippery. The plaintiff had no other duty with respect to the machine or the rolls.

The plaintiff's version of the accident is that the floor around the box was slippery, and that in going around the end of the box in connection with his work he slipped, and in falling got his left hand in some way between the iron rolls, and it was injured. He says he cannot tell just how it was done. His complaints in his writ are that the rolls

were not guarded, and that he was not instructed or cautioned as to dangers.

There were no guards in front of the rolls on the machine, except that the wooden roll itself served as a guard to the nip of the two iron rolls. To get the hand into the nip of the iron rolls it would be necessary to put it over and back of, or under and back of, the wooden roll. And the mechanical construction is such that it is practically certain that the plaintiff put his hand over and back of the wooden roll. The top of the roll, as already stated, was 4 feet 1½ inches from the floor. The plaintiff's armpit was 4 feet from the floor. It follows that his hand must have been lifted somewhat above a level from his shoulder.

Whether the plaintiff was cautioned or not is in dispute. The condition of the floor is also in dispute. The plaintiff says it was wet and slippery from the starch. The defendant admits that it had been wet and starchy an hour or more before, but claims that the floor had been swept clean of water and starch before the accident. And the weight of the evidence clearly supports that contention. There is no question, however, that the floor was damp.

While there are some improbabilities in the plaintiff's story, we think it may be conceded that it is possibly true. But, giving to the evidence and to the situation an effect most favorable to the plaintiff, we think that he is not entitled to recover, and that the verdict in his favor is indisputably wrong.

[3] In the first place, we think it cannot properly be said that the defendant owed to the plaintiff the duty of guarding the nip of the iron rolls more than it was guarded. The plaintiff was not working at the machine. He had no occasion to come into proximity with the rolls. The nip was nearly as high as his shoulder. There was a wooden roll in front of it. His work was at the box, nearly 8 feet from the rolls. And we do not overlook the claimed fact that the floor was slippery, a condition known to the plaintiff. The master is not an insurer of the safety of his servant. He is only bound to use reasonable care to have the place where the servant works in a reasonably safe condition.

[4] But, if we were to assume that the place in this case was unsafe and dangerous, the plaintiff stands in no better position. It is so well settled, that it needs no citation of authorities to sustain the doctrine, that the servant assumes the risk of all obvious dangers, and of all dangers incidental to the business which are known to and appreciated by him, and, as well, of all dangers that he ought to have known and appreciated. It is equally well settled that the servant is not entitled to instructions and cautions about dangers which he already knows and appreciates.

The plaintiff's own testimony shows that he knew the consequences of getting his hand between the rolls. He knew where they were. He knew or ought to have known which way they were turning. He knew the condition of the floor. He knew the danger of slipping. He says he was "afraid" of it, and was "careful" by reason of it. Although he was young, it is clear that he knew and understood the dangers. We cannot do otherwise than to hold that the plaintiff assumed the risks of which he now complains.

The verdict is so clearly without warrant that we feel compelled to set it aside.

Motion for a new trial sustained.

(112 Me. 258)

**ANDREWS v. DIRIGO MUT. FIRE  
INS. CO.**

(Supreme Judicial Court of Maine. Oct. 14, 1914.)

**1. INSURANCE (§ 333\*)—NEGLIGENT FIRE—  
INCREASE OF RISK.**

Plaintiff, a man 79 years of age, induced his daughter and her husband, J., to live with him on his property without any lease or special arrangement. Plaintiff had full control of the premises, but because of his age and feeble health left the work to J., who attempted to smoke meat which belonged to him and intended for use in the home, and while doing this in a shed, fire escaped and burned the house. Held, that in the absence of evidence that plaintiff had anything to do with the smoking of the ham or advised or consented thereto, there was no such alteration of the situation affecting the risk or increase of risk by or with plaintiff's knowledge, advice, agency, or consent as would avoid the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 842-846; Dec. Dig. § 833.\*]

**2. TRIAL (§ 136\*)—QUESTIONS OF LAW—REASONABLE TIME.**

What constitutes reasonable time on undisputed facts is a question of law.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 318, 320, 321, 323-327; Dec. Dig. § 136.\*]

**3. INSURANCE (§ 559\*)—PROOF OF LOSS—  
WAIVER.**

Where plaintiff's dwelling house was destroyed by fire on May 2, 1913, and on June 18th following plaintiff received a letter from the secretary of the insurer, notifying him that the insurer could not legally pay the loss, such letter operated as a waiver of proofs of loss.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1391, 1392; Dec. Dig. § 559.\*]

**4. INSURANCE (§ 665\*)—FIRE POLICY—Loss—  
PROOFS—REASONABLE TIME.**

Where plaintiff suffered a fire loss May 2, 1913, and on June 18th the insurer notified him that it could not legally pay the loss, and proofs were filed August 5, 1913, there was sufficient basis for a finding that a statement in writing of the loss had been rendered to insured within a reasonable time.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1555, 1707-1728; Dec. Dig. § 665.\*]

On Motion from Supreme Judicial Court, Androscoggin County, at Law.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Action by L. C. Andrews against the Dirigo Mutual Fire Insurance Company. A verdict was rendered for plaintiff, and defendant moves for a new trial. Overruled.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

McGillicuddy & Morey, of Lewiston, for plaintiff. Newell & Skelton, of Lewiston, for defendant.

HANSON, J. This is an action on a fire insurance policy, dated February 11, 1911. The fire occurred May 2, 1913, and proof of loss was filed August 5, 1913. The jury returned a verdict for the plaintiff in the sum of \$1,234.24. The case is before the court on a general motion for a new trial. The material facts in the case are substantially these:

The fire was caused by smoking a large ham and a shoulder in a shed about 20 feet square. The hams were suspended by a tarred string from an iron rod running across the bottom of a wooden barrel, which was inverted over a similar barrel; the latter standing on the wooden floor. A kettle containing the fire and combustible material stood on bricks in the bottom of the lower barrel.

The premises were owned by the plaintiff, who had occupied them for 35 years, and continued to live in the house until driven out by the fire. For about 2 years his daughter and her husband, a Mr. Jackson, had lived there, without any lease or special arrangement, but doing the work about the place and owning some of the personal property. The plaintiff retained full control of the premises, but on account of his advanced age and feeble condition was obliged to secure the assistance of Mr. Jackson and his wife in the management of his farm and care of himself in his sickness. The ham and shoulder were the property of Mr. Jackson, and he was smoking them for use in the plaintiff's home. The plaintiff was confined to his bed at the time of the fire, and was carried from his house by neighbors. He lost his deed and other papers, and much of his personal property, in the fire. The plaintiff introduced a certified copy of the deed of the premises from Charles D. Fox to Leonard C. Andrews, dated November 8, 1874, and the following letter:

"Dirigo Mutual Fire Insurance Co.

"Gorham, Maine, June 18, 1913.

"L. C. Andrews, Monmouth, Me.—My Dear Sir: I am very sorry to be obliged to notify you that we cannot see how the company can legally pay you for your loss which was caused by smoking hams in your carriage house without permission.

"Very truly yours, T. F. Millett, Sec'y.  
"TFM—B."

The proof of loss was offered and admitted, and the following admission was made: "It is admitted that August 5, 1913, the firm of McGillicuddy & Morey sent proof of loss of

L. C. Andrews to the Dirigo Mutual Fire Insurance Company at Gorham, Maine; and on the 15th day of August, 1913, we submitted for Mr. Andrews to the same company a list of three appraisers, from which they were requested to make their selection in the fire loss of L. C. Andrews against the Dirigo Mutual Fire Insurance Company, stating the names, and that no answer was ever made by the company to either the proof of loss, nor did they ever suggest any names from which we could select, or make a selection of ours."

The defendant pleaded the general issue, with the following brief statement:

"(1) That at the time the fire occurred, to wit, on May 2, 1913, the property insured was not then the property of the plaintiff in suit.

"(2) That the fire which resulted in the loss of the property, the value of which is in suit in this case, was caused through the gross negligence and want of care of the plaintiff acting through his servants and agents in the care and custody thereof, and in the matter in which the fire occurred, and was set directly by the plaintiff or by his servants and agents."

At the conclusion of the plaintiff's testimony, the attorney for the defendant stated to the court that he would not undertake to offer any further testimony, that the facts were brought out practically as they existed, and that he desired "to address the jury on the evidence as it stands."

The defendant contends: That the fire was caused by the gross negligence of the plaintiff, and that he has violated two conditions of the policy, namely, that provision that:

"The policy shall be void if \* \* \* without such consent [that of the company], the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured be so altered as to cause an increase of such risks."

And the provision that, "in case of loss or damage \* \* \* a statement in writing \* \* \* shall be within a reasonable time rendered to the company setting forth the value of the property insured," etc., and says "that the only fair inference to be drawn from the evidence is that whatever was done was the act of the plaintiff done through his agents or employees. Jackson and his wife were doing the active work, but there is no claim of any lease, or independent contract of any sort. The plaintiff remained there; they were simply one family, and, as Mrs. Jackson said, he still had full control of it. The transactions about the place were as much his as though he had been personally present every minute and had done them with his own hand," and that the fire was due to gross negligence. That smoking a ham in a shed, without constant watching, was negligence. That the place and means selected, instead of locating the barrel outside the buildings, was inexcusable. In effect defendant claims that the plaintiff was grossly careless, and therefore cannot recover.

We are not able to agree with the defendant's claim that the plaintiff violated two of the conditions of his policy as set out in the brief of counsel, viz.: (1) That the situation

or circumstances affecting the risk were so altered, by or with the knowledge, advice, agency, or consent of the insured as to cause an increase of the risk; and (2) that "a statement in writing" was not rendered to the defendant within a reasonable time, as required by the terms of the policy.

[1] As to the first contention the record does not disclose that it was submitted to the jury, but it does show conclusively that the plaintiff had no knowledge of the situation or circumstances causing the fire; that he had given no instructions in relation to smoking hams, or any other work on that day, or previously; that he did not own the ham in question, or know of its existence. He was 79 years old, and had been ill for months, and in no condition to voluntarily assume control, or in any manner to direct another in the conduct of his farm, or other work. He was helpless and dependent, and the evidence is conclusive that the situation and circumstances affecting the risk were not so altered as to cause an increase of the risk, by or with his knowledge, advice, agency, or consent. Nor does the evidence justify an inference that whatever was done was the act of the plaintiff performed through Mr. Jackson and his wife, as agents, thus violating a condition of the policy.

The defendant relies particularly upon its claim that a proof of loss was not furnished "within a reasonable time." From the briefs of counsel on either side it appears that this question was submitted to the jury by the presiding justice, and the jury passed upon it, but the defendant says that:

"In the absence of proof of an express waiver, it was not a matter of positive instructions by the court to be reviewed on exceptions, but was a question for the jury on which it erred," and "that the only possible way in which the plaintiff can prevail is by reading into the law words which are not there, in order to avoid giving force to the words which are there."

[2] Counsel agree that it was a proper question to be submitted to the jury, and in the absence of exceptions, and the charge of the presiding justice, we must assume that the question was submitted under proper instructions. The words under consideration are the same in the statute and policy, to wit, "within a reasonable time." It is firmly settled in this state that what constitutes reasonable time, on undisputed facts, is not for the jury, but is a question of law. *Hill v. Hobart*, 16 Me. 164; *Greene v. Dingley*, 24 Me. 131; *Libby v. Haley*, 91 Me. 331, 39 Atl. 1004; *Watson v. Fales*, 97 Me. 366, 54 Atl. 853, 94 Am. St. Rep. 504.

[3] Other questions were involved, and the case was necessarily submitted to the jury. It is manifest that there was evidence from which the jury could properly find that there was a waiver of the right of the defendant to require a proof of loss, or that such proof of loss was furnished within a reasonable

time. The brief statement does not set up the absence of a proof of loss, or negative a waiver. *Robinson v. Ins. Co.*, 90 Me. 385, 33 Atl. 320.

[4] The letter in the case, which was obviously a reply to a communication from the plaintiff on the subject of the loss, the continued illness of the plaintiff, his great age, the facts admitted touching the offer on the plaintiff's part to submit his claim to arbitrators, the silence of the defendant and its neglect to answer communications from the plaintiff, and the further fact that the notice, when furnished, was for the benefit of the defendant, and that substantially all the facts connected with the fire were known to the defendant before the date of the letter to the company on June 18, 1913, furnished ample ground for a finding that a statement in writing was rendered within a reasonable time, as required by the statute and the terms of the policy.

It is the opinion of the court that the verdict should stand.

The entry must be:

Motion overruled.

(112 Me. 255)

FELKER v. BANGOR RY. & ELECTRIC CO.  
(Supreme Judicial Court of Maine. Oct. 14, 1914.)

1. HUSBAND AND WIFE (§ 209\*) — MARRIED WOMAN — INJURIES — DAMAGES — ELEMENTS—INABILITY TO LABOR—EXPENSES OF CARE.

Where a married woman is injured while living with her husband by the negligence of a third person, she may not recover for loss of ability to do domestic labor in their home, nor for the expenses of her treatment and care, since her inability to labor is the loss of her husband, and the burden and expense of caring for and nursing her is also his, unless she has expressly undertaken to be personally responsible therefor.

[Ed. Note.—For other cases, see *Husband and Wife*, Cent. Dig. §§ 766-772, 968, 973; Dec. Dig. § 209.\*]

2. DAMAGES (§ 130\*) — EXCESSIVENESS — PERSONAL INJURIES.

Plaintiff, a married woman, was injured in a collision between a carriage in which she was riding and one of defendant's cars. Plaintiff was 71 years old and in good health for a woman of her age. She was thrown violently to the ground between the railroad tracks, severely bruised; two of her ribs were broken, and she sustained a severe nervous shock. She suffered great pain for several weeks on account of the irritation caused by the pricking ends of the fractured ribs, was unable to sleep, and though the fractured ribs united, she continued to suffer pain and lameness in her side up to the time of the trial and was unable to do any work. *Held*, that a verdict allowing her \$1,200 was not excessive.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 357-367, 370; Dec. Dig. § 130.\*]

On Motion from Supreme Judicial Court, Penobscot County, at Law.

Action by Emily E. Felker against the Bangor Railway & Electric Company. On motion for a new trial. Overruled.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

Argued before SAVAGE, C. J., and SPEAR, CORNISH, BIRD, HALEY, and PHILBROOK, JJ.

D. I. Gould, of Bangor, for plaintiff. E. C. Ryder, of Bangor, for defendant.

SAVAGE, C. J. Case to recover for injuries sustained in a collision between the carriage in which the plaintiff was riding and the electric car of the defendant company. The plaintiff obtained a verdict for \$1,200. The case comes up on the defendant's motion for a new trial on the usual grounds. But counsel have argued only the question of damages, and to that question we shall confine ourselves.

The plaintiff is a married woman, and at the time of the accident was about 71 years of age, and in ordinarily good health for a woman of her age. The carriage in which she was riding was overturned, and she was thrown violently upon the ground, between the railroad tracks. The evidence would warrant a jury in finding that she sustained a severe nervous shock; that two of her ribs were broken, and that she was considerably bruised about her back and other parts of her body; that in consequence of her injuries she suffered great pain for several weeks on account of the irritation caused by the pricking ends of the fractured ribs, that she suffered also in other ways; that it was necessary, in order to ease her pain, to turn her in bed and give her a rubbing half a dozen times a night; that she was unable to sleep well nights, that as a result of the shock a serious nervous condition was developed, from which she had not fully recovered at the time of the trial, 14 months after the injury. Her attending physician, in testifying, spoke of this condition as "this horrible state of the nervous system." And the jury might find that, although the fractured ribs united well in a few weeks, she suffered even up to the trial from pain and lameness in her right side, and was unable to do any work of any consequence.

It appears that while confined to her bed in consequence of her injuries, the plaintiff had an attack, but not a severe one, of hypostatic pneumonia, which is a phase of pneumonia incident to old age. It is not claimed that the pneumonia was caused by her physical injuries. Whether she was more susceptible to it by reason of her condition, does not clearly appear.

[1] Being a married woman and living with her husband, the plaintiff is not entitled to recover for loss of ability to do domestic labor in their home, nor for the expenses in caring for her, surgically and otherwise. Under the marital relation, the labor in the house belonged to her husband. Her inability to perform that labor is his loss. And on the other hand, as the law imposes on him the duty of caring for her in sickness as

well as in health, the burden of the expenses for medical and surgical treatment and for nursing falls upon him and not upon her, unless she has expressly undertaken to be personally responsible for them.

[2] But the plaintiff may recover for the undoubted shock of the accident, and for all the suffering, mental and physical, which it caused. The loss of health and strength was her personal loss, irrespective of its effect upon her ability to labor. For the endurance of the nervous condition caused by her injuries she is entitled to compensation. Such suffering may be both mental and physical.

There is no standard by which the damages for such injuries as are shown in this case can be measured. In the end the question must be left to the sound sense and good judgment of the jury, to award such damages as seem to them to be fairly compensatory. And when it appears that the jury have discharged their duty with fidelity, and have reached a reasonable approximation of the damages, the court will not interfere, even though the verdict should seem to them somewhat large. When the verdict is within the bounds of reason, the court will not institute a paring process to make it conform more exactly to their own views. Such is this case.

Motion overruled.

(113 Me. 230)

#### LINDSEY v. SPEAR.

(Supreme Judicial Court of Maine. Oct. 8, 1914.)

#### 1. MASTER AND SERVANT (§§ 101, 102\*)—INJURIES TO SERVANT—DUTY OF MASTER—SAFE PLACE TO WORK.

A master must use reasonable care to provide a reasonably safe place for his servant to work in.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 135, 171, 174, 178-184, 192; Dec. Dig. §§ 101, 102.\*]

#### 2. MASTER AND SERVANT (§§ 206, 217\*)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

A servant assumes the risks which are ordinarily incident to his employment, and such other risks as are known to him, or which, by the exercise of ordinary care, he ought to know.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 550, 574-600; Dec. Dig. §§ 206, 217.\*]

#### 3. MASTER AND SERVANT (§ 278\*)—INJURIES TO SERVANT—SUFFICIENCY OF EVIDENCE—NEGLIGENCE OF MASTER.

In an action for injuries to an employé caused by a fall from a stage upon which the employé, who was at least partially intoxicated, was engaged in unloading coal from a vessel, evidence held insufficient to warrant the jury in finding that the master had failed to furnish a safe place to work, and therefore to require the direction of a verdict for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 954, 956-958, 960-969, 971, 972, 977; Dec. Dig. § 278.\*]

#### 4. MASTER AND SERVANT (§ 286\*)—INJURIES TO SERVANT—ACTIONS—QUESTIONS FOR JURY.

While the jury are the proper judges of questions of fact, the question of the negligence

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of a master, in failing to provide a safe place for work, becomes a question of law, where the evidence on that issue is such that only one conclusion can be drawn by reasonable men.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1001, 1003, 1003, 1010-1015, 1017-1033, 1036-1042, 1044, 1046-1050; Dec. Dig. § 286.\*]

Exceptions from Supreme Judicial Court, Knox County, at Law.

Case to recover for personal injuries by Alvah Lindsey against Fred R. Spear. Verdict directed for defendant, and plaintiff excepts. Exceptions overruled.

Argued before SAVAGE, C. J., and BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Philip Howard, of Rockland, for plaintiff. Arthur S. Littlefield, of Rockland, for defendant.

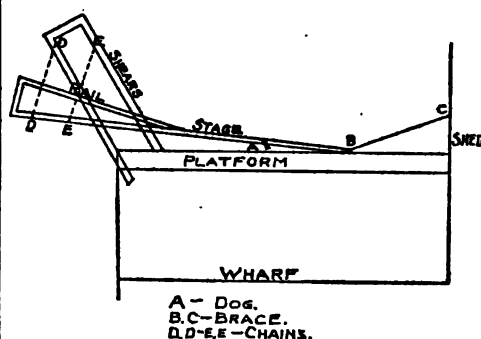
SAVAGE, C. J. Case to recover for injuries caused by defendant's alleged negligence. The presiding justice directed a verdict for the defendant, and the plaintiff excepted.

The plaintiff was employed by the defendant in unloading coal from a vessel. The coal was being hoisted by means of shears and hoisting gear from the hold of the vessel in tubs to the level of the stage on which the plaintiff worked, and was then emptied from the tubs into wheelbarrows, and the plaintiff's particular duty was to wheel it from the tubs across the stage and dump it in the shed. It was also his duty, when a tub was hoisted, to assist in emptying or dumping it into his wheelbarrow. It took two tubs, about 1,000 pounds of coal, to fill the wheelbarrow. When the accident happened, one tub had already been emptied into the barrow, and another one was hoisted. The plaintiff described what followed in these words:

"When this tub came up we dumped it. Those shears would certainly always have a shake; when this rocked, it rocked the whole stage, \* \* \* and something swiveled like that, and when it did I went over the line. \* \* \* Something seemed to travel. I noticed something slipped under my feet, and, when it did, it throwed me right over the line."

The stage was a completed structure. One end was suspended by chains attached to the shears overhead. The other end rested on a platform, which was several feet above the wharf. When not in use, it appears to have been pulled in. When a vessel came to the wharf to be unloaded, it was pushed out with crowbars, so that, when ready for use, both the shears and the front end of the staging extended over the side of the vessel. The stage was then fastened in position by iron dogs on either side driven into the platform on which it rested. It was further stayed by planks or bars on the platform extending from cleats on the inner end of the stage to the end of the coal shed. And, so long as it remained stayed in this manner, no question is made but that it was reasonably safe

for men to work upon. The following will give a sufficiently approximate profile view of the situation:



A rope or life line was stretched from post to post across the front end of the stage, about 2½ feet from the floor. The ends were attached to the outer rail posts. Before the plaintiff was employed, the stage had been pushed into place for work, and its condition remained unchanged until the time of the accident.

[1, 2] It is the undoubted rule that it is the duty of the master to use reasonable care to provide a reasonably safe place for his servant to work in. It is also the rule that the servant assumes the risks which are ordinarily incident to his employment, and such other risks as are known to him, or which, by the exercise of ordinary care, he ought to know. He assumes the obvious risks. These principles have been declared so many times that citation of authorities is unnecessary.

[3] The plaintiff in his specifications alleges in substance that the accident was due to one or two or all of the following factors, namely: (1) The insufficiency in height and material of the "lifeline," which we assume was placed where it was to protect men from falling off the stage either by accident or when it was shaken by the dumping of coal; (2) the rotten and decayed condition of the platform, so that the dogs would not hold; (3) the insecure fastening of the iron dogs, whereby the stage could sway; (4) the insecure fastening of the braces, so that they became displaced, with the same effect; and (5) that the staging was improperly fastened to the shears. As to the insufficiency of the lifeline, it need only be said that the defect, if defect it was, was an obvious one, the risk of which was assumed by the plaintiff. The plaintiff had worked on this stage many times, and was perfectly familiar with its construction. As to the other supposed defects, there is absolutely no evidence of them, except the rocking or swaying of the stage testified to by the plaintiff and by one other witness whose presence there is denied and is doubtful. There is no evidence that the dogs had failed to hold, or that the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

braces were out of place. If either of these things had occurred, it must necessarily have been observed after the accident. There were six or eight men working on this coal operation. They were known to the plaintiff. It is not shown that they were unfriendly to him. If the iron dogs were found to be insecure, or the braces out of place after the accident, it seems beyond belief that some of them would not have known of it, and, if they had known of it, it seems equally beyond belief that the knowledge should not have come to the plaintiff. All the witnesses who noticed the staging afterwards, and there were several, declare that there was no trouble with dogs or braces. It is testified to by one witness that planking in the platform was rotten, but that is of no consequence if the dogs held. The plaintiff suggests that the defects, if they existed, may have been remedied before the witnesses had opportunity to observe them. But there is no evidence to support the suggestion.

On the other hand, the case shows that the stage, from the very manner of its construction, was not and could not have been entirely steady and firm when great weights of coal were dumped from the tubs to the barrow. That it should shake or sway a little was inevitable. And this must have been known to the plaintiff, and was assumed by him.

Now it appears that the plaintiff had been drinking that morning. He admits it. The evidence shows beyond any reasonable question that he was more or less intoxicated, and that he had been warned that day by fellow workmen of the danger in working upon that stage in an intoxicated condition. His description of his sensations at the time of the rocking and swiveling of the stage are not unlike what might be expected in the case of an intoxicated man.

[4] It is true, as the learned counsel for the plaintiff urges, that the questions we are discussing are questions of fact. It is true, too, that the jury is the proper tribunal to determine questions of fact. But, when the evidence as to negligence in a case like this is of such a character that only one conclusion can be drawn by reasoning and reasonable men, it becomes a question of law (*Maine Water Co. v. Crane*, 99 Me. 485, 59 Atl. 953), and the judgment of the court must follow the conclusion of fact. And, if a verdict of the jury should happen to be contrary to that conclusion, it is the duty of the court to set it aside.

Again, the contention of the plaintiff rests solely upon an inference which it draws from what he calls a "rocking" of the stage. There is at least as strong an inference that the rocking which the plaintiff seemed to feel was due to his intoxication.

Upon the whole, we feel bound to say that the evidence, if it had been submitted to a

jury, would not have warranted them in finding that the defendant had failed to perform his duty to the plaintiff, with respect to the safety of the stage on which the plaintiff worked. It was therefore the duty of the presiding justice to direct a verdict for the defendant. *Frederickson v. Central Wharf Towboat Co.*, 101 Me. 406, 64 Atl. 686; *Young v. Chandler*, 102 Me. 251, 68 Atl. 539; *Veano v. Crafts*, 109 Me. 40, 82 Atl. 293. Exceptions overruled.

(113 Me. 263)

## DUPLISSY v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine. Oct. 17, 1914.)

## 1. RAILROADS (§ 482\*)—FIRES—ACTIONS—SUFFICIENCY OF EVIDENCE.

In an action for the value of buildings and their contents destroyed by fire, evidence held sufficient to support a jury finding that the fire was caused by sparks from a railroad locomotive.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1730-1732, 1734-1736; Dec. Dig. § 482.\*]

## 2. DAMAGES (§ 139\*)—EXCESSIVENESS—INJURIES TO PROPERTY.

In an action against a railroad company for the value of a hotel and outbuildings and their contents destroyed by fire, where the evidence showed the fair value of the buildings to be from \$3,000 to \$3,500, while the schedule of personal property amounted to \$3,000, and the furniture for the most part had been purchased within a year, a verdict for \$5,341.67 was not so excessive as to require interference.

[Ed. Note.—For other cases, see *Damages*, Cent. Dig. §§ 400-403; Dec. Dig. § 139.\*]

## 3. RAILROADS (§ 481\*)—INJURIES FROM FIRE—EVIDENCE—RELEVANCY—SIMILAR MATTERS.

In an action against a railroad company for the destruction of a hotel and its contents by fire, where the company showed that its engine was equipped with a spark arrester in good condition, and called witnesses who expressed the opinion that sparks could not have been emitted that would have set the fire, a person living five houses from the hotel was properly permitted to testify as to finding a large quantity of cinders on her piazza the morning after the fire.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1717-1720; Dec. Dig. § 481.\*]

## 4. TRIAL (§ 194\*)—INSTRUCTIONS—INVADING PROVINCE OF JURY.

An instruction prescribing in detail the character of the evidence required, and which would have necessitated the court passing upon matters clearly within the province of the jury, was properly refused.

[Ed. Note.—For other cases, see *Trial*, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

Motion and Exceptions from Supreme Judicial Court, Penobscot County, at Law.

Action by Edward W. Duplissy against the Maine Central Railroad Company. Verdict for plaintiff, and defendant brings exceptions and moves for a new trial. Motion and exceptions overruled.

Argued before SAVAGE, C. J., and SPEAR, CORNISH, BIRD, HALEY, and PHILBROOK, JJ.

James D. Rice, of Bangor, and Wm. R. Pattengall, of Waterville, for plaintiff. Fellows & Fellows, of Bangor, for defendant.

**CORNISH, J.** Action on the case to recover damages for the loss of a hotel in Kingman, with outbuildings, stable, and contents, including furniture, supplies, and personal effects, alleged to have been destroyed by fire communicated by a locomotive of the defendant.

#### Liability.

[1] The evidence justifying the finding of liability is ample. It is for the most part undisputed. The plaintiff's premises adjoined the railroad location, being situated northerly thereof, with the shed nearest the right of way and the long ell and main part extending to Marginal street. A freight train of the defendant, with 12 empty cars, left Mattawamkeag at 1:50 on the morning of September 29, 1913, going east, passing Kingman about 2:15 a. m., and arriving at Danforth at 3:15 a. m. The train did not stop at Kingman station. There was an upgrade from the station for nearly one-half a mile, and the hotel was situated about midway this distance. The train was 50 minutes late. The night was unusually dry; there being practically no dew on the grass, as several witnesses stated. The wind was light, but from a southerly or southwesterly direction, blowing from the track toward the buildings.

One witness testified that he was up at 2 o'clock and looked toward the hotel, and no fire was visible then. Between that time and the time when the fire was discovered, 2:30 or 2:45 a. m., this freight train passed by. The fire originated on the part of the premises toward the railroad and spread to the rest of the buildings. A large number of witnesses testified that when they first saw the fire it was on the southerly side of the shed and creeping up onto the roof. The posts of an old pigpen which had formerly stood between the shed and the track were burned, showing that the grass between the location and the buildings was on fire.

All other sources, except the engine, are practically eliminated. There had been two fires in the hotel, one a coal fire in the office, and the other a wood fire in the kitchen for the 6 o'clock supper. The latter had gone out, and the former could not have caused the fire in question, because the people were in and about the office, as well as the other rooms in the ell and main part, at the same time that the fire was burning in the shed.

The defendant attempted to suggest two other sources, but failed utterly. The fireman on the locomotive testified that, while going through the town at the rate of 20 or 22 miles an hour, he saw through a crack in the stable a light that looked like a lantern, but he saw no fire of any kind. This story has many inherent improbabilities, but the theory failed because in the first place the

stable did not take fire until after the shed and from the shed or ell, and in the second place it was found locked when the plaintiff and his boarder went to it and removed the animals and contents. The other suggested source is within the hotel, and, to prove this, three employes of the defendant, who were living in a caboose at the station, testified that when they reached the fire it seemed to be on the roof of the ell near the main part, and they saw no fire elsewhere. But this testimony, negative at the best, was overwhelmed by that of the neighbors, who clearly prove that the fire spread from the shed to the ell and thence to the main part.

The only other evidence introduced by the defendant was that the engine was equipped with a spark arrester in good condition, and, in the opinion of the witnesses, sparks could not have been emitted that would have set the fire. But, as showing the distance to which the sparks or cinders could fly, one neighbor testified to finding a large quantity of cinders on her piazza the same morning; her premises being in close proximity to the burned buildings and adjoining the railroad location.

Without discussing the evidence in detail further, it is sufficient to say that, the proximity of the premises, the direction of the wind, the dryness of the night, the time of the passage of the train, the discovery of the fire within a short time thereafter, the location of the fire when first discovered, and the absence of all other reasonably probable sources justified the jury in drawing the inference that the locomotive of the defendant caused the fire. As was said in *Jones v. Railroad Co.*, 106 Me. 442, 78 Atl. 710:

"It is a question of reasonable inference from all the facts and circumstances, and the evidence should be of such a character that a reasoning mind shall see the connection between cause and effect."

That test is fully met by the evidence in this case.

#### Damages.

[2] The plaintiff's evidence showed the fair value of the buildings to be \$3,000 or \$3,500. The schedule of personal property amounted to \$3,000, making an outside limit of \$6,500. The verdict was \$5,341.67. This might be divided into buildings \$3,500 and personal property \$1,841.67, and the evidence would justify the finding. The furniture was for the most part nearly new, having been purchased within a year. The defendant offered no evidence whatever on values, either of buildings or contents, and it would seem that, on the uncontradicted evidence offered by the plaintiff, the damages are not so manifestly excessive as to warrant the interference of the court.

#### Exceptions.

[3] 1. The testimony of Mrs. Leach, a neighbor, who lived five houses west of the hotel, as to finding a large quantity of cinders on

her piazza the morning after the fire, was properly admitted. The capacity of the engine to throw sparks was an issue, and upon that point her evidence was pertinent. The objections raised by the defendant go to the weight of the evidence rather than to its admissibility.

[4] 2. The instruction requested by the defendant was properly refused, as it asked the court to prescribe in detail the character of the evidence required in this class of cases and to pass upon matters that are clearly within the province of the jury. The court, in the charge, properly instructed the jury upon the burden of proof resting on the plaintiff, and fully protected the defendant's rights in all respects.

Motion and exceptions overruled.

(113 Me. 248)

### STATE v. VANNAH

(Supreme Judicial Court of Maine. Oct. 10, 1914.)

#### 1. CONSTITUTIONAL LAW (§ 197\*)—STATUTES (§ 267\*)—CRIMINAL PROCEDURE—RETROACTIVE LEGISLATION.

Rev. St. c. 79, § 90, as amended by Laws 1913, c. 220, § 3, provides that original and appellate jurisdiction in all criminal matters in the counties of Cumberland and Kennebec, and all powers incident thereto, or formally exercised by the Supreme Judicial Court, but conferred on and exercised by the superior courts, are continued, and section 4 declares that any indictment for murder returned by a grand jury in the superior court at the April term thereof, in the year 1913, shall be in order for trial at the next September term of the court, which shall have jurisdiction of all matters pertaining thereto. *Held* that, since such act did not affect a crime previously committed but related entirely to the remedy, it was constitutional and applicable to a prosecution for murder committed prior to the adoption of the act, and, as to such prosecution, was neither retroactive legislation nor an *ex post facto* law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 550; Dec. Dig. § 197.\* Statutes, Cent. Dig. §§ 350-359; Dec. Dig. § 267.\*]

#### 2. CRIMINAL LAW (§ 116\*)—VENUE—CHANGE OF VENUE.

The right to a change of venue is not a common-law right, but is created and regulated by statute, and is a matter of procedure over which the Legislature has plenary power.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 236; Dec. Dig. § 116.\*]

#### 3. CONSTITUTIONAL LAW (§ 197\*)—TRIAL BY JURY—SELECTION FROM DIFFERENT COUNTY—EX POST FACTO LAW.

The right to have a jury selected from another county or district is not one of the rights guaranteed by the Constitution, prohibiting the passage of *ex post facto* laws.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 550; Dec. Dig. § 197.\*]

#### 4. CONSTITUTIONAL LAW (§ 197\*)—EX POST FACTO LAW—CONSTITUTION OF TRIAL COURT—CHANGE.

A statute merely changing the Constitution of the trial court, and leaving unchanged all the substantial protections which the law in force at the time of the commission of an alleged offense threw about accused, was not *ex post facto*.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 550; Dec. Dig. § 197.\*]

Exceptions from Superior Court, Kennebec County, at Law.

Frances A. Vannah, alias Frank Vannah, was convicted of murder, and he brings exceptions. Overruled.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Scott Wilson, Atty. Gen., and W. H. Fisher, Co. Atty., of Augusta, for the State. B. F. Maher, of Augusta, for defendant.

HANSON, J. This case is before the court on exceptions to the order of the justice of the superior court for the county of Kennebec, overruling four motions filed at the January term of that court, 1914. The respondent was indicted for the murder of one Edward E. Hardy, at the April term of that court, 1913, and at the September term, on his own motion, was committed to the State Hospital for observation. He was tried at the January term, 1914, and was found guilty of murder.

The motions in their order were: (1) To continue to the Supreme Judicial Court. (2) To continue to a later term of the superior court, when a justice of the Supreme Judicial Court may preside. (3) Refusing to plead. (4) In arrest of judgment. The reasons stated in the several motions are the same. The first motion is as follows:

"And now comes the respondent and moves: First. That the superior court is without jurisdiction of the offense alleged in the indictment.

"Second. And the respondent further moves that said superior court is without jurisdiction in offenses such as charged in the aforesaid indictment because the alleged offense was committed on the 20th day of March, A. D. 1913, and said act, attempting to confer jurisdiction upon the aforesaid court, was passed on the 7th day of April, A. D. 1913, and took effect July 1, 1913, and was accordingly, in its attempt to reach the aforesaid case at bar, retroactive legislation and *ex post facto* in its nature.

"Third. And the respondent further moves that said superior court is without jurisdiction of the offense charged in this indictment, because chapter 220 of the Public Laws of 1913, wherein jurisdiction was sought to be conferred upon said court in section 4 of said act, by its terms would make reply to this particular case, and was in effect the creation of a court to try a particular case.

"Fourth. And the respondent further moves that he was deprived of one of his constitutional rights to seek and obtain change of venue for cause sought, which cause he says exists because of the silence of the act, wherein jurisdiction for offenses, such as is charged in this indictment, is sought to be conferred upon said superior court.

"Fifth. And the respondent further moves, because by virtue of the statute in such case made and provided, in offenses such as charged in this indictment, one of the justices of the Supreme Judicial Court to be designated by the Chief Justice thereof shall preside, which designation has not been made and no such justice presiding, this court is without jurisdiction to proceed in the absence of such designation, in conformity with the statute.

"Wherefore, and because of the aforesaid reasons now before the impaneling of a jury, the re-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

spondent moves that the said cause be continued to the next term of the Supreme Judicial Court to be held within and for said county having jurisdiction of the offense alleged."

Counsel for the respondent argues: (1) That it has never been the policy of the state to allow a court of limited and inferior jurisdiction to determine the rights of a man charged with murder. (2) That the respondent was denied the constitutional right to a change of venue; that, if such change were sought and ordered, he would then receive only what the law insures, the right to a trial before a justice of this court. (3) That he is entitled thereto, because "the law of April 11, 1913, attempted to repeal section 2 of chapter 132, R. S., which gives the Supreme Court jurisdiction, \* \* \* must relate back to the time of the shooting, namely, March 20, 1913"; that therefore the amendment in question was not in force on that day; and that, as to his client, such amendment was entirely inoperative in any event until after the expiration of 90 days from the date of its approval. (4) While supporting his exceptions as stated in the foregoing, counsel concludes his brief with this statement:

"We do not undertake to argue upon the unconstitutionality of the law on this question.

"Our contention is not whether the law is *ex post facto*, but we claim that the attempt of the state to control the situation as it was March 20, 1913, was futile, and, under the 90 days' provision, of no force or effect. In other words, we say it was not an *ex post facto* law of which we complain, but 'no law' which could take effect until long after the shooting took place on that fateful day of March 20th near the reservation at Togus, Me.

"And concerning the fifth section of page 12 of the printed case, wherein it is set forth that the respondent declined to plead in the superior court, while a ruling of the superior court may be open to exceptions, we think comment unnecessary and depend more fully upon the attempt of the prosecution to keep the case away from a justice of the Supreme Judicial Court in the manner hereinbefore stated."

As to the first objection raised by the respondent's counsel, it is sufficient to say that, when the superior court for Kennebec county was established in 1878 (Laws 1878-80, c. 10), it had full jurisdiction in criminal cases. At the same session, the act creating that court was amended as follows:

"Sec. 19. When any indictment is found for any of the offences described in sections one and two of chapter 117 of the Revised Statutes, sections two, three, four, five, six, eight, nine, ten, eleven, twelve, thirteen, fifteen, twenty-five and twenty-seven of chapter 118 of the Revised Statutes, sections one, two and three of chapter 119 of the Revised Statutes, the clerk of said superior court shall certify and transmit the indictment to the Supreme Judicial Court for said county, at the next term, when it shall be entered. The Supreme Judicial Court shall have cognizance and jurisdiction thereof, and proceedings shall be had thereon in the same manner as if the indictment had been found in that court." (Laws 1878-80, c. 48.)

[1] Full jurisdiction was restored in 1881, and so continued until 1891, when the provision relating to the trial of murder cases was

again changed, providing that a justice of the Supreme Judicial Court be designated to preside at such trials. In 1899, the provision requiring indictments to be certified to this court was restored, and remained in force until 1913, when the section providing for certifying and transmitting indictments to this court was repealed, and section 90, c. 79, R. S., was amended by chapter 220, § 3, and as amended reads as follows:

"Laws of 1913, chap. 220, sec. 3. The original and appellate jurisdiction in all criminal matters in said counties of Cumberland and Kennebec, and all powers incident thereto, originally exercised by the Supreme Judicial Court, but heretofore conferred upon and exercised by said superior courts, are continued."

The following section was added, and the principal contention in this case arises thereunder:

"Sec. 4. Any indictment for murder returned by the grand jury in said superior court at the April term thereof, in the year nineteen hundred and thirteen, shall be in order for trial at the next September term of said court, which shall have jurisdiction of all matters pertaining thereto."

It is urged in the motion that this provision, "in its attempt to reach the case at bar, is retroactive legislation and *ex post facto* in its nature." If the point raised related to the crime charged, or to the constitutional rights of the respondent thereunder, our conclusion would not be reached so easily, but the provision in question, directed, as it plainly is, to procedure, and relating entirely to the remedy, and having for its obvious purpose the conduct and disposition of a pending case, is constitutional, and wholly within the legislative power and control, and is not as to this case an *ex post facto* law, or retroactive in its nature or tendency. *Coolley's Const. Lim.* (6th Ed.) p. 326; *Bishop's Crim. Law*, vol. 1, §§ 279, 277, 280, 282, 283; *Commonwealth v. Phelps*, 210 Mass. 78, 96 N. E. 349, 37 L. R. A. (N. S.) 567, Ann. Cas. 1912C, 1119; *Calder v. Bull*, 3 Dall. 386, 390, 1 L. Ed. 648; *Thompson v. Missouri*, 171 U. S. 386, 18 Sup. Ct. 922, 43 L. Ed. 204.

The motions were made a part of the exceptions, and the brief made by other counsel follows substantially the remaining points made in the motions. Both urge the right to a change of venue, and say that the right was denied. It does not appear that any reason existed why change of venue should be had, that a fair trial could not be had, or was not in fact had.

[2] The right to a change of venue is not a common-law right. It is created and regulated by statute, and is also a matter of procedure authorized by the Legislature under its sole and plenary power to determine what course shall be pursued in the administration of justice, as well as in all other matters concerning the public good. *Hopt v. Utah*, 110 U. S. 574, 4 Sup. Ct. 202, 28 L. Ed. 262; *Gibson v. Miss.*, 162 U. S. 589, 16 Sup. Ct. 904, 40 L. Ed. 1075; *Thompson v. Utah*, 170 U. S. 351, 18 Sup. Ct. 620, 42 L. Ed. 1061.



[3] The right to have a jury selected from another county or district is not one of the rights within the words and intent of the Constitution prohibiting the passage of ex post facto laws, under article 1, §§ 9 and 10. Chase, J., in the leading case (*Calder v. Bull*, 3 Dall. 386, 390 [1 L. Ed. 648]), stated the laws included thereunder as follows:

"(1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Every law that aggravates a crime, or makes it greater than it was, when committed. (3) \* \* \* (4) Every law that alters the legal rules of evidence, and receives less, or different, testimony than the law required at the time of the commission of the offense, in order to convict the offender. All these and similar laws are manifestly unjust and oppressive. \* \* \* but I do not consider any law ex post facto, within the prohibition that mollifies the rigor of the criminal law, but only those that create or aggravate the crime, or increase the punishment, or change the rules of evidence, for the purpose of conviction." *Cooley's Const. Lim.* (7th Ed.) 373, 374.

[4] It is well settled that a mere change in the Constitution of the trial court, which leaves unchanged all the substantial protections which the law in force at the time of the commission of the alleged offense threw about the accused, is not ex post facto. *Duncan v. Missouri*, 152 U. S. 377, 14 Sup. Ct. 570, 38 L. Ed. 485. Nor is a change in the place of trial. *Gut v. Minnesota*, 9 Wall. 35, 19 L. Ed. 573, quoted and affirmed in *Cook v. United States*, 138 U. S. 157, 11 Sup. Ct. 268, 34 L. Ed. 906; *Cooley's Const. Lim.* (7th Ed.) 375, note.

The remaining objection is to the jurisdiction of the court, on the ground that the act of April 7, 1913, did not become a law until 90 days after its passage, to wit, July 11, 1913, and that, the crime having been committed on March 20, 1913, the statute which that law was intended to amend in part and repeal in part was itself then in force, and urges that the respondent should have been tried thereunder; the justice presiding to be a justice of this court. We do not so hold. We think the reasons already given are sufficient to justify the ruling of the presiding justice in this as well as in the other claims of the respondent's counsel, and we may add that the practice is uniform, and it is well settled that:

"So far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the Legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice, and heard only by the courts in existence when its facts arose. The Legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure, in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime." *Cooley's Const. Lim.*

(7th Ed.) 381, and cases cited; *Commonwealth v. Phillips*, 11 Pick. (Mass.) 82.

The fact that the crime was committed before the passage of the act in question, and that 90 days must elapse before such act has the force of law, does not avail the respondent. He had violated the law. There is no pretense that the law so violated had been changed. The only change effected was in the manner in which he should be tried for that offense against the law. That change was made by the law-making power whose will is paramount and whose right to shape the policy of the state is not to be questioned by the court, nor is the administration thereof to be dictated by the offender. He has no vested right in the matter of procedure. *Cooley's Const. Lim.* (7th Ed.) p. 381; *Cyc.* vol. 8, § 1031. The rules and orders provided for the conduct of courts, officials, and community generally are to be observed by all alike as the law, unless they interfere with some substantial right guaranteed by the fundamental law.

A careful examination of the questions involved convinces the court that the respondent was not deprived of the full protection to which he was entitled under existing law.

The entry must therefore be:

Exceptions overruled.

ANDERSON v. SALANT et al. (No. 455.)  
(Supreme Court of Rhode Island. Oct. 21, 1914.)

COURTS (§ 243\*)—CASE CERTIFIED TO SUPREME COURT—REMITTING TO SUPERIOR COURT.

A cause certified to the Supreme Court on constitutional questions will, upon motion of defendants, be remitted to the superior court, to permit there a motion to dismiss as to them without prejudice to the rights of others.

[Ed. Note.—For other cases, see *Courts*, Dec. Dig. § 243.\*]

Action by William E. Anderson against Gabriel Salant and others. On motion by Gabriel Salant and others to remit the cause, certified on a constitutional question to the Supreme Court, to the superior court, to permit a motion there to dismiss as to the moving defendants. Motion granted.

Fred A. Otis, of Providence, for plaintiff. Irving Champlin, James Harris, and Herbert A. Rice, all of Providence, for defendants. Gardner, Pirce & Thornley, of Providence, for moving defendants, appearing specially for the purposes of this motion, and not otherwise.

PER CURIAM. The motion of Gardner, Pirce & Thornley is hereby granted, and the case is remitted to the superior court, to permit said Gardner, Pirce & Thornley to make a motion in said superior court that said action be dismissed as to Gabriel Salant, Aaron B. Salant, and Solomon J. Wallach without prejudice to the rights of any party properly before the court in said action to

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

have the constitutional question, upon which the action has been certified to this court, hereafter heard and determined by this court. After hearing and determining said motion to dismiss, said superior court is directed to transmit the papers in said action to this court, for the purpose of enabling this court to hear and determine said constitutional question upon which said action has been heretofore certified to this court.

**HARTFORD et al. v. PARKER, Secretary of State. SAUNDERS et al. v. SAME. TRIPP et al. v. SAME.**  
(Nos. 226-228.)

(Supreme Court of Rhode Island. Oct. 14, 1914.)

**MANDAMUS (§ 10\*)—CERTIFICATION OF NOMINATION.**

Mandamus would not lie to compel the secretary of state to certify relators' names as candidates for office on the Progressive party ticket, where the testimony did not show that relators had been duly selected as candidates for such offices by any legally constituted body representing the electors of that party qualified to vote for candidates for such offices.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 37; Dec. Dig. § 10.\*]

Petitions for writs of mandamus by Walter G. Hartford and others, by Harry L. Saunders and others, and by William F. Tripp and others against J. Fred Parker, Secretary of State, to compel defendant to certify relators' names as candidates for office on the Progressive party ticket. Writs denied.

Greenough, Easton & Cross, of Providence (William B. Greenough, of Providence, of counsel), for petitioners. Herbert A. Rice, Atty. Gen., for respondent. Lewis A. Waterman, of Providence, for certain interested parties.

**PER CURIAM.** It does not appear from the testimony presented at the hearing that the persons alleged to have been nominated for the respective offices set forth in said petitions were duly selected as candidates for said offices by any legally constituted body representing the electors of the Progressive party qualified to vote for said candidates for said offices.

The said petitions are therefore denied and dismissed.

(85 N. J. L. 387)

**STATE v. MORGAN.**

(Court of Errors and Appeals of New Jersey. Nov. 17, 1913.)

**1. CRIMINAL LAW (§ 1036\*)—APPEAL—RULINGS ON EVIDENCE—OBJECTIONS AT TRIAL.**

Rulings on evidence cannot be reviewed on appeal, where no objection was made at the trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 1631-1640, 2639-2641; Dec. Dig. § 1036.\*]

**2. CRIMINAL LAW (§ 1056\*)—APPEAL—INSTRUCTIONS—NECESSITY OF EXCEPTIONS.**

Assignments of error with reference to the court's charge cannot be considered on appeal, where no exception was taken to the instructions at the trial.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 2663, 2670; Dec. Dig. § 1056.\*]

**Appeal from Supreme Court.**

John H. Morgan was convicted of criminal assault, and appealed to the Supreme Court, where the judgment was affirmed, from which judgment he again appeals. Affirmed.

The opinion of the Supreme Court is as follows:

[1] This case is argued by counsel for the plaintiff in error as if it was before us for review under the provisions of section 136 of the Criminal Procedure Act (2 Comp. St. 1910, p. 1863). This, however, is not the fact, for the record of the proceedings had upon the trial of the cause has not been certified to us by the trial court. The questions argued by counsel are none of them raised by any bill of exceptions. The testimony of Helen Brown, showing that she was present with Louisa Carey at the time of the alleged criminal assault upon the latter, and that on the same occasion the defendant committed an assault upon her (the witness), was not objected to; nor was the testimony of these two girls, that on an earlier occasion the defendant committed a similar assault upon them, objected to.

[2] The criticism upon the charge of the court raised by the second assignment of error is not based upon any exception, for no exception, either general or special, was taken to the instruction to the jury.

The judgment under review will be affirmed.

Frank H. Sommer, of Newark, for appellant. Louis Hood, of Newark, for the State.

**PER CURIAM.** The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

(85 N. J. L. 389)

**STATE v. SICILIANO.**

(Court of Errors and Appeals of New Jersey. Nov. 17, 1913.)

**1. CRIMINAL LAW (§ 1149\*)—INDICTMENT AND INFORMATION (§ 136\*)—MOTION TO QUASH INDICTMENT—MATTERS REVIEWABLE.**

A motion to quash an indictment is addressed to the discretion of the court, and is not reviewable on strict writ of error.

[Ed. Note.—For other cases, see *Criminal Law*, Cent. Dig. §§ 3039-3043, 3058; Dec. Dig. § 1149.\* Indictment and Information, Cent. Dig. §§ 470, 471; Dec. Dig. § 136.\*]

**2. INDICTMENT AND INFORMATION (§ 125\*)—DUPLICITY.**

An indictment charging the crime of keeping a disorderly house, in that defendant habitually sold, or permitted to be sold, intoxicating liquors on his premises contrary to law, drawn in conformity with Criminal Procedure Act (P. L. 1898, p. 894) § 74, was not bad for duplicity.

[Ed. Note.—For other cases, see *Indictment and Information*, Cent. Dig. §§ 334-400; Dec. Dig. § 125.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**Appeal from Supreme Court.**

Garino Siciliano was convicted of keeping a disorderly house by permitting the illegal sale of intoxicating liquors. From a judgment of the Supreme Court, affirming the conviction, he appeals. Affirmed.

The opinion in the Supreme Court was as follows:

The plaintiff in error was found guilty upon an indictment charging him with the crime of keeping a disorderly house, the disorder consisting solely in the habitual selling, or permitting to be sold, on his premises, intoxicating liquor contrary to law. There was a motion to quash the indictment on the ground of duplicity. The motion was refused, and the sole error assigned is based upon this refusal.

[1, 2] The judgment should be affirmed. In the first place, a motion to quash an indictment is addressed to the discretion of the court, and is not reviewable on strict writ of error. *State v. Hageman*, 13 N. J. Law, 314; *Proctor v. State*, 55 N. J. Law, 472.† In the second place, the assertion that the indictment is faulty for duplicity is not justified by the fact. It is drawn in conformity with the seventy-fourth section of the Criminal Procedure Act of 1898 (P. L. 1898, p. 894), and is similar in form to that which received the approval of this court in *State v. Wahle*, 82 N. J. Law, 184, 82 Atl. 300.

The judgment under review will be affirmed.

Wilbur A. Heisley, of Newark, for appellant. John S. Applegate, Jr., of Red Bank, for the State.

**PER CURIAM.** The judgment under review will be affirmed, for the reasons set forth in the opinion of the Supreme Court.

(85 N. J. L. 24)

**BOARD OF DOMESTIC MISSIONS OF THE REFORMED CHURCH IN AMERICA v. EDWARDS, Comptroller.**

(Supreme Court of New Jersey. Nov. 3, 1913.)

**TAXATION (§ 876\*)—COLLATERAL INHERITANCE TAX—CHARITABLE CORPORATIONS—EXEMPTIONS—STATUTES.**

The Supplement of March 15, 1898 (P. L. p. 106), to the Collateral Inheritance Tax Act of May 15, 1894 (P. L. p. 318), having been superseded by Act May 15, 1906 (P. L. p. 432), a bequest to a charitable corporation in a foreign state was not exempt from payment of the tax.

[Ed. Note.—For other cases, see *Taxation*, Cent. Dig. §§ 1603-1649; Dec. Dig. § 876.\*]

Certiorari by the Board of Domestic Missions of the Reformed Church in America, Prosecutor, against Edward I. Edwards, Comptroller. Writ denied, and assessment confirmed.

Argued before GARRISON, TRENCHARD, and MINTURN, JJ.

Collins & Corbin, of Jersey City, for prosecutor. Theodore Backes, of Trenton, and Edmund Wilson, Atty. Gen., of Red Bank, for defendant.

GARRISON, J. The prosecutor is incorporated under the laws of the state of New York as a charitable society and as such

claims exemption from the payment of collateral inheritance taxes as legatee and devisee under the will of Susan Van Neste, who died in this state on February 28, 1912, and whose will was admitted to probate in the county of Middlesex.

This claim is based upon the supplement to the Collateral Inheritance Tax Act of 1894 (P. L. 318) approved March 15, 1898 (Pamph. L. p. 106), which, if still in force, entitles the prosecutor to the exemption claimed by it.

This question was before the Prerogative Court in the case of *In re Estate of Gopsill*, 77 N. J. Eq. 215, 77 Atl. 793, in which Vice Ordinary Walker (now Chancellor) held that since the passage of the amendment to the Collateral Inheritance Tax Act of 1906 (at page 432) the supplemental act of 1898 was no longer in force. We agree with the vice ordinary that the act of 1898 has been eliminated, not by its repeal, but by its being superseded by later legislation covering the subject-matter. *Eldridge v. Philadelphia & Reading Railroad Co.*, 83 N. J. Law, 463, 85 Atl. 179.

The assessment and tax brought up by this writ are affirmed.

(85 N. J. L. 377)

**MUPO v. CREW LEVICK CO.**

(Court of Errors and Appeals of New Jersey. Oct. 17, 1913.)

**APPEAL AND ERROR (§ 1011\*)—FINDINGS—CONCLUSIVENESS.**

The findings by the trial court upon disputed facts are conclusive on appeal, when there is any evidence to support them.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 3983-3989; Dec. Dig. § 1011.\*]

**Appeal from Supreme Court.**

Action by Dominick Mupo against the Crew Levick Company. A judgment for plaintiff being affirmed by the Supreme Court, defendant appeals. Affirmed.

The opinion in the Supreme Court was as follows:

The action was brought in the district court of the city of New Brunswick to recover damages for negligently driving and overdriving a horse of the plaintiff, bailed by him to the defendant for hire. The horse died before the bailment terminated.

The court, sitting without a jury, found the defendant guilty of negligence; "that the defendant agreed to return the horse in as good a condition as it was when bailed, as an inducement to the plaintiff to make the bailment; and that the value of the horse was \$200. Judgment accordingly was rendered for the plaintiff. The defense is that there was no proof of misuse of the horse. The findings of the judge upon the disputed facts are conclusive here, when there is any evidence, as in this case, to support them.

The judgment will be affirmed.

George S. Silzer, of New Brunswick, for appellant. Theodore Strong, of New Brunswick, for respondent.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**PER CURIAM.** The judgment under review is affirmed, for the reasons set forth in the per curiam opinion filed in the Supreme Court.

(85 N. J. L. 370)

**HOLDEN et al. v. BOARD OF EDUCATION OF KEARNY et al.**

(Court of Errors and Appeals of New Jersey. Oct. 17, 1913.)

**1. SCHOOLS AND SCHOOL DISTRICTS (§ 85\*) — SCHOOLHOUSE — CONSTRUCTION — APPROVAL OF PLANS.**

Where plans and specifications for the erection of a schoolhouse had been approved by the state board, the contractor having abandoned the work, it was not necessary to secure a further approval of the plans and specifications for the completion of the unfinished work as preliminary to a contract to complete the building without change in the original plans.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. § 202; Dec. Dig. § 85.\*]

**2. SCHOOLS AND SCHOOL DISTRICTS (§ 80\*) — SCHOOLHOUSE — CONSTRUCTION — EXPENDITURE.**

Where the total expenditure necessary for the construction of a schoolhouse had been sanctioned by the board of school estimate, and no increase of cost was involved in a contract to complete the building after the original contractor had abandoned it, it was not necessary that the board sanction the expenditure of the amount required to complete the work.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 191-194; Dec. Dig. § 80.\*]

**3. SCHOOLS AND SCHOOL DISTRICTS (§ 79\*) — SCHOOL BUILDINGS—CONSTRUCTION—POWER OF BOARD.**

Under School Law (4 Comp. St. 1910, p. 4768) § 126, making it the duty of a school board to provide suitable school facilities, including proper school buildings, where the contractor abandoned a school building unfinished, because of bankruptcy, the board had complete authority to contract with another to finish the building.

[Ed. Note.—For other cases, see *Schools and School Districts*, Cent. Dig. §§ 188-191; Dec. Dig. § 79.\*]

Action by Henry Holden and others against the Board of Education of Kearny and others. From a judgment dismissing a writ of certiorari, plaintiffs appeal. Affirmed.

See, also, 83 N. J. Law, 551, 83 Atl. 954. The opinion of Swayze, J., in the Supreme Court, is as follows:

At the time of the decision of the Court of Errors and Appeals in *Kay v. Board of Education of Kearny*, 83 N. J. Law, 551, 83 Atl. 954, the schoolhouse was partially completed. Further work was halted by the judgment of the court. The contract now under review is a contract for the completion of the building.

[1] I think the approval of the plans and specifications for the schoolhouse by the state board sufficed, and that it was not necessary to secure a further approval of the plans and specifications for the completion of the unfinished work, as long as no change was made thereby in the original plans and specifications. It would be mere idle ceremony for the state board to approve once more what they had already approved. The approval of the original plans and specifications must have included the work

now proposed, as the whole includes every part. Counsel for the prosecutors in his brief does not suggest that there was any change or variation, and I think this reason fails.

[2] The second reason urged also fails, and for substantially the same reasons. The total expenditure has already been sanctioned by the board of school estimate. No increase of cost is involved.

[3] It is, however, urged that the board of education has no power to award a contract for the completion of the building, but can only contract for building, enlarging, or repairing a school house. It would require no great strain of language to hold that the completion of a schoolhouse in an advanced stage of construction was an enlarging or repairing, but it is unnecessary to rest on this language. Section 52 (4 Comp. St. 1910, p. 4741), to which reference is made, is not the section giving power to the board of education. It is the section requiring advertisement before awarding the contract. The power is given by section 126, which makes it the duty of the school board to provide suitable school facilities, which are to include proper school buildings. I can think of no better way to do this than to proceed to complete a building already owned by the board of education. As counsel for the defendant forcefully argues, it cannot be that the board cannot complete a building which has been abandoned by the contractor, or which he is unable to finish by reason of bankruptcy. I cannot accede to the suggestion of counsel for the prosecutor that this opens the door to the award of a contract illegally, and the carrying out of that illegal contract by a new contract for the finishing of the work. The question involved here is not whether the contractor under the illegal contract can recover for his work, nor whether moneys paid under that contract can be recovered. Here the board of education owns an unfinished schoolhouse on its land. Whether it acquired it legally or illegally, whether it has paid for it or not, whether any one is liable to refund money already paid therefor or not, it cannot be required to destroy or remove the existing structure, nor can the public be required to suffer the loss of the land as the alternative or equivalent to keeping it as the site of a useless building. The board may accept the building as it stands and complete it. Who shall suffer the pecuniary loss growing out of the fact that the original contract was illegal is another question that may well be settled in another form of action. To hold otherwise would put it in the power of a board of education to deprive the public of any beneficial use of public property, except at the cost of removing the building thereon.

I think the writ of certiorari should be dismissed, with costs.

Pierre P. Garven, of Jersey City, for appellants. McCarter & English, of Newark, for respondents.

**PER CURIAM.** The judgment under review is affirmed, for the reasons stated in the opinion filed in the Supreme Court by Mr. Justice Swayze.

(85 N. J. L. 379)

**MINICHINO v. PUBLIC SERVICE RY. CO.**  
(Court of Errors and Appeals of New Jersey, Oct. 8, 1913.)

**RAILROADS (§ 400\*)—INJURIES TO PERSONS ON TRACK—NEGLIGENCE.**

Where the motorman of an interurban car saw an object on the track which he thought was a dirty piece of paper, but made no effort to bring his car under control so that it could

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

be stopped in case it was a child, he cannot, as a matter of law, be held to have exercised reasonable care, where, when he did discover it was a young child, it was too late to prevent running the infant down.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1365-1381; Dec. Dig. § 400.\*]

#### Appeal from Supreme Court.

Action by Antonio Minichino, by his next friend, against the Public Service Railway Company. A judgment for plaintiff being affirmed by the Supreme Court, defendant appeals. Affirmed.

The opinion in the Supreme Court was as follows:

This is an action for personal injuries. The plaintiff, a boy  $3\frac{1}{2}$  years of age at the time of the accident, while sitting upon the ties just outside the north rail of the east-bound track of the defendant's railway between Jersey City and Newark, was struck by the running board of an open car. The plaintiff had a verdict, and the judgment entered thereon is now before us for review.

The only matter argued by counsel for the plaintiff in error is the refusal of the trial court to direct a verdict in favor of the defendant. It is contended that this course should have been pursued for the reason that the testimony disclosed no negligence on the part of the defendant's employees who were operating the car. The testimony shows that the motorman saw the boy in plenty of time to stop his car before it reached the place where the boy was sitting, but thought that what he observed was a dirty piece of paper, and so gave the matter no thought until he was within a few feet of the plaintiff, when the latter raised up. The motorman thereupon applied the emergency brake, but too late to avoid the accident. We do not think that it can be said, as a matter of law, that the motorman was not negligent. It was a question for the jury to say whether, having observed this object on the track, he exercised reasonable care in running it down without first ascertaining whether it was what it appeared to be, or whether it was, as it turned out to be, a human being.

The judgment under review will be affirmed.

Lefferts S. Hoffman, of Newark, for appellant. Beecher & Bedford, of Newark, for respondent.

PER CURIAM. The judgment is affirmed, for the reasons stated in the memorandum of the Supreme Court.

(5 Boyce, 209)

#### STECKEL v. BARNES.

(Superior Court of Delaware. New Castle.

Oct. 12, 1914.)

#### PLEADING (§§ 339, 409\*)—DEFECTS—WAIVER BY PLEADING TO DEFECTIVE PLEA.

The right to require the defendant to draw out his plea is waived by filing a replication to the plea, and while the court has power to permit the replication to be withdrawn in order that plaintiff may decline to reply to the plea, it will not do so, in the absence of peculiar and exceptional facts.

[Ed. Note.—For other cases, see *Pleading*, Cent. Dig. §§ 1033-1045, 1375-1383, 1386; Dec. Dig. §§ 339, 409.\*]

Action by assumpsit (No. 100, January term, 1914) by Frank E. Steckel against

James M. Barnes. On motion by plaintiff to amend replications by withdrawing the replications to defendant's fourth plea, so that he may decline to reply to the said fourth plea until the same shall have been drawn out. Application refused.

Argued before PENNEWILL, C. J., and CONRAD, J.

Robert H. Richards and Aaron Finger, both of Wilmington, for plaintiff. Saulsbury, Morris & Rodney, of Wilmington, for defendant.

PENNEWILL, C. J. (delivering the opinion of the court). In the above case the plaintiff asks leave to amend his replications by withdrawing the replications to defendant's fourth plea, so that he may decline to reply to the said plea until the same shall have been drawn out.

The court are of the opinion that the motion must be refused for the reason that by failing to require the defendant to draw out said plea when he had the opportunity and before filing his replications, the plaintiff waived his right in that regard. We are not unmindful of the fact that the constitutional and statutory provisions respecting the amendment of pleadings are very broad, but, as was said by the court in *Wright v. Wilmington City Ry. Co.*, 2 Marvel, 141, 42 Atl. 440, "there are limitations, and they have been recognized through our reports."

One of those limitations, distinctly recognized in the case referred to, is, that if a party has the right to require the defendant to draw out his plea, or draw it out more fully and formally, and does not exercise such right but elects to plead, he waives the right and cannot successfully insist upon it after pleading.

In the case above mentioned release was pleaded, which upon motion of the plaintiff was drawn out but not fully and sufficiently to enable the plaintiff to intelligently plead thereto. The plaintiff, notwithstanding the insufficiency, filed a general replication thereby taking issue upon the plea. At the trial and "after the plaintiff had rested under the pleading and the defendant had put in evidence upon the point," the defendant asked leave to amend his replication. It was held "too late on the part of the plaintiff to ask leave to amend."

It is true that the application in the present case comes before the trial, but we think it nevertheless falls within the reasoning and decision of the case to which we have referred. In that case the court said:

"When you demanded that the plea of release should be drawn out fully and formally, you had a right to stand upon it, and if he did not so draw it out, you were not bound to plead. Upon application to this court we could have compelled him to draw it out within the terms of the law, in order that you might intelligently plead."

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

"You are too late in making this application. \* \* \* This plea was generally pleaded. You did not put in the proper replication; you waived it—and that is one ground upon which the courts have held that it is too late; that is, after waiver."

We are aware of the decision given in the case of Kirwan Mfg. Co. v. Truxton, 2 Pennewill, 48, 44 Atl. 427, but that was an exceptional case, and the court expressly stated that it was not to be considered as an authority except in a like case under like circumstances.

Inasmuch as the court in that case went further perhaps than this court had ever gone before in allowing amendments, it may be well to refer to it more fully in order to show that it cannot be regarded as an authority in support of the present application.

The case had been continued at the preceding term with general leave to amend. At that time certain pleas in bar had been filed, but since the continuance the defendant had filed three additional pleas, two of which were pleas in abatement, and one a plea in bar. Counsel for defendant asked leave to withdraw his pleas in bar, leaving the pleas in abatement which had been filed since the preceding term; also to amend the third additional plea so as to make it a plea in abatement.

We quote from the concurring opinion delivered by Judge Grubb:

"In concurring with Judge Spruance in this decision, I simply want to add that this matter of allowing a party to withdraw his pleadings, or any portion of them, or to amend the pleadings, or any portion of them, is in the discretion of the court. I do not consider that an application of this kind, which is to introduce a plea in abatement after a plea in bar has been filed, would be granted by the court in every case; but where our discretion is appealed to, in a case having peculiar circumstances like this, I consider it is allowable. In this case, at the last term, it was admitted that

the property of the plaintiff at the time of bringing this suit, was in the hands of a receiver in Maryland. It was also admitted that the receiver was not made a party. It was alleged by the counsel for the defendant, that they had no knowledge whatever of the appointment of said receiver until within a few hours prior to making the application for continuance, and had had no opportunity to avail themselves of any defense, if any, growing out of that fact; and the court announced that they ought to have time to examine that question and to take such advantage of it as they were entitled to. The court therefore continued the case to the April term, to be pleaded to issue and ready for trial at said term under a peremptory rule. \* \* \*

"There may be cases in which the court would not exercise its discretion to the extent of granting such leave as we grant in this case, to withdraw a plea in bar and to file a plea in abatement. This decision applies to the particular circumstances and claims of this case and this application."

Judge Spruance in delivering the opinion of the court concluded by saying:

"Counsel for the defendant have examined into the question then raised, and have come to the conclusion that that fact (insolvency of the plaintiff) cannot properly be brought before the court except upon a plea of abatement, and to refuse this application would be wholly inconsistent with the ruling of the court \* \* \* at the last term."

It clearly appears, therefore, that the court allowed the amendment because of the peculiar and exceptional facts of the case before them, none of which exist in the present case.

The court have the power in the present case, as the court had in the Kirwan Case, to allow the amendments asked for, but we think such power should not be exercised when the case is at issue and the defendant has had the opportunity to obtain the leave now desired, and waived such right by pleading.

The application is refused.

(5 Boyce, 112)

**BRADFIELD v. STATE.**

(Superior Court of Delaware. New Castle. Oct. 6, 1914.)

**CRIMINAL LAW (§ 1013\*)—APPEAL—CERTIORARI—ELECTION OF REMEDIES.**

Where a defendant, after conviction in the municipal court, sued out a certiorari, and at the same time took an appeal to the Court of General Sessions, and thereafter elected to stand on his appeal, the certiorari proceedings will be discontinued.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2370; Dec. Dig. § 1013.\*]

William M. Bradfield was convicted in the municipal court of the city of Wilmington of a crime, and he petitioned for certiorari (No. 31, September term, 1914), and also took an appeal to the Court of General Sessions (No. 120, September term, 1914). Certiorari discontinued.

Argued before PENNEWILL, C. J., and RICE, J.

Josiah O. Wolcott, Atty. Gen., for the State. Howell S. England, of Wilmington, for defendant.

**PER CURIAM.** The plaintiff having elected to proceed on his remedy by appeal, his other remedy by certiorari, pending at the same time, is discontinued at his own cost.

(5 Boyce, 112)

**STATE ex rel. SAULSBURY v. LEWIS et al.**  
(Superior Court of Delaware. New Castle. July 11, 1914.)

**1. MANDAMUS (§ 157\*)—MOTION TO DISMISS PETITION—EFFECT AS ADMISSION.**

A motion to discharge the rule to show cause why a writ of mandamus should issue, and to dismiss the petition, admits those allegations in the petition which are well averred.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 317-323, 371; Dec. Dig. § 157.\*]

**2. MANDAMUS (§ 162\*)—MOTION TO QUASH ALTERNATIVE WRIT—EFFECT AS ADMISSION.**

In mandamus the alternative writ takes the place of the declaration, and the facts therein well pleaded are admitted by a motion to quash the alternative writ.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 338-340; Dec. Dig. § 162.\*]

**3. MANDAMUS (§ 160\*)—ALTERNATIVE WRIT—SUFFICIENCY.**

An alternative writ of mandamus to compel the department of elections to appoint registrars from the list furnished by the party chairman, as required by Act May 20, 1898 (21 Del. Laws, c. 40) § 3, par. 4, which shows that the list furnished was in conformity with the requirements of the statute, that the persons named therein had the proper qualifications for registration officers, and that the appointments for the district in question were not made as required by that act, entitles the relator to the peremptory writ, unless the allegations are properly denied by respondents.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 326-335; Dec. Dig. § 160.\*]

**4. ELECTIONS (§ 95\*)—REGISTRARS—QUALIFICATIONS.**

The requirement of Act May 20, 1898, § 3, par. 4, that the department of elections appoint the registrars of election from lists of eligible

persons submitted by the chairman of the two leading political parties, is a reasonable requirement for the promotion of fair elections, and does not violate Const. art. 14, which, after prescribing the oath for public officers, provides that no other oath, declaration, or test shall be required for any office of public trust.

[Ed. Note.—For other cases, see Elections, Cent. Dig. §§ 95, 96; Dec. Dig. § 95.\*]

**5. ELECTIONS (§ 101\*)—OFFICERS—LISTS SUBMITTED BY PARTY CHAIRMAN.**

Under Act May 20, 1898, § 3, par. 4, requiring the department of elections to appoint the registrars of election from lists submitted by the party chairman, containing the names of at least six qualified persons in each election district, the list is in effect a distinct list for each district, and a fatal defect therein with respect to one or more districts does not vitiate the remainder of the list.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 99; Dec. Dig. § 101.\*]

**6. MANDAMUS (§ 74\*)—SUBJECTS OF RELIEF—ADMINISTRATIVE DECISIONS.**

The determination by the department of elections whether the persons named on the list, submitted by the chairman of the political parties as required by Act May 20, 1898, § 3, par. 4, possess the qualifications of registrars of election is administrative, and not of such a judicial character as will prevent a review of that decision by mandamus.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 150-157; Dec. Dig. § 74.\*]

**7. MANDAMUS (§ 160\*)—ALTERNATIVE WRIT—DUPLICITY.**

An alternative writ of mandamus, ordering the department of elections to appoint registrars of election in several different districts from the list furnished by the chairman of the political party, as required by Act May 20, 1898, § 3, par. 4, is not duplicious, since the duties therein commanded are certain, positive, similar and successive.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 326-335; Dec. Dig. § 160.\*]

**8. MANDAMUS (§ 164\*)—RETURN—REQUISITES.**

The office of the return to an alternative writ of mandamus is to show a right to refuse obedience, and it must deny the allegations of the writ or show other facts sufficient to defeat the claim of the relator.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 344-360; Dec. Dig. § 164.\*]

**9. MANDAMUS (§ 162\*)—RETURN—QUASHING PART OF RETURN.**

The court may quash part of the return to an alternative writ of mandamus, and hold part sufficient.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 338-340; Dec. Dig. § 162.\*]

**10. MANDAMUS (§ 164\*)—RETURN—REQUISITES.**

The return to an alternative writ of mandamus must not be uncertain, argumentative, or evasive.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 344-360; Dec. Dig. § 164.\*]

**11. MANDAMUS (§ 164\*)—RETURN—SUFFICIENCY.**

In mandamus proceedings, to compel the department of elections to appoint registrars from a list filed by a political party, as required by Act May 20, 1898, § 3, par. 4, the averment in the return that certain persons named for appointment do not reside at the addresses given in the list, but not averring that they do not reside in the district, is not sufficient.

[Ed. Note.—For other cases, see Mandamus, Cent. Dig. §§ 344-360; Dec. Dig. § 164.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 91 A.—63

**12. ELECTIONS (§ 101\*)—OFFICERS—APPOINTMENT—LIST SUBMITTED BY PARTY CHAIRMAN.**

Under Act May 20, 1898, § 3, par. 4, requiring the department of elections to appoint registrars from lists of six qualified persons in each election district, to be submitted by the chairman of the political parties, where one or more of the persons named in the list are not qualified to serve as registrars, the list may be disregarded for that district and persons not named therein appointed.

[Ed. Note.—For other cases, see Elections, Cent. Dig. § 99; Dec. Dig. § 101.\*]

Mandamus by the state of Delaware, on relation of James Saulsbury, against Jacob Hadley Lewis and others, as members of the Department of Election for the City of Wilmington. Peremptory writ of mandamus issued for part of the relief prayed for, and denied for part.

Argued before BOYCE, CONRAD, and RICE, JJ.

Robert G. Harman and John W. Brady, both of Wilmington, for relator. Phillip L. Garrett and Frank L. Speakman, both of Wilmington, for respondents.

On July 8, A. D. 1914, in vacation, the relator filed a petition and accompanying affidavits with the prothonotary for New Castle county, praying that a rule issue out of the Superior Court, in and for said county, directed to and requiring the respondents, constituting the members of the department of elections for the city of Wilmington, to show cause why a writ of peremptory mandamus shall not issue against them, requiring them to appoint certain registration officers, in the city of Wilmington, in accordance with the law. The prothonotary, in pursuance of section 3, chapter 775, volume 19, Laws of Delaware, Revised Code, p. 697, immediately transmitted the petition with accompanying affidavits to the Chief Justice of the state, who, under the authority of said statute, deeming the matters contained therein ought to be heard and determined before the term of the next regular session of said court, awarded the rule prayed for, and made it returnable at a special session of said court, to meet at the court house, in Wilmington, on the 11th day of July, A. D. 1914, at 11 o'clock a. m., as called by the Chief Justice, a majority of the members of said court deeming a special session expedient. The special session of said court having convened, in pursuance of said call, at the said time and place, formal application was made by counsel for the relator to file the said petition and accompanying affidavits, and leave was granted.

The petition, among other things, averred:

First. That your said petitioner is a citizen of the city of Wilmington, New Castle county and state of Delaware; that he was a registered voter at the last general election held in the state of Delaware, and still is, a registered

and legal voter; that he is a member of the Democratic party and also is chairman of the City Executive Committee of the Democratic party for the city of Wilmington.

Second. That on the twenty-eighth day of May, A. D. nineteen hundred and fourteen, your petitioner as chairman of the City Executive Committee of the Democratic party for the city of Wilmington, in pursuance of a resolution of the said Executive Committee of the Democratic party in the city of Wilmington, filed with the Department of Elections for the city of Wilmington, a list of three and more names of properly qualified persons from each election district in the city of Wilmington, from which said names the Department of Elections for the city of Wilmington was compelled by law to select names for each appointment accredited to the Democratic party as registrars, assistant registrars and election officers for the purpose of registering voters and holding the election to be held on the third day of November, A. D. nineteen hundred and fourteen.

Third. That on the sixteenth day of June, A. D. nineteen hundred and fourteen, the said Department of Elections for the city of Wilmington as its meeting held, appointed as such registrars, assistant registrars and election officers the following men whose names did not appear upon said list so as aforesaid furnished by the said City Executive Committee of the Democratic party through its chairman as aforesaid.

James L. Taggart as assistant registrar and election officer from the Sixth district of the Second ward, James J. Riley as assistant registrar and election officer from the Third district of the Third ward, William H. Blake as assistant registrar and election officer from the Fifth district of the Third ward, C. Gregg Derickson as assistant registrar and election officer from the Tenth district of the Seventh ward, Hugh McDonough as assistant registrar and election officer from the Third district of the Tenth ward and Miles Jennings as assistant registrar and election officer from the Eleventh district of the Tenth ward.

Fourth. That the said Department of Elections of the city of Wilmington was thereupon notified by the City Executive Committee through its chairman as aforesaid, at a regular meeting of said Department of Elections held on the twenty-second day of June, A. D. nineteen hundred and fourteen, that the said appointments were illegal and it was requested by your petitioner as chairman of the City Executive Committee of the Democratic party to correct and change the same in conformity with the law, yet the said Department of Elections for the city of Wilmington, fraudulently and illegally neglected and refused so to do, and still continues so to do, to the irreparable injury of the Democratic party in the districts aforesaid.

Fifth. That the appointment of the said named men in manner and form as aforesaid, is contrary to the laws of the state of Delaware providing for the appointment of registrars, assistant registrars and election officers by the said Department of Elections for the city of Wilmington, in that, it is in violation of paragraph 4, of section 3, of chapter 40 of vol. 21 of the Laws of Delaware. \* \* \*

Sixth. Your petitioner therefore alleges that the said action of the said Department of Elections for the city of Wilmington, is unauthorized, unwarranted and illegal and is a fraudulent and willful evasion of the statute above cited and in such case made and provided.

Seventh. That the following is a list of the duly and properly qualified persons named in the list submitted to the Department of Elections for the city of Wilmington by the City Executive Committee of the Democratic party for the respective districts from which the said

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



appointments were made illegally by the said Department of Elections.

[Then followed the list, containing six names for each district in question.]

The eighth paragraph averred injury, etc., and concluded with a prayer for relief, the substance of which has already been stated.

The statute relied upon by both parties is section 3, paragraph IV, chapter 40, volume 21, Laws of Delaware 141, which reads:

"They shall in the month of June, in each year in which a general election is held, appoint for each election district in the city of Wilmington three capable persons, who shall be voters and residents in the election district, for which they shall be appointed, who shall be the registration officers of the election district for which they are appointed; one of whom shall be designated as 'Registrar,' and the other two 'Assistant Registrars,' and not more than two of them shall be of the same political faith; provided, that the total number of registration officers in each representative district, shall be divided as equally as possible between the two leading political parties, as the same shall be determined upon by the Department of Elections at the time of making the appointments. And further, for each appointment accredited to any political party under this section the city executive committee of such political party shall furnish the Department of Elections on or before the first day of June of the year in which said appointment is to be made, a list of three names of properly qualified persons, from which list the Department of Elections shall make its appointments."

Counsel for the respondents moved to discharge the rule and dismiss the petition for the following reasons:

1. That the said petition does not show upon its face a clear right to the relief demanded.
2. That the allegation of facts made in said petition are argumentative, uncertain, not specific, not positive and are insufficient.
3. That it appears in and by said petition that there is no duty imposed upon said respondents to perform the act complained of.
4. That it does not appear from the said petition that the said respondents have failed to perform any ministerial duty imposed upon them by law.

The main contention, on the motion, was that the qualification of the persons named in the list were matters to be judicially determined by the Department of Elections at the time of making the appointments of the registration officers, and that the discretion to be exercised by the department cannot be reviewed by mandamus.

The authorities relied upon are *Houston v. Levy* Court, 5 Har. 108; *Taylor et al. v. Kolb*, 100 Ala. 603, 18 South. 779; and *Com. v. Perkins*, 7 Pa. 42. For the relator it was urged that the qualifications of the persons named in the list were sufficiently averred in the petition, supported by the accompanying affidavits; that for the purpose of the motion the allegations contained in the petition are to be taken as true; and that the department having failed to make the appointments as required by the statute, compliance therewith may be enforced by mandamus.

BOYCE, J. [1] The motion to discharge the rule and dismiss the petition has the ef-

fect to admit the allegations in the petition well averred. We are constrained under the facts disclosed by the petition and affidavits to deny the motion.

Upon application being made therefor, it is the judgment of the court that the alternative writ should issue, returnable to this special session of the court, on the 15th day of the present month, at 11 o'clock a. m., to which time the court will be adjourned.

(July 15, 1914.)

The court having reconvened, the alternative writ was returned, showing service.

Counsel for the respondents moved to quash the writ, assigning several reasons therefor, but relied upon the third and fourth reasons assigned for the dismissal of the petition, and upon the same authorities.

BOYCE, J. [2] Under our practice in mandamus, the alternative writ takes the place of the declaration, and is the first pleading. The facts therein well pleaded are, by this motion, admitted; and the question now is, in the absence of the return, whether enough is shown to entitle the relator to the peremptory writ.

[3] The writ *prima facie* shows that the list filed is in conformity with the requirements of the statute; that the persons named in the list have the proper qualifications for registration officers in the city of Wilmington, and that the appointments for the districts in question have not been made as required by the act of assembly. Unless these allegations are properly denied by the respondents, the peremptory writ prayed for must issue. The motion to quash the alternative writ is denied. The respondents thereupon filed their return to the alternative writ.

Counsel for the relator moved to quash the return which was resisted by counsel for the respondents. The further facts and contentions appear in the opinion of the court.

BOYCE, J. (delivering the opinion of the court). This is a motion to quash the return for insufficiency, uncertainty, argumentativeness and as being contrary to law.

This motion is resisted for three reasons: First, that the answer conclusively shows that the Department of Elections in the appointment of said registration and election officers acted within its discretion and in accordance with the law; second, that in the manner of making the appointments the provisions of the statute are merely directory and not mandatory; and third, that if the court should hold, that the provisions of statute in regard to the manner of the appointments of said registration and election officers is mandatory then said provision of law is unconstitutional.

The contention made by the respondents on the first proposition is the same as was

urged on the motion to discharge the rule and dismiss the petition, and the authorities then cited are relied upon.

Our attention is directed to errors and mistakes in the list filed as set out in the return, and it is urged that the Department of Elections in the exercise of its discretion had a right to disregard the entire list, and to make the appointments independently thereof. That the duties imposed under the statute are judicial and not ministerial.

[4] It is further urged that the provision of the statute requiring "that the total number of registration officers in each representative district, shall be divided as equally as possible between the two leading political parties, as the same shall be determined upon by the Department of Elections at the time of making the appointments" is unconstitutional in that it conflicts with article 14 of the state Constitution entitled "Oath of Office," which after prescribing the oath for public officers provides that "no other oath, declaration or test shall be required as a qualification for any office of public trust."

The authorities relied upon are *Attorney General v. Detroit*, 58 Mich. 213, 24 N. W. 887, 55 Am. Rep. 675; *State ex rel. Holt v. Denny*, 118 Ind. 449, 21 N. E. 274, 4 L. R. A. 65; *People ex rel. Le Roy v. Hurlbut*, 24 Mich. 44, 9 Am. Rep. 103; *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15, 34 L. R. A. 408; *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572; and *Bowden v. Bedell*, 68 N. J. Law, 451, 53 Atl. 198.

We will dispose of the last proposition immediately.

It is said in 15 Cyc. 313, F:

"This subject, however, has not been much attended to in other jurisdictions, but where the question has been raised it has been held that such a provision does not establish such a political test of office as is repugnant to the Constitution, but is rather a rule for the guidance of the appointing power."

Without going into a general discussion of the question raised, we think the provision of the statute objected to as unconstitutional is reasonable within legislative intentment to promote fair elections, and that it is not within the prohibitory clause of the Constitution or repugnant thereto. In *re Wortman* (Sup.) 2 N. Y. Supp. 324; *State v. McAlister*, 38 W. Va. 485, 18 S. E. 770, 24 L. R. A. 343; *Rogers v. Buffalo*, 123 N. Y. 173, 25 N. E. 274, 9 L. R. A. 579; and *Com. v. Plaisted*, 148 Mass. 375, 19 N. E. 224, 2 L. R. A. 142, 12 Am. St. Rep. 566. Other cases cited: *People v. Hoffman*, 116 Ill. 587, 5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793; *State v. Kinney*, 63 Ohio St. 304, 58 N. E. 809; *State v. Finger*, 48 Ohio St. 505, 28 N. E. 135; *In re Elec. Sup'rs* (C. C.) 43 Fed. 859; *In re Appt. Elec. Sup'rs* (C. C.) 9 Fed. 14, 20 Blatchf. 13; *Vincent v. Mott*, 163 Cal. 342, 125 Pac. 346; *Skain v. Milward*, 138 Ky. 200, 127 S. W. 773.

Proceeding to the consideration of the mer-

its of this case, we cannot now do much more than announce the conclusions which the court has reached.

[5] First, we deem it important to say that in the selection of persons for registration officers too great care cannot be exercised. Efficient, reasonable and fair-minded men should be appointed—men who will discharge their official duties faithfully without bias or prejudice. An error in residence or disqualification as a voter in a particular district should not prevent an appointment from the rest of the list for such district if composed of proper persons. A spirit of fairness dictates such a course. One list from each of the two leading parties covering the districts of the entire city is all that is required by the statute. The practical effect of this is that it constitutes a distinct list for each district.

A fatal defect in the list with respect to one or more districts does not have the effect in law or good reason to vitiate and make illegal the remainder of the list. So far as the list which is required to be filed is in full compliance with the statute with respect to one or more districts, it is good and sufficient as to such district or districts. The list filed with the Department of Elections which has been under consideration does not appear to have been prepared with careful attention. But this fact does not warrant the action taken thereon with respect to some of the districts in question. The object of the statute is obvious, and the appointing power should never lightly disregard its purpose.

[6] The Department of Elections in making the appointments of registration officers must as a preliminary step determine whether proper persons have been named in the lists filed with them, and whether the qualifications required by the statute exist; but such determination is administrative and not of such judicial and final character as will prevent a review of their action by mandamus; for, "if it should be held that in all cases the determination of such preliminary questions calls for the exercise of judicial discretion, the writ of mandamus, as has often been said, might as well be expunged from the remedial code." *Merrill on Mandamus*, § 44. The same author says the weight of authority seems to be that erroneous decisions as to preliminary questions of law may be reviewed by this writ; that erroneous decisions as to preliminary questions of fact may be reviewed, unless the general nature of the duties to be performed are considered to be judicial, or the law intended that such decision should be final. *Id.* § 48. This statement of the law is fully supported by the decisions.

[7] We think the case at bar is distinguished from the case of *Oxy-Hydrogen Co. v. Simmons et al.*, in 3 Pennewill, 291, 50 Atl. 213. The duties here are certain, positive, similar

and successive, and present no conditions to prevent one procedure for the relief sought. The alternative writ is, therefore, not duplicitous.

[8] The respondents in their return cannot merely rely upon the powers with which they are clothed by the statute and allege that they have performed. The office of the return is to show a right to refuse obedience to the alternative writ, and it must be good, as tested by the ordinary rules of pleading. It must deny the allegations of the writ or show other facts sufficient to defeat the claim of the relator.

[9] The question now is whether upon the face of the return, the condition of the relator is so changed as to prevent the issuance of the peremptory writ. The court may quash part of the return and hold part sufficient. *State ex rel. Lindsay et al. v. J. & M. P. Co.*, 7 Pennewill, 397, 72 Atl. 1057.

All allegations in the alternative writ sufficiently pleaded and not denied by the return are to be taken as admitted. By the return, the allegations in the first, third, fourth (except in so far as the latter charges fraudulent and illegal neglect, etc.) and seventh paragraphs of the petition are admitted.

As to the second paragraph it is admitted that on the date alleged therein "the said James Saulsbury, then representing himself to be chairman of the City Executive Committee of the Democratic party for the city of Wilmington, filed with the Department of Elections for the city of Wilmington, a list purporting to be a list of registration and election officers which had theretofore been submitted by the respective ward-chairman to the Democratic Committee, which said list is in the words and figures following. [Here follows a copy of the list filed.]" But as to the said second paragraph the respondents "wholly deny \* \* \* that a list of three and more names of properly qualified persons for each election district in the city of Wilmington from which said names the Department of Elections for the city of Wilmington was compelled by law to select names for each appointment accredited to the Democratic party as registrars, assistant registrars and election officers for the purpose of registering voters and holding the election to be held on the third day of November, A. D. 1914."

A general denial is made of the fifth and sixth paragraphs. We do not think it necessary for the purpose of this case to incorporate those paragraphs in the opinion.

It is shown by the return that the list filed by the relator was filed on the 28th day of May, A. D. 1914, and that on the 16th day of June following, the Department of Elections for the city of Wilmington at its meeting accredited to the Democratic party two appointments for certain of the several 118 election districts in the city of Wilmington as therein mentioned, including the Fifth and Tenth districts of the Third ward, and the Tenth dis-

trict of the Seventh ward, being three of the districts in question, and likewise one appointment in certain other of said districts, including the Sixth district of the Second ward, and the Third and Eleventh districts of the Tenth ward, the remaining three districts in question.

It is averred that the executive committee of the Democratic party of the city of Wilmington did not furnish the Department of Elections on or before the 1st day of June, A. D. 1914, for each appointment so accredited to the Democratic party a list of three names of properly qualified persons from which list the Department of Elections was required to make said appointments, etc.; that the said list was incomplete, insufficient and not in accordance with law in the following respects. Here follow at length the reasons assigned. We do not think it necessary to incorporate these as most of them relate to other districts than those involved in this proceeding. The substance of the reasons assigned affecting the districts in question follows:

With respect to the three districts accredited with two Democratic appointments, it is averred in the return as to the first mentioned that one of the persons on the list, naming him, does not reside at the address given; as to the second, that one of the persons on the list, naming him, does not reside in the district; and that two other persons on the list, naming them, do not reside at the addresses given; as to the third, that one of the persons on the list, naming him, does not reside at the address given, but at Atlantic City, state of New Jersey. With respect to the remaining three districts accredited with one Democratic appointment, it is averred as to the first mentioned that three of the persons on the list, naming them, do not reside at the addresses given; as to the second that two of the persons, naming them, do not reside at the addresses given, and which are not located in the district, and that one of the persons named, is not a qualified voter, and as to the third, that one of the persons named removed from the address given before filing list, and another person named does not reside at the address given.

[10] The return must not be uncertain, argumentative or evasive.

[11, 12] The averments in the return that certain persons named in the list filed do not reside at the addresses given without further averring that such persons are not residents of the respective districts for which they were named is not sufficient answer to the alternative writ. The averment that a person named in the list does not reside in the district for which he was named is sufficient. The averment that a person named in the list is not a voter in the district for which he was named, when admitted as in this case, is sufficient. The statute makes it mandatory that the names of three persons shall be furnished as provided for each ap-

pointment accredited to any political party. So that where two appointments are accredited to a party for any district, and six names as required have been submitted for that district in the list required, and the return distinctly and sufficiently shows that one or more of such persons is disqualified, the list with respect to such district does not comply with the requirements of the statute; and the Department of Elections may, as to such district, disregard the remaining names on the list, and appoint other suitable persons.

The same principle applies when only one appointment is accredited to a party. And if, in such a case, six names are furnished, and three of the names are properly qualified persons, the appointment must be made from the list.

The return is insufficient as to the Sixth district of the Second ward, the Third district of the Third ward, and the Third and Eleventh districts of the Tenth ward, and as to these four districts the return is quashed. With respect to the appointments alleged to have been heretofore made in these four districts of persons whose names were not on the list furnished the Department of Elections, we will say that in contemplation of law the department in attempting to make these appointments exceeded the discretion permitted by the law. The return is sufficient as to the Fifth district of the Third ward and the Tenth district of the Seventh ward and as to these two districts, the motion to quash the return is denied.

It is ordered that a peremptory writ of mandamus as prayed for issue directed to the respondents with respect to the Sixth district of the Second ward, the Third district of the Third ward, the Third district of the Tenth ward, and the Eleventh district of the Tenth ward.

(5 Boyce, 226)

#### STATE v. MORRIS.

(Court of General Sessions of Delaware. New Castle. Jan. 14, 1914.)

#### 1. GAMING (§ 74\*)—KEEPING "GAMING TABLE"—OFFENSE.

Under Rev. Code 1852, amended to 1893, p. 961 (11 Del. Laws, c. 454) § 1, providing that if any person shall keep or exhibit a gaming table at which any game of chance is played, or shall be concerned in interest in the keeping of such table, he shall be guilty of a misdemeanor, the word "keeping" is to be given its ordinary significance, and a "gaming table" to be understood as one used for gaming purposes; the purpose of the act being to prevent the keeping of devices suitable for gambling.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 190-198; Dec. Dig. § 74.\*]

For other definitions, see Words and Phrases, First and Second Series, Gambling Table.]

#### 2. GAMING (§ 74\*)—KEEPING GAMING TABLE—ELEMENTS OF OFFENSE.

Where one keeps a gaming table on which games of chance are played, he is guilty of the offense of keeping a gaming table, denounced by

Rev. Code 1852, amended to 1893, p. 961 (11 Del. Laws, c. 454) § 1, even though he be not financially interested in the game and does not derive a profit from keeping the table.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 190-198; Dec. Dig. § 74.\*]

#### 3. CRIMINAL LAW (§ 308\*)—EVIDENCE—PRESUMPTIONS.

An accused is presumed to be innocent until proven guilty beyond a reasonable doubt; the burden of proving guilt being on the state.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 731; Dec. Dig. § 308.\*]

#### 4. CRIMINAL LAW (§ 561\*)—TRIAL—EVIDENCE—SUFFICIENCY.

In a criminal prosecution, the jury should acquit if they have, after consideration of the evidence in a careful and conscientious way, a reasonable doubt as to accused's guilt.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1267; Dec. Dig. § 561.\*]

Charles B. Morris was indicted for exhibiting a gaming table. Verdict, guilty.

See State v. Panaro, 91 Atl. 998.

Argued before CONRAD and WOOLLEY, JJ.

Armon D. Chaytor, Jr., Deputy Atty. Gen., for the State. J. Frank Ball, of Wilmington, for accused.

The accused was tried under an indictment (No. 38, January term, 1914) under chapter 454, volume 11, Laws of Delaware (Revised Code 1852, amended to 1893, page 961), containing four counts. The first count charged that Charles B. Morris, the accused, exhibited a gaming table on December 17, 1913. The second count charged that Morris was concerned in interest in keeping and exhibiting a gaming table on said date. The third count charged him with keeping a gaming table from November 1 to December 20, 1913; and the fourth count charged said Morris with being concerned in interest in keeping and exhibiting a gaming table between the latter dates.

The state proved: That the defendant upon the dates mentioned in the indictment was conducting a cigar store at Fourth and Poplar streets, in the city of Wilmington. That said business was conducted upon the first floor, from which there were steps leading to a basement which was fitted up with pool tables and also contained two smaller tables about 4 feet and 4½ feet in diameter, respectively, covered with green cloth, with playing cards upon them, which basement and paraphernalia were in the possession and control of the accused. At various times on and about the said dates, games of poker, pitch, and pinochle were played with cards for money by various persons and upon the tables furnished by Morris and that the usual amount played for was 5 cents ante and 25 cents limit. That during the course of the games 5 cents would be taken out of the pot and laid aside and when a sufficient amount had accumulated the players would order cigars, cigarettes, chewing gum, or candy,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

from Morris or some one representing him, and the amount thus accumulated would be handed to Morris without counting it or without estimating the gross amount of the purchases. That at times the money would be spent for oysters or drinks not furnished by Morris. There was also evidence that at times Morris himself joined in the above mentioned games. There was no evidence, however, that Morris had any direct pecuniary interest in the games, or that he was what is technically known as a "backer." The accused offered no evidence upon his part.

#### State's Prayers.

1. That if the jury find that the accused kept or exhibited any table at which a game of cards was played for money, then they should find him guilty, as under the first clause of the first section of the act (chapter 454, volume 11, Laws of Delaware, Revised Code, 961), the mere exhibiting or keeping of a gaming table is made the crime. *Toney v. State*, 61 Ala. 1; *Wren v. State*, 70 Ala. 1; *Bibb v. State*, 83 Ala. 84, 8 South. 711; *Id.*, 84 Ala. 13, 4 South. 275.

2. That it is not necessary for the state to show that the defendant had any pecuniary interest or expectation of gain in the keeping and exhibiting of a gaming table, to show a violation of the first clause of section one. See authorities above cited and *Commonwealth v. Colton*, 8 Gray (Mass.) 488.

3. That the fact that a table may at times have been used for other purposes than gaming would not deprive it of its character as a gaming table, if as a matter of fact it was kept and exhibited as a gaming table. *Jones v. Territory*, 5 Okl. 536, 49 Pac. 934, 935.

Counsel for the accused opposed the prayers as asked for by the state, and requested the court to charge the jury that, in order to convict, it is incumbent upon the state to prove beyond a reasonable doubt all the necessary elements or ingredients of the offense charged in the indictment.

That in order to convict, the jury must be satisfied beyond a reasonable doubt that the accused had a pecuniary interest in the keeping and exhibiting of a gaming table.

CONRAD, J. (charging the jury). Gentlemen of the jury: Charles B. Morris, the accused, stands indicted before this court and is on trial before you under an act of the General Assembly, entitled "An act for the suppression of gaming," passed as long ago as 1857 (11 Del. Laws, c. 454), so that it is old enough to be good. It is the province of the court when called upon, to interpret and construe the law, and it is your province as members of the jury to take the law and to fit the facts into it and from that make up your verdict. This act provides:

"Section 1. That if any person or persons shall keep or exhibit a gaming table, faro bank, sweat cloth, roulette table, or other device under

any denomination, at which cards, dice or any other game of chance is played for money, or other thing of value, or shall be a partner or concerned in interest in the keeping or exhibiting such table, bank, sweat cloth, or other device, he, she or they shall be deemed guilty of a misdemeanor," etc. Rev. Code, 961.

It is that law that the counsel in this case have asked us to construe.

[1] The accused is charged under the first and third counts of this indictment with keeping or exhibiting a gaming table. In the opinion of the court a person keeping a gaming table is liable under the statute; and by keeping, the ordinary meaning of the word is applicable. The word keeping means to maintain, to control, to carry on, to manage. A gaming table is a table used for gaming purposes, a table upon which games of chance are played for a stake, and the evident idea in the minds of the legislators was that the keeping of a table to be used for gaming purposes and called a gaming table was an important and almost necessary adjunct in the matter of gambling, and that in prohibiting the keeping or exhibiting of a gaming table, the effect would be to lessen the offense of gambling.

[2] Under the first and third counts of the indictment in this case the accused is charged with exhibiting and keeping (on different dates) a gaming table. The offense so charged is fully sustained when the fact is proven to the satisfaction of the jury that the accused kept or exhibited a gaming table, and the matter of the accused being concerned in interest in, or deriving a profit from it, is not an element in the charge. The keeping and exhibiting are the only things that need be shown under these two counts. That disposes of the first and third counts.

In the second and fourth counts the accused is charged with keeping and exhibiting a gaming table in which he was concerned, or in which he had an interest. The court feel constrained to say that under the evidence adduced in this case in its opinion the charge made in the second and fourth counts of the indictment that the accused was concerned in interest in the keeping or exhibiting of a gaming table has not been sustained, and the charges made in those two counts are withdrawn from your consideration; so that the question left for your determination is, whether or not the accused kept or exhibited a gaming table, as defined. You are to weigh, gentlemen of the jury, and consider the evidence as you have heard it from the stand. If the state has proven to your satisfaction that the accused kept or exhibited a gaming table, that it was under his control or management, then the offense charged has been sustained and your verdict should be guilty, regardless of the fact that no profits were shown to have been proved as received by the accused from the table.

[3, 4] We also charge you, gentlemen of the

Jury, that the accused is presumed to be innocent until he is proven guilty beyond a reasonable doubt, and the burden is upon the state to prove its case, so that if after consideration in a careful conscientious way, as reasonable, fairminded men, you have a reasonable doubt as to the guilt of the accused, then you should find him not guilty. The matter is left with you.

Verdict, guilty.

(5 Boyce, 220)

#### STATE v. PANARO.

(Court of General Sessions of Delaware. New Castle. May 7, 1914.)

#### 1. GAMING (§ 63\*)—STATUTES—POLICE POWER.

Rev. Code 1851, amended to 1893, p. 961 (11 Del. Laws, c. 454) § 1, making it a misdemeanor for any person to keep a gaming table or to be interested in the keeping of such table, is directed against gambling appliances themselves, and is within the police power of the state, being enacted for the protection of the morals of society.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. § 120; Dec. Dig. § 63.\*]

#### 2. GAMING (§ 74\*)—STATUTES—CONSTRUCTION.

Rev. Code 1852, amended to 1893, p. 961 (11 Del. Laws, c. 454) § 1, making it a misdemeanor for any person to keep or exhibit a gaming table, or to be interested in the keeping of such a table, denounces two offenses, one the "keeping" or maintaining of a table upon which persons are authorized to play games of chance, and the other being interested in the keeping; hence one who keeps a gaming table is guilty, though he derives no profit from the keeping.

[Ed. Note.—For other cases, see Gaming, Cent. Dig. §§ 190-198; Dec. Dig. § 74.\*]

Daniel Panaro was indicted for violation of the law against keeping gaming tables. On motion to strike the testimony of a witness. Motion denied.

See State v. Morris, 91 Atl. 998.

Indictment (No. 27, May term, 1914) for violating the provisions of chapter 454, volume 11, Laws of Delaware (Rev. Code 1852, amended to 1893, page 961), against keeping gaming tables.

Counsel for the defendant moved that all of the testimony of one of the witnesses be stricken out upon the ground that the testimony did not show that the defendant was "concerned in interest" in keeping a gaming table, and therefore did not prove that the defendant had violated any provision of the statute under which he was indicted.

Argued before WOOLLEY and RICE, JJ.

Josiah O. Wolcott, Atty. Gen., for the State. Robert G. Harman, of Wilmington, for defendant.

WOOLLEY, J. [1, 2] The statute under which the defendant is indicted is chapter 454, volume 11, Laws of Delaware (Revised Code of 1852, amended to 1893, page 961), and is as follows:

"Section 1. That if any person or persons shall keep or exhibit a gaming table, faro bank,

sweat cloth, roulet table, or other device under any denomination, at which cards, dice or any other game of chance is played for money, or other thing of value, or shall be a partner or concerned in interest in the keeping or exhibiting such table, bank, sweat cloth, or other device, he, she or they shall be deemed guilty of a misdemeanor," etc.

The indictment under which the defendant is being tried was obviously drawn in contemplation of the two provisions of this one paragraph of the statute, and contains two counts, the first of which charges simply that the defendant kept or exhibited a gaming table at which cards, dice or other games of chance were played for money, and the second, that the defendant was "concerned in interest" in such a table being kept and exhibited for such a purpose.

It is contended that the mere keeping and exhibiting of a gaming table at which games of chance are played for money is not within the prohibition of the statute, and hence the first count states no offense, and that the only offense contemplated by the statute is that of being concerned in interest in the keeping of such a table for such a purpose, and as the testimony of the witness discloses no such interest, no offense under the second count is proven.

The statute in question does not prohibit gambling, but is designed rather to reduce the opportunities and discourage the facilities for gambling. There is nothing in this statute which makes it unlawful for four men to play cards for money upon a table, nor does it make it unlawful for the owner of a table to permit it to be used for card playing for stakes, when the table is neither kept nor exhibited for that purpose. The object of the statute as its title indicates, is "the suppression of gambling," and the particular method pursued by the Legislature to attain this end, was to prevent and prohibit the keeping of gambling tables and devices, under circumstances of notoriety and opportunity, which would induce or enable men the more readily to gamble.

This enactment is within the police power of the state, and under that power, a state may enact such laws of regulation and restraint over men and things as are reasonable and proper to protect the lives, health, comfort and property of its citizens and to promote the order, morals and welfare of society.

The meaning of this statute is such as its plain words conveys. A gaming table is a table used for gambling purposes, upon which games of chance are played for stakes. The use to which the table is put characterizes the table and determines its part in the crime. If a table so used and thus characterized is kept and exhibited for the uses to which it is put, then he who keeps or exhibits a table for such a purpose, violates the law.

The words "keep" or "exhibit," as used

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

in the statute, embrace no technical meaning. They mean to maintain, to control, to carry on, to display. The display of such a table by one having authority over it, and the invitation or permission of the owner to use the table for gambling purposes, constitute a keeping and exhibiting within the meaning of the law. *Bibb v. State*, 83 Ala. 84, 3 South. 711; *Bibb v. State*, 84 Ala. 13, 4 South. 275; *Commonwealth v. Colton*, 74 Mass. (8 Gray) 488.

It is within the police power of the state for the General Assembly to consider that the morals of the community are injured by the keeping and exhibiting of gaming tables even when their owners are not financially interested in the outcome of the games, and that the morals of society are benefited by restricting the opportunities of its members to engage in gambling practices. This the General Assembly has done by enacting that the keeping and exhibiting of such tables constitute a misdemeanor, without regard to the owner thereof being "concerned in interest" in the games or in profits derived from the use of the table.

The second provision is altogether different from the first, and is obviously intended to reach beyond the person who actually keeps and exhibits a gaming table, to any person who "shall be a partner or concerned in interest in the keeping or exhibiting such table." We are of opinion that the statute contemplates two offenses, and that the interest that determines the latter is no material ingredient of the former. The motion is refused.

Upon the subsequent failure of the state to prove that the table was kept or exhibited by the defendant, the Attorney General entered a *nolle prosequi*.

(5 *Boyce*, 223)

CARROLL v. COHEN et al.

(Superior Court of Delaware. New Castle. May 21, 1914.)

**1. COVENANT, ACTION OF (§ 3\*)—SCOPE OF REMEDY—ACTIONS ON SEALED CONTRACTS.**

The action of covenant is a proper form of action for the recovery of damages for the breach of a contract under seal.

[Ed. Note.—For other cases, see *Covenant, Action of*, Cent. Dig. § 9; Dec. Dig. § 3.\*]

**2. CONTRACTS (§ 176\*)—CONSTRUCTION—QUESTIONS OF LAW.**

The meaning of a contract is a question of law.

[Ed. Note.—For other cases, see *Contracts*, Cent. Dig. §§ 767-770, 917, 956, 979, 1041, 1097, 1825; Dec. Dig. § 176.\*]

**3. MASTER AND SERVANT (§ 43\*)—ACTIONS FOR BREACH OF CONTRACT—QUESTIONS FOR JURY.**

In an action for breach of a contract of employment, whether plaintiff had been guilty of conduct amounting to a breach of the stipulations of the contract, implied or expressed, justifying dismissal, was a question of fact for the jury.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 57, 58; Dec. Dig. § 43.\*]

**4. MASTER AND SERVANT (§ 8\*)—CONTRACTS OF EMPLOYMENT—CONSTRUCTION—TERM OF EMPLOYMENT.**

Where, under a contract of employment for one year from April 14, 1913, at \$30 a week for the first six months, and \$35 a week for the second six months, the first week of services was waived by agreement of both parties, the waiver did not prevent the contract from going into effect on April 14, 1913, and the first six months of employment ended on October 13, 1913, and the second six months on April 13, 1914.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 8-10, 17; Dec. Dig. § 8.\*]

**5. MASTER AND SERVANT (§ 30\*)—DISMISSAL—JUSTIFICATION.**

Whether the dismissal of a person, employed as manager of a department store, was justified by anything done or omitted by him as manager, may be determined with respect to conditions shown to exist in the store for which he was not responsible.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 30-36; Dec. Dig. § 30.\*]

**6. MASTER AND SERVANT (§ 53\*)—PERFORMANCE OF SERVICES—DEGREE OF SKILL REQUIRED.**

In a contract of employment, and especially in a contract by which the employé stipulated to do all things for the best interests of the employer usually done by persons occupying the position of manager of a department store, a stipulation is implied that the employé is reasonably competent to perform the work undertaken; and it was not sufficient for the employé to do the best he could in the service he performed, if he did not do what was reasonably required of a man occupying the position undertaken by him.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. § 67; Dec. Dig. § 53.\*]

**7. MASTER AND SERVANT (§ 56\*)—PERFORMANCE OF SERVICES—DEGREE OF SKILL REQUIRED.**

A person employed as manager of a department store, and who by his contract agreed to serve the firm diligently and according to his best abilities, and generally do all things for the best interest of the firm usually done by persons occupying such position, was only required to substantially comply with the provisions of the contract; and if he was a fairly efficient manager, gave his whole time and all of his ability to the business, and in good faith performed his duties to the best of his ability, and did not misconduct himself or otherwise violate the provisions of the contract, there was a substantial compliance, notwithstanding occasional mistakes which might have been made by any competent manager.

[Ed. Note.—For other cases, see *Master and Servant*, Dec. Dig. § 56.\*]

**8. MASTER AND SERVANT (§ 3\*)—PERFORMANCE OF SERVICES—DEGREE OF SKILL REQUIRED.**

A person employed as manager of a department store, who by his contract agreed to serve his employer diligently and according to his best abilities, and generally to do all things for the best interests of the employer usually done by persons occupying such position, neither insured nor guaranteed the results of his work as manager.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 2, 3; Dec. Dig. § 3.\*]

**9. MASTER AND SERVANT (§ 30\*)—DISMISSAL—JUSTIFICATION.**

If a person employed as manager of a department store failed to do the things usually

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

done by one engaged to do the work which he agreed to do, or if he was not competent to do the work, or, being competent, did not exercise his ability and properly supervise the buying and selling of the merchandise of the store, his dismissal before the expiration of his term of employment was justified, and he could not recover damages.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 30-36; Dec. Dig. § 30.\*]

**10. MASTER AND SERVANT (§ 40\*)—ACTIONS FOR WRONGFUL DISCHARGE—BURDEN OF PROOF.**

A person, suing for breach of a contract of employment, must show by the preponderance of the evidence a substantial compliance with the contract; and it then devolves upon the defendants to show a default justifying the discharge.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 47-49; Dec. Dig. § 40.\*]

**11. EVIDENCE (§ 588\*)—PROVINCE OF JURY—CONFLICTING EVIDENCE.**

Where the evidence is conflicting, the jury should reconcile it, if possible; but, if they cannot, they should accept as true that evidence which they deem worthy of credit, and reject that deemed unworthy, having due regard to the opportunity and capacity of the witnesses to know that of which they speak, and their apparent fairness or bias.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2347; Dec. Dig. § 588.\*]

**12. MASTER AND SERVANT (§ 41\*)—WRONGFUL DISCHARGE—MEASURE OF DAMAGES.**

An employé, wrongfully discharged before the expiration of his term of employment, is entitled to recover the agreed wages for the unexpired portion of the term of employment, less the amount which he has earned, or by reasonable effort might have earned, in other employment during such unexpired term.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 12, 50-53; Dec. Dig. § 41.\*]

Action by William F. Carroll against Manuel Cohen and another, now or late trading as Cohen & Finkelstein. Verdict for plaintiff.

Argued before WOOLLEY and RICE, JJ.

Charles F. Curley, of Wilmington, for plaintiff. Daniel O. Hastings, of Wilmington, for defendant.

Action of covenant (No. —, September term, 1913), to recover balance alleged to be due on a written contract entered into between the plaintiff and the defendants, whereby plaintiff was to perform the duties of manager of the store of the defendants for a period of one year from the 14th day of April, 1913, to the 14th day of April, 1914, at a salary payable monthly as stipulated in the contract. Verdict for plaintiff.

The facts and contentions of the parties appear in the charge of the court.

RICE, J. (charging the jury). [1] Gentlemen of the jury: The action is one of covenant and the form of the action is a proper one to bring for the recovery of damages for the breach of a contract under seal.

It is claimed by the plaintiff and admitted

by the defendants that the following contract under seal was entered into by the parties to the present action.

"Articles of agreement, made this twelfth day of April, A. D. 1913, between Manuel Cohen and Isaac B. Finkelstein, both of the city of Wilmington and state of Delaware, merchants and copartners under the firm name and style of Cohen & Finkelstein, of the one part, and William F. Carroll, of the city of Philadelphia and state of Pennsylvania, of the other part. The said parties mutually agree as follows:

"1. The said William F. Carroll shall enter into the service of the said Cohen & Finkelstein as the manager of the retail department of the business of Cohen & Finkelstein as merchants at their place of business, Nos. 228 and 230 Market street, city of Wilmington, Delaware, for the period of one year from the fourteenth day of April, 1913, subject to the general control of said Cohen & Finkelstein.

"2. The said William F. Carroll shall devote the whole of his time, attention and energies to the performance of his duties as such manager of said retail department, and shall not, either directly or indirectly, alone or in partnership, be connected with or concerned in any other business or pursuit whatsoever during the said term of one year.

"3. The said William F. Carroll shall, subject to the control of the said firm of Cohen & Finkelstein, take entire charge of the retail department of the business of said Cohen & Finkelstein herein mentioned, he shall exercise supervision over the whole of the said retail department of said business, shall employ such help as may be necessary and desirable, shall serve said firm diligently and according to his best abilities in all respects, and shall generally do all things for the best interest of said firm that are usually done by persons occupying such position as manager.

"4. The salary of the said William F. Carroll shall be the sum of thirty dollars (\$30) per week for the first six months, payable by the said firm weekly from the commencement of the said service, and thirty-five dollars (\$35) per week for the second six months, payable weekly in like manner from the commencement of such second six months: Provided however, that if the services of the said William F. Carroll shall be found to be entirely satisfactory to the said firm of Cohen & Finkelstein, the said William F. Carroll shall be paid for his services at the rate of forty dollars (\$40) per week for the second six months of the term of one year, herein mentioned.

"5. If the said William F. Carroll shall be neglectful of the interest of the said firm of Cohen & Finkelstein or shall manage the business under his supervision badly or in an improper way, or shall misconduct himself, the said Cohen & Finkelstein may at their option terminate this agreement and such service as manager upon two weeks' notice to the said William F. Carroll; and, further provided, that the said William F. Carroll may terminate his service upon two weeks' notice to the said Cohen & Finkelstein."

This contract was duly executed by the parties under their seal respectively.

There is no contention that the contract was induced by fraud of either party.

The plaintiff claims pursuant to the terms of the contract he entered the employ of the defendant firm on April 21, 1913, as manager of the retail department of their business, and on the 18th day of August the same year he was dismissed by the firm, and there-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



after prevented from performing his contractual duties. These facts are admitted by the defendants.

The further claim is made by the plaintiff that he faithfully, fully and in a competent manner performed all his covenants contained in the contract of employment, and that his dismissal was without justification or legal reason on the part of the defendants, and by the defendants' action he suffered damages in an amount equal to his wages for the unexpired term of the contract, less such amounts as he was reasonably able to earn, during that time. In support of his claim for damages the plaintiff testified that he earned \$15 a week from September 17th to October 26th and from November 10th to the present time he earned \$62 a month.

The defendants dispute these claims of the plaintiff, and contend that William F. Carroll, the plaintiff did not perform his duties as manager in a competent manner, and he failed to efficiently do those things usually done by persons occupying such position as manager, and generally his conduct of the business was of such a nature that it amounted to a breach, on his part, of the provisions of the contract, also that he misconducted himself, and therefore they were justified in dismissing the plaintiff from their employ and thereafter discontinuing his services.

The defendants also contend that under the terms of the contract they were the exclusive and final judges of the efficiency of the plaintiff and the satisfactory nature of the work performed by him in their services, and whether they should continue him in their employ was optional with the defendants.

[2] The meaning of a contract is a question of law, and it is necessary for us to construe the terms of the contract to an extent necessary for the jury to understand it.

[3] The agreement entered into by the plaintiff and defendants was a legal contract. Under its terms the plaintiff covenanted to perform certain services for the defendants and it was incumbent on him to do his work in the manner stipulated. For the defendants to justify the dismissal the plaintiff must have been guilty of such conduct as would amount to a breach of his stipulations either implied or expressed, and whether their action was justified under the terms of this contract, is a question of fact for the jury to determine.

[4] The contract called for the plaintiff to assume his duties on April 14, 1913, but by agreement of both parties the first week of services were waived, but this waiver did not prevent the contract from going into effect on April 14th.

The contract was for a period of one year from the 14th day of April, 1913, and for the first six months the plaintiff was to receive a certain weekly wage and for the second six months the amount of his wages was to be increased. In this connection we

will say to you that the first six months of employment ended on the 13th day of October, the same year, and the second six months ended on the 13th day of April, the year following.

[5] The question for the determination of the jury is whether or not the defendants' discharge of the plaintiff from their employ, prior to the expiration of the time of employment named in the contract, was justified by the omission on the plaintiff's part of anything he should have done, or by the commission by him of anything he should not have done, as manager under the contract, of the defendants' retail business. The plaintiff's conduct in this regard is to be determined with respect to conditions shown by the evidence to have existed in the defendants' store, for which he was not responsible.

[6] There is an implied stipulation in contracts, like the one now under consideration, that the servant is reasonably competent to perform the work undertaken by him, and in this agreement it is expressly provided that the plaintiff "shall generally do all things for the best interests of said firm that are usually done by persons occupying such position as manager." It is not therefore sufficient for the plaintiff to merely show that he did the best he could in the service he performed. He must show that he did what was reasonably required of a man occupying the position undertaken by him.

[7, 8] Plaintiff must show a substantial compliance with all the provisions of his contract, and an occasional mistake which might have been made by any competent manager of such a business is not inconsistent with a substantial compliance; and if you believe from the evidence that the plaintiff was a fairly efficient manager, within the contemplation of the contract, and he gave his whole time and all of his ability to the conduct of the defendants' retail business as the manager thereof, and in good faith performed his duties to the best of his ability in behalf of the defendants' interests, and during the said term of employment did not misconduct himself and did not otherwise violate the provisions of his contract, your verdict should be in favor of the plaintiff.

On the other hand, mistakes made by plaintiff in the performance of his duties, of a nature that would substantially affect the business of the defendant, is evidence to justify the dismissal of the plaintiff by the defendants. However, the plaintiff neither insured nor guaranteed the results of his work as manager of the business.

[9] If you should find from the evidence that the plaintiff was incompetent or was negligent, or managed the business of the defendants badly or in an improper way, or if he misconducted himself while in their employ, or if the plaintiff failed to do the things usually done by one engaged to do the work he agreed to do, or if you believe from the

evidence that the plaintiff was not competent to do the work he contracted to do, or being competent he did not exercise his ability and properly supervise the buying and selling of the merchandise of the store, your verdict should be for the defendants.

[10] The contract in the present case is admitted by both parties to it, and for the plaintiff to recover he must show, by the preponderance of the evidence, a substantial compliance with its terms. It then devolves upon the defendants to show that by the default of the plaintiff they were legally justified under the terms of the contract, in discharging the plaintiff from their services.

[11] Where the evidence is conflicting, as it is in this case, you should reconcile it if you can; but if you cannot do so, you should accept as true that part of it which you deem worthy of credit, and reject that part you deem unworthy, having due regard to the opportunity and capacity of the witnesses to know of that of which they speak, and their apparent fairness or bias.

[12] If you find for the plaintiff your verdict should be for the amount of his wages, as contracted for, for the unexpired portion of the term of employment, less the amount he has earned or might, by reasonable effort, have earned in other employment during such unexpired term.

If you find for the defendants, your verdict should be simply for the defendants.

Verdict for plaintiff.

(5 Boyce, 240)

#### WILLIAMS v. STATE.

(Court of General Sessions of Delaware. New Castle. Oct. 8, 1914.)

#### 1. CRIMINAL LAW (§ 1139\*)—APPEAL—TRIAL DE NOVO—MOTION TO QUASH INFORMATION.

An information for assault and battery, filed in the Court of General Sessions on appeal from the municipal court, will not be quashed because it states the result of the municipal court trial and the sentence imposed, although the trial in the Court of General Sessions is de novo, since the court, notwithstanding such statements, can prevent any statement of the outcome of the trial below from reaching the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3000; Dec. Dig. § 1139.\*]

#### 2. CRIMINAL LAW (§ 1139\*)—APPEAL—TRIAL DE NOVO—REQUISITES OF INFORMATION.

On appeal to the Court of General Sessions from a municipal court, the fact that the sentence of the court below was such as to give the Court of General Sessions jurisdiction of the appeal, under Const. art. 4, § 30, need not be alleged in the information, nor proved, since it sufficiently appears from the transcript, which is a part of the record.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3000; Dec. Dig. § 1139.\*]

James Williams was convicted of assault and battery in the municipal court, and appeals to the Court of General Sessions. On motion to quash information. Overruled.

Argued before PENNEWILL, C. J., and CONRAD, J.

Levin Irving Handy, of Wilmington, for appellant. Armon D. Chaytor, Jr., Deputy Atty. Gen., for the State.

PENNEWILL, C. J. (delivering the opinion of the court). In the above stated case an information was filed by the state in the following language:

September Term, 1914.

New Castle County—ss.:

Josiah O. Wolcott, Attorney General of the state of Delaware, now here in the Court of General Sessions of the state of Delaware, now sitting in and for New Castle county aforesaid at the September term of said court in the year of our Lord one thousand nine hundred and fourteen, information makes:

That James Williams, late of Wilmington hundred in the county and state aforesaid, on the ninth day of July in the year of our Lord one thousand nine hundred and fourteen, having been brought before the Honorable Harry P. Joslyn, deputy city judge of the municipal court for the city of Wilmington, state of Delaware, after arraignment, plea and hearing was by the said the Honorable Harry P. Joslyn, deputy city judge of the municipal court as aforesaid, adjudged guilty and sentenced to pay a fine of fifty dollars and the costs of the said prosecution amounting to the sum of seven dollars and eighty-five cents, and to be committed to the board of trustees of the New Castle County Workhouse for six months at labor at some suitable employment, eight hours each secular day, unless physically disabled, the said commitment commencing on the said ninth day of July in the year of our Lord one thousand nine hundred and fourteen, and ending on the eighth day of January in the year of our Lord one thousand nine hundred and fifteen, on the charge in the said municipal court for the city of Wilmington aforesaid of an assault and battery upon one Walter Johnson, in the city of Wilmington aforesaid, the said municipal court for the city of Wilmington then and there having jurisdiction to hear and determine said charge. And afterwards, to wit, on the tenth day of July in the year of our Lord one thousand nine hundred and fourteen, the said James Williams did appeal from the judgment of the said municipal court for the city of Wilmington aforesaid to the Court of General Sessions of the state of Delaware sitting in and for New Castle county, and entered into a recognizance to prosecute said appeal, as he is authorized to do by the statutes of the state of Delaware in such case made and provided.

Whereupon, in the said Court of General Sessions of the state of Delaware in and for New Castle county Josiah O. Wolcott, Attorney General as aforesaid, information makes:

That James Williams, late of Wilmington hundred in the county aforesaid, on the sixth day of July in the year of our Lord one thousand nine hundred and fourteen, with force and arms at Wilmington hundred aforesaid in and upon one Walter Johnson, in the peace of God and of the said Walter Johnson did then and there beat, wound and illtreat, and other wrongs to the said Walter Johnson then and there did, to the great damage of the said Walter Johnson, against the form of the act of the General Assembly in such case made and provided, and against the peace and dignity of the state.

Josiah O. Wolcott,  
Attorney General.  
Armon D. Chaytor, Jr.,  
Deputy Attorney General.

[1] On behalf of the defendant, a motion is made to quash the information because it contains a recital of the proceedings in the

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

municipal court against the defendant, including his arrest, trial, conviction and sentence. It is insisted that these facts, if proved, or made known to the jury, would be unfair and prejudicial to the defendant. It is also insisted that the trial in this court upon information in appeal must be a trial de novo, and that no reference can be made to the proceedings below any more than can be in an appeal from a justice of the peace in a civil suit.

It is further insisted that, inasmuch as the information contains averments respecting the proceedings below which can be neither proved or made known to the jury, the same should be quashed.

It is true that upon such an information the trial in this court is de novo, and that no reference can be made here to the proceedings in the municipal court where the defendant was tried. But it does not necessarily follow that the information is bad because it embodies such proceedings, for the court will not permit the information to go to the jury, neither will they allow the state to produce any evidence, or make any statement, to the jury in regard to the proceedings below.

[2] The Constitution of this state in giving jurisdiction to inferior courts in certain criminal cases provides:

"That there shall be an appeal to the Court of General Sessions in all cases in which the sentence shall be imprisonment exceeding one month, or a fine exceeding one hundred dollars." Section 30, art. 4.

Because of such provision the state contends that the imposition of the sentence by the municipal court is a fact that must be averred in the information and proved at the trial in order that the court may have jurisdiction of the case.

In regard to this contention we say that such jurisdictional fact sufficiently appears from the transcript filed, which is a part of the record in the case.

The motion to quash the information is refused.

(112 Me. 207)

#### AUSTIN v. BAKER.

(Supreme Judicial Court of Maine. Oct. 19, 1914.)

#### 1. APPEAL AND ERROR (§ 695\*)—QUESTIONS REVIEWABLE — NONSUIT — RECORD — EVIDENCE.

Where exceptions are taken to an order of nonsuit or to the direction of a verdict, all the evidence necessarily becomes a part of the case, and must be included therein in order to entitle the excepting party to review the ruling.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2911-2914; Dec. Dig. § 695.\*]

#### 2. LANDLORD AND TENANT (§ 167\*)—DEFECTIVE PREMISES—INJURIES TO LICENSEES.

Defendant owned a building the upper story of which he rented for a barber shop. The approach to the shop was by an outside flight of stairs leading to a landing at the outside door.

Around the landing was a railing. One of these rails was decayed at the post. Plaintiff went up the stairs to the shop, not for any business with the barber, but to give him a drink from a bottle of whisky which he carried. As he started to return, plaintiff halted on the platform to talk with another man, and as he did so, he placed his hand on the defective rail, which gave way, and he was precipitated to the ground below and injured. *Held*, that plaintiff was not an invitee, but at most a licensee, to whom the landlord owed no duty to exercise reasonable care to keep the premises in suitable condition.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 668-674, 676-679; Dec. Dig. § 167.\*]

Exceptions from Supreme Judicial Court, Androscoggin County, at Law.

Action by Bird A. Austin against Hattie F. Baker. The court ordered a nonsuit, and plaintiff brings exceptions. Exceptions overruled.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, and HANSON, JJ.

L. B. Waldron, of Dexter, and McGillicuddy & Morey, of Lewiston, for plaintiff. Manson & Coolidge, of Pittsfield, and Newell & Skelton, of Lewiston, for defendant.

SAVAGE, C. J. [1] This case comes before this court on exceptions by the plaintiff to an order of nonsuit. The case as made up contains a part only of the evidence, such part as the plaintiff has seen fit to have printed. This being so, we might very properly dismiss the exceptions. When exceptions are taken to an order of nonsuit, or to the direction of a verdict, all of the evidence necessarily becomes a part of the case. Such a ruling is based upon the entire evidence. And it cannot be determined that the ruling was erroneous without an examination of all the evidence. It may be that the errors complained of are cured by the evidence omitted. It was so held in *Bank v. Nickerson*, 108 Me. 341, 80 Atl. 849. Though the defendant has made the point, she has not absolutely insisted upon it. And we have thought best to examine the case on its merits.

[2] So much of the evidence as is reported shows that the defendant is the owner of a two-story building in Hartland. All of the upper story was occupied by one Burton and used by him as a barber shop. He was a tenant at will, under the defendant. The approach to the barber shop was by a flight of stairs on the outside of the building, at the top of which was a platform leading to the outside door of the shop. Around the platform was a railing. One rail was decayed and defective at the post. The plaintiff went up the stairs to the barber shop. He carried with him a bottle of whisky, from which he drank in a back room connected with the barber shop, and he gave the barber a drink. He then started to return. He halted upon the platform to talk with another man. He

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

says he did not lean against the rail, but that his hand was upon the defective rail. At any rate, the rotten end of the rail gave way, and the plaintiff was precipitated to the ground or landing below, and was injured. This suit is brought to recover for this injury.

The plaintiff did not go to the barber shop to be barbered, or to do any business with the barber. He went purely for his own convenience and to gratify his own whim or inclination. That being the case, he was a mere licensee, and the defendant as landlord owed him no duty, except the negative one of not wantonly to injure him. He was not invited.

The distinction between licensees and invitees is stated in *Stanwood v. Clancey*, 106 Me. 72, 75 Atl. 293. In that case the court said that:

"While it is the duty of the owner of a building, having it in charge, to be careful in keeping it safe for all those who come there by his invitation, express or implied, he owes no such duty to those who come there for their own convenience. \* \* \* Toward a licensee the owner owes no duty, except that he shall not wantonly injure him. *Dixon v. Swift*, 98 Me. 207 [56 Atl. 761]; *Russell v. M. C. R. Co.*, 100 Me. 408 [61 Atl. 899]; *Parker v. Portland Publishing Co.*, 69 Me. 173 [31 Am. Rep. 262]. It is well settled that when the owner of a building fits it up for business uses, he impliedly invites all persons to come there whose coming is naturally incident to the business carried on there. And if he leases the building, or parts of it, to tenants, he impliedly invites all persons to come there in connection with the business carried on by the tenants. At the same time, if the building is open, and there is nothing to indicate that strangers are not wanted, he impliedly permits and licenses persons to come there for their own convenience, or to gratify their curiosity. To those invited, he owes the duty of exercising care \* \* \* but to those merely licensed he owes no such duty. *Plummer v. Dill*, 156 Mass. 426 [31 N. E. 128, 32 Am. St. Rep. 463]."

It will be noticed that the duty of a landlord to exercise care to have the leased premises safe even for invitees arises, in the foregoing discussion, when he has the building in charge. In this case the defendant contends that the case does not show that she was in charge, or had any control of the premises, or was under any legal obligation to make repairs. She says that in fact the case falls into the ordinary class where in the absence of express, valid agreement, the landlord is not bound to make repairs, but the tenant takes them as he finds them, and a visitor has no greater rights than the tenant. *McKenzie v. Cheetham*, 83 Me. 543, 22 Atl. 469; *Whitmore v. Orono Pulp & Paper Co.*, 91 Me. 297, 39 Atl. 1032, 40 L. R. A. 377, 64 Am. St. Rep. 229; *Bennett v. Sullivan*, 100 Me. 118, 60 Atl. 886; *Hill v. Foss*, 108 Me. 467, 81 Atl. 581, Ann. Cas. 1913C, 971.

But it is unnecessary to consider this last contention. Assuming that the defendant was in charge of the premises, and owed a

duty to invitees, it is clear that she owed no duty to a mere licensee, as the plaintiff was. The nonsuit was properly ordered. Exceptions overruled.

(112 Me. 560)

### CUOZZO v. MAINE CENT. R. CO.

(Supreme Judicial Court of Maine. Oct. 21, 1914.)

#### 1. CARRIERS (§ 258\*) — TRANSPORTATION OF PASSENGERS—SPECIAL CONTRACTS—INDEFINITE AGREEMENTS.

Where plaintiff telephoned the railroad station agent at B. and asked if he could issue transportation and make arrangements to transport a number of men who were coming to B., and was told that the agent would see what he could do, and the agent later telephoned plaintiff, saying that it was all right and asking how many men were coming, which plaintiff did not know, and there was no statement anywhere as to what kind of transportation was to be provided, whether regular fare, mileage books, or passes, the arrangement was too indefinite to constitute a contract.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1035, 1036; Dec. Dig. § 258.\*]

#### 2. CARRIERS (§ 251\*) — TRANSPORTATION OF PASSENGERS—SPECIAL CONTRACTS—AUTHORITY TO MAKE.

A railroad station agent had no authority to bind the company by a contract for the transportation of a party of men to his station without receiving for the benefit of the company the full consideration for the transportation or arranging for its payment upon call for the tickets.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1014, 1026; Dec. Dig. § 251.\*]

#### 3. CARRIERS (§ 277\*) — TRANSPORTATION OF PASSENGERS—BREACH OF CONTRACT—DAMAGES.

Where a railroad company broke a contract for the transportation of laborers, whereby their services were lost to plaintiff and he was obliged to secure other laborers to take their place, but it appeared that all the expenditure necessary to engage the laborers and bring them to the point where such transportation was to commence had been made prior to the making of the contract, the only damages recoverable were the difference between the regular or mileage fare and the special rate contracted for, and in the absence of any evidence as to any special rate there could be no recovery.

[Ed. Note.—For other cases, see *Carriers*, Cent. Dig. §§ 1082-1084; Dec. Dig. § 277.\*]

Report from Supreme Judicial Court, Penobscot County, at Law.

Action by George Cuozzo against the Maine Central Railroad Company. On report. Judgment for defendant.

Argued before SAVAGE, C. J., and SPEAR, KING, HALEY, HANSON, and PHILBROOK, JJ.

George E. Thompson and James D. Rice, both of Bangor, for plaintiff. Fellows & Fellows, of Bangor, for defendant.

PER CURIAM. The declaration in this case sets up a contract on the part of the defendant company through its authorized agent to furnish transportation from Portland to Bangor for 17 men alleged to have been en-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

gaged by the plaintiff to enter his employ on some contract work in the city of Bangor, and alleges a breach of the contract by a refusal and failure of the defendant to transport the men, as agreed; by reason of which the men did not come to Bangor, whereby their services were lost to the plaintiff and he was obliged to secure other laborers to take their place to his damage in the sum of \$500. The plaintiff alleges that, in consideration of his agreement with the station agent in Bangor, he paid the money to him for the transportation of the men.

But this allegation is entirely erroneous, as the plaintiff's own testimony unequivocally shows. This allegation being negatived, we are unable to discover, viewing the plaintiff's evidence in the most favorable light, any adequate proof of a contract. The evidence shows no act or promise on the part of the agent at Bangor which could be regarded as binding upon the defendant company, as his principal.

[1] The plaintiff's contract is practically stated in the following answer made to the court:

"I telephoned to the Maine Central agent at Bangor, Mr. Benson, asking him if he could issue transportation, make arrangements to transport these men. He asked me what train they would come on, and I said they would come on the night train from Portland to Bangor; that they were in Portland now getting their meals. He says, 'I will see what I can do.' Then I got another telephone message from Mr. Benson, the Maine Central agent, saying it was all right. He asked me how many men, and I didn't know how many exactly there were, and I telephoned back to Portland to my foreman who was there."

There was no statement anywhere in the case of what kind of transportation the ticket agent at Bangor was to provide, whether regular fare, mileage books, or passes. Such evidence is too vague for proof of a contract.

[2] Assuming that the agent at Bangor did and said just what the plaintiff says, we still think it was beyond the scope of his agency to bind the defendant company, with any such contract as claimed, without first having received for the benefit of the company the full consideration for the transportation which the company was to furnish, or arranging for its payment upon call for the tickets. There is no evidence of such arrangement. The plaintiff, accordingly, had no valid contract for the transportation of these men with the defendant company.

[3] But even upon the assumption that the plaintiff did have a contract for the transportation of these men from Portland to Bangor, the evidence shows that the damages claimed by the plaintiff practically all accrued before the contract, which he claims, was made with the defendant company. When he went to Mr. Benson, the ticket agent in Bangor, he says:

"I received information that there was a crew of men in Portland ready to come to

Bangor and for me to make transportation for them."

It is evident from this testimony that all the expenditure necessary to engage these men and bring them to Portland had been made prior to any attempted contract with the defendant company for transportation. If therefore the defendant was guilty of a breach of contract, the damages could be only the difference between a regular or mileage fare from Portland to Bangor and the special rate which the contract provided for. But, as the contract, as shown by the plaintiff's evidence, contained no specification as to what the rate of transportation should be, there is no proof upon which to found an estimate of damages.

This alleged contract was consummated at Bangor. What occurred afterward could be of no avail. Therefore the letter claimed to be evidence of a contract cannot change the actual transaction as related by the plaintiff himself.

Judgment for defendant.

(112 Me. 277)

COLBATH v. EVERETT D. CLARK SEED CO.

(Supreme Judicial Court of Maine. Oct. 22, 1914.)

FRAUDS, STATUTE OF (§ 23\*)—PROMISE TO ANSWER FOR ANOTHER'S DEBT—ORIGINAL OR COLLATERAL PROMISE.

Where a seller of potatoes to K., who had a contract to furnish potatoes to defendant, telephoned defendant that he had been informed that K. was not good financially, and that he would not ship the potatoes unless defendant would agree to pay for them, and defendant's agent thereupon stated that he would pay for them if K. did not, and the potatoes were then shipped to defendant, the promise was an original one, and not a collateral promise to answer for another's debt, required to be in writing by Rev. St. c. 113, § 1, par. 2.

[Ed. Note.—For other cases, see *Frauds, Statute of*, Cent. Dig. §§ 18, 19; Dec. Dig. § 23.\*]

On Motion from Supreme Judicial Court, Aroostook County, at Law.

Action by George M. Colbath against the Everett D. Clark Seed Company. Verdict for plaintiff, and defendant moves to set the verdict aside. Motion overruled.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

James Archibald, of Houlton, and W. T. Spear, of Ft. Fairfield, for plaintiff. Powers & Guild, of Ft. Fairfield, for defendant.

PHILBROOK, J. The plaintiff having obtained a verdict in his favor, the defendant brings this case before us on a general motion to have the verdict set aside, as being against the law and the evidence.

Briefly stated, the contention between the parties is whether the defendant made an original promise to pay for potatoes shipped by the plaintiff to the defendant, and received

by the defendant, or whether the defendant merely made an oral promise to answer for the debt of another which could not be enforced under the provisions of R. S. c. 113, § 1, par. 2.

It appears that the defendant had a contract with one Klippel whereby the latter was to furnish a large quantity of potatoes to the defendant. The defendant claimed that it had advanced money on the contract, or, as the defendant claimed, it had paid in advance for nearly all the potatoes which Klippel might purchase and deliver to the defendant. It was not claimed by either party that Klippel was the agent of the defendant.

In the early part of April, 1912, the plaintiff telephoned Fred M. Clark, secretary and treasurer of defendant company, who was then at Ft. Fairfield, and this telephone message was the only method employed in making the contract on which plaintiff now relies. The testimony given by the plaintiff on direct as to the conversation over the telephone is as follows:

"I told Mr. Clark that I had been informed that Klippel was no good financially, and I could not ship any potatoes on his order, and I could not ship them unless he agreed to pay for them. He told me he could not pay for them because he had already paid Mr. Klippel. I says: 'You have not paid for my potatoes and I am not going to ship them unless you will pay for them.' He says: 'I have got to have the potatoes and I will pay for them if Klippel don't.' I says: 'I have been informed that Klippel is no good, and I will not ship them unless you agree to pay for them.' And he says: 'All right; I will pay for the potatoes if Klippel don't; let the potatoes go forward.' I hung up the receiver and shipped the potatoes and sent him the bill of lading."

On cross-examination the plaintiff stated the substance of the telephone interview in terms somewhat more favorable to his contention, and said that he charged the potatoes to the defendant and sold them on the credit of the defendant, but the following questions and answers appear in the cross-examination of the plaintiff:

"Q. Didn't you ship these potatoes because you understood Mr. Clark to agree to pay if Klippel didn't?"

"A. That is just what I did; yes, sir.

"Q. And that was his agreement?"

"A. Yes, sir."

The plaintiff also gave these answers in his cross-examination:

"Q. But you say Mr. Clark did tell you that if Klippel didn't pay he would?"

"A. Yes, sir.

"Q. And you accepted that agreement?"

"A. Yes, sir."

In a letter from the plaintiff to the defendant dated May 4, 1912, he tells the defendant:

"I had my man on the phone on same line so I have witness to conversation we had over the phone."

This important witness was not produced at the trial, nor was his absence accounted for, and although plaintiff testified that he charged the potatoes to the defendant, his books showing such charge were not produced nor their absence accounted for.

Mr. Clark's testimony as to the telephone interview varied materially from that of the plaintiff. He states as follows:

"Some one on the phone in Mr. Klippel's office said: 'My name is Colbath; and I have just sold a car of potatoes to Mr. Klippel, and I want the shipping instructions.' And I turned to Mr. Klippel, and he says: 'Yes; that is the car that is to go to Milford.' And I says: 'The shipping instructions, Mr. Klippel says, is to the Everett D. Clark Seed Company, Milford, Conn.' And he took it down; that is, he took the time to take it down, apparently. And he then said: 'Now, Mr. Clark, who is going to pay for these potatoes?' And I said: 'Our dealings are entirely with Mr. Klippel; we have paid for these potatoes, and we are dealing only with Mr. Klippel.' And I said, further: 'Mr. Klippel is good for a car of potatoes, isn't he?' And Mr. Colbath replied: 'Yes; I guess he is all right, and so are you good for a car of potatoes, aren't you?' And I replied: 'Yes; I guess we are all right.' Colbath says: 'That is all I want to know.' And I requested that the bill of lading be gotten to me, so I could get it on the morning train the day following. He also said he was going that afternoon away, and he would arrange to have it left with the station agent; and as I came through, I got the bill of lading at the Fairmont station as I remember it."

The defendant also introduced two letters written by the plaintiff less than a month after the telephone conversation transpired which are as follows:

"Easton, Me., 4/30, 1912.

"Everett B. Clark Seed Co., or Mr. Clark.

"Dear Sirs: I have not received pay from Mr. Klippel for that car seed ship you which you guaranteed payment. I have not been home since I went South the day I sold the car potatoes. Wish you would look after it. I need the money. I am at Bristol, Ct., 74 S. Elm St.

"Yours truly, G. M. Colbath."

"Easton, Me., May 4, 1912.

"The Everett B. Clark Seed Co., Milford, Ct.

"Dear Sirs: Yours at hand, I am surprised at the stand you take in regard to car potatoes, you surely have not forget the conversation we had over the phone when you were at Fort Fairfield.

"Mr. Klippel called me wanted car seed. I made him price he said would see his man and let me know. I called up C. E. Spencer and asked him if Klippel was all right he said he would not sell him without the cash, but you was going to have the potatoes what ever you said was all right. I did not have time to arrange to get pay of Mr. Klippel before the potatoes went forward because he wanted them to go that night and I was going on 4 p. m. train that night so I called you and told you could not let potatoes go with being paid for for. You said you had already advanced the money for the potatoes but if Mr. Klippel did not pay for them you would so I let the potatoes go and billed them straight to you and left the bill of lading and invoice with the station agent at Easton for you. Now Mr. Klippel may pay for these potatoes all right when I get home but if he don't I shall expect you to, just as you agreed to over the phone. I had my man on the phone on same line so I have witness to conversation we had over the phone. Will be home last of next week.

"Yours truly,

G. M. Colbath."

We have endeavored to fairly state the substance of the evidence relating to the contract adduced by each party to this suit. Upon this evidence the defendant says that it

has not made any promise which can be enforced against it; that such promise as it did make was not original, but collateral and within the statute of frauds. The plaintiff says otherwise.

The case presents an interesting field for research. At the outset we must observe that the potatoes were not delivered to Klippel, but were delivered to the defendant at Milford, Conn., in accordance with shipping instructions given the plaintiff by defendant's agent, and presumably the defendant received the benefit of such delivery. The benefit thus accruing, as to its legal effect upon the promise, has furnished much discussion in many cases, and the difference in opinion between such learned jurists as Chief Justice Shaw of Massachusetts and Chancellor Kent of New York is interesting and marked. For an exhaustive and able discussion of this question see *Hurst Hardware Co. v. Goodman*, 68 W. Va. 462, 69 S. E. 898, 32 L. R. A. (N. S.) 598, Ann. Cas. 1912B, 218. It is also noteworthy that not only has the New York court now substantially adopted the views of the Massachusetts court, but the latter have been adopted by the federal court. *Emerson v. Slater*, 22 How. 28, 16 L. Ed. 860; *Davis v. Patrick*, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826. The rule as it appears in *Emerson v. Slater* is:

"Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damages to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability."

"When a benefit, legal or pecuniary, to the promisor is the inducement for a promise of indemnity, such promise is not within the statute of frauds as being a special promise to answer for the debt or default of another, but is an original promise binding upon the promisor." *McCormack v. Boylan*, 83 Conn. 686, 78 Atl. 535, Ann. Cas. 1912A, 882.

If there were no element of benefit to the defendant in this case, we should be of opinion that the plaintiff had only proved a promise which was within the statute of frauds, but that element of benefit being so plainly apparent, under the authorities cited, we must hold otherwise.

Motion overruled.

(112 Me. 262)

#### CAFFINI v. HERMANN.

(Supreme Judicial Court of Maine. Oct. 22, 1914.)

#### 1. ASSAULT AND BATTERY (§ 85\*)—SUFFICIENCY OF EVIDENCE—EXCESSIVE FORCE.

In an action for assault and battery against a deputy sheriff, who sought to justify his conduct on the ground that he was making a legal arrest, evidence held to show that excessive force was used.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. § 51; Dec. Dig. § 35.\*]

#### 2. ARREST (§ 63\*)—AUTHORITY TO ARREST WITHOUT WARRANT.

An officer may not arrest for a misdemeanor without a warrant on information or suspicion, unless the misdemeanor was actually committed in his presence; and hence an arrest was not justifiable, though the officer suspected that the person arrested had intoxicating liquors in his suit case, in violation of the law prohibiting the illegal manufacture, transportation, and sale of such liquors.

[Ed. Note.—For other cases, see *Arrest*, Cent. Dig. §§ 145-156; Dec. Dig. § 63.\*]

#### 3. EVIDENCE (§ 130\*)—RELEVANCY—EXCLUSION AS RES INTER ALIOS ACTA.

In an action against a deputy sheriff for assaulting a person whom he suspected of carrying intoxicating liquor in his suit case, evidence as to the trouble which the officers had been having with those illegally transporting liquor in suit cases and hand bags, and that they had previously made seizures of liquor illegally transported in that way, was properly excluded, where there was no attempt to connect such acts with plaintiff.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. § 403; Dec. Dig. § 130.\*]

#### 4. INTOXICATING LIQUORS (§ 249\*)—SEARCHES AND SEIZURES—NECESSITY OF WARRANT.

That the circumstances were such as to cause an ordinarily prudent officer, in the exercise of his official duties, to believe that plaintiff had intoxicating liquor in his suit case for unlawful purposes, did not justify the officer in making a search of the suit case and using the force reasonably necessary for that purpose, since, while the statute authorizes an officer to seize intoxicating liquors illegally kept without a warrant, no search without a warrant is authorized.

[Ed. Note.—For other cases, see *Intoxicating Liquors*, Cent. Dig. §§ 376-385; Dec. Dig. § 249.\*]

#### 5. ASSAULT AND BATTERY (§ 10\*)—ARREST WITHOUT WARRANT—PROVOCATION.

Where a deputy sheriff without a warrant assaulted or arrested plaintiff for the purpose of ascertaining whether he was transporting intoxicating liquor in his suit case, the court properly refused to charge that if plaintiff, for the purpose of misleading the officer, deliberately created circumstances arousing the suspicion of the officer, intending to get the officer into trouble, and if the officer was thereby misled and became suspicious that a crime was being or had been committed, and under those circumstances committed the assault complained of, the plaintiff could not recover.

[Ed. Note.—For other cases, see *Assault and Battery*, Cent. Dig. §§ 6-8; Dec. Dig. § 10.\*]

Exceptions and Motion from Superior Court, Cumberland County, at Law.

Action by Linwood Caffini against George E. Hermann. Verdict for plaintiff, and defendant brings exceptions and moves for a new trial. Motion and exceptions overruled.

Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ.

Charles G. Keene, Jacob H. Berman, and Bernard A. Bove, all of Portland, for plaintiff. Hinckley & Hinckley, of Portland, for defendant.

PHILBROOK, J. Action to recover damages for assault and battery, in which the plaintiff recovered a verdict of \$200. The

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes 91 A.—64

defendant presents exceptions and the customary motion to have the verdict set aside and new trial ordered.

[1] The plaintiff is an Italian, who had been in this country four or five years, employed as a laborer, and had acquired only a limited knowledge of our language. On the 16th of August, 1913, he took an electric car at Old Orchard about 8:45 in the evening and came to Portland, bringing in his hand a dress suit case containing his wearing apparel. He arrived in Portland about quarter past 10, and, according to his testimony, soon after leaving the car he was accosted by the defendant, who, although a deputy sheriff, was not in uniform, and who seized the plaintiff's suit case, attempting to take it from him. The plaintiff testified that he thought it was an attempt to steal his suit case and refused to give it up. After some struggle he says the defendant struck him on the hand four or five times with an instrument which proved to be a black jack. He says that he was then seized by the defendant and another person and that they started with him for the police station. Thereupon an officer in uniform appeared and told the plaintiff that the persons who had seized him wanted to see what he had in his suit case, and then, the plaintiff says, he dropped his suit case, and when the defendant could not open it, the plaintiff opened it and allowed it to be searched, nothing contraband being found. The plaintiff was then permitted to go his way and carry the suit case with him.

[2] The defendant says that he was a deputy sheriff especially charged with the duty of enforcing the law prohibiting the illegal manufacture, transportation, and sale of intoxicating liquor. He says that the officers had been having trouble with offenders who brought liquors to Portland in suit cases and hand bags, and, on the evening in question, was with his superior officer, the sheriff of the county, on Federal street when the plaintiff left the car. He says that either he or the sheriff remarked "that fellow looks as if he had quite a heavy case," and that presently the sheriff said to the defendant, "Go get him." He says he stepped up to the plaintiff and asked permission to look at the suit case, which was refused. He further says that the plaintiff struck at him with an umbrella, and that he then said, "Don't do that, because I am an officer; all I want to see is what you have got in that dress suit case," at the same time throwing back his coat and displaying his official badge. Neither the defendant nor the sheriff had any warrant authorizing the arrest of the plaintiff, or any precept authorizing any search of the person of the plaintiff. Although the defendant seeks to justify his conduct on the ground that he was an officer making a legal arrest and using no more force than was necessary, the law is well settled that

even an officer may not arrest for a misdemeanor without a warrant, on information or suspicion, unless the misdemeanor was actually committed in his presence. *Palmer v. Maine Central Railroad Co.*, 92 Me. 399, 42 Atl. 800, 44 L. R. A. 673, 69 Am. St. Rep. 513. Under the circumstances of this case the arrest was not justifiable, even if excessive force had not been used, and it seems plain that such force was used. The presiding judge was correct in ordering a verdict for the plaintiff.

[3] Testimony was offered by defendant, and excluded, relative to trouble which the enforcement officers had been having with those who violated the law by illegally transporting liquor in suit cases and hand bags; but as there was no attempt to connect such acts with this plaintiff there was no error in the ruling. The same was true relative to offered evidence that the officers had made previous seizures of liquor illegally transported in the way just referred to.

[4, 5] The defendant presented three requests for instructions, all of which the presiding judge refused to give, except as they were given in the charge. They were as follows:

"1. If you believe from all the evidence that the circumstances were such as would have caused an ordinarily prudent officer in the exercise of his official duties to believe that the plaintiff had in his dress suit case intoxicating liquor for unlawful purposes, then the officer would be justified in making a search of the dress suit case and using whatever force would be reasonably necessary to accomplish this purpose."

"2. If you are satisfied that was not a malice on the part of the defendant, who, if he committed the acts, believing he was doing his duty, then the plaintiff could not recover punitive damages, but could recover only the actual damages to himself."

"3. If the plaintiff, for the purpose of misleading the defendant, deliberately created circumstances to arouse the suspicion of the defendant, who was an officer of the law, having in mind at the time and intending thereby to get the officer into trouble, and the officer by these acts was misled and became suspicious that a crime or offense was being committed or had been committed by the plaintiff, and under these circumstances committed the acts alleged, then the plaintiff could not recover, because he himself would be to blame."

As to the first request, it is only necessary to call attention to the fact that the statute authorizes an officer to "seize" intoxicating liquors illegally kept, without a warrant, but not to "search" without such precept.

As to the second, the entire point was covered in the charge; and as to the third, it is only necessary to say that it does not contain a correct statement of law.

Finally, as to damages. Correct instructions were given both as to actual and exemplary damages, and from the evidence and the instructions we think the verdict of the jury was not so manifestly wrong as to require us to interfere.

Motion and exceptions overruled.



(113 Me. 373)

**ALLEN v. INHABITANTS OF LUBEC.**

(Supreme Judicial Court of Maine. Oct. 22, 1914.)

**PAUPERS (§§ 89, 52\*)—LIABILITY OF TOWN—NOTICE—SUFFICIENCY.**

Under Rev. St. c. 27, § 45, providing that towns shall pay expenses necessarily incurred for the relief of paupers by an inhabitant not liable for their support, after notice and request to the overseers, until provision is made for them, where plaintiff, who was financially unable to support his father and mother, notified one of the overseers of the condition of his father and told him that he was unable to support him and that his father knew this, and was told by the overseer that he would see what could be done, and after waiting some time plaintiff saw another overseer and told him that if he did not find some means of removing and supporting the father plaintiff would have to see if he could get his pay, the notice, as a matter of law, contained all the elements of information required by the statute, and whether they were so clearly and expressly stated as to enable the officers to understand them was a question for the jury, especially where the father, prior to the notice, had been a pauper up or the town for eight or ten years.

[Ed. Note.—For other cases, see *Paupers*, Cent. Dig. §§ 162-179, 215-237; Dec. Dig. §§ 39, 52.\*]

On Motion from Supreme Judicial Court, Washington County, at Law.

Action by Richard M. Allen against the inhabitants of Lubec. Verdict for plaintiff, and defendant moves for a new trial. Motion overruled.

Argued before SAVAGE, C. J., and SPEAR, KING, HALEY, and HANSON, JJ.

L. D. Lamond, of Eastport, for plaintiff.  
J. H. Gray, of Lubec, for defendant.

SPEAR, J. In this action plaintiff seeks to recover of defendant town, under the provisions of R. S. c. 27, § 45, the sum of \$213.42, for supplies alleged to have been furnished L. J. Allen and his wife, who, it is alleged, stood in need of immediate relief, and chargeable to defendants. The account of plaintiff covers a period extending from August 22, 1912, to June 28, 1913. The jury found for the plaintiff for \$168.61, and the case is before the court upon the usual motion for a new trial. The facts are as follows: In June, 1912, and prior thereto, Loring J. Allen and wife were paupers in the town of Lubec, Mr. Allen, being sick, was sent by the overseers of the poor of Lubec, June 17, 1912, to the Maine General Hospital at Portland, for treatment. He returned August 22, 1912, and went directly to his son's house, the plaintiff, to live, where his wife, Amanda Allen, had been stopping while he was away. At the hospital he was treated for piles and rupture, and for no other trouble, and from information gained from the hospital superintendent it was claimed Mr. Allen came home a well man and able to do light work; hence the overseers of the poor say they gave the matter no further

attention, supposing him to be able to support himself and in no further need of pauper supplies.

The plaintiff claims, on the contrary, that Loring J. Allen was not able to support himself and wife and was in need of relief, and that he (the plaintiff), a son, was not able to support him, of which he says he notified the overseers of the poor of Lubec on the 5th of September, 1912.

The defendant contends: (1) That Loring J. Allen when he came from the Maine General Hospital on the 22d day of August, 1912, was able to support himself and was not in need of pauper supplies. (2) That if he was not able to support himself and stood in need of pauper supplies, then his son, the plaintiff, was liable for his support. (3) That no notice or request was made to the overseers of the poor by the plaintiff such as is contemplated by R. S. c. 27, § 45.

The presiding justice presented these issues so clearly to the jury that we quote his charge covering these points:

"To restate it: In order for this plaintiff to recover in this action he must prove by a fair preponderance of the evidence, first, that his father was destitute and in need of immediate relief at the time these supplies were furnished right straight down through. If he fails in that, you stop right there. If he succeeds in that, you move to the next point—that he himself was not financially able to take care of his father and mother. If you find he was financially able, that would stop the case. If you find he was not, then you move on, and the next point is the question of notice. If you find the notice given was such as the defendants claim here, that is the end of the case; plaintiff cannot recover. On the other hand, if you find such a notice was given as the statute requires and as the plaintiff testifies to, so they had full notice of what he expected, and the condition, and everything, then he would be entitled to recover for his necessary expenses, such as you find them to be, connected with the relief of his father."

The first two questions presented to the jury involved pure questions of fact. The jury found against the defendants upon each question. A careful reading of the evidence does not reveal any such error on the part of the jury as requires the interference of the court. The third contention may be said to have presented a mixed question of law and fact. The notice given by the plaintiff as the jury found may be stated substantially as follows:

"I notified them (the overseers) about the 5th of September, Mr. Reynolds, I believe. I stated the condition of my father, and told him I was unable to support him, and my father knew I was. He told me that he would see Mr. Baker, another overseer, and see what could be done. I waited another week and I had no reply, and I sent and see Mr. Baker, and see what could be done. I waited another week and I had no reply, and I went and see Mr. Baker and I see Mr. Reynolds. I told Mr. Baker if he didn't find some means of removing and supporting him I would have to see if I could get my pay. I never heard anything more, and I did. Now I am unable to."

This conversation was corroborated by his wife.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

As a matter of law, we think this notice contained all the elements of information required by the statute to be given to the officers of the defendant town. Then arises the question whether these elements were so clearly and expressly stated as to enable the officers to understand them. This, of course, was a question of fact for the jury under all the evidence in the case. It appears as a conceded fact that L. J. Allen had prior to this notice been a pauper upon the town of Lubec for some eight or ten years. It therefore seemed incredible that the selectmen of the town, with full knowledge of this fact, would have failed to fully understand the full purport and meaning of the above notice given them by the plaintiff. While it was not logical nor comprehensive, it yet must have been sufficient to convey to the town officers, to two of whom it was communicated, at different times, that they were requested to remove L. J. Allen and take care of him or the plaintiff would expect them to pay him for his support after the date of the notice. At any rate the jury found that the notice was sufficient to convey this information, and we are unable to discover any good reason for disturbing their verdict upon this question.

Motion overruled.

(88 Conn. 536)

**WAGNER v. MUTUAL LIFE INS. CO. OF NEW YORK et al.**

(Supreme Court of Errors of Connecticut. Oct. 8, 1914.)

**1. HUSBAND AND WIFE (§ 43\*)—CONTRACTS BETWEEN HUSBAND AND WIFE—ENFORCEABILITY.**

Where loans by a wife to her husband and an assignment of an insurance policy by the husband to the wife to secure such loans were made in good faith and upon a valuable consideration, they will be enforced in equity; the terms of the contracts being just, reasonable, and certain.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 226; Dec. Dig. § 43.\*]

**2. HUSBAND AND WIFE (§ 136\*)—RIGHT TO POSSESSION AND INCOME OF WIFE'S PERSONAL ESTATE.**

Under the married woman's act of 1849 (Laws 1849, c. 20), applicable to a husband and wife who were married in 1873 and did not thereafter avail themselves of the act of 1877 (Laws 1877, c. 114), the husband was entitled to the possession of the wife's personal property and the income therefrom not held as her sole and separate estate.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 508-511; Dec. Dig. § 136.\*]

**3. HUSBAND AND WIFE (§ 179\*)—WIFE'S SEPARATE ESTATE—RIGHTS AND POWERS OF WIFE.**

Under the married woman's act of 1849 (Laws 1849, c. 20), personal property held as the wife's sole and separate estate was hers to do with as she pleased, and she might loan it to her husband and make any contract in relation thereto that a stranger could make with his property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 711, 939; Dec. Dig. § 179.\*]

**4. HUSBAND AND WIFE (§ 110\*)—WIFE'S SEPARATE ESTATE—PROPERTY CONSTITUTING.**

Where a wife retained the possession and control of and collected the income from her personal property free from the domination and supervision of her husband, and the husband agreed to repay loans made to him by the wife, and treated moneys loaned him by her and all of her securities as her sole and separate estate, such property was her sole and separate estate, under the married woman's act of 1849 (Laws 1849, c. 20), especially where the husband agreed to and did assign an insurance policy to secure such loans, in reliance upon which agreement subsequent loans were made.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 396-407; Dec. Dig. § 110.\*]

**5. HUSBAND AND WIFE (§ 87\*)—CONTRACTS BY WIFE—GUARANTY.**

A guaranty by a wife of a loan by a third person to her husband was unenforceable, where the husband and wife were married prior to 1877.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 346-353, 798; Dec. Dig. § 87.\*]

**6. HUSBAND AND WIFE (§ 87\*)—CONTRACTS BY WIFE—GUARANTY OR LOAN.**

Where, a husband having collected money for a third person, it was agreed between him, his wife, and the third person that the third person would loan the money to the wife, and she would loan it to the husband, and all of the parties intended this as an absolute cancellation of the husband's debt to the third person, the husband's agreement to repay the loan from the wife was not unenforceable on the ground that she was a mere guarantor of his debt, though the money never left the physical possession of the husband.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 346-353, 798; Dec. Dig. § 87.\*]

**7. APPEAL AND ERROR (§ 173\*)—OBJECTIONS IN LOWER COURT—NECESSITY—PLEADING.**

In a suit in the nature of interpleader to determine the rights of parties in the proceeds of an insurance policy which plaintiff claimed was assigned to her as security for a debt, where the several items making up the consideration for the assignment were not disclosed until the trial, and limitations were therefore not pleaded, but the claim that plaintiff's debt was barred by limitations was made in the argument on the trial, it was available on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.\*]

**8. LIMITATION OF ACTIONS (§ 73\*)—PERSONS BARRED BY STATUTE.**

Where a wife loaned her husband money from her sole and separate estate limitations ran against the loan as in the case of a transaction between strangers.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 399-412; Dec. Dig. § 73.\*]

**9. LIMITATION OF ACTIONS (§ 148\*)—ACKNOWLEDGMENT OR NEW PROMISE—GIVING OF SECURITY.**

The assignment of an insurance policy as security for a debt waived the benefit of the statute of limitations and operated as an unequivocal acknowledgment of the existence of the debt from which the law implied a promise to pay the debt.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 597-603; Dec. Dig. § 148.\*]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

# 10. EVIDENCE (§ 419\*)—PAROL EVIDENCE TO SHOW CONSIDERATION.

The consideration for the assignment of a life insurance policy was open to oral proof, and, in determining whether it was assigned as security for a debt, the court properly viewed the transaction in the light of the facts and circumstances under which it was made.

[Ed. Note.—For other cases, see *Evidence*, Cent. Dig. §§ 1912-1928; Dec. Dig. § 419.\*]

# 11. LIMITATION OF ACTIONS (§ 151\*)—NEW PROMISE—GIVING OF NOTE.

Where a husband, indebted to his wife on loans aggregating about \$11,000, gave her notes for \$1,000 and \$2,000 for the purpose of acknowledging the debt and renewing his promise to pay the several loans and to prevent their outlawing, the giving of the notes constituted an unequivocal acknowledgment of the entire debt, from which the law would imply a promise to pay it.

[Ed. Note.—For other cases, see *Limitation of Actions*, Cent. Dig. §§ 614-618, 620; Dec. Dig. § 151.\*]

# 12. EXECUTORS AND ADMINISTRATORS (§ 415\*)—SETTLEMENT OF INSOLVENT ESTATES—WAIVER OF SECURITY.

Under Gen. St. 1902, § 337, providing that if any creditor, having security for his claim against an insolvent estate upon any property of the estate, shall present his claim to the commissioners on the estate, they shall inquire into the cash value of the security, and, if they allow such claim, the executor, administrator, or trustee shall notify the creditor of the amount allowed and the value reported, and that, unless such creditor shall lodge with the court a certificate of his election to relinquish such security, he shall be entitled to a dividend from the estate only upon the excess of his claim above the value of the security, the presentation of a claim to the commissioners, without notice to them of the security held and its allowance by them, was not an election to receive the claim in that way rather than from the security, and did not defeat the creditor's right to the security and to a dividend upon the excess of the debt.

[Ed. Note.—For other cases, see *Executors and Administrators*, Cent. Dig. §§ 1863-1873; Dec. Dig. § 415.\*]

Appeal from Superior Court, New Haven County; Edwain B. Gager, Judge.

Suit in the nature of interpleader by Estellah C. Wagner against the Mutual Life Insurance Company of New York and others, to determine the rights of the respective claimants to a sum of money paid into court by the defendant named as the amount due from it under a policy upon the life of plaintiff's deceased husband. Facts found and judgment rendered for plaintiff for \$9,028, and the defendant People's Bank & Trust Company, administrator d. b. n. c. t. a. of the decedent, appeals. Affirmed.

S. Harrison Wagner and plaintiff, Estellah C. Wagner, intermarried in 1873, and did not thereafter avail themselves of the married woman's act of 1877 (Laws 1877, c. 114). Mr. Wagner died June 17, 1912, leaving a will in which Mrs. Wagner was named as executrix. She qualified as such July 11, 1912, and continued as executrix until July 1, 1913, when she resigned, and the People's Bank & Trust Company was appointed in her

stead as administrator d. b. n. c. t. a. From 1900 to his death in 1912, Mr. Wagner had a policy of insurance on his life in the Equitable Life Assurance Society and one in the Mutual Life Insurance Company.

In January, 1900, Mrs. Wagner received by distribution from her father's estate one-third of a \$1,500 debt owed by Mr. Wagner; the other two-thirds were inherited by her brothers, who gave the same to her. Mr. Wagner did not pay over this sum to Mrs. Wagner, but they agreed that Mr. Wagner should hold it as a loan from her, which he promised to repay, with interest.

About March 1, 1901, Mr. Wagner collected \$1,200 due Mrs. Wagner for a tort injury to her person, and thereafter Mr. Wagner borrowed this sum of Mrs. Wagner upon his promise to repay the same, with interest. It did not appear that he ever paid over this sum so collected to his wife, but he always held and treated and acknowledged it to be her sole and separate estate.

Prior to December 1, 1904, there was delivered to Mrs. Wagner stock to the amount of \$2,500 as a gift to her. This was sold and reinvested by her. These investments were in part sold, and the proceeds, \$1,600, loaned by Mrs. Wagner to her husband upon his promise to repay the same, with interest. Mr. and Mrs. Wagner and the donor recognized that this gift became her sole and separate estate.

Mr. Wagner collected for a Mrs. Tousley \$2,000, and Mrs. Tousley agreed to loan this sum to Mrs. Wagner October 1, 1905, and Mrs. Wagner in turn loaned it to Mr. Wagner. This sum was not in fact paid over to either Mrs. Tousley or to Mrs. Wagner, but all the parties intended this as a loan from Mrs. Tousley to Mrs. Wagner, and then from Mrs. Wagner to Mr. Wagner, and a cancellation of the debt of Mr. Wagner to Mrs. Tousley.

Mrs. Wagner sold 11 shares of New Haven Water Company stock, inherited from her father, and from the proceeds loaned Mr. Wagner \$1,000. Mrs. Wagner borrowed upon the stock inherited from her father \$450, and loaned the same to Mr. Wagner.

Mr. Wagner always recognized these several loans as debts owed by him to his wife. Mr. Wagner always treated the moneys loaned him and Mrs. Wagner's stocks and bonds as her sole and separate estate. He never took or claimed the income from her investments. She collected the income and had entire control of them.

Shortly after the first loan, Mr. Wagner agreed with Mrs. Wagner to assign to her \$25,000 of insurance upon his life to secure the payment of the loan made and those that might thereafter be made, with interest. And Mrs. Wagner made the loans subsequent to the first loan in reliance upon said agreement. In pursuance of said agreement Mr.

Wagner assigned to Mrs. Wagner, in January, 1912, the Equitable policy, the proceeds of which she collected and credited upon her claim, and on March 29, 1912, the Mutual Life policy, the proceeds of which form the subject of this action. These assignments were made in acknowledgment of these loans and in recognition of them as an existing claim and to carry into effect his said promises to secure the loans, with interest. Thereafter, in May and June, 1912, Mrs. Wagner paid premiums due on said policies, amounting to \$658.41. The consideration for the assignments were these loans, with interest to December 9, 1913, aggregating \$11,900. Mr. and Mrs. Wagner believed at this time Mr. Wagner was solvent, and did not make the assignments in fraud of his creditors nor in view of his insolvency.

On March 15, 1910, Mr. Wagner gave to Mrs. Wagner his demand note for \$2,000, and on March 15, 1912, his demand note for \$1,000. These notes were not given in discharge of the entire debt, but for the purpose of acknowledging the debt to her and of renewing his promise to pay the several loans and to prevent their outlawing. Mrs. Wagner, as executrix, represented said estate as insolvent under advice of counsel, but did not know at the time the estate was in fact insolvent. The estate consists of many securities of uncertain value, and it cannot be now found that the estate is in fact insolvent, although highly probable that Mr. Wagner was in fact insolvent on March 29, 1912, the date of the assignment of the Mutual Life policy.

Harrison Hewitt, of New Haven, for appellant. George M. Wallace and George E. Beers, both of New Haven, for appellee.

WHEELER, J. (after stating the facts as above). The reasons of appeal based upon the exceptions to the finding are not in due form. Practice Book 1908, p. 268, § 9. The record satisfies us that neither of the several exceptions (if made in accordance with our prescribed method) would have furnished valid ground of appeal.

The first and second reasons of appeal raise the point that all of these contracts of loan and the assignment were invalid, since Mr. and Mrs. Wagner were married prior to 1877.

The third reason of appeal is that Mr. Wagner's agreement to pay Mrs. Wagner interest on her loans was without consideration, since he was entitled to the income of her personal property.

The seventh reason of appeal is that Mr. Wagner had not abandoned his marital rights as to the several items of property of Mrs. Wagner loaned to him, so as to constitute them her sole and separate estate.

The eighth and ninth reasons of appeal are intended to be identical with the seventh, with special application to the loan of moneys received from Mrs. Wagner's father's estate

and to the loan of the moneys received by Mr. Wagner for the tort injury to Mrs. Wagner.

[1] The several loans and the conveyance assigning the policy of insurance were made in good faith, upon a valuable consideration, and must, in this equitable action, be enforced, since the terms of the contracts are just, reasonable, and certain. Boland v. O'Neil, 72 Conn. 217, 44 Atl. 15; Brown v. Clark, 80 Conn. 419, 68 Atl. 1001; Clarke v. Black, 78 Conn. 467, 62 Atl. 757; Corr's Appeal, 62 Conn. 403, 26 Atl. 473; Haussman v. Burnham, 59 Conn. 117, 22 Atl. 1065, 21 Am. St. Rep. 74.

[2, 3] Under the statute of 1849 (Laws 1849, c. 20), applicable to Mr. and Mrs. Wagner, Mr. Wagner was entitled to the possession of all of her personal property and the income therefrom not held as her sole and separate estate. Personal property held to her sole and separate estate was hers to do with as she pleased; she might loan it to her husband and make any contract in relation to it that a stranger could make with his property. Comstock's Appeal, 55 Conn. 214, 220, 10 Atl. 559; Imlay v. Huntington, 20 Conn. 146.

[4] From the finding it appears that Mrs. Wagner always retained the possession and control of, and collected the income from, her personal property, free from the domination and supervision of her husband, and that, as to the proceeds of the securities sold and loaned him and all other loans made, he agreed to repay the same, with interest. It is also found that Mr. Wagner always treated the moneys loaned him by Mrs. Wagner, and all of her securities, as her sole and separate estate. The finding makes this property her sole and separate estate. It also appears from the finding that shortly after the first loan Mr. Wagner agreed to assign to Mrs. Wagner \$25,000 of life insurance to secure to her the payment of the loan made and others which might be made, with interest. And the loans subsequently made were in reliance upon such agreement, and the assignments of policies thereafter made were in fulfillment of this agreement. These acts completely divested the husband of all marital control of these items of her property, and, if they were not already the sole and separate property of the wife, made them such. Bidwell v. Beckwith, 86 Conn. 463, 469, 85 Atl. 682.

The finding specifically negatives reasons of appeal 3 and 5 that these loans and the assignment were in fraud of creditors and void as to them.

[5, 6] The sixth reason of appeal is that Mrs. Wagner was a mere guarantor of a loan by Mrs. Tousley to Mr. Wagner. If Mrs. Wagner was a mere guarantor, the sum so guaranteed could not be included in the consideration for the assignments, for the reason that the contract of guaranty would be unenforceable, since Mr. and Mrs. Wagner were married prior to April 20, 1877. Free-

man's Appeal, 68 Conn. 533, 539, 37 Atl. 420, 37 L. R. A. 452, 57 Am. St. Rep. 112; National Bank v. Smith, 43 Conn. 327.

The finding negatives the claim that the transaction was one of guaranty. It recites that Mr. Wagner had in his possession \$2,000 collected by him and belonging to Mrs. Tousley, and that Mrs. Tousley agreed to loan and did loan this sum to Mrs. Wagner, and she in turn loaned it to Mr. Wagner. The \$2,000 was not in fact paid over to Mrs. Tousley, or by her paid over to Mrs. Wagner, or by Mrs. Wagner paid over to Mr. Wagner. All the parties intended this as a loan to Mrs. Wagner and an absolute cancellation of the debt of Mr. Wagner to Mrs. Tousley.

We think the finding is controlling, and it follows, as a necessary conclusion from the subordinate facts found, that Mrs. Wagner loaned Mr. Wagner the \$2,000, and was not a mere guarantor of his debt. Nor do we think the fact that this sum remained in the physical possession of Mr. Wagner, as a matter of law, deprives the transaction of the effect intended by the parties.

[7-9] Reasons of appeal 10, and a part of 9, are that all claims accruing prior to July 1, 1906, are within the statute of limitations, and that the assignment of the policy of insurance did not constitute a new promise under General Statutes, § 707, taking the claims out of the statute. The statute was not pleaded, and could not have been, since the several items making up the consideration for the assignment of the policy was not disclosed until the trial. This claim was made in the argument in the trial below, and hence is available on appeal. Since Mrs. Wagner loaned these several sums for her sole and separate estate, the statute runs against her, as in the case of a transaction between strangers.

This is an equitable action of interpleader to determine the ownership of the proceeds of an insurance policy which the court finds was assigned as security for the payment of certain debts owed the plaintiff by the assured. At the time of the assignment, unless there had previously been a new promise to pay, these debts were barred. Though the debts were then barred, that defense could not be made subsequent to the assignment of the policy to secure their payment. The giving of security for a debt barred by the statute of limitations waives the benefit of the statute and operates as an unequivocal acknowledgment of the existence of the debt, from which the law implies a promise to pay the debt.

It is an acknowledgment of liability as significant as a part payment of the debt; both acts are alike in character, and equally unequivocal. *Merrills v. Swift*, 18 Conn. 257, 269, 46 Am. Dec. 315; *Smith v. Ryan*, 66 N. Y. 352, 354, 23 Am. Rep. 60; *Insurance Co. v. Dunscomb*, 108 Tenn. 724, 729, 69 S. W. 345, 58 L. R. A. 694, 91 Am. St. Rep. 769; *Pollock v. Smith*, 107 Ky. 509; *Conway v.*

*Caswell*, 121 Ga. 254, 48 S. E. 956, 2 Ann. Cas. 269; *Balch v. Onion*, 4 Cush. (Mass.) 559; *Begue v. St. Marc*, 47 La. Ann. 1151, 17 South. 700; 25 Cyc. 1343.

[10] The trial court properly viewed the transaction of the assignment in the light of the facts and circumstances under which it was made. The consideration for the assignment was open to oral proof. It very plainly involved, as the court has found, a recognition of these several loans as present obligations, and constituted an agreement that the policy of insurance should stand as security for their payment, with interest in accordance with the original agreement, in reliance upon which all but the first of these loans had been made. The assignment was a promise to pay these loans by providing the means for so doing.

[11] The giving of the notes were also unequivocal acknowledgments of the entire debt from which the law would imply a promise to pay them.

[12] Reason of appeal 11 is that the presentation by Mrs. Wagner of her claim to the commissioners on the insolvent estate of Mr. Wagner, without notice to them of the security held by her as security for her claim and its allowance, was an election by her to receive her claim in that way rather than from the security of this policy assigned to her.

The procedure for a creditor of an insolvent estate, who has security for his claim, is that prescribed by General Statutes, § 337. It is his duty to present his claim to the commissioners and notify them of his security and their duty to allow or disallow the claim and find the value of the security and report the same to the court of probate, and if they allow such claim it becomes the duty of the executor, administrator, or trustee to notify the creditor of the claim allowed and the value of the security found. And, unless within 15 days after such notice he relinquishes such security, he shall be entitled only to a dividend upon the excess of his claim above the value of his security. The statute does not in terms prescribe the procedure in case he fails to notify the commissioners of his security and fails to make the election prescribed. It does not provide that the presentation of his claim is a waiver of his security.

In the absence of a contrary statutory procedure, one who holds security for his debt may pursue his remedy on the debt and on the security at the same time. He will not be permitted in any case to obtain more than his debt. If a dividend be paid him, the payment is applied on the debt, and the security is available only for the balance of the debt. If the dividend satisfy the debt, the security is discharged. If the security be first applied to the debt, the dividend will be allowed only upon the part of the debt unsatisfied. *Findlay v. Hosmer*, 2 Conn. 350, 353; *Peck v. Harrison*, 23 Conn. 118, 122; *Lawrence v. Security Co.*, 56 Conn.

<sup>1</sup> 54 S. W. 740.

442, 15 Atl. 406, 1 L. R. A. 342. If payment be secured in part by each method the total payments will not be permitted to exceed the debt.

Our statute has, to a certain extent, modified these rules. Since the statute made it the duty of Mrs. Wagner to give notice of her security, and unless she relinquished her security to apply it to her debt, and then to obtain a dividend from the estate upon the excess of her debt, she should not be permitted, through failure to comply with the statute, to secure a greater benefit than she could obtain by a compliance with the statute. So long as the statute stands, we think she must apply the security to her debt in the first instance, and then obtain a dividend from the estate only upon the excess of her debt. This remedy, we think, she was entitled to, even though she had given no notice to the commissioners of her security.

In this case the security was more than sufficient to pay her debt, and the judgment of the court properly provides for the cancellation of her claim, as allowed by the commissioners upon the payment from the proceeds of the security of the amount found due her by the court. The administrator upon Mr. Wagner's estate has no just cause of complaint with the terms of the decree.

The record does not show that the allowance by the commissioners of the plaintiff's claim was accepted as final by the trial court; hence we have no occasion to consider reason of appeal 4. Moreover, as we understand the finding, it tends to show that the court found the amount of the claim and did not accept the allowance of the commissioners as final.

There is no error. In this opinion the other Judges concur.

(33 N. J. Eq. 599)

ARMSTRONG v. GRIFFIN et al. (No. 38-47)  
(Court of Chancery of New Jersey. Oct. 2, 1914.)

COVENANTS (§ 52\*)—CONSTRUCTION—RESTRICTIVE COVENANTS.

Where a deed prohibited the grantee, his heirs and assigns, at any time before 1903 from erecting, upon the land granted, buildings other than of a certain class, from building nearer than five feet to the street line, from erecting two-story clothes poles, and from selling or manufacturing liquors upon the premises, and other deeds by the same grantor to land in that locality contained similar covenants which were also limited to the year 1903, all of the restrictive covenants stand alike and are binding only until the year 1903, and at the end of such time liquor might be manufactured or sold on the premises.

[Ed. Note.—For other cases, see Covenants, Cent. Dig. § 51; Dec. Dig. § 52.\*]

Bill by John Armstrong against Joseph William Griffin and another. On order to show cause why a temporary injunction should not be continued. Order discharged.

Joseph Anderson, of Jersey City, for complainant. Robert Carey, of Jersey City, for defendant Muller. Joseph F. Farmer, of Jersey City, for defendant Griffin.

GRIFFIN, V. C. The material facts in this case are as follows: On the 23d of November, 1897, one Darling conveyed to Spangenberg and wife, the immediate grantors of the defendant Kathryn Muller, certain premises on West Side avenue in Jersey City by deed containing the following restrictions:

"That the party of the second part, their heirs and assigns, shall not at any time previous to September 1, 1903, erect nor cause, nor procure, permit or suffer to be erected upon the said premises any building other than a store or dwelling having a stone or brick foundation, and having at least two stories above such foundation, which building shall not be used for any other purpose than as a store or dwelling within the time limited; that no building shall be erected nearer than five feet to the street line of West Side avenue. No two story clothes poles shall be erected on the said property.

"It is expressly agreed that no wines, beers nor liquors of any kind shall be sold or manufactured upon the said premises."

Afterwards, by deed dated the 1st of December, 1898, Darling conveyed to the complainant lands on Duncan avenue, about 25 feet west of the rear line of the Spangenberg lot, which deed contained the following restrictions:

"That the party of the second part, his heirs or assigns, shall not at any time previous to September 1, 1903, erect, or cause or procure, permit or suffer to be erected upon the said premises, any building other than a store or dwelling having a stone or brick foundation, and having at least two stories above such foundation, which building shall not be used for any other purpose than as a store or dwelling, within the time above limited. That no dwelling shall be erected nearer than ten (10) feet to the street line. It is, however, understood and agreed that stables and barns may be erected upon the rear half of the said premises, which buildings, shall, however, be used only as stables and barns, and shall be kept clean and free from nuisance.

"It is expressly agreed, that no wines, beers or liquors of any kind shall be sold or manufactured upon said premises.

"No two-story clothes poles shall be erected on the said premises."

This deed was offered in evidence at the hearing on the order to show cause by consent.

Mrs. Muller leased the premises which she purchased from Spangenberg to Griffin, who had a license to sell liquor at another place transferred by the mayor and aldermen of Jersey City to permit the sale of liquor on said premises, and Griffin was proceeding to fit up the premises for the sale of liquors when the complainant filed his bill to restrain the defendants from leasing or using or permitting to be used, the said premises, 771 West Side avenue in Jersey City, for the sale or manufacture of wines, beers, or liquors, etc. Upon filing said bill an order to show cause was granted, which included a restraint against the defendants selling or manufacturing wines, beers, or liquors of any kind on the premises.

A comparison of both sets of restrictions shows that the third restriction in the deed

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes.

to the complainant, against the sale of liquors, is the fourth restriction in the deed to Spangenberg; and the third restriction in the deed to Spangenberg is the fourth restriction in the deed to the complainant. Both restrictions, however, are substantially the same.

The defendants contend that all the restrictions contained in said deed expired on September 1, 1903; whereas, the complainant contends that there are practically four separate and independent restrictions, all disjoined, the time limitation applying only to the first, namely, as to the style of building to be erected on the premises, which restriction became inoperative on and after September 1, 1913; the second, which prohibits the erection of a building within a certain distance of the street line; the third in the complainant's deed and the fourth in the Spangenberg deed, directed against the sale and manufacture of liquors; and the fourth in the complainant's deed and the third in the Spangenberg deed, which regulates the height of the clothes poles which might be erected. And he must so contend, because if the time limitation is annexed to any one of the subsequent restrictions it must necessarily apply to all, for the reason that there is nothing in the instrument which indicates that the framer of the restrictions intended that there should be any distinction made between the second, third, and fourth restrictions as to the period of their existence. It is therefore necessary to examine into the character of the restrictions to determine if the second, third, or fourth restrictions, or either of them, are so related to the first that the restrictions would lack utility after the first became inoperative.

In dealing with the "third and fourth restrictions" for the sake of brevity I will refer to the fourth restriction in the Spangenberg deed as being the "third restriction," and to the third restriction in the Spangenberg deed as being the "fourth restriction," thus making the restrictions conform in order of sequence in the complainant's deed.

The first, second, and fourth restrictions have to do with the building; the first is as to the style of the building to be erected prior to September 1, 1903; the second is referable to the location where the building mentioned in the first restriction may be erected; the fourth relates to the height of the clothes poles to be used in connection with the building mentioned. This must, of necessity, be so, because after the 1st of September, 1903, the owner of the premises was not limited to the erection of a store or dwelling; he might erect a factory building extending the full width of the lot; he might erect telephone or telegraph poles to any height on the lot. It seems unreasonable to say that after the first restriction had expired the draughtsman

intended that the second and fourth restrictions as to the building line and the clothes poles should stand, when, at the same time, the owner might cover the whole lot with any character of building without restriction. If the second and fourth restrictions are so tied to the first that they also ceased to be operative after September 1, 1903, then, to my mind, a plain reading of the four restrictions indicates that all four were to expire on September 1, 1903. The complainant says that the object of the restrictions was to create a neighborhood plan for residence purposes. I am satisfied that this is true; but of what value would such a plan be after the 1st of September, 1903, if any character of lawful building which the owner might see fit to construct could be erected upon the land? The owner might erect factories and other buildings which might be perfectly lawful and yet tend largely to depreciate the value of the surrounding property which had been developed on the neighborhood plan and destroy it for residential purposes.

If the framer of the restrictions had intended that any of them should continue after the 1st day of September, 1903, he should have so provided by clear and unambiguous language. This he has not done. On the other hand, taking the scope and purpose of the restrictions, it seems to be clear that they were all to endure until September 1, 1903. If this interpretation is doubtful, then the restrictions are ambiguous. In either event, the result reached must be the same, namely, that the complainant is not entitled to an injunction. *Fortesque v. Carroll*, 76 N. J. Eq. 583, 588, 75 Atl. 923, Ann. Cas. 1912A, 79 (Court of Errors, 1909).

I will advise an order discharging the order to show cause.

(83 N. J. Eq. 610)

In re FRITZ'S ESTATE. (No. 2908.)

(Prerogative Court of New Jersey. Sept. 25, 1914.)

1. COURTS (§ 198\*)—NEW JERSEY—ORPHANS' COURT—JURISDICTION.

The orphans' court being a creature of statute, invested with special powers and jurisdiction in derogation of the powers of the courts established by the Constitution, it can exercise no powers beyond those authorized by statute.

[Ed. Note.—For other cases, see *Courts*, Cent. Dig. §§ 469, 471-475, 478; Dec. Dig. § 198.\*]

2. COURTS (§ 201\*)—NEW JERSEY—ORPHANS' COURT—JURISDICTION.

Where petitioner, the executrix of an estate which was indebted to defendant's testator, recovered in her individual capacity a judgment against the estate of defendant's testator, the orphans' court, in which proceedings were had to compel defendant to sell her testator's land to satisfy execution on the judgment, is without jurisdiction to determine a controversy between petitioner and defendant as to the liability of the estate of which petitioner was executrix, it not appearing that such estate was insolvent; for the orphans' court has no

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

jurisdiction over disputed claims save in case of insolvent estates.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 86, 87; Dec. Dig. § 201.\*]

**8. EXECUTORS AND ADMINISTRATORS (§ 454\*)—EXECUTION AGAINST ESTATE—PROPERTY SUBJECT TO LEVY.**

Where an execution in favor of the petitioner against the estate of defendant's testator was returned unsatisfied, the petitioner may compel a sale of his lands, and cannot be required to seek satisfaction out of the proceeds of a note held by deceased against an estate of which petitioner was executrix; for choses in action are subject to execution only when made so by statute, and there is no statutory authority to levy upon bills and notes.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1909-1928; Dec. Dig. § 454.\*]

**4. EXECUTION (§ 88\*)—SALES—PROPERTY.**

A judgment creditor can sell personalty or realty at his option on execution.

[Ed. Note.—For other cases, see Execution, Cent. Dig. § 183; Dec. Dig. § 88.\*]

**5. EXECUTORS AND ADMINISTRATORS (§ 341\*)—PAYMENT OF CLAIMS—PROPERTY SUBJECT—SALE OF REAL ESTATE—DEFENSES.**

In a proceeding to compel the executrix of a judgment debtor to sell land to satisfy an execution, an order of the orphans' court directing a sale of the realty is not erroneous, where there was not sufficient personalty to satisfy the claim, because the deceased was entitled to a distributive share in an estate of which the judgment creditor was executrix; for, while the personalty of a decedent is primarily liable for his debts, a creditor is entitled to compel sale of lands where there is not sufficient personalty on hand to satisfy his claim.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. §§ 1434-1437; Dec. Dig. § 341.\*]

**Appeal from Orphans' Court, Passaic County.**

In the matter of the estate of Adam Fritz, deceased. Petition by Minnie E. Dodd, for the use of Barbara Thomas, to require Catherine Fritz, the executrix, to sell the real property to satisfy an execution. From an order of the orphans' court directing a sale of the land, the executrix appeals. Order affirmed.

Michael Dunn, of Paterson, for appellant.  
Wayne Dumont, of Paterson, for respondent.

LEWIS, V. O. The appellant, Catherine Fritz, widow and devisee of Adam Fritz, deceased, and sole executrix under his last will, appeals from an order of the orphans' court of Passaic county, made March 14, 1912, requiring the executrix to sell certain real estate to pay the judgment of the petitioners therein. The petition sets forth that on June 23, 1910, Minnie E. Dodd, to and for the use of Barbara Thomas, recovered a judgment against the executrix of Adam Fritz, in the Passaic county circuit court, for the sum of \$753.92; that execution was issued thereon and returned wholly unsatisfied for want of personal estate to be levied on and sold; that Adam Fritz died seised of certain real estate therein described; that

petitioner had requested the executrix of Adam Fritz to take proceedings to obtain a sale of the whole or a part thereof for the payment of said judgment, in accordance with the orphans' court act, and that she has refused to comply with such request for the space of at least one month after being so required, and the orphans' court was asked to make an order for the sale of said lands, or a part thereof, for the payment of said judgment, under section 97 of the orphans' court act, Laws 1898, p. 715.

The answer of Catherine Fritz, executrix as aforesaid, practically confesses the facts set forth in said petition, and seeks to avoid the relief which would necessarily follow thereon, upon the following grounds:

That said Barbara Thomas, one of the petitioners, and owner of the said judgment, for all practical purposes, is the surviving executrix of the last will and testament of Peter Fritz, deceased, of whom the said Adam Fritz was a son, said Adam Fritz in his lifetime being also an executor of the said last will and testament of Peter Fritz, deceased; that the estate of Peter Fritz, deceased, is indebted to the estate of Adam Fritz, and that if this indebtedness were paid to the executrix of Adam Fritz she would then have in hand sufficient personal property with which to pay the judgment of Barbara Thomas; and upon these facts the appellant, Catherine Fritz, not only resists the granting of the relief prayed for in the petition, but, by way of cross-petition, she attacks the answer and prays for affirmative relief, by asking the court to make an order directing the said Barbara Thomas to file an account of her administration of the estate of Peter Fritz, and to sell the real estate of the said Peter Fritz, for the purpose of paying to the executrix of Adam Fritz, the appellant, the money so due on said estate. To this answer and cross-petition the respondents replied that, by virtue of a certain writing under the hand and seal of said Barbara Thomas and said Adam Fritz, her brother and coexecutor, made during his lifetime, said money so due from the estate of Peter Fritz to the estate of Adam Fritz is not to be payable until the death of an invalid sister of Barbara Fritz. The jurisdiction of the orphans' court in this case arises from the obtaining of the judgment against the executrix, Catherine Fritz.

(2) The issuing of execution which remains unsatisfied "for want of personal estate to be levied on and sold."

(3) That there is real estate.

(4) The neglect of the executrix, after notice to sell said lands.

The testimony taken before me shows that the estate of Peter Fritz, deceased, of which Barbara Thomas is the surviving executrix, is indebted to the estate of Adam Fritz, deceased, in the sum of \$1,859.99 on a promissory

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



note, dated October 16, 1908, payable 30 days after date, which was given by the executors for moneys loaned and advanced by Adam Fritz to the estate of Peter Fritz, and which was used to buy out the dower right of the widow of Peter Fritz, and also to pay taxes and insurance and to make necessary repairs to maintain and keep the buildings on the property of Peter Fritz in a tenable condition, to prevent the estate from waste, and the money so advanced is evidenced by this note; that under the will of Peter Fritz the whole estate is devised to the executors therein named, to be by them distributed as therein mentioned; that it also gave the executors full power to sell and convey the real estate; that the said Adam Fritz was also a devisee and legatee under said will; that the effect of the said will of Peter Fritz, in devising the property to the executors for distribution, was practically to convert his property so that it might be treated as if it were personal estate; that the said Barbara Thomas was requested, as surviving executrix of the said Peter Fritz, deceased, to file her account and proceed to settle the estate and raise the necessary moneys to pay this note of \$1,850.99 due to the estate of Adam Fritz, and to pay to her the amount of the interest of Adam Fritz in the estate of Peter Fritz, as would be shown in the final settlement, thereby putting into the hands of Catherine Fritz, executrix of Adam Fritz, the money due to the estate of Adam Fritz from the estate of Peter Fritz, to enable her to liquidate the said judgment.

[1-3] It is the contention of the appellant that both parties being officials of the court, and representing different estates, and both being subject to the orders of the court, and it being in the interest of both estates that litigation should be avoided and expenses thereby saved, that it was the duty and the right of the orphans' court to grant an order against Barbara Thomas, as executrix of Peter Fritz, to proceed and settle the same, and to sell the real estate and thereby avoid further litigation.

It will be noted that the judgment obtained by Barbara Thomas against the estate of her coexecutor was obtained by her in her individual capacity.

"Our statutes confer no authority on the orphans' court to try disputed claims, except in the case of insolvent estates." *Middleton v. Middleton*, 35 N. J. Eq. 115, and cases there cited.

It (the orphans' court) "being a court created by statute and invested with special powers and jurisdiction in derogation of the powers of the courts established by the Constitution, it must \* \* \* be restrained in the exercise of those powers and jurisdiction by the words of the statute." *Ludlow v. Ludlow*, 4 N. J. Law, 189; *Tenbrook v. McCalm*, 10 N. J. Law, 333; *Bray v. Neill*, 21 N. J. Eq. 343.

"Choses in action are subject to execution only when made so by statute." 17 Cyc. 971.

Our statute concerning execution does not make choses in action the subject of levy

and sale, except in certain specified cases, amongst which promissory notes are not included.

I am therefore well satisfied that there was no error in the decree of the court below, so far as the promissory note was concerned.

[4, 5] In regard to the distributive share of the estate of Peter Fritz to which Adam Fritz would be entitled I fail to see any reason for delaying the collection of the judgment. A judgment creditor can sell personalty or realty at his option on execution. He is the one the law is particularly interested in seeing made whole. However, when the debtor dies and his estate is sued, his personalty becomes liable first of all, and his realty only secondarily. The law still primarily looks after the judgment creditor. The protection of the heir is only a secondary matter. The heir may give bonds to prevent the sale of the real estate if he wishes to do so, and thus prevent a forced sale of the realty. Therefore I must assume that, as the orphans' court act clearly states, if there is not sufficient personalty to pay the judgment, the realty (or so much thereof as may be necessary) shall be sold, that must be the order, as the orphans' court is only a statutory court.

The decree shall be affirmed.

(35 N. J. L. 141)

BARNES et al. v. ESSEX COUNTY PARK COMMISSION et al. (No. 79.)

(Court of Errors and Appeals of New Jersey. Sept. 25, 1914.)

# 1. HIGHWAYS (§ 18\*)—PUBLIC HIGHWAYS—STATUTORY PROVISIONS.

Under Act Feb. 16, 1870 (P. L. p. 191), authorizing the Essex public road board to lay out, construct, improve, and maintain certain avenues in the county of Essex, including Park avenue, and providing that such avenues when constructed shall be deemed and taken to be public roads or highways, Park avenue is a public highway.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. § 25; Dec. Dig. § 18.\*]

# 2. HIGHWAYS (§ 168\*)—PARKWAYS—REGULATION OF USE.

Under Act April 22, 1907 (P. L. p. 180) § 1, providing relative to the county park commissions authorized thereby to be appointed in certain counties that such board shall have full power and authority to pass rules and regulations for the protection, regulation, and control of parks and parkways, and Act March 5, 1895 (P. L. p. 175) § 6, providing that the board shall have power, not only to lay out and open roadways, parkways, etc., but to establish the grade thereof, etc., and regulate the use thereof, while a park commission may possibly have power to prohibit the use of parkways by business vehicles of such heavy draft as would tend to injure or destroy the road, it cannot prohibit the use of a parkway by ordinary grocery delivery wagons; the protection of the highway not requiring their exclusion therefrom.

[Ed. Note.—For other cases, see *Highways*, Cent. Dig. §§ 456, 457; Dec. Dig. § 168.\*]

### 3. HIGHWAYS (§ 165\*)—PARKWAYS—REGULATION OF USE.

The Legislature may impair the public easement in a public highway by prohibiting business traffic thereon, and may delegate such power.

[Ed. Note.—For other cases, see Highways, Dec. Dig. § 165.\*]

#### Appeal from Supreme Court.

Certiorari by Robert Barnes and others against the Essex County Park Commission and others, to review the validity of an ordinance of such commission. From a judgment setting aside the ordinance (88 Atl. 837), defendants appeal. Affirmed.

Alonzo Church, of Newark, for appellants. Borden D. Whiting, of Newark, for appellees.

**WALKER, C.** The Essex County Park Commission on January 7, 1913, passed an ordinance excluding from the parkway known as Park avenue in Essex county "omnibuses, express wagons, carts or other vehicles carrying or ordinarily used to carry merchandise, goods, tools, or rubbish, however propelled, \* \* \* except as it may be necessary to carry supplies to or from residences on either side of the avenue, or in case of buildings being erected fronting on said avenue, when it shall be lawful to carry building materials thereto. \* \* \* The prosecutors, respondents, engaged in the grocery business and having a store on Park avenue (the one in question) with customers located, some of them on the avenue, and more elsewhere, to whom they delivered goods by means of ordinary grocery delivery wagons, of which they run six in number, constantly using the avenue for delivery purposes, obtained a certiorari to review the validity of the ordinance. The Supreme Court, after hearing, set the ordinance aside, and the respondents appealed.

[1] We agree with the Supreme Court that Park avenue, laid out under authority of the act of the Legislature (P. L. 1870, p. 181), is a public highway. This is so by the express language of that statute, which enacts that the avenues, when constructed by the board, "shall be deemed and taken to be public roads or highways." It is true too that Park avenue has been used as a public road and highway without restriction until restricted use was attempted to be imposed upon it by the ordinance under consideration.

[2] The Supreme Court in its opinion says that if the public enjoyment of the avenue is now to be impaired, it can only be because the Legislature has passed some act under which power to that end has been clearly granted and expressed, and that this has not been done.

The act under which the commission is em-

powered to pass ordinances (P. L. 1907, p. 180, § 1) provides:

"The said board shall have full power and authority and is hereby empowered to pass and enact, alter, amend and repeal rules and regulations for the protection, regulation, and control of such parks and parkways."

And in section 6 (P. L. 1895, p. 175):

"That the said board shall have power and authority not only to lay out and open roadways, parkways and boulevards, connecting parks and open spaces as herein provided, but shall have authority to establish the grade of such highways, and change and alter the same, to grade, curb, flag, pave and otherwise improve the said parkways, roadways and boulevards, and to regulate the use thereof."

The Supreme Court holds that "the power to regulate and control is not necessarily the power to prohibit." To this, as a general proposition, we agree, but are unwilling to concede that the statute, under which the ordinance in question was passed, is not broad enough to permit of prohibiting the use of the avenue by heavy business vehicular traffic.

[3] In the opinion of the Supreme Court it is stated that the Legislature may impair the public easement in a public highway by prohibiting business traffic thereon, and that such power may be delegated. And this is plainly the law.

Now, the right of the Legislature to impair the public easement in a public highway by prohibiting vehicular business traffic thereon is conceded, and therefore the question whether the park commission may prohibit vehicular traffic upon this particular highway depends upon whether or not the terms of the statute, under which it acts, are broad enough to include that power. If under the legislative authorization to enact rules for protecting, regulating and controlling the highway, business vehicles may be prohibited the use of the parkway, then it has such power, otherwise not. Of course the commission has not the power to prohibit all traffic; but may it not for the protection of highways make a regulation that business vehicles of such heavy draft as would tend to injure and destroy the road shall not use the highway, save, perhaps, under exceptional circumstances? We think this question is at least debatable, and that therefore it should not be foreclosed.

Because forbidding the use of Park avenue by grocery delivery wagons, such as are owned and used by the prosecutors, is not necessary for that highway's protection, the ordinance under consideration prohibiting such use is unreasonable. Protection of the highway in question does not require their exclusion therefrom.

The judgment of the Supreme Court setting the ordinance aside will therefore be affirmed.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

(84 N. J. Eq. 321)

RAILWAY REVIEW et al. v. GROFF DRILL &amp; MACHINE TOOL CO. (No. 35-686.)

(Court of Chancery of New Jersey. June 26, 1914.)

CORPORATIONS (§ 215\*)—STOCK ISSUE—VALUE OF ASSETS.

Where a corporation was organized to manufacture and sell a patented article in the United States, which at the time had become standardized on certain railroads, and it then appeared that the demand would necessarily increase, and new conditions which subsequently arose to render the article less valuable could not then have been anticipated, capitalization on the basis of earnings for the preceding year did not constitute an overvaluation, so as to render stockholders liable to assessment on the subsequent insolvency of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 826-828, 845-848, 852, 854; Dec. Dig. § 215.\*]

Suit by the Railway Review and others against the Groff Drill & Machine Tool Company. On the receiver's petition for an assessment against stockholders of the defendant, an insolvent corporation. Denied.

Ott & Carr, of Camden, for receiver. Grey & Archer, of Camden, for defendants Paul and Taylor. H. H. Voorhees, of Camden, for defendants Lovekin and Macneir.

LEAMING, V. C. There can be no substantial doubt touching the facts. The plant was turned over to the corporation at a valuation based upon its earning capacity capitalized at 6 per cent. interest. Groff testified that a full statement of the earnings was shown to the directors in full details, and all the evidence discloses that what in fact was done was to fix a valuation based on those earnings. The earnings of the Groff plant for the year preceding had been about \$1,000 per month or \$12,000 a year, and that income was capitalized on a 6 per cent. basis as the value of the business. While the resolution refers to the machinery as worth \$45,000, it is obvious that the real basis of the valuation adopted was that an established business, including the machinery and the exclusive right to manufacture and sell the patented article in this country, which could make \$12,000 a year, was worth \$200,000. The theory of the whole transaction clearly was that the company was to acquire from Groff assets which were producing \$12,000 per year in profits, and these assets were accordingly valued at \$200,000.

I find nothing improper or unlawful in that valuation under the circumstances disclosed by the evidence. It may be assumed, as held in *See v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843, that prospective profits, arising from the new conditions created by the transfer, are not elements that can be considered in ascertaining value for which stock can be issued. But it cannot be doubted that established past and present earning capacity may be made a proper basis of valuation in appro-

priate circumstances. If a house should be purchased for purposes of rental, the established past and present rental value clearly affords a stable basis of its valuation for the purpose named; and in like manner the established earning capacity of a business of the nature of the business here in question must be regarded as a proper basis of its value, for such a business is necessarily purchased solely for and by reason of its peculiar earning capacity. Nor is it possible for any intelligent purchaser to wholly disregard future prospects. While our statute may not contemplate the capitalization of prospective future profits, it is clear that no present earning capacity can be made the intelligent basis of valuation without due consideration of future prospects; but where there are prospects of increased future earning capacity, the present earning capacity demonstrated by actual operation clearly affords a proper basis of valuation of a business of this peculiar nature, if the future prospects are not also capitalized.

The testimony in this case not only discloses that the earning capacity of the rights purchased were about \$12,000 a year, as shown by profits actually earned during the year then past, but also that the future prospects of the business reasonably assured much greater profits. The patented article had become "standardized" on certain railroads, and it then appeared that the demand would necessarily increase; the new conditions which arose to render the patented article less valuable could not have been then anticipated.

The earning capacity of this business cannot be regarded as in any sense good will. The article which was manufactured, and from the manufacture of which the profits arose, was unique and protected by a patent; that situation bears no analogy to a valuation placed upon the hope that established customers will continue to patronize the same plant to which they have theretofore extended their favors in the purchase of articles that could be elsewhere procured.

I am convinced that under the evidence in this case it cannot be properly determined by this court that an overvaluation was made.

I will advise an order denying an assessment.

(86 N. J. L. 555)

LOUDENSLAGER et al. v. CLERK OF ATLANTIC COUNTY et al.  
(Supreme Court of New Jersey. Oct. 9, 1914.)

(Syllabus by the Court.)

EMINENT DOMAIN (§ 180\*) — ESTABLISHMENT OF DISPOSAL PLANTS — NOTICE TO LAND-OWNERS.

Under Act 1909, p. 138, empowering municipalities to establish disposal plants, notice to property owners of the passage of an ordinance under which their property is sought to be tak-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

en is essential; notice of hearing before commissioners appointed to assess the value of the land sought to be taken is not sufficient.

[Ed. Note.—For other cases, see *Eminent Domain*, Cent. Dig. § 489; Dec. Dig. § 180.\*]

Certiorari on the prosecution of Almira M. Loudenslager and others against the Clerk of Atlantic County and Ventnor City to review an order appointing commissioners to assess the value of land to be taken. Order set aside.

Argued June term, 1914, before TRENCHARD, BERGEN, and BLACK, JJ.

J. Edward Ashmead, of Newark, for prosecutors. J. S. Westcott, of Atlantic City, for defendants.

BLACK, J. The writ of certiorari in this case was allowed by Mr. Justice Kalisch to review the validity of an order made by him on May 23, 1914, appointing three commissioners, to fix the compensation to be paid for lands owned by the prosecutors and sought to be condemned by Ventnor City, for use in connection with the construction and maintenance of a sewage disposal plant proposed to be erected by the city. The proceedings are under the act (P. L. 1909, p. 138, and P. L. 1911, p. 724) and by an ordinance which is known as "Ordinance No. 6" of Ventnor City.

There are six reasons urged by the prosecutors why this order should be set aside. It is only necessary to consider the first, which is fatal, and that is that the common council of Ventnor City did not give any notice of its intention to pass and adopt the ordinance authorizing the improvement. It is argued that, because the statute under which the proceedings are authorized does not require notice, no notice is essential; but the cases concerning assessments for benefits are quite uniform in holding that, where the act is judicial in character, a notice is necessary, it being contrary to natural justice that a person should be bound by proceedings of a judicial character affecting his person or property without having an opportunity to be heard. *Groel v. Newark*, 78 N. J. Law, 144, 73 Atl. 522. That class of cases cannot be distinguished in principle from the one under investigation, nor can it be successfully maintained that the determination by the city to establish a disposal plant and take the prosecutors' land for that purpose is not an act essentially judicial in character. *Sears v. Atlantic City*, 73 N. J. Law, 712, 64 Atl. 1062, 118 Am. St. Rep. 724. Nor is it sufficient that the prosecutors will receive notice in the condemnation proceedings and have an opportunity to be heard, because this notice only enables the landowners to be heard upon the question of the amount of the award. They are entitled to be heard upon the proceedings, which are liable to result in taking their land. *Sears v. Atlantic City*, 72 N. J. Law, 486, 60 Atl. 1093.

The order appointing commissioners and all proceedings under it must be set aside, with costs.

(86 N. J. L. 556)

REVERUZZI v. CARUSO et al.

(Supreme Court of New Jersey. Oct. 9, 1914.)

(Syllabus by the Court.)

SET-OFF AND COUNTERCLAIM (§ 44\*)—WHEN ALLOWED—JOINT AND SEPARATE DEBTS.

Under the district court acts providing for set-off, joint and separate debts cannot be set off against each other.

[Ed. Note.—For other cases, see *Set-Off and Counterclaim*, Cent. Dig. §§ 82-96, 98, 99; Dec. Dig. § 44.\*]

Appeal from District Court of Orange.

Action by Angelo Reveruzzi against Pasquale Caruso and others. Judgment for plaintiff, and defendants appeal. Affirmed.

Argued June term, 1914, before TRENCHARD, BERGEN, and BLACK, JJ.

Egidio W. Mascia and Edwin C. Caffrey, both of Newark, for appellants. William A. Lord, of Orange, for appellee.

BLACK, J. This is an appeal from the Orange district court. Judgment was given for the plaintiff for \$100. The case was tried by the judge without a jury. The suit was on a replevin bond. The only controverted point is whether one of the defendants, Pasquale Caruso, had a right to have a set-off allowed. He offered to prove the amount of a set-off, filed in the case, for \$90, alleged to be owing by the plaintiff to one of the defendants, Pasquale Caruso. The trial court overruled this offer of testimony, on the ground that a set-off of one defendant against the plaintiff could not be made available, in a suit brought by the plaintiff, against such defendant and another jointly, on a replevin bond. We think the ruling of the trial court was correct. This right of the defendant is claimed under the statutes relating to district courts (P. L. 1912, p. 379, § 12), which reads, "Subject to rules, the defendant may counterclaim or set off any cause of action," and sections 60 and 61, Compiled Statutes of New Jersey, vol. 2, p. 1970. These statutes are not essentially different from the general statute of set-off. Compiled Statutes of New Jersey, vol. 4, p. 4836. Chancellor Green stated the rule thus:

"The general rule in equity, as well as at law, is that joint and separate debts, or debts accruing in different rights, cannot be set off against each other. At law, under the statutes of set-off, the rule is inflexible; but in equity, special circumstances give rise to exceptions." *Brewer v. Norcross*, 17 N. J. Eq. 225.

*Naylor v. Smith*, 63 N. J. Law, 596, 44 Atl. 649, is an apt illustration, where a set-off was disallowed in a suit under the Mechanic's Lien Act, and the set-off arose in a different right. So, in Indiana, in a suit on a replevin bond, it was held, under the statute

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

of that state, that a note executed by one of two obligees cannot be set off in an action on the bond. *Ringgenberg v. Hartman*, 124 Ind. 186, 24 N. E. 987. In that case, it was said to be a fundamental principle that a set-off cannot exist in a case where there is a want of mutuality.

The judgment is therefore affirmed.

(87 N. J. L. 487)

# BROWN v. ERIE R. CO. (No. 1.)

(Court of Errors and Appeals of New Jersey.  
Sept. 25, 1914.)

## 1. RAILROADS (§ 350\*)—CROSSING ACCIDENT—GATES—STATUTE—APPLICATION.

P. L. 1909, p. 54, provides that, whenever any railroad company maintains safety gates at a crossing and a person is struck by a locomotive while attempting to cross the tracks when the gates are not down, the question whether he was guilty of contributory negligence shall be determined by the jury in all actions to recover damages therefor. *Held*, that such act is not limited to crossings in cities, but applies as well to injuries at crossings partly in a township and partly in a borough, where the railroad company had established crossing gates.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1152-1192; Dec. Dig. § 350.\*]

## 2. STATUTES (§ 210\*)—CONSTRUCTION — PREAMBLE.

Resort may be had to the preamble or recitals of legislative intent in a statute only when the enacting part is ambiguous and doubtful.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 287; Dec. Dig. § 210.\*]

## 3. STATUTES (§ 210\*) — ENACTING CLAUSE — PREAMBLE.

The enacting clause of a statute can be extended by the preamble, but cannot be restrained by it.

[Ed. Note.—For other cases, see *Statutes*, Cent. Dig. § 287; Dec. Dig. § 210.\*]

## 4. RAILROADS (§ 330\*)—CROSSINGS — SAFETY GATES—DUTY TO OPERATE.

P. L. 1909, p. 137, provides that whenever a railroad has installed safety gates at a crossing any person approaching the crossing shall, during such hours as posted notice at the crossing shall specify, be entitled to assume that such gates are in proper order and duly operated, unless a written notice bearing the inscription "out of order" be posted, and in any action brought for injuries to a person at such crossing plaintiff shall not be barred because of a failure to stop, look, and listen before crossing. *Held* that, where a railroad company had provided gates at a grade crossing, that it had not posted any notice specifying at what hours the gates would be operated did not render the section inapplicable, and the company, not having posted such notice, was estopped to complain that a person passing over the tracks when the gates were up was not entitled to assume that they were in good order and would be properly operated.

[Ed. Note.—For other cases, see *Railroads*, Cent. Dig. §§ 1071-1074; Dec. Dig. § 330.\*]

## 5. DEATH (§ 104\*)—ACTIONS—INSTRUCTIONS—"CAPITALIZE."

In a mother's action for the wrongful death of her son, the court instructed the jury to allow the capital sum which would represent the money which plaintiff had a reasonable expectation of receiving from decedent during the term of her natural life, and then capitalize that in a fixed sum and let that be the verdict. *Held*, that the word "capitalize" as so used meant

to convert a periodical payment into a sum in hand, and, the jury being presumed to have so understood it, the instruction was correct. [Ed. Note.—For other cases, see *Death*, Cent. Dig. §§ 142-148; Dec. Dig. § 104.\*]

## 6. APPEAL AND ERROR (§ 1056\*)—RULINGS ON EVIDENCE—PREJUDICE.

The court's exclusion of a preliminary question, on an issue as to a mother's damage by the wrongful death of her son asking if her husband did not make good wages in order to minimize her pecuniary loss by the death of her son, was not prejudicial to defendant.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 4187-4193, 4207; Dec. Dig. § 1056.\*]

### Appeal from Supreme Court.

Action by Johanna Brown, as administratrix of William Jacobs, deceased, against the Erie Railroad Company. A judgment for plaintiff was reversed by the Supreme Court, and she appeals. Reversed, and judgment of the circuit court affirmed.

Alexander Simpson, of Jersey City, for appellant. Collins & Corbin, of Jersey City, for respondent.

**WALKER, C.** This was a suit for damages under the death act. The disputed questions of fact were as to whether the view of the deceased was obstructed by freight cars at the crossing of the defendant company's tracks where the accident happened; also, whether any warning was given of the approach of the train by bell or whistle; also, whether the crossing gates were up or down at the time. The case was submitted to the jury, who found for plaintiff, and defendant appeals.

[1] The controverted questions of fact were involved in that of contributory negligence under chapter 35 of the Laws of 1909, P. L. p. 54, wherein it is provided that when a person is killed or injured when attempting to cross the tracks of a railroad company, by being struck by a locomotive or train where gates are maintained and such gates are not down at the time of the injury, the question as to whether the person killed or injured was or was not guilty of contributory negligence shall be a question to be determined by the jury. The trial court permitted the jury to find liability against the defendant by reason of the fact, if it were a fact, that the gates were not down. The Supreme Court in reversing the judgment said this statute of 1909 was inapplicable, because the accident happened at a crossing partly in a township and partly in a borough, meaning, evidently, that the act applied only to crossings in cities. We cannot take that view.

The title of the act is unrestricted. It is: "An act relating to accidents at railroad crossings." The enacting clause is equally broad. It reads:

"1. Whenever any railroad company shall have assumed to establish and maintain what are known as safety gates at any railroad cross-

ing in this state, and a person is killed or injured at such crossing by being struck by a locomotive or train when attempting to cross the tracks at a time when such gates are not down, as required by any statute giving the railroad the right to run through an incorporated city at any rate of speed they see fit, upon compliance with the provisions of such statute, that in all such cases the question whether the person so killed or injured, upon attempting to cross such railroad crossing, at a time when the safety gates at such crossing are not down, was or was not guilty of contributory negligence shall be a question to be determined by the jury, in all actions brought to recover damages for such loss of life or personal injury."

It is true the act contains a preamble, as follows:

"Whereas, by the provisions of the statutes of this state, it has been provided that whenever a railroad company shall have enclosed its right of way through any incorporated city of this state with a fence, wall or embankment, and shall have established and maintained gates at street crossings, as provided by the provisions of any statute of this state, that upon such compliance with such provisions the said railroad company could run over the part of their said so enclosed road through any incorporated city of this state at any rate of speed they may deem proper, and that such speed should not, thereafter, be restrained by any city ordinance to regulate the same."

The provision in the enacting clause that where a person is killed or injured when such gates are not down "as required by any statute giving the railroad the right to run through any incorporated city at any rate of speed they may see fit, upon compliance with the provisions of such statute," is meant not to excuse, but to render liable, railroad companies running trains through cities at any rate of speed; and is not meant to limit the liability of railroad companies for accidents on railroad crossings where safety gates are established, wherever those crossings may be, whether within or without the limits of an incorporated city, unless the precautionary measure of lowered gates is an accomplished fact on the given occasion.

[2, 3] It seems to be established that, in cases of doubt as to the proper construction of the body of a statute, resort must be had to the preamble or recitals for the purpose of ascertaining the legislative intent. But where the enacting part of the statute is unambiguous, its meaning will not be controlled or affected by anything in the preamble or recitals. The enacting clause of a statute may be extended by the preamble, but cannot be restrained by it. 36 Cyc. 1132; Den v. Urison, 2 N. J. Law, \*212, 224; James v. Dubois, 16 N. J. Law, 285; Quackenbush v. State, 57 N. J. Law, 18, 21, 29 Atl. 431.

In Cooper Hospital v. Camden, 70 N. J. Law, 478, 57 Atl. 260, it is laid down by the Supreme Court that to ascertain the intention of the Legislature we must look at the preamble of the act, citing from Pott. Dwar. Stat. 265, as follows:

"The preamble states with more or less accuracy the object of a law and the occasion of its making. Its first legitimate and unquestioned use is to ascertain what the cases are to which

the act was intended to apply. It has never been disputed that the preamble to an act may properly be used to ascertain and fix the subject-matter to which the enacting part is to be applied."

There is nothing in this which is inconsistent with what was said in Den v. Urison, supra, by Mr. Justice Pennington in the Supreme Court (2 N. J. Law, \*224), viz.:

"It appears to me, to be a settled principle of law, that the preamble cannot control the enacting part of the statute, in cases where the enacting part is expressed in clear, unambiguous terms; but in case any doubt arises on the enacting part, the preamble may be resorted to, to explain it, and show the intention of the law-maker. The enacting part of this statute is clear and explicit; there is no ambiguity on the face of it. Shall we then go out of the enacting part, which is clear and intelligible, and resort to the preamble, to create an ambiguity, and then have recourse to the same preamble, to explain this ambiguity? It appears to me that this would be carrying the office of the preamble beyond anything heretofore contemplated, by giving it a paramount authority to the enacting part of the statute itself."

Nor is there anything in that case (Cooper Hospital v. Camden) which is inconsistent with the doctrine held by the Supreme Court in Quackenbush v. State, 57 N. J. Law, 18, at page 21, 29 Atl. 431, at page 432, wherein it was said:

"It is well settled that where the intention of the Legislature is clearly expressed in the purview or body of the act the preamble shall not restrain it, although it be of much narrower import. Sedgw. Stat. & Const. L. 43. The preamble cannot restrict the enacting clauses except where their language is ambiguous or uncertain. Pott. Dwar. Stat. 267; End. Stat. 82; 1 Kent, 460; Den v. Dubois, 16 N. J. Law, 285, 295."

Now, the enacting clause of chapter 35 of the Laws of 1909, omitting reference to existing law requiring safety gates to be down when trains are approaching and passing, reads as follows:

"1. Whenever any railroad company shall have assumed to establish and maintain what are known as safety gates at any railroad crossing in this state, and a person is killed or injured at any such crossing by being struck by a locomotive or train when attempting to cross the tracks at a time when such gates are not down, \* \* \* that in all such cases the question whether the person so killed or injured, upon attempting to cross such railroad crossing, at a time when the safety gates at such crossing are not down, was or was not guilty of contributory negligence shall be a question to be determined by the jury, in all actions brought to recover damages for such loss of life or personal injury."

The requirement referred to in the omitted portion of the above-quoted enacting clause reads as follows:

"Cause the same (gates) to be closed at least half a minute before any train may cross such highway and until such train shall have passed by."

Inserting this provision (which is contained in section 22 of the general railroad act) into chapter 35 of the Laws of 1909, instead of the reference to it contained in the statute, it would read as follows:

"1. Whenever any railroad company shall have assumed to establish and maintain what

are known as safety gates at any railroad crossing in this state, and a person is killed or injured at any such crossing by being struck by a locomotive or train when attempting to cross the tracks at a time when such gates are not down (at least half a minute before any train may cross such highway and until such train shall have passed by), that in all such cases the question whether the person so killed or injured, upon attempting to cross such railroad crossing, at a time when the safety gates at such crossing are not down, was or was not guilty of contributory negligence shall be a question to be determined by the jury, in all actions brought to recover damages for such loss of life or personal injury."

The only provision of the railroad law which authorizes a company to run its trains through a city at any rate of speed is section 22, 3 Comp. Stat. 1910, p. 4230, and reads as follows.

"Any railroad company may erect a fence or other enclosure around its stations so as to prevent persons other than passengers from coming near its trains, and may exclude from such enclosures all persons except travelers; where any railroad company in any city shall maintain along its roadway where the same may adjoin a public highway, a fence or embankment four feet high, sufficiently close and strong to prevent children and horses from going through the same, or where its tracks shall be laid in a cut at least four feet deep, and shall provide on each side of the track at any highway crossing in such city a gate of like height and sufficiency, and cause the same to be closed at least half a minute before any train may cross such highway and until such train shall have passed by, in such case it shall be lawful for such company to run its trains in said city over the portions of its railroad thus protected and over the portions not adjoining or crossing any highway, at such rate of speed as it deems proper, but in the absence of such protection and safeguard, the company shall be bound by lawful and reasonable municipal ordinances regulating the speed of its trains along streets and at crossings."

The enacting clause of chapter 35 of the Laws of 1909, which provides that when gates are not down as required by any statute giving a railroad the right to run its trains through an incorporated city at any rate of speed it may see fit, when read in connection with section 22 of the general railroad law, giving such right, provided the gates shall be closed at least half a minute before any train may cross the highway and until such train shall have passed by, makes the question of contributory negligence, when a person is injured or killed at such crossing when the gates are up, a jury question; the inference being that if the gates are up there is an invitation to persons to cross upon an assumption that there is no danger to be apprehended from an approaching train.

Gates at railroad crossings in cities are not the only ones provided for in the statute. By section 36 of the general railroad law it is provided that, whenever the governing body of any township or municipality shall so direct, an application shall be made to the Court of Chancery for an order that gates shall be erected across any one or more streets or highways where the same are

crossed by a railroad track at grade, and that a flagman shall be stationed there, or that some other reasonable provisions for protecting such crossing shall be adopted.

It may have been in virtue of proceedings under this section that the gates in question were installed, or the company may have "assumed" to establish and maintain them as mentioned in chapter 35 of the acts of 1909. Whatever the authority or reason for their erection, they must be operated, that is, raised and lowered, and, under chapter 35 of the Acts of 1909, must be down when a train approaches and passes a highway, in order to afford protection to the company for death or injury to persons.

[4] The Supreme Court, in *Wolcott v. N. Y. & L. B. R. Co.*, 68 N. J. Law, 421, 53 Atl. 297, decided that when a railroad company assumes to protect a highway crossing by a flagman it is responsible for injuries received at that crossing, by a traveler on the highway, which have resulted solely from the negligence of such flagman; and that responsibility exists notwithstanding that the company is under no legal obligation to so protect the crossing. It is the same in reference to gates voluntarily installed. And this was expressly provided in chapter 96 of the Laws of 1909 (P. L. p. 137). And we think that that act is also applicable in the case at bar. It provides:

"Whenever any railroad whose right of way crosses any public street or highway, has or shall install any safety gates, bell or other device designed to protect the traveling public at any crossing or has placed at such crossing a flagman, any person or persons approaching any such crossing so protected as aforesaid, shall, during such hours as posted notice at such crossing shall specify, be entitled to assume that such safety gates or other warning appliances are in good and proper order, and will be duly and properly operated unless a written notice bearing the inscription 'out of order' be posted in a conspicuous place at such crossing, or that the said flagman will guard said crossing with sufficient care whereby such traveler or travelers will be warned of any danger in passing over said crossing, and in any action, brought for injuries to person or property, or for death caused at any crossing protected as aforesaid, no plaintiff shall be barred of the action because of the failure of the person injured or killed to stop, look and listen before passing over said crossing."

The argument made by the respondent that, because there was no notice posted at the crossing in question specifying at what hours the gates were to be operated, the provision is not applicable, is unsound. To sanction such a view would, in effect, be to hold that a railroad company by failure, willful or otherwise, to observe the spirit of the act, and regard as a mandate that which is not enjoined in terms, but arises from the clearest implication, namely, that it shall post such notice at the given crossing, could defeat the beneficent purposes of the act.

As no notice was posted by the defendant at the crossing in question, giving information as to the hours when the gates were to

be operated, the company will not be heard to complain that a person passing over the railroad tracks at the crossing was not entitled to assume that the gates were in good and proper order and would be duly and properly operated, especially as there was no notice present bearing an inscription that the gates were out of order. This act may be said to be equally as strong for the plaintiff as the prior one, because it provides that in the situation in which this plaintiff's intestate found himself the action is not barred because of his failure "to stop, look and listen before passing over such crossing," while the former provides that whether he "was or was not guilty of contributory negligence shall be a question to be determined by the jury."

We also think that the facts of the case under consideration are clearly distinguishable from those present in *Lindsay v. Pennsylvania R. R. Co.*, 78 N. J. Law, 704, 75 Atl. 912. In that case the deceased was partially deaf, and therefore it was his duty in approaching a railroad track, before entering thereon, to rely especially upon his sense of sight. It appeared that he was familiar with the crossing and of the movement of the train, and that while in a place of safety, four feet from the first rail of the track, he had an unobstructed view in the direction in which the train came that struck him. But in the case under consideration the view of the deceased was obstructed by a line of freight cars which stood within five feet of the crossing, and it was only when he passed the line of the obstructing freight cars that he was enabled to see the approaching train. Although there was a space of eight feet and three inches between the extreme end of the rails of the tracks, that is, from the track upon which the freight cars stood and the track upon which the train approached, we think that the circumstance that he was on a railroad track, a place of danger, without warning by the railroad company, a jury question was presented, whether the deceased, in proceeding onward, acted, under all the circumstances, with that degree of care and prudence which an ordinarily prudent person would have exercised under like circumstances.

[5] Aside from the question of contributory negligence, the defendant-respondent urges sustaining of the Supreme Court's decision because of alleged error in the trial judge's charge with respect to the measure of damages. That portion of the charge excepted to on the question of damages is as follows:

"You have to say in your best judgment, if you come to the question of damages, what capital sum—which is your verdict—whatever it may be, would represent the money which his mother had a reasonable expectation of receiving from him during the term of her natural life, and it would seem from the evidence in this case that she did not get over \$6 per week. You have to say how many weeks you think she had a reasonable expectation of re-

ceiving that, and then capitalize that in a fixed sum, and let that be your verdict."

In this instruction the judge told the jury that their verdict should be the capital sum which "would represent the money which his mother had a reasonable expectation of receiving from him during the term of her natural life, and it would seem from the evidence in this case that she did not get over six dollars per week."

Defendant's counsel argues that this comes under the ban of this court's decision in *Hackney v. Del. & Atl. Tel. Co.*, 69 N. J. Law, 835, at page 837, 55 Atl. 252, where Justice Fort said, speaking of the verdict in that case:

"That was giving to the widow and next of kin as a present value the whole amount which the jury might find the intestate, had he lived, would have given to the widow and next of kin, in installments, at future periods, during the whole of his life. Such an instruction does not take into account the fact that the widow and next of kin will come into the present possession of the fund with the future income thereof. What the plaintiff is entitled to recover is a 'capital fund' (so to speak) which shall represent the present value of all the pecuniary loss which will fall upon the widow and next of kin by the premature taking off of the intestate."

If any vice inheres in the first sentence of the portion of the charge excepted to, it may be said to be cured by the second sentence which was:

"You have to say how many weeks you think she had a reasonable expectation of receiving that, and then capitalize that in a fixed sum, and let that be your verdict."

This was equivalent to saying that the jury should say how many weeks they thought the mother had a reasonable expectation of receiving from decedent \$6 or less—the jury fixing the number of weeks and the sum per week—and that the sum so ascertained should be capitalized.

True, the trial judge did not define the word "capitalize" as applied to the measure of damages with which he was dealing. Counsel for the defendant give the definition of "capitalize" from the *Standard Dictionary*, including: "(2) to convert (a periodical payment) into a sum in hand."

If the jury understood the meaning of the word "capitalize" as thus defined, and they are presumed to have so understood it, then they were given a technically correct, though not luminous, instruction.

The defendant did not prefer any requests to charge as to the law of damages, and relies solely upon the exception to the charge as delivered. We think the instruction is not reversible error.

[6] Defendant also urges that the Supreme Court's judgment should be sustained because there was error in the trial court's overruling an inquiry as to the earnings of the plaintiff's second husband, claiming that that would tend to show that plaintiff's pecuniary loss would not be as great as if her deceased son were her sole support. The



question which was asked and overruled was this: "Q. 'He (referring to plaintiff's husband) makes good wages, doesn't he?'"

If the question had been directed to showing how much the plaintiff's second husband contributed toward her support, it doubtless would have been error to overrule it; but the overruling of the introductory question could not in and of itself have been harmful to the defendant.

The other alleged errors we think unsubstantial. The judgment of the Supreme Court should be reversed, to the end that the judgment of the circuit court shall stand.

(83 N. J. Eq. 459)

**BOLLSCHWEILER v. PACKER HOUSE HOTEL CO. et al. (No. 37-191.)**

(Court of Chancery of New Jersey. Oct. 1, 1914.)

**1. CORPORATIONS (§§ 464, 467\*)—PROMISSORY NOTE—ACCOMMODATION PAPER—ULTRA VIRES ACTS.**

Where a corporation acquires the business and capital stock of another corporation and gives its note in exchange for notes of the former corporation, secured by stock in the new corporation, for which the holder exchanged the stock of the old corporation, which he had held as collateral for former notes, the note so given is neither accommodation paper nor ultra vires notwithstanding an agreement between the holder of the note and certain officers of the new corporation that when the note is paid the stock should become the property of those officers.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1820, 1821, 1828, 1831; Dec. Dig. §§ 464, 467.\*]

**2. CORPORATIONS (§ 377\*) — PURCHASE OF STOCK IN OTHER CORPORATION—CONSTRUCTION OF STATUTES ADOPTED AT SAME SESSION.**

The provision of P. L. 1913, p. 82, excepting from a prohibition of purchases of corporate stock by another corporation purchases authorized by the Corporation Act, applies to the purchase by a corporation of stock necessary for its business, authorized by act of the same date (P. L. 1913, p. 28) which amended section 49 of the Corporation Act (P. L. 1896, p. 293).

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1531-1534; Dec. Dig. § 377.\*]

**3. CHATTEL MORTGAGES (§ 192\*)—RECORDING—TIME—STATUTORY REQUIREMENTS.**

Where a chattel mortgage was given to secure the payment of notes executed and delivered on the same day as the mortgage, and also the payment of other sums which might become due under the terms of an agreement between the parties, which agreement was drawn at the time of the execution of a chattel mortgage, but sent to the other parties thereto to be signed by them, and was returned two days later to the attorney who had drawn the papers, at which time the certificate of the authority of the notary who took the acknowledgment was also received, the failure to record the mortgage until the fifth day after its execution, whether it be regarded as delivered on the date of its execution or as delivered in escrow then to become effective upon the execution of the contract, rendered it invalid against those who became creditors prior to the recording thereof, under 1 Comp. St. 1910, p. 463, § 4, requiring the immediate recording of a mortgage, which is construed to require recording as quickly as the

nature of the case will permit, although the mortgage would be valid against creditors who became such after it was recorded.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 434-437; Dec. Dig. § 192.\*]

**4. CHATTEL MORTGAGES (§ 192\*)—RECORDING—TIME—STATUTORY REQUIREMENTS.**

The fact that the delay was occasioned by the unexpected absence of the attorney from his office on other legal matters does not render the mortgage valid, since a reasonable explanation for the delay does not satisfy any statutory requirement for immediate record.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 434-437; Dec. Dig. § 192.\*]

**5. CHATTEL MORTGAGES (§ 192\*)—RECORDING—TIME—STATUTORY REQUIREMENTS.**

Even if it be held that the contract did not become effective until its execution was approved by the attorney, the delay of one day in recording the mortgage after the return of the attorney was, under the circumstances, a failure to comply with the statutory requirement for immediate record.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 434-437; Dec. Dig. § 192.\*]

**6. CHATTEL MORTGAGES (§ 90\*)—RECORDING—AFFIDAVIT.**

If the contract was so essential to the mortgage that the latter did not become effective until the execution of the former, the affidavit for the recording of the mortgage, which mentioned the other consideration, but made no mention of the contract, was defective under 1 Comp. St. 1910, p. 463, § 4, requiring such affidavit to set out the consideration of the mortgage and as nearly as possible the amount due and to become due thereon.

[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. §§ 168-173; Dec. Dig. § 90.\*]

Suit by Albert Boltschweiler against the Packer House Hotel Company and others for the appointment of a receiver for an insolvent corporation. Appeal from the determination of the receiver allowing and disallowing certain claims against the corporation. Determination of receiver sustained in part and in part overruled.

Joseph E. Stricker, of Perth Amboy, for receiver. John A. Coan, of South Amboy, and James S. Wight, of Perth Amboy, for exceptant Peterson. T. H. Brown, of Jersey City, for exceptant Taylor.

EMERY, V. C. I will state briefly the conclusions reached on the hearing of the appeals on the claims of Mallon and Taylor.

[1, 2] 1. The claim of William P. Mallon as allowed by the receiver must stand. The notes of the insolvent corporation on which it is based are not, as claimed by the exceptants, accommodation paper. They were given partly in consideration of the surrender by Mallon of notes of equal amount of the Packer House Company, which latter company at the same time conveyed to the insolvent corporation all its assets by bill of sale. The fact that it was also part of the consideration that the stock of the Packer

House Company held by Mallon was to be transferred to the purchasing company and made in part the basis for issuing its own stock to equal amount, and that this new stock of the purchasing company was to be delivered to Mallon as security for the notes of the purchasing company, does not make the paper accommodation paper. This purchase of the stock of the vendor company, under the act of February 19, 1913 (P. L. 1913, c. 15, p. 28), amending the forty-ninth section of the corporation act, may be held to be not full-paid stock under the first proviso of that section; but that question is not now an issue. That act amends the section of the corporation act which made the judgment of the directors as to value conclusive as to the value of the stock purchased, in the absence of fraud. The subsequent act of the same year (chapter 18, p. 32), prohibiting purchases of stock, expressly excepts purchases authorized by the corporation act. This will include supplements thereto then in force, and include chapter 15 of the same date, authorizing purchases of stock necessary for its business.

The transaction as disclosed by the evidence was substantially the taking over by bill of sale and delivery of possession of the entire assets and property of the Packer House Company, and, in connection with it, its entire capital stock, by the new company which was organized for the purpose of taking it over and continuing the business, and as part of the consideration gave its notes to a creditor of the vendor company, who was entitled to follow and hold its assets for payment. He surrendered to the new company the notes evidencing his claims as creditor of the old company on receiving from the new company its notes for the same amount. Its notes in his hands are therefore not accommodation. The circumstance that, when these notes of the new company were given for the debts of the old company, stock in the new company was given to Mallon as collateral to an amount equal to the stock of the old company, and which he also held as collateral and surrendered, and the further circumstance that by the provision of an agreement signed by Mallon, the new company and Brevoul, one of its officers, it was agreed that on the payment of these notes of Mallon by the company the stock of the new company held as collateral should be the joint property of Bollschweiler and Brevoul, may, either on the evidence at the hearing or when the question comes to issue, raise the question as to whether this stock in the hands of Brevoul and Bollschweiler is fully paid. But Mallon received the stock of the new company only as collateral, and, in view of the whole evidence given on the appeal as to the circumstances under which the notes were given, this agreement does not, as against him, have the effect insisted on so strenuously by complainant's counsel, of making the new company's notes in Mal-

lon's hands either accommodation or ultra vires paper.

2. The claim of John S. Taylor is also founded in part upon notes of the new company given to him upon the surrender of notes of the old company upon the transfer of its assets to the new company, and in part (\$400) for notes of that amount given to Mallon and transferred to him. The receiver has allowed only the latter amount disallowing the balance of his claim. For the reasons stated in reference to the Mallon claim, Taylor's claim should be allowed to the full extent of the notes of the old company surrendered to the new company on the transfer.

As Mr. Taylor, however, was the principal stockholder of the old company and on the transfer to the new company was one of the three persons to whom the entire stock of the new company (\$19,000) was issued as fully paid stock for the purposes of the transfer, a question may hereafter arise whether the stock thus issued to Taylor is full-paid stock, and whether as holder of unpaid stock he is liable to assessment for payment of the debts of the insolvent company, and whether any amount for which he is so liable should not be set off against his claim. On this proceeding the only question is the validity and amount of the claim.

[3] 3. Claim of John N. Peterson: The amount and validity of this claim as a claim against the company for \$6,478.25 is not disputed, but it is secured by a chattel mortgage, and its preference as against Mallon and Taylor, who became creditors on March 1, 1913, and before it was recorded on March 6, 1913, and who seem to be the only creditors of this kind, is disputed. As against creditors who became such subsequent to the recording, the mortgage is preferred. *Roe v. Meding*, 53 N. J. Eq. 350, 369, 30 Atl. 587, 33 Atl. 394 (Err. & App. 1895). The statute (1 Comp. St. p. 463, par. 4) requiring "immediate delivery" of the mortgaged chattels, or the "recording" as directed by the act as construed in *Roe v. Meding*, supra, 53 N. J. Eq. 368, 30 Atl. 587, 33 Atl. 394, means "immediate possession" or "immediate recording." There was a further declaration (Van Syckel, J., 53 N. J. Eq. 359, 33 Atl. 395) that "immediate" means "as soon as may be by reasonable dispatch under the circumstances of the case"; and in subsequent cases, both in the Supreme Court and in this court, this construction of the meaning of the term "immediate" as given in *Roe v. Meding* was adopted. *Hardcastle v. Stiles*, 69 N. J. Law, 551, 55 Atl. 104 (1903), affirmed, for reasons stated, 70 N. J. Law, 828, 59 Atl. 1117; *Brockhurst v. Cox*, 71 N. J. Eq. 703, 64 Atl. 182 (Garrison, V. C., 1906), affirmed on appeal 72 N. J. Eq. 950, 73 Atl. 1117; *Gulden v. Lucas*, 81 N. J. Eq. 106, 85 Atl. 902, 903 (Garrison, V. C., 1913).

The chattel mortgage in question given by the Packer House Hotel Company to Pabst

Brewing Company and John N. Peterson was dated March 1, 1913, and conveyed all the chattels then in the hotel known as the Packer House in Perth Amboy, or to be afterwards added to or substituted for these chattels. These were the chattels which had been purchased by bill of sale from the Packer House Company, executed and delivered on the same day to the Packer House Hotel Company, in connection with the delivery of the notes on this purchase, above referred to, which also took place on the same day, but was a separate and independent transaction. Pabst Brewing Company and Peterson supplied the money which was paid on the purchase, and this chattel mortgage was given in part to secure them for the money advanced in cash, which was paid over that day to the vendors, who at the same time received the new company's notes in substitution for the old company's notes as above stated. Mallon and Taylor do not appear to have had any knowledge of the proposed mortgage given to secure the money advanced to make the cash payments to them on the transfer. On the day of executing the mortgage, an affidavit as to its consideration was taken by Peterson, in which this consideration is stated to have been "\$4,000 thereof money actually loaned by the mortgagees in order to enable the mortgagor to pay part of the purchase price of the property herein described. The remaining \$4,000 to secure the mortgagee, Peterson, for his indorsement of a note made by the Packer House Hotel Company and discounted with the First National Bank of Perth Amboy, N. J., in order to raise additional funds to meet the balance of the purchase price for the property herein described," and "that there is actually due on the mortgage \$4,000, and in the event of the failure of the mortgagor to pay the note indorsed by Peterson, then the additional sum of \$4,000 will be due, making in all the sum of \$8,000." There was no reference in the affidavit to any other consideration of the mortgage. The mortgage itself, however, is by its term conditioned not only for the payment of the sum of \$8,000, on demand with interest, but is also upon condition that the mortgagor "pay all other sums which may be due or become due by it to the parties of the second part, or either of them, for merchandise sold to it by either of them, and shall also fully comply with the terms of an agreement between the parties, bearing even date herewith, for the sale of Pabst beer and other merchandise exclusively." This agreement is only referred to, but is not set out, in the mortgage, and the affidavit does not refer to it as constituting part of the consideration. It appears by the evidence that such an agreement to be executed in triplicate was drawn at the time of the execution of the mortgage, signed by the mortgagor and Peterson, and was to be signed by the Brewing Company. The mortgage and contracts were left with

Mr. Gilbert, the attorney of the brewing company, who acted for them in arranging the contract. The papers were left with him at his office in New York upon their execution on Saturday, March 1, 1913. After the execution of the mortgage and contracts, Mr. Gilbert, being satisfied that the brewing company would approve, delivered checks for the money to be advanced by the brewing company on account of the purchase price on the transfer from the old company to the new company, and this transfer was completed independently and subsequently on the same day. The execution of the mortgage took place on Saturday after the closing of the public offices, and Mr. Gilbert, before whom as notary public the affidavit as to the consideration of the chattel mortgage had been taken, gave directions for procuring this certificate on the Monday following, and also on Saturday mailed to the Pabst Brewing Company in New York the contracts for their execution and return to him in New York. On Sunday Mr. Gilbert was called to Albany to attend to a case in the Court of Appeals of New York, and at the time expected to return on Monday. On Monday, March 3d, the brewing company, by its letter of that date, returned two signed copies of the contract to Mr. Gilbert's office. Whether this letter was received on March 3d or March 4th does not appear. On March 3d the certificate of the county clerk to Mr. Gilbert's notarial authority was also received at his office. Mr. Gilbert was unexpectedly detained at Albany and did not return to his office until Wednesday, March 5th. He does not seem to have given, either before leaving for Albany or while there, any directions as to the forwarding of the chattel mortgage for record after procuring the clerk's certificate, and the return of the contracts executed. The transaction had been under his exclusive charge and the chattel mortgage with the contract remained in his office until his return on March 5th, and on that day he sent the chattel mortgage by mail to the county clerk of Middlesex county, where it was received and recorded on March 6th, at 8 a. m.

Five days thus elapsed between the execution and the recording of the mortgage, and treating the direction of the statute as to "immediate recording" to mean as declared by V. Ch. Pitney in *Roe v. Meding*, 53 N. J. Eq. 358, 359, 368, 80 Atl. 587, 590, "as quickly as the circumstances of the case and the character of the chattels will permit," or as declared by the Appellate Court in the same case to be, "as soon as may be by reasonable dispatch under the circumstances of the case," the question of fact to be decided is whether, applying this test, the chattel mortgage, under the circumstances of the case, was "immediately recorded" as required by the statute. On the part of the mortgagee, it is claimed that the original delivery of the mortgage on Saturday, March 1st, to Mr. Gil-

bert, was in escrow only; that the mortgage, as appears by the terms of it, was to secure not only the payment of money, but the performance of a written agreement therein referred to; that this agreement did not become effective until the agreement itself was signed by Pabst Brewing Company and not until after its execution had been approved personally by Mr. Gilbert, in whose hands the chattel mortgage had been left in escrow; that, as he had no opportunity to give his approval until his return on March 4th, the question as to delay is reduced to the delay of a single day in sending the mortgage by mail from New York.

[4] And it is further insisted that the unexpected delay in not sending the mortgage on Monday, March 3d, has been reasonably explained, and that under the decisions such reasonable explanation of the delay in recording satisfies the statute. In my judgment, the contention that delay "reasonably explained" satisfies the statute cannot be allowed. The statute itself requires "immediate" recording, and, as construed by the courts, recording "as soon as may be with reasonable dispatch under the circumstances of the case." This is a different statutory rule from "immediately recording, unless the delay be explained." The delay may be explained, and this explanation may be entirely satisfactory, as it is in this case, so far as the parties to the mortgage and their attorney, to whom it was delivered for record, are concerned. But that is an entirely different question, I take it, from whether, as between the creditors of the mortgagor and the mortgagee, the mortgage was, under the circumstances of the case, recorded either as quickly as the circumstances permitted, or with reasonable dispatch. Circumstances of the case which, among others, have a bearing on the question of "reasonable dispatch," are these: The mortgaged chattels, owned by a New Jersey corporation and located in New Jersey, were conveyed to the mortgagor on March 1st by bill of sale delivered in New York City, at the office of a New York attorney, and the notes representing part of the purchase money, or arising out of the purchase, were then delivered to the creditors, who became creditors of the mortgagor on that date, and without, so far as it appears, any knowledge as to a proposed mortgage to be given on the property sold, to secure the payment of portion of the purchase money paid on the transfer to the person or persons who had advanced it for the mortgagee. The chattel mortgage was executed and acknowledged on March 1st, but in New York and before an officer of that state, which required a delay of at least a day for procuring an official certificate to the acknowledgment. The additional delay in recording or sending for record arose by reason of the New York attorney's engagements in the courts of New York. While this explains the delay, it does

not, in my judgment, as against these creditors, make the recording or sending for record after this delay, either an "immediate recording" as the express terms of the statute require, or a recording "as soon as may be" or "with reasonable dispatch," as construed by the courts.

In the cases referred to by counsel, as adopting by construction the qualification "unless the delay is explained," it appears that *prima facie* the delay in recording was such as to preclude its being considered as an "immediate recording," and the fact that no explanation was given was referred to, not by way of importing a qualifying clause into the statute, but by way of confirming the conclusion justified by the facts which did appear. This seems to be the express declaration in these cases relied on. *Dunham v. Cramer*, 63 N. J. Eq. 151, 158, 51 Atl. 1011 (Grey, V. C., 1902); *Brockhurst v. Cox*, 71 N. J. Eq. 703, 706, 64 Atl. 182 (Garrison, V. C., 1906).

Treating the case as one where the delivery of the mortgage was suspended until the execution of the contract by the brewing company, this took place on March 3d, on which day also the clerk's certificate was procured. The agreements were to be executed in triplicate. On Saturday Mr. Gilbert mailed all three copies (executed by the hotel company and Peterson) to the brewing company, who were to execute all three, and, as appears by the brewing company's letter to Mr. Gilbert of March 3d, to return only two of them to him. The brewing company apparently retained the third copy, and on the mailing of the two signed copies to Mr. Gilbert, for delivery to the other parties, the contract was complete. The retention of the chattel mortgage from record or the failure to send it for record either by mail or messenger on the morning of the 4th was due to the retention of all the papers in Mr. Gilbert's office, pending his return, and his apparent failure or omission to give any directions in relation to the matter during his unexpected absence. He intended and expected, as he says, to be at his office on Monday, and had he been there the mortgage would undoubtedly have been sent or mailed on the 3d or the morning of the 4th. Delay beyond this time, under all the circumstances proved in this case, seems to me to have been a failure to record the mortgage either "as soon as may be" or with "reasonable dispatch." The fact that our courts allow "reasonable dispatch" under the circumstances to be treated as "immediate recording" under the words of the statute, and have thus by construction extended its terms to a reasonable limit, requires, I think, that in the application of the statute, under this construction, we should continue to keep in mind that the language to be construed is still the direction for "immediate recording," not these words as qualified by an express statutory direction for "reasonable dispatch,"

or "unless the delay is explained," leaving these expressions to be construed and applied to subsequent cases, as being likewise statutory provisions. The original words of the statute are to be kept in view as the rule or standard to be applied in each case, and, in giving a "reasonable" application of them to the circumstances of each case, their force and effect must not be practically destroyed by a liberal construction of "explanations of delay." These "explanations of delay," so far as creditors protected by the recording act are concerned, must be equivalent to proof that the recording was "with all reasonable dispatch."

[5] The mortgagee's counsel insists strenuously that the mortgage did not become effective until the contract to be signed by the brewing company was personally approved by Mr. Gilbert, and that this would not have taken place until March 4th on his return. Assuming this to be proved in the case, this would still make a delay until the 5th, and apparently a late mail on that day, and this delay of a day, in my judgment, was a failure to record with reasonable dispatch within the terms of a statute for "immediate recording." And as to the delivery of the mortgage in escrow until after Mr. Gilbert's personal approval of the execution of the contract by the brewing company, no direct proof of any such understanding between the parties, that Mr. Gilbert should personally approve the formal execution of the contract by the brewing company, appears in the case. And although it may have been expected by the mortgagors, as well as Mr. Gilbert himself, that it would be approved by him, yet it appears by his evidence that the substantial matter awaiting the delivery of the mortgage was the approval by the brewing company of the terms of the contract, which, as Mr. Gilbert says, had been agreed on after much discussion, and which had been in a measure finally settled by him, on behalf of the brewing company, but without an opportunity for consultation with them. If the terms were approved, the formal execution and its correctness was a matter entirely within the routine duties of the officers of the company. The contracts were prepared to be signed only by the secretary, the officer who usually affixes the seal, and the formal execution was also a matter as to which any member of Mr. Gilbert's firm could pass on in his absence. There is nothing to indicate, in my judgment, that after the brewing company had in fact actually mailed the contract, properly executed on their part, the chattel mortgage was still to be considered as held in escrow by Mr. Gilbert for his personal approval of the execution by the company.

[6] But, assuming that it was so held, and that this chattel mortgage did not become valid by delivery until after the formal approval by Mr. Gilbert personally of the

execution of the contract, then, on the evidence, a further and apparently a fatal objection to the validity of the chattel mortgage under the recording act appears. This contract between the parties was expressly referred to in the chattel mortgage as one of the conditions thereof, and, on the theory that the mortgage was not valid until the execution and delivery of the contract, the contract clearly became part of the true consideration of the mortgage. It was not, however, set out in the mortgage itself, nor was it referred to in the affidavit as making up any part of the consideration of the mortgage. The mortgage treats the advance of money as the sole consideration of the mortgage. If this contract was such an essential part of the transaction that the validity of the mortgage depended on its delivery, then, as it now seems to me, either the contract or its substance and effect should have been set out in the affidavit as to consideration. Under the statute (1 Comp. St. 463, par. 4) the affidavit must set out "the consideration of said mortgage and as nearly as possible the amount due and to grow due thereon." If the execution of the contract was so essential to the validity of the mortgage as to entitle the mortgagee under the statute to the benefit of at least two days delay against the creditors for the purpose of procuring it, it would seem that it must be considered as so much a part of the consideration of the mortgage as to entitle them to have set it out in the affidavit.

The chattel mortgage must be held not to be a preferred claim against the creditors of the company whose claims arose prior to its recording.

(86 N. J. L. 558)

TROTH v. MILLVILLE BOTTLE WORKS.  
(Supreme Court of New Jersey. Oct. 9, 1914.)

(*Syllabus by the Court.*)

1. MASTER AND SERVANT (§ 87½, New, vol. 16 Key-No. Series)—EMPLOYERS' LIABILITY ACT —EMPLOYMENT OF MINORS—NOTICE.

When section 2 of the Employers' Liability Act (P. L. 1911, p. 134) is not intended to apply to the employment of minors, the notice must be given by or to the parent or guardian of the minor; a notice posted in the works or by means of the pay envelope does not suffice.

2. MASTER AND SERVANT (§ 16½, New, vol. 18 Key-No. Series)—EMPLOYERS' LIABILITY ACT —CONSTITUTIONALITY.

The act, as applied to pre-existing contracts, is constitutional.

Certiorari to Court of Common Pleas, Cumberland County.

Certiorari by Edgar L. Troth against the Millville Bottle Works, to review an order on defendant to pay petitioner a certain sum under the Employers' Liability Act. Judgment affirmed.

Argued June term, 1914, before TRENCHARD, BERGEN, and BLACK, JJ.

Louis H. Miller, of Millville, for prosecutor. Wescott & Wescott, of Philadelphia, Pa., for defendant.

**BLACK, J.** This writ of certiorari brings before the court for review an order made by the judge of the Cumberland court of common pleas on the 17th day of February, 1914, by which he ordered the defendant to pay to petitioner the sum of \$5 per week for 100 weeks, or a total of \$500, under the act known as the Employers' Liability Act (P. L. 1911, pp. 134, 763). The record discloses these facts: The petitioner became an apprentice to the defendant, as a mold maker, on the 25th day of September, 1909, prior to the passage of the act by the Legislature. He was injured by a blow in the eye on December 22, 1911. At the time of the injury the petitioner was 18 years of age. The prosecutor urges six points for setting aside the order of the court below, which may be grouped under three heads: First, the employer had no notice of the injury; second, the employer had given notice to the employé of the fact that it would not be bound by section 2 of the act; and, third, the act is unconstitutional.

[1] As to the first, it is sufficient to say that there is evidence to support the conclusion of the trial court, and this court will not reverse on that ground. On the second point, the notice relied upon is as follows:

**"Employés Take Notice.**

"The provisions of section 2 of the New Jersey Employers' Liability Act, approved April 4, 1911 (Chapter 95, Laws of 1911), are not intended by this corporation to apply to its contract of hiring with you.

"Millville Bottle Works."

This notice was posted around the works and given through the medium of the pay envelope. The difficulty with this notice is that it is not in compliance with the statute. Section 9 of the statute provides, that:

"In the employment of minors, section II shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor."

This was not done.

[2] On the third point—the constitutionality of the act—this court held, in the Sexton Case, 84 N. J. Law, 85, 86 Atl. 451, affirmed in the Court of Errors and Appeals in Sexton v. Newark District Telegraph Co., 86 N. J. Law, —, 91 Atl. 1070, that the act was constitutional, when applied to contracts made after the passage of the act. As to pre-existing contracts, the act is also constitutional, as was said by the Supreme Court of Wisconsin in construing an act of that state. This is not a compulsory law; therefore the question is not whether the act offend against the state and federal Constitutions, which guarantee all citizens against the deprivation of property without due process of law. That was the question decided in the

affirmative by the New York Court of Appeals in the celebrated case of *Ives v. South Buffalo Railroad Co.*, 201 N. Y. 271, 94 N. E. 431, 34 L. R. A. (N. S.) 162, Ann. Cas. 1912B, 156, and in the negative by the Supreme Court of Washington in *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 153, 117 Pac. 1101, 37 L. R. A. (N. S.) 466.

In the present case the petitioner was employed under a contract of service made prior to the passage of the law, and which did not expire until the 25th day of September, 1913. It is urged that the act, as applied to pre-existing contracts, is unconstitutional, as impairing the obligation of contracts. This view is not sound, for the reason stated by Chief Justice Winslow of the Supreme Court of Wisconsin in the case of *Borgnis v. Falk Co.*, 147 Wis. 327, 133 N. W. 209, 37 L. R. A. (N. S.) 489:

"The right to bring an action in the future in case of a possible tort not yet committed is no part of the contract of employment. That right arises out of the relation of employer and employé, and is subject to change by the law-making power at any time. The employer does not contract that it shall remain intact. There is no vested right in a mere remedy for a hypothetical wrong. At most, the law cannot be said to do more than change the remedy for a tort which is yet to happen, and may never happen. The Legislature may change the remedies for torts yet to be committed at any time, and such changes cannot be said to make any change in mere contracts of service existing between the parties. This seems very patent."

The judgment of the Cumberland common pleas is affirmed.

(96 N. J. L. 505)

**SABELLA et al. v. BRAZILEIRO.**

(Supreme Court of New Jersey. Oct. 1, 1914.)

(Syllabus by the Court.)

**MASTER AND SERVANT** (§ 87½, New, vol. 16 Key-No. Series)—"**CASUAL EMPLOYMENT.**"

An employment is not "casual," within the meaning of that term as used in the so-called "Employers' Liability Act" (Act April 4, 1911 [P. L. p. 134]), where one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of the continuance for a reasonable period.

**Certiorari to Court of Common Pleas, Hudson County.**

**Certiorari by Emilia Flaumela Sabella and others against Lloyd Brasileiro.** Judgment affirmed.

Argued June term, 1914, before **TRENCHARD, BERGEN, and BLACK, JJ.**

**McDermott & Enright, of Jersey City, for prosecutors.**

**BERGEN, J.** This cause was submitted on such briefs as should be filed within the time prescribed by the rules of this court, and we have not been favored with any on behalf of the defendant in certiorari. A paper was filed by a person who claims to be an attorney at law, but he appears to be ignorant of the rule observed in this court

that only those who have been admitted as counselors of this court are permitted to appear and argue causes before it. A brief filed in this court by one who has not been admitted to the degree of counselor at law will not be considered. *Hazard v. Phoenix Co.*, 78 N. J. Eq. 568, 80 Atl. 456.

This dispute requires the determination of two questions raised under the statute commonly called the Employers' Liability Act (P. L. 1911, p. 134): (a) Was the contract of employment made in New Jersey? (b) Was the employment of the deceased casual? The trial court found that the contract was made in this state, and that the employment was not casual, and awarded to the next of kin compensation as provided by the statute. On the first point there was evidence that the deceased was a longshoreman, and had frequently been employed by the prosecutor to assist in loading and unloading its ship; it being a foreign corporation engaged in shipping between the port of New York and different ports of the Republic of Brazil, owning and sailing a number of ships for such purpose; that all longshoremen are paid by the hour for the term of service; that prosecutor's foreman told deceased in Brooklyn, N. Y., to go to Jersey City, as they had a ship in dock, and deceased went there, was set to work, and within two hours the accident happened which caused his death; that the time for which deceased was to be paid did not begin to run until he was set at work in Jersey City; that the prosecutor was under no liability to pay unless deceased was set to work, nor was it bound to employ him after he reached Jersey City. We think there was evidence to sustain the finding that the contract was entered into when the deceased was put to work and not until then, and, as he was not really engaged until after he reached Jersey City, the contract was made in this state. As to the other point, the evidence shows that deceased was justified in the expectation that the employment would continue at least until the ship was loaded or so long as his services were required for that purpose. While this class of work was not constant, depending upon there being a ship of the prosecutor in port, it appears that the deceased was frequently called upon by the prosecutors to serve them in this particular character of work, being one of a class of stevedores ready to respond when called. We think this supports the finding that the employment was not "casual" within the meaning of the word as expressed in the statute. The ordinary meaning of the word "casual" is something which happens by chance, and an employment is not casual—that is, arising through accident or chance—where one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of its continuance for a reasonable period.

In our opinion, the trial court correctly disposed of the questions argued on the return of the writ allowed in this cause, and the judgment is therefore affirmed, with costs.

(86 N. J. L. 507)

### VERMULE v. VERMULE.

(Supreme Court of New Jersey. Oct. 1, 1914.)

(Syllabus by the Court.)

#### DEPOSITS IN COURT (§ 11\*)—APPLICATION—INTEREST.

Where the complainant, in a bill to restrain the collection of a personal judgment against him, deposits money with the clerk of the court for the indemnity of the judgment creditor enjoined, and upon dismissal of his bill it appears that the deposit is not sufficient to fully satisfy the judgment, with interest at the legal rate, because the rate allowed and collected by the clerk on such deposit is less than the legal rate, such loss of interest must be borne by the depositor, and the judgment creditor is only required to credit on his judgment, as interest, the amount paid to him by the clerk on account thereof.

[Ed. Note.—For other cases, see *Deposits in Court*, Cent. Dig. § 12; Dec. Dig. § 11.\*]

Bill by John D. Vermule against Cornelius C. Vermule. Bill dismissed, and rule to show cause why execution or costs should not be stayed discharged.

See, also, 89 Atl. 535.

Argued June term, 1914, before TRENCHARD and BERGEN, JJ.

Robert H. McCarter, of Newark, for the rule. Lindabury, Depue & Faulks, of Newark, opposed.

BERGEN, J. The plaintiff recovered a judgment against the defendant in a personal action, who filed a bill in chancery praying an injunction to restrain its collection. Before such injunction can issue, under the statute (C. S. vol. 1, p. 434, § 64), the defendant is required to deposit the full amount of the judgment, or give a bond conditioned to pay the judgment and interest if the bill be dismissed. The defendant deposited the amount due on the judgment, instead of giving bond, with the clerk in chancery. The bill was subsequently dismissed, and the decree ordered the clerk to pay to the defendant or his solicitors the sum "deposited with the said clerk in the above entitled cause on or about August 1, 1906, as a condition of staying execution together with all accumulations of interest thereon, less the clerk's commissions under the rules and practice."

The interest collected and allowed was at the rate of 3 per cent., and the plaintiff, crediting the amount received on the judgment, now proposes to collect by execution the difference between the amount so received and the amount that would be due if interest be charged at the legal rate, namely 6 per cent. The defendant obtained a rule to show cause why execution should not be

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

stayed and the judgment declared paid and satisfied, which rule it is now moved be made absolute upon the ground that the deposit and its acceptance by the plaintiff absolves the defendant from further payment. We do not consider that a deposit made with the clerk, in order to obtain an injunction, amounts to a satisfaction of the debt. It is a security required by the statute, and if not sufficient, does not estop the plaintiff from demanding whatever is due after applying the security.

We are not able to distinguish this case in principle from *Carpenter v. Easton & A. R. R.*, 28 N. J. Eq. 390. The plaintiff was deprived of the use of his money by the action of the defendant in obtaining the injunction; some one must suffer, and it should be the party who caused the loss.

The rule will be discharged.

(86 N. J. L. 486)

**CONNOLLY v. SMITH, Collector, et al.**

(Supreme Court of New Jersey. Oct. 1, 1914.)

**MANDAMUS (§ 121\*)—RIGHT TO RELIEF—TIME OF APPLICATION.**

Under School Act (4 Comp. St. 1910, p. 4787) § 185, as amended by P. L. 1912, p. 507, providing that in a municipality the custodian of school moneys is the collector when so designated by the board of education, otherwise the person designated by law as the custodian of moneys of the municipality, and that, if the term of office of such person expires before the close of the school year, he shall continue as such custodian until the close of the then current school year, under 4 Comp. St. 1910, p. 5577, § 15, providing for the appointment of a township treasurer to have the custody of the township moneys, and under 4 Comp. St. 1910, p. 5571, § 6, providing that the term of office of all appointive officers in the township shall end on the second Saturday after the next annual township election, a township treasurer whose term as such expired in March, 1914, and who had been appointed custodian of the school moneys for the year ending June 30, 1914, is not entitled, after June 30th, to a mandamus to compel the payment to him of the balance of school money collected on the 1913 tax, since he was not then the legal custodian of such moneys; and mandamus will not issue unless the right to relief is clear at the time of the award.

[Ed. Note.—For other cases, see *Mandamus*, Cent. Dig. § 255; Dec. Dig. § 121.\*]

Mandamus by William J. Connolly, relator, against Elbert M. Smith and others. On rule to show cause why mandamus should not issue. Issuance of writ denied.

Argued June term, 1914, before SWAYZE, PARKER, and KALISCH, JJ.

Addison Ely, Jr., of Rutherford, for relator. Luther Shafer, of Rutherford, for defendants.

**PARKER, J.** The relator, claiming to be custodian of school moneys of the township of Union, in the county of Bergen, seeks to enforce by mandamus the payment to him as such custodian of a balance of \$5,027.50 school money raised by taxation in 1913.

This payment, by section 95 of the School Law (4 C. S. p. 4755), is obligatory on the collector of the taxing district.

The writ is resisted on several grounds, the first of which is that relator is not de facto or de jure the custodian of school moneys. To be entitled to such writ he must at least be custodian at the time it issues. *Silverthorne v. Warren R. R. Co.*, 33 N. J. Law, 372. We proceed, therefore, to an examination of this question, which is a little complicated on the facts.

By section 185 of the School Act, as amended by P. L. 1912, p. 507, the custodian of school moneys in a municipality is the collector when so designated by the board of education, otherwise he is the "person designated by law as the custodian of the moneys belonging to the municipality in which the school district shall be situate." In the case of a township such "person" is the treasurer. C. S. 5577, § 15. It satisfactorily appears that relator, Connolly, was township treasurer in June, 1913, and in that month was also duly appointed custodian of school moneys for the school year ending June 30, 1914, and qualified as such.

But in July, 1913, proceedings were instituted to put in force chapter 221 of the Laws of 1911 (P. L. p. 462), known as the "Walsh Act," and it appears that in October two of the three commissioners were elected, there being a tie as to the third; that these two filled the vacancy by selecting the third; and that this board appointed Connolly as the treasurer of the reorganized government, which office he accepted and drew salary therefor. It would seem that by this action his tenure of the office of township treasurer terminated. Relator argues that the validity of the adoption of the Walsh Act is disputed and is now in litigation. But, be this as it may, he accepted office under a de facto government, and it may well be questioned whether he did not thereby vacate his tenure of the former treasurership. His resignation of the office under the commission in January, 1914, does not help the matter.

But even if there was no incompatibility, his term as township treasurer ran out on the second Saturday after the next annual township election (in March, 1914). 4 C. S. p. 5571, § 6; page 5577, § 15. So, putting the best face on it, relator's term as township treasurer under either government had expired several months before application for the writ.

It is true that by Act 1912, p. 507, *supra*, if the term of the "collector or other person" designated or acting ex officio as custodian expires before the close of the school year, he is to continue as such custodian until the close of the then current school year. This would continue relator in office as custodian until June 30, 1914; and, in fact, his title was recognized by payments of school moneys up to that time. But his term of office

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



expired, quite plainly as it seems to us, on that date.

A writ of mandamus will not be awarded unless the right to relief is clear at the time of the award. Not only is such right not clear to us in this case, but we are quite clear to the contrary. We do not undertake, of course, to adjudicate finally on relator's title to the office that he claims; but necessarily the determination of the question involved required such examination of the matter as would satisfy the court of the validity or otherwise of relator's claim to this money. Relator failing to show such title, the rule to show cause will be discharged.

The result reached makes it unnecessary to deal with the other phases of the case.

(86 N. J. L. 550)

### JACKSON v. ERIE R. CO.

(Supreme Court of New Jersey. Oct. 9, 1914.)

#### (Syllabus by the Court.)

#### 1. MASTER AND SERVANT (§ 250%, New, vol. 16 Key-No. Series)—EMPLOYERS' LIABILITY ACT—REVIEW ON APPEAL.

An order of the court of common pleas, made under the Employers' Liability Act, based upon disputed questions of fact, will not be set aside.

#### 2. MASTER AND SERVANT (§ 250%, New, vol. 16 Key-No. Series)—EMPLOYERS' LIABILITY ACT—"DEPENDENT."

"Dependent" in that act means dependent for the ordinary necessities of life; one who looks to another for support or help.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dependent.]

Certiorari to Court of Common Pleas, Passaic County.

Certiorari by the Erie Railroad Company against Sarah J. Jackson to review an order under the Employers' Liability Act. Judgment affirmed.

Argued June term, 1914, before TRENCHARD, BERGEN, and BLACK, JJ.

Collins & Corbin, of Jersey City, for prosecutor. McDermott & Enright, of Jersey City, for defendant.

BLACK, J. This writ brings under review an order of the Passaic court of common pleas, made on the 18th day of December, 1912, under which the plaintiff in certiorari was ordered to pay the petitioner the sum of \$8 per week for a period of 300 weeks, under the act of the Legislature approved April 4, 1911 (P. L. 1911, pp. 134, 763), known as the Employers' Liability Act. The record shows that Sarah J. Jackson, the petitioner, was a sister of Walter H. Jackson, who suffered injuries from which he died on July 24, 1912. The trial court found as a fact that the deceased was, at the time of the accident, in the employ of the Erie Railroad Company; also the petitioner was *partially* dependent upon the de-

ceased, her brother. The record shows that the judge making the order had evidence before him which amply supports the order in these two particulars; hence this court will not set the order aside on either of these grounds, viz.: That at the time the deceased was killed he was not in the employ of the Erie Railroad Company, or that the dependency of the petitioner on the deceased was not proved.

[1] On the first ground it is argued that as the deceased, when injured, was employed on a work train on the Ringwood Branch of the Erie Railroad Company, the cars used were owned by the Wilson & English Company, an independent contractor, for hauling gravel and sand in building a new branch for the Erie Railroad Company; but the contract between the two companies was not put in evidence, nor the exact relationship between the two companies shown. In order to bring the case within the principle of Delaware, etc., R. R. Co. v. Hardy, 59 N. J. Law, 35, 34 Atl. 986, the plaintiff in certiorari, must show that the servant has in fact consented to the transfer of his services to the new master and accepted him as his master *pro hac vice*, and that he has entered upon the service and submitted himself to the direction and control of the new master; but this was not shown.

[2] On the second ground it is urged, because the statute provides, "*Actual dependents*" (P. L. 1911, page 139), and "*no dependents*," the court having found the petitioner "*partially*" dependent, the word "*actual*" does not include "*partial*." We cannot adopt this construction. Dependent in these statutes means dependent for the ordinary necessities of life; one who looks to another for support or help. If partially dependent, they must necessarily be actually dependent. The judgment is affirmed.

(86 N. J. L. 551)

### LONDON v. GILBERT et al.

(Supreme Court of New Jersey. Oct. 9, 1914.)

#### (Syllabus by the Court.)

#### INNKEEPERS (§ 4\*)—LICENSE.

A license granted for an inn and tavern by the commissioners of the city of Bordentown, in violation of an un repealed ordinance passed by the excise commissioners under the Act of 1901, p. 239, is void.

[Ed. Note.—For other cases, see Innkeepers, Cent. Dig. § 6; Dec. Dig. § 4.\*]

Certiorari on the prosecution of Thomas H. London to review a resolution of James S. Gilbert and others, Board of Commissioners of City of Bordentown, and John F. Martin. Resolution set aside.

Argued June term, 1914, before TRENCHARD, BERGEN, and BLACK, JJ.

Nelson B. Gaskill, of Trenton, for prosecutor. Peter Backes, of Trenton, for respondents.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

**BLACK, J.** This writ of certiorari brings up for review a resolution of the board of commissioners of the city of Bordentown, passed on the 21st day of April, 1914, granting a license for an inn and tavern, to John F. Martin, to be used at the premises No. 84 Farnsworth avenue, in Bordentown.

The points in the controversy are shown by the situation as disclosed in the record as follows: That on April 15, 1913, the city of Bordentown adopted by vote the commission form of government under the act (P. L. 1911, p. 462) known as the "Walsh Act." The commissioners were duly elected on June 17, 1913. The eighth section of said act (P. L. 1911, p. 462) and the amendment to such section (P. L. 1912, p. 643) provide that:

"All ordinances or resolutions heretofore passed in any such cities, not inconsistent with the rights and powers herein granted shall remain in full force and effect until altered or repealed by the commissioners in the manner herein provided."

The city charter of Bordentown gave the common council the sole, only, and exclusive right and power of granting licenses annually. By an act of the Legislature (P. L. 1901, p. 239) the judge of the court of common pleas was authorized to appoint an excise board, and such a board was appointed by the judge of the court of common pleas of Burlington county, for the city of Bordentown. By the provisions of said act, no license shall be granted in such city by any other body than such board of excise commissioners *during the existence of such board.*

The city of Dover contested the constitutionality of said act, and on the 10th of November, 1902, the Supreme Court held the act unconstitutional, in the case of *Schwarz v. Mayor, etc., of Dover*, 68 N. J. Law, 576, 53 Atl. 214. No order or judgment was entered pursuant to that decision, and on a petition, filed by the excise commissioners of Dover, asking for a reargument, in order that the commissioners might be heard, a reargument was granted on February 23, 1904. The Supreme Court, upon the reargument of the case, overruled the decision formerly rendered, sustained the validity of the act (P. L. 1901, p. 239) and the appointment of boards of excise commissioners (*Schwarz v. Mayor, etc., of Dover*, 70 N. J. Law, 502, 57 Atl. 394), basing the decision upon the intervening decision of the Court of Errors and Appeals in the case of *Ross v. Chosen Freeholders of Essex County*, 69 N. J. Law, 291, 55 Atl. 310.

On March 18, 1902, the board of excise commissioners appointed by the court, under the act of 1901, p. 239, passed an ordinance concerning inns and taverns. The pertinent paragraphs provide as follows:

"Sec. 21. No new license shall be granted for a place within three hundred feet of a church or school, or two hundred feet of an existing place on the same street.

"Sec. 22. That any place which shall not have had a license for more than three months shall

be considered as a new place if application for a license at, or a transfer to, such place be made."

On the 10th day of February, 1903, the common council of the city under the charter, by reason of the first decision of the Supreme Court, assumed that it was equally effective with reference to the board of excise commissioners of the city of Bordentown, attempted to resume its functions by passing an ordinance concerning inns and taverns, which is a repetition in words and figures of the ordinance passed by the board of excise commissioners, on March 18, 1902, above quoted. Meanwhile the board of excise commissioners continued to exercise their powers under the Act of 1901, until the adoption by the city of Bordentown of the commission form of government under the Act of 1911. This was the situation when the board of commissioners of the city of Bordentown came into existence on June 17, 1913, under the act of 1911, p. 462. They found these two ordinances, one passed by the board of excise commissioners on March 18, 1902, and one passed by the common council on the 10th day of February, 1903, identical in terms.

On August 5, 1913, the board of commissioners passed an ordinance repealing the ordinance providing for the establishment of a board of excise commissioners, but it contained no language for the repeal of any of the ordinances adopted by the said board of excise commissioners. Subsequently on April 22, 1914, the board of commissioners repealed section 22 of the ordinance passed by the common council of the city of Bordentown, on February 10, 1903. On April 21, 1914, the board of commissioners passed a resolution granting an inn and tavern license to John F. Martin, one of the respondents, to be used at the premises No. 84 Farnsworth avenue, which is in violation of the ordinance passed by the board of excise commissioners on March 18, 1902, under the act of 1901.

It is contended by the respondents that the ordinance passed by the common council on the 10th day of February, 1903, identical in terms with the ordinance passed by the board of excise commissioners on March 18, 1902, was an implied repealer of the later, and, if not repealed, the ordinance of the common council, being the later ordinance in point of time of its enactment, superseded the former one, and the board of commissioners on April 22d having repealed section 22 of the ordinance passed by the common council February 10, 1903, above quoted, left the city commissioners free to grant a license in violation of the twenty-second section of the ordinance passed by the excise commissioners, March 18, 1902.

We cannot accept this view as sound. The common council in assuming to pass the ordinance of February 10, 1903, was not even a de facto body. *Dienstag v. Fagan*, 74 N. J.

Law, 418, 65 Atl. 1011; *Lang v. Mayor, etc.*, of Bayonne, 74 N. J. Law, 455, 68 Atl. 90, 15 L. R. A. (N. S.) 93, 22 Am. St. Rep. 391, 12 Ann. Cas. 961. That ordinance had no legal effect. The ordinance of the board of excise commissioners passed on March 18, 1902, being unrepealed, and the license in this case being in violation of its provisions, is set aside with costs.

(86 N. J. L. 161)

**KOSHER DAIRY CO. v. NEW YORK, S. & W. R. CO. (No. 75.)**

(Court of Errors and Appeals of New Jersey. Sept. 25, 1914.)

**1. RAILROADS (§ 351\*)—INJURIES AT CROSSING—INSTRUCTIONS—FORM—"EITHER."**

The court charged that it was incumbent on defendant railroad company to have a bell on each engine rung continuously on approaching a grade crossing of a highway, beginning at least 300 yards from the crossing and continuing until the engine had crossed the highway, or steam whistle attached to each engine and blown at intervals until the engine had crossed the highway, and the failure to give "either" of the statutory signals on approaching the crossing would constitute negligence. *Held*, that the word "either" meant one or both of two things, and that the jury would be presumed to have understood that the word was used in the sense that defendant was negligent only if neither the bell was rung nor the whistle sounded, and that it was not negligent if the bell was rung but the whistle was not sounded, or vice versa, and was therefore not objectionable as requiring both, in order to relieve defendant from the imputation of negligence.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1193-1211, 1213-1215; Dec. Dig. § 351.\*]

For other definitions, see Words and Phrases, First and Second Series, *Either*.]

**2. APPEAL AND ERROR (§ 882\*)—ESTOPPEL TO ALLEGE ERROR—INSTRUCTIONS—REQUEST TO CHARGE—INCONSISTENT REQUEST.**

Where alternative and inconsistent requests to charge are preferred, the party is estopped to complain of the court's selection.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3591-3610; Dec. Dig. § 882.\*]

**3. TRIAL (§ 258\*)—INSTRUCTIONS—ALTERNATIVE REQUEST.**

In making requests to charge, it is proper for the party to prefer alternative requests setting forth varying propositions of law or fact, or blended questions of law or fact, according to how the facts may be found.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 646, 647; Dec. Dig. § 258.\*]

Appeal from the Supreme Court.

Action by the Kosher Dairy Company against the New York, Susquehanna & Western Railroad Company. The judgment of the district court of the city of Hoboken in favor of defendant was affirmed by the Supreme Court, and defendant appeals. Affirmed.

See, also, 83 N. J. Law, 270, 83 Atl. 498.

Collins & Corbin, of Jersey City, for appellant. William B. Stites, of Hoboken, for respondent.

**WALKER, C.** This is an appeal from a judgment of the Supreme Court affirming a judgment of the district court of the city of Hoboken in favor of the respondent and against the appellant. The action was one for damages for the killing of cows driven over a railroad crossing, which killing was alleged to have been occasioned by the negligence of the railroad company.

[1] It is strenuously argued that the trial court erred in its charge to the jury respecting the necessity for giving one or the other of the statutory signals by bell or whistle. What the trial judge said to the jury on that question was as follows:

"Now, under the law—that is, under our statute—it is incumbent upon the railroad company to have a bell on each engine, weighing not less than 30 pounds, and rung continuously in approaching a grade crossing of a highway, beginning at a distance of at least 300 yards from the crossing and continuing until the engine has crossed such highway, or a steam whistle shall be attached to each engine and blown at intervals until the engine shall have crossed such highway, and the failure, if there was such failure, on the part of the defendant company in this case, to give either of the statutory signals in approaching the crossing, would constitute negligence on the part of the defendant. Now, then, whether the railroad company performed its duty in that regard is a question for you to determine."

The law of the case in this regard was laid down in the opinion of the Supreme Court in *Kosher Dairy Co. v. New York, Susquehanna & Western R. R. Co.*, 83 N. J. Law, 270, at page 272, 83 Atl. 498, at page 499, on the review of a former trial of this cause, as follows:

"The failure, on the part of the defendant company to give either of the statutory signals in approaching the crossing would constitute negligence."

The Supreme Court, in treating of this question in its opinion in the case at bar, observed:

"A failure to give either [signal] means the omission of both; and the court, having once been reversed on that point, was plainly following the language of the opinion in this case" (quoting the language above copied from 83 N. J. Law, at page 272, 83 Atl., at page 499).

We agree with the Supreme Court that the criticism of the judge's charge in the case under review was "a misapprehension of the language used, as the context clearly indicates."

In Webster's New International Dictionary the word "either" is defined: "1. Each of two; the one and the other." "2. One of two; the one or the other."

Language is well known to be ambiguous, and many words have two or more meanings. Jurors are presumed to understand the English language and to understand the various shades of meaning which words possess. The jury in this case was presumed to know that the word "either" meant *one or both* of two things, accordingly as it was intended to mean one or both, and when within a single

paragraph—nay more, within a single sentence—of the charge, the trial judge instructed the jury that it was incumbent upon the appellant to have a bell on each engine rung continuously in approaching a grade crossing, or a steam whistle sounded, etc., until the engine shall have crossed the highway, and, on failure to give either of these signals in approaching the crossing, etc., they are presumed to have understood the judge to use the word “either” in the sense that the company was negligent only if *neither* the bell was rung *nor* the whistle sounded, and that it was not negligent if it rung the bell but did not sound the whistle, or vice versa. Doubtless the trial court could have used a more perspicuous formula of expression in instructing the jury upon the company’s duty with respect to the statutory signals, but we find no error in the charge as delivered upon that question. Furthermore, if anything were wanting in the charge of the trial judge to elucidate to the jury the sense in which the word “either” was used, it seems to have been supplied in a subsequent part of the charge, where he said:

“So far as the whistle or the ringing of the bell on the locomotive are concerned, there has also been evidence,” etc.

And still further on where he said:

“It is for you to consider and determine which of the witnesses was telling the true story; for instance, on the question of giving these signals as required by the statute—that is, the ringing of the bell or the sounding of the whistle. This part of the testimony, as you recall it, was contradicted.”

Errors alleged with reference to the charge of the trial court will now be noticed. First, it was urged that the trial court should have charged request 3a, which was that:

“There is no evidence to justify a verdict against the defendant by reason of alleged failure of the crossing bell to ring.”

We think there was such evidence, and therefore the refusal was right.

[2, 3] But we are not in accord with the Supreme Court in its observation that as this request was preferred in connection with three other alternative or inconsistent requests, the rule is that the party cannot be heard to complain of the court’s selection. These requests were preferred in these formulæ:

“3a. There is no evidence to justify a verdict against the defendant by reason of alleged failure of the crossing bell to ring.

“If 3a is refused then No. 4.

“4. If crossing bell was ringing in time to give drivers due warning of the approach of the train, defendant was not negligent with respect thereto.

“5. If crossing bell was not ringing before train reached crossing in time to give due warning to the drivers of the approach of the train, the plaintiff is not entitled to recover on that ground, unless the evidence shows that the failure of the crossing bell to ring was caused by the defendant’s negligence.

“6. If crossing bell did not ring in time to give due warning to the drivers of the approach of the train, plaintiff cannot recover on that ground, unless the evidence shows that the defendant knew that the bell was out of or-

der, or that the bell was out of order a sufficient length of time before the accident to charge defendant with knowledge that it was out of order.”

Request 3a was refused, and rightly so, as stated. Requests 4 and 5 were charged, and 6 was charged with this addendum:

“With regard to that you recall what the testimony was on the part of the defendant and plaintiff as to this crossing bell”

—so that the charge, as to that request, in toto was as follows:

“Request No. 6. If crossing bell did not ring in time to give due warning to the drivers of the approach of the train, plaintiff cannot recover on that ground unless the evidence shows that the defendant knew that the bell was out of order, or that the bell was out of order a sufficient length of time before the accident to charge defendant with knowledge that it was out of order. With regard to that you recall what the testimony was on the part of the defendant and plaintiff as to this crossing bell.”

The Supreme Court inadvertently, we think, characterized these requests as “alternative or inconsistent.” They were alternative, but not inconsistent. In support of its observation that a party will not be heard to complain of the court’s selection of “alternative or inconsistent requests,” 38 Cyc. 1711 is cited as authority. The text referred to is under a headline “Inconsistent requests,” and perusal of it shows at a glance that it does not treat at all of alternative requests. It is as follows:

“A party is bound by the theory of the case presented by the instructions given at his instance, and it is proper to refuse instructions requested by him which are inconsistent with other instructions given at his request; and where several instructions are requested, some of which are inconsistent with the others and involve different theories of the case, a party submitting such instructions cannot complain of the trial court in adopting one of the theories of the case and giving the instructions applicable thereto and refusing those which are inconsistent with the ones given.”

When inconsistent requests to charge are preferred, doubtless the party cannot be heard to complain of the court’s selection, because, even if a wrong one is selected and an erroneous charge made, it was induced by the party’s own act; but alternative prayers to charge may be made where they set forth varying propositions of law or fact, or blended questions of law and fact, accordingly as the law or the facts may be found in a given case by the court or the jury, according to their respective functions.

That prayers to charge may be in the alternative is quite analogous to prayers for alternative relief in a bill in chancery, which are permitted. Dan. Ch. Pl. & Pr. \*384; *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158.

There was no impropriety in the alternative requests in the case at bar. They dealt with varying facts, one or more of which the jury might have found to the exclusion of others. The judge charged all of them except 3a, which was properly refused; and,

therefore, in our judgment, there was no error prejudicial to the defendant.

In regard to the other questions discussed in the opinion of the Supreme Court we are satisfied with that court's deliverance, and the judgment under review will therefore be affirmed, with costs.

(88 Vt. 107)

### SEVIOUR v. RUTLAND R. CO.

(Supreme Court of Vermont. Oct. 14, 1914.)

#### 1. EVIDENCE (§ 109\*)—ADMISSIBILITY—KNOWLEDGE.

A witness cannot testify that he could distinguish by sound between freight and passenger trains, for the knowledge of the deceased, who was run down at a crossing by a special train, though she had the same opportunities of observation, could not be measured by the knowledge of the witness.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 213-229; Dec. Dig. § 109.\*]

#### 2. TRIAL (§ 194\*)—INSTRUCTIONS—WEIGHT OF TESTIMONY.

The court may express its opinion regarding the weight of the evidence, provided the expression is fair and reasonable, and is accompanied by instructions which plainly leave the determination with the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

#### 3. TRIAL (§ 194\*)—INSTRUCTIONS—SUFFICIENCY.

In an action for the death of a traveler, run down at a railroad crossing, an instruction submitting to the jury the question whether the required signals were given is not bad because it informed them that it was the duty of the engineer to give the signals, and that there was a probability that he performed that duty; the instruction, while expressing the opinion of the court, not encroaching on the province of the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 413, 436, 439-441, 446-454, 456-466; Dec. Dig. § 194.\*]

#### 4. EVIDENCE (§ 586\*)—WEIGHT AND SUFFICIENCY.

Positive evidence is entitled to greater weight than negative testimony.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2432-2435; Dec. Dig. § 586.\*]

#### 5. TRIAL (§ 235\*)—INSTRUCTIONS—APPLICABILITY.

Where the evidence as to whether defendant's train which ran down plaintiff's intestate gave the required signals was conflicting, some of plaintiff's witnesses testifying that they did not hear them, an instruction that positive testimony is of more value than negative evidence was properly given.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 539-541, 543-548, 551; Dec. Dig. § 235.\*]

#### 6. RAILROADS (§ 848\*)—CROSSING ACCIDENTS—ACTIONS—EVIDENCE—SUFFICIENCY.

In an action for the wrongful death of a traveler run down at a crossing, evidence held insufficient to show that the servants in charge of the train were guilty of any negligence after they saw that deceased was about to go on the track.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1138-1150; Dec. Dig. § 348.\*]

Exceptions from Windham County Court; William H. Taylor, Judge.

Action by Warren W. Seviour, as administrator, against the Rutland Railroad Company. There was a judgment for defendant, and plaintiff excepted. Exceptions overruled.

Argued before POWERS, C. J., and MUNSON, WATSON, and HASELTON, JJ.

Hugh Chase, Clarke C. Fitts, and Hermon E. Eddy, all of Brattleboro, for plaintiff. Edwin W. Lawrence and T. W. Mohoney, both of Rutland, for defendant.

MUNSON, J. Mrs. Seviour, the plaintiff's intestate, and her sister, Miss Hazen, while riding in a light open wagon drawn by one horse, with Miss Hazen driving, were killed by a north-bound train of the defendant at the first crossing north of Chester station. Mrs. Seviour was 22 years of age, and had been married 4 years, during the last 2 of which she had lived about a mile from the crossing, in the south part of the village, on the west side of the railroad. Until her marriage she lived with her parents a few rods from the crossing, on the easterly side of the track. Miss Hazen was a nurse, 41 years old, and had lived at this place 20 years, except that during the last 10 years she was away from home about half the time. C. R. Hazen, a brother lived here with Miss Hazen after the marriage of Mrs. Seviour and the subsequent death of the parents, getting most of his meals at Mrs. Seviour's when Miss Hazen was away. The location of the Hazen house was such that passing trains were plainly visible to its occupants.

The train which caused the injury consisted of the combined engine and observation car Nehasne, and a pay car. The train, as thus made up, goes over the road about once a month at irregular intervals, having no schedule time, and not stopping regularly at stations. It did not stop at Chester on this occasion. All passenger trains stop there. There is a crossing at the south end of the station, and another about a third of a mile below. The station signal is one long whistle, and this is required whether there is to be a stop or not. The signal for a crossing consists of two long and two short whistles. The evidence regarding the giving of signals was contradictory. The theory of the plaintiff, as stated in his brief, was that the occupants of the wagon were lulled into security by the giving of the station signal only, and the fact that passenger trains always stopped at Chester.

[1] C. R. Hazen was called by the plaintiff, and testified that he had frequently driven with his sisters, and that they had talked about trains and signals; and, after testifying under defendant's exception that there was a difference between the sound of a freight train and a passenger train as it approached, he was asked, "Are you able to distinguish which kind of a train is ap-

proaching by the sound?" and this was excluded. Counsel argue that, inasmuch as all three had the same opportunities of observation, the knowledge which Mrs. Sevlour and her sister had acquired by their observation could be shown by proving what the brother would have known. We think the argument is unsound, and that the question was properly excluded. This is not like proving whether an object can be seen or a sound heard from a given point. This involved a determination of the understanding which persons of different habits of observation and different capabilities would gain from the same opportunities. It was not a matter to be determined by tests. In the absence of proof of any information directly conveyed to them, the knowledge of the deceased parties was to be inferred by the jury from all that the evidence disclosed regarding them and their opportunities.

[2, 3] The court referred to the crossing signal as required by the law and the rules of the company, and instructed the jury that in determining the issue regarding the giving of the signals they should keep in mind that the burden was upon the plaintiff to make out by a fair balance of evidence that the whistle was not sounded or the bell not rung, and that the rules of the company, introduced in evidence, governing the engineer in this regard, were to be considered with the other evidence in the case, keeping in mind that there was a rule which required the engineer to perform this duty, and the probability of his having discharged his duty, and thereupon submitting the question: "Do you find by a fair balance of the evidence that the signals were not given?" The plaintiff excepted to the charge that the jury should keep in mind the rule requiring signals and the probability that that rule was complied with.

The language complained of was not used in charging the jury upon any point of law. The court was dealing with a controverted matter of fact and the evidence bearing upon it. The jury were not told that the matters referred to raised any presumption in favor of the claim that the signal was given. The statement was, at most, an expression of the court's opinion that the existence of the requirement afforded some support to the testimony of the witnesses who said that the signal was given. There is no legislative provision or judicial holding in this state that bars the court from expressing its opinion regarding the evidence and the weight of the evidence. The right is seldom exercised, but its existence remains unquestioned. The expression must, however, be fair and reasonable, and be accompanied by instructions which plainly leave the determination with the jury. *Sawyer v. Phaley*, 33 Vt. 69; *Rowell v. Fuller*, 59 Vt. 688, 10 Atl. 853; *Baker v. Sherman*, 71 Vt. 439, 46 Atl. 57.

The language excepted to was nothing more than an incidental comment upon one feature of the evidence. The facts that the statute required the giving of the signal, and that a rule of the company directed it, and that it was a stated and frequently recurring duty of the employé, might reasonably be thought by the jury to lend some probability to the claim that it was given on this occasion; and it was within the discretion of the court to suggest these things to the jury as matters proper for their consideration in connection with the testimony of the witnesses. The jury had already been distinctly told that they were to determine the question upon the whole evidence. We think the phrase complained of, in the connection in which it was used, cannot have been misleading. We are satisfied that the jury got from it no impression that they were in any way restricted in determining for themselves the probative value of this evidence.

[4, 5] With reference to the contradictory testimony regarding the giving of signals, the court charged, in substance, that there was a distinction between positive and negative evidence which should be taken into account; that the first was entitled to greater weight than the last, and that in weighing such evidence they should consider all the surrounding circumstances. The plaintiff excepted to the charge upon this subject, and specifically to the statement, in substance, that testimony that a person saw or heard a thing was entitled to greater weight than testimony that he did not see or hear a thing. The distinction made by the court is found in text-writers of authority, and is judicially recognized in this state. *Bates v. Cilley*, 47 Vt. 1; *Farmers', etc., Bank v. Champlain Trans. Co.*, 23 Vt. 186, 56 Am. Dec. 68. The propriety of charging it depends upon circumstances. To give the instruction in some cases might be legal error. But, as applied to this subject-matter, and in view of the evidence presented, we think the plaintiff has no ground of complaint. The defendant's evidence tended to show that all the required signals were given. Many of the plaintiff's witnesses regarding signals were men engaged in stores near the station and working in and about mills located near the lower crossing. Some put it that they did not hear any whistle; others that they did not remember of hearing any; others that there was none. Some testified that one long whistle was given, and no other. Common experience has shown that signals regularly and frequently given within the hearing of persons who have no special interest in them, like the sounding of whistles, the ringing of bells, or the striking of clocks, are quite likely to occur without being noticed.

[6] The main track of the defendant's road, from a point south of Chester station to and beyond the crossing where the accident occurred, runs in a straight line on a slightly

ascending grade. The victims of the accident were riding northward on a highway which crosses the railroad at an angle of 30 degrees. The main station building is on the westerly side of the track, about 600 feet south of the crossing. The freighthouse is on the same side of the track, about 480 feet south of the crossing. A traveler from the south reaching a point in the highway about 100 feet from the crossing could see the main track as far south as the station. The horse driven by Miss Hazen was 16 years old, high-spirited, and a good roader. The plaintiff's witnesses placed the speed of the train at from 30 to 60 miles an hour. Defendant's witnesses placed it at from 25 to 30 miles. The point of impact was at the hind quarters of the horse.

The only eyewitness of the accident produced by the plaintiff was standing about 60 feet westerly from the crossing, in a vacant lot on the opposite side of the highway from the station. He first saw the team when it was about 120 feet from the crossing. It was then jogging along about 6 or 8 miles an hour. The women had their faces turned towards the station, and kept them in that position as they went on. As they approached the crossing, and after the train came in view, at a distance from the crossing regarding which the witness was confused, but which he apparently intended to place about 35 or 40 feet from it, Mrs. Seviour took out the whip and struck the horse, on which it started ahead and went faster.

The only witnesses to the accident produced by the defendant were occupants of the Nehasne. This engine has an observation compartment constructed over the boiler in front of the engineer's cab. The boiler is covered by a platform which has an elevation of 12 or 14 inches above the floor, and extends the entire length of the compartment. There is a row of three chairs on each side of the compartment, and an aisle on each side between the chairs and the platform. On this occasion the front chair on the right was occupied by Hewitt, supervisor of track, and the chair opposite by Burton, supervisor of bridges. Aldrich, the conductor, sat behind Burton. In the floor at the left of Hewitt, standing about 1½ inches above the surface, was a pedal by means of which the engineer could be signaled. This was 6 or 7 feet distant from Burton, and separated from him by the platform. There was no other appliance in the compartment for signaling the engineer.

Hewitt testified that after they had passed the freighthouse some little ways he noticed a team approaching the crossing, that as it neared the crossing they pulled up as if going to stop, and then whipped the horse; and, when asked how near the team was to the crossing when this happened, said approximately 50 or 60 feet. Inquired of in cross-examination, the witness said that

when he first saw the team the train was probably 250 or 300 feet from the crossing and the team 50 or 60 feet from it; that the team was jogging along probably 6 or 8 miles an hour; that when they whipped the horse the train was probably 100 feet from the crossing and the team 20 feet from it. His testimony throughout was that when they whipped the horse he immediately signaled the engineer to stop, and that until then he had no idea that they were intending to cross.

Burton testified that he first noticed the team when the train was a little north of the freighthouse; that the team was then probably 90 or 100 feet from the crossing; that when he first saw them they were jogging along, and immediately afterwards, probably a few seconds, they seemed to become excited, and both leaned forward and began whipping the horse; that when they began to whip up they were probably 30 or 40 feet from the crossing; and said further on cross-examination that when they began to speed up the train was 350 or 400 feet from the crossing. Aldrich testified that the windows of the Nehasne were opened from the top; that in passing Chester station he was standing up with his head out of the window, looking for signals; that on taking his seat, when the train was possibly 100 feet from the crossing, he looked past Burton through the window and saw a wagon close to the crossing, not over 30 or 40 feet from it, with the occupants apparently urging the horse forward; and that, fearing a collision, with pieces coming through the windows, he went backwards and lay on the floor; that when he saw the women nothing had been done to stop the train.

The fireman, whose place was on the side from which the team was approaching, was attending to his fire at this time. The engineer testified that when he got the signal he was on his seat with his head out of the side window, looking ahead; that he immediately brought in his head, and shut off the steam and applied the emergency brake. In cross-examination he was inquired of about sanding the rail, and said that it was not done; that he did not have time to do it, and that he knew of no appliance by which you could sand the rail and pull the brake at the same time; that sanding the rail would help somewhat—he could not say how much. Nothing further appeared regarding this. The train stopped 640 feet from the crossing. The plaintiff introduced a witness who had been an engineer 3½ years, who testified that a train like this on such a grade, when going 40, or even 50, miles an hour, ought to be stopped by an application of the emergency within 400 feet, and that going 60 miles an hour it could probably be stopped in 600 feet. It appeared from his further testimony that a heavy train can be stopped quicker than a light one; that he had used the emergency but once, and did

not then observe how far the train went; and that his judgment was based upon his general experience in running trains.

The plaintiff submitted three requests which called for instructions upon the doctrine of the last clear chance. These requests were refused, and no charge upon the subject was given. It is not necessary to inquire as to the technical or substantial accuracy of the requests as framed. There was no evidence fairly and reasonably tending to show that the death of Mrs. Seivour was due to any failure on the part of the defendant's servants to do what they could to save the occupants of the wagon from the moment it was realized that they were placing themselves in peril by attempting to cross the track.

Judgment affirmed.

(246 Pa. 58)

In re ALEXANDER'S ESTATE.

Appeal of MOYER.

(Supreme Court of Pennsylvania. July 1, 1914.)

1. WILLS (§ 38\*)—VALIDITY—"DELUSION."

A "delusion" of a testator, such as will invalidate a will, is an insane belief or a mere figment of the imagination.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 79-81; Dec. Dig. § 38.\*]

For other definitions, see Words and Phrases, First and Second Series, Delusion.]

2. WILLS (§ 52\*)—VALIDITY—DELUSION—BURDEN OF PROOF.

The burden is on a party, relying on the existence of a delusion to invalidate a will, to prove that such delusion controlled the testator's volition and destroyed his freedom of action in disposing of his estate.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 101-110; Dec. Dig. § 52.\*]

3. WILLS (§ 55\*)—VALIDITY—DELUSION—SUFFICIENCY OF EVIDENCE.

Evidence in support of a petition for an issue *devisavit vel non* held insufficient to show that the will was executed in consequence of an insane delusion on the part of the testator, the petitioner's father, though testator practically disinherited her and may have been mistaken in his judgment that she had been guilty of unnatural conduct toward him and her mother.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 137-158, 161; Dec. Dig. § 55.\*]

Appeal from Orphans' Court, Berks County.

In the matter of the Estate of Edgar W. Alexander, deceased. From a decree dismissing appeal from decree of the register of wills, refusing an issue *devisavit vel non*, Nettie I. Moyer appeals. Affirmed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Cyrus G. Derr and E. H. Deysher, both of Reading, for appellant. Isaac Hiester, of Reading, E. Carroll Schaeffer, and C. H. Ruhl, both of Reading, for appellees.

BROWN, J. Edgar W. Alexander died November 12, 1912, leaving personal property appraised at \$332,956.87 and real estate

worth about \$10,000. He left to survive him but one child, a daughter, Nettie, born to him by his first wife, who died May 11, 1897. The daughter subsequently married J. Harry Moyer and became the mother of two children Josephine and Dorothy. By a will, dated September 4, 1912, and a codicil executed a month later, appellant's father gave the bulk of his estate to his second wife, collateral relatives, stepchildren, and charities. To each of his two grandchildren, Josephine and Dorothy Moyer, he gave \$5,000. He practically disinherited his daughter and only child by the following clause in his will:

"I give and bequeath to Mrs. Nettie I. Moyer, wife of J. Harry Moyer, the sum of one thousand (\$1,000) dollars, on condition that should she take any exceptions to the provisions of this my will she shall not participate in my estate to the extent of one dollar. I make this a condition in view of the unnatural conduct of said Mrs. Nettie I. Moyer towards her deceased mother as well as myself in her relation as a child and daughter."

The daughter appealed from the decree of the register admitting the will of her father to probate, and in a petition to the orphans' court, in which she averred that the will, so far as it affected her, was the result of a delusion on the part of the testator. prayed for an issue to determine: (1) Whether he was the victim of a delusion with respect to her conduct towards himself and her mother, so affecting him as to have rendered him insensible to his parental obligations, and to have caused him to execute the paper admitted to probate as his will; and (2) whether at the time he executed the same he was of sound and disposing mind. This appeal is from the refusal to award the issue prayed for.

The habits of the decedent, upon which we need not dwell, were not good; but nothing was shown to indicate that he was not of sound mind and good business judgment, and the prayer for an issue to determine whether he had testamentary capacity was groundless. This does not seem to be questioned, for we are asked to reverse the decree of the court below solely on the ground that the decedent was the victim of a delusion with respect to his daughter which controlled him in making his will.

[1] A delusion which will render invalid a will executed as the direct result of it is an insane belief or a mere figment of the imagination—a belief in the existence of something which does not exist and which no rational person, in the absence of evidence, would believe to exist. Taylor's Executor v. Trich et al., 165 Pa. 586, 30 Atl. 1053, 44 Am. St. Rep. 679; McGovern's Estate, 185 Pa. 203, 39 Atl. 816; Bennett's Estate, 201 Pa. 485, 51 Atl. 336.

[2, 3] The burden was upon the appellant to show that such a delusion controlled the will of her father and destroyed his freedom of action in disposing of his estate. In her effort to do so she submitted much testimony

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



the recital of which in detail will serve no useful purpose. It was shown by a number of witnesses that she had nursed her mother during a long period of sickness with the tender solicitude of an affectionate child, that her father and mother had both praised her for what she had done for them, and that after the death of her mother the father had exhibited great affection for her and her two children. In view of all the testimony as to this, it is difficult to understand why he left but \$1,000 of his large estate to her, and it would almost seem that he must have been under an insane delusion in giving his reason for doing so; but there was evidence from which he may have believed that his daughter's conduct towards himself and her mother had been unnatural. It was therefore for him alone, being of sound mind, to pass judgment on that evidence, and, however harsh, unnatural, and cruel his judgment may have been it was not, in legal contemplation, a delusion—a mere figment of his imagination, all-controlling with him in the execution of his will.

For ten years prior to his death he and his daughter had been estranged. This appears from her own testimony. She admits that she talked about him to members of his family, and it may be, as she says, not maliciously or unkindly, but for the purpose of helping him to do better. He, however, manifestly thought otherwise. On two occasions prior to her leaving his home in 1902, where she and her family were living with him, she had reproached him for his indecent conduct towards an orphan girl who was living with them as a domestic. While he did not resent this at the time, he may subsequently have done so, and regarded her reproof as "unnatural conduct" on her part. In a letter written to him in 1910, when she was about to undergo a serious operation, she pathetically refers to his long-time estrangement from her and asks his forgiveness for what he may have thought it was not her privilege as a daughter to ask and demand from him as a father. This appeal was unavailing, and he died unreconciled to his daughter, whose conduct he believed to have been unnatural towards him, in view of what she had said or done and of what she was reported to him as having said about him.

From the testimony submitted by the proponents it appeared that, for years before the testator's death, the appellant had repeatedly spoken of his failings, that she had been reproached for doing so by those to whom she had complained of him, and that what she said about him had been repeated to him, leading him at times to say that what she had said of him had nearly made him crazy and almost ashamed to stay in Reading. It further appeared that she had charged her mother with overindulgence in drink, and this, too, was repeated to her father,

who expressed his grief that she should have so accused her mother. In September, 1903, in response to a request from her, he sent her the earrings of the mother, and in an accompanying letter wrote that he preferred sending them by a messenger to having her come to his house for them, and that he could no longer submit to her villification of him, threatening her that, if she did not desist from it, he would prosecute her. All this may have been unjust on his part, but there is nothing to show that it was a mere delusion which drove him into an unnatural attitude towards his daughter. He has stated why he discarded her. It may be—and we are inclined to so believe—that he was unreasonable in characterizing her conduct towards him and her mother as unnatural, and that his treatment of her as the natural object of his bounty was most harsh; but he acted upon what was his belief, and, if it was error, we are powerless to correct it. His opinion of his daughter's conduct, upon which he acted in making his will, may have been wholly unreasonable; but this can have no weight in the present inquiry, unless it be shown that the opinion rested on an imagined state of facts. *McGovran's Estate*, supra.

The burden was upon the appellant to show, by proof sufficient to sustain a verdict in her favor, that what she most naturally regards as the injustice of her father to her resulted from the delusion which she avers in her petition for the issue. After a review of all the testimony, we are constrained to say that she has failed to do so, and that we must concur in the following conclusion of the court below:

"It may safely be asserted as a clear fact from the testimony that there were many stories afloat about Mr. Alexander which he believed to have been started by Mrs. Moyer. She herself tells her father not to believe what he hears without giving her a chance to defend herself, and he speaks of stories in his own letter about the earrings. Whether Mr. Alexander is to be condemned for listening to rumors and idle gossip, or, perhaps, to false stories told by persons to discredit his own child, is not a question that this court is called upon to decide. The only inquiry is whether there is evidence from which a jury might reasonably infer that Mr. Alexander was laboring under a mental disorder; and the result of that inquiry is that there is nothing to show that he did more than take the stories as they came to him, including the story about his dead wife, believe them, and pass a very severe judgment upon the daughter."

Decree affirmed, at appellant's costs.

(246 Pa. 24)

REESER v. METROPOLITAN ELECTRIC CO.

(Supreme Court of Pennsylvania. July 1, 1914.)

MASTER AND SERVANT (§ 190\*)—INJURY TO SERVANT—NEGLECT OF FELLOW SERVANTS—FOREMAN.

An employé injured through the negligence of a foreman, while he is assisting in the erection of poles on which wires are to be strung,

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

cannot recover therefor from the master where the foreman at the time of the injury was not performing a duty belonging to the master, or doing anything in the line of superintendence, but was merely doing work on the same footing with other employes.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 449-474; Dec. Dig. § 190.\*]

Appeal from Court of Common Pleas, Berks County.

Trespass by Robert L. Reeser against the Metropolitan Electric Company, for personal injuries. From a judgment for plaintiff, defendant appeals. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

C. H. Ruhl and R. L. Jones, both of Reading, for appellant. Harvey F. Heinly, of Reading, for appellee.

POTTER, J. The plaintiff here sought to recover damages for injuries which he alleged resulted from the negligence of defendant's foreman.

The plaintiff was one of several employes of defendant, who were engaged in the erection of poles upon which wires were to be strung. While thus engaged a pole fell upon plaintiff and injured him. In the history of the case the operation in which the men were engaged, is thus described: The pole in question was about 50 feet long and about 20 inches in diameter at the butt. A hole was dug in the ground, and iron bars were inserted therein at one side, and the butt of the pole was placed against them, in order that it might slide more smoothly into the hole. The other end of the pole was lifted by the men, and after it reached a certain elevation it was raised upon what was known as a deadman, which was a stout piece of timber with a U-shaped prong at the top and an iron spear point in the center. Two of these deadmen were used, one of which was in charge of the plaintiff. The other members of the gang had poles or pikes, of varying lengths, with iron points at the end, which they stuck into the pole, raising it by what was termed a rocking process, from one deadman to the other, the deadmen in turn being moved toward the hole at each step in the rocking process, the pole meanwhile being raised to a position approaching the perpendicular. During this process it was the duty of one of the men to assist in holding the pole in position, with cant hooks fastened to the pole near the butt. When the pole in question fell, the foreman of the gang was operating the cant hooks, but the evidence shows that he did not usually attend to this duty. At the time of the accident, the pole had been raised to an angle of about 45 degrees, and while in this position, and while resting upon the deadman, which was in charge of plaintiff, it fell and injured him. The accident is thus described, by plaintiff:

"I was standing there, holding the deadman under the pole; the next thing I saw Griesemer lean out, and that quick the pole turned off of the point of the deadman," and fell. The testimony upon the part of defendant tended to show that the deadman was not placed at the right angle under the pole, and that it slipped out, letting the pole down. It was a wet day, and the pole was very slippery. But no matter whether the pole turned by reason of some inadvertent motion of the foreman who happened at the moment to be in charge of the cant hooks, or whether the deadman by reason of not being properly adjusted, slipped and caused the pole to fall, it is perfectly apparent that at the time the men were all engaged in one common purpose, which was the raising of the pole, and the settling of it in its place in the hole prepared for it. Intelligent co-operation in manual labor was all that was required. The particular act in which the foreman was at the time engaged, the holding of the cant hook, was not a duty whose performance in any way peculiarly or properly belonged to the master. Upon the contrary the manipulation of these implements was upon the same level with the work of the other employes, and in fact it appears from the evidence that the cant hooks were generally handled by one of the other men, and not by the foreman. In holding them at that particular time, the foreman was simply co-operating with the rest of the men, and stood upon precisely the same footing. It is more than doubtful under the evidence, whether anything which Griesemer did, in handling the cant hooks, could properly be regarded as causing the fall of the pole, or that he was in any way negligent. But if so, it did not occur while he was engaged in the discharge of any duty which was in its nature that of superintendence; but it did occur while he was engaged in a bit of manual labor with the other men, in an effort to accomplish an object, which all were uniting to bring about. Eleven men were at the moment engaged in a common undertaking, each of them having a part to perform. At least a half dozen implements in addition to the cant hooks were brought into use to aid in holding the pole in position. The theory that the pole fell because of anything which Griesemer did seems to us to have been based on nothing more than conjecture. But if the action of Griesemer had anything to do with it, clearly it was while he was engaged as a fellow workman, assisting in the work which the men were doing in common; and it cannot, under the evidence, be fairly connected with anything in the line of superintendence.

After examining all the evidence, we think the conclusion is unavoidable that defendant was entitled to an affirmance of its third point, which was a request for binding instructions. The same question arose upon

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

the rule for judgment non obstante veredicto, and judgment should have been there entered for defendant.

The fourth, fifth, and sixth assignments of error are sustained.

The judgment is reversed, and is here entered for the defendant.

(246 Pa. 44)

**READING CITY PASS. RY. CO. et al. v. BERKS COUNTY.**

(Supreme Court of Pennsylvania. July 1, 1914.)

**1. STREET RAILROADS (§ 31\*)—USE OF COUNTY BRIDGE—TERMINATION OF AGREEMENT.**

An agreement between a street railway company and a county for the use of a county bridge by the company and relative to the rental to be paid therefor, terminated with the lawful demolition of the bridge by the county, and gives the company no rights in a new county bridge thereafter built.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 67, 68; Dec. Dig. § 31.\*]

**2. STREET RAILROADS (§ 31\*)—USE OF COUNTY BRIDGE—PROCUREMENT OF CONSENT.**

While terms on which a street railway company may use a county bridge are a matter of agreement in the first instance and the railroad company cannot use the bridge without the county's consent, such consent cannot be arbitrarily withheld.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 67, 68; Dec. Dig. § 31.\*]

**3. STREET RAILROADS (§ 31\*)—USE OF COUNTY BRIDGE—REASONABLE RENTAL.**

An annual rental of \$3,000 for the first two years and \$4,000 for the next two years, and \$5,000 for the succeeding six years, for the use of a county bridge, was reasonable, where the cost of the bridge had been \$100,000 greater than it would have been but for the provision made for the laying of railway tracks, and a bridge adequate for the railway company's purposes, and having a life of 30 to 35 years, would cost exceeding \$60,000, not including changes of route, new tracks, price of land taken, repairs, and maintenance.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 67, 68; Dec. Dig. § 31.\*]

**4. APPEAL AND ERROR (§ 1054\*)—HARMLESS ERROR—RECEPTION OF EVIDENCE.**

In a suit to enjoin a county from preventing railway companies from running cars over a county bridge, wherein the county prayed for a decree fixing the rental to be paid by the company for the use of the bridge, the admission of irrelevant evidence concerning the compensation paid by the companies in other counties for the use of bridges was harmless, where it appeared that the chancellor did not consider such evidence.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4185, 4186; Dec. Dig. § 1054.\*]

Appeal from Court of Common Pleas, Berks County.

Suit by the Reading City Passenger Railway Company and others against the County of Berks. From decree for defendant, plaintiffs appeal. Affirmed.

Bill in equity for an injunction, with cross-bill for decree fixing compensation for use of county bridge.

From the record it appeared that the bill was filed to restrain the county of Berks

from preventing the appellants from running cars over the Harrisburg bridge, in the city of Reading, in accordance with an agreement entered into with the county on December 27, 1893. This county bridge was demolished and removed, after having been condemned, in 1910, and a new and larger county bridge was erected in its place. The county of Berks filed a cross-bill, praying for a decree fixing and determining the rental to be paid by the appellants for the use of the new bridge. In dismissing the appellants' bill and making the decree asked for in the cross-bill, the court found facts and reached legal conclusions as follows:

**Findings of Fact.**

1. On December 27, 1893, the Reading City Passenger Railway Company and the Reading Traction Company, to whom it had leased and whose rights subsequently passed to the United Traction Company and thereafter to the Reading Transit Company, entered into an agreement with the county of Berks, whereby the latter consented to the construction by the railway companies of a double track railway, to be operated by electricity, with overhead wires, etc., upon and over a county bridge across the Schuylkill river, known as the Harrisburg bridge (then an iron structure about 1,000 feet long, 40 feet wide, having a roadway of 26 feet, and erected at a cost of \$150,000) with stipulations that, upon the bridge, the railway companies' cars should have no preference over other vehicles, and should not be run at a speed of more than four miles an hour nor more than one car or train of cars at one time—that the county should not be obligated to maintain said bridge for the use of the railway companies or for the purposes of the agreement, and should not be liable for injury to persons or property resulting from the railway companies' use of said bridge, and that the railway companies should pay to the county the annual sum of \$600 to be applied to keeping the bridge in repair, the payments to be continued as long as the cars of the railway companies should run across or over said bridge, and a failure so to run them for three consecutive months to be taken as an abandonment of the line and a surrender of the right granted, which was to be exercised within one year or forfeited. The bridge being within the limits of the city of Reading, the consent of the latter to its occupation by the railway companies as indicated was given by resolution of councils approved January 16, 1895.

2. In the meanwhile and before anything was done under the agreement the county of Berks refused to be bound by it, and the railway companies, attempting to proceed, applied to this court for an injunction prohibiting them from constructing their tracks upon the bridge. In that proceeding it was found

that the bridge was inadequate to support the burden intended to be imposed upon it, as well as too narrow to admit of a double track and its operation without undue interference with the general travel and traffic over the bridge, and finally, on August 28, 1895, after requiring the railway companies to strengthen the bridge sufficiently to permit, with safety, the laying and operation of a single track upon it, a decree was made allowing the construction and operation of such single track by the railway companies, on condition of their payment to the county of the annual sum of \$600, so long as the track should remain upon the bridge—that cars should be run thereon at a speed not exceeding four miles an hour, and that not more than one car or train of cars should be on the bridge at one time—that the railway companies protect the county against liability from their use of it and against any damage to the bridge therefrom, ordinary wear and tear excepted, and that the county should not be obligated to maintain said bridge for the use of the railway companies or the purposes of the railway—and that failure to run cars for three months should be taken as an abandonment and surrender of the rights granted by the decree, etc.

3. On the western side of the river the Reading & Womelsdorf Electric Railway Company constructed its line to and connecting with the track laid upon the bridge in accordance with the decree referred to, and on December 23, 1895, leased the same to the Reading Traction Company, which thereupon transferred it to the United Traction Company, by which it was subsequently passed to the Reading Transit Company.

4. In 1910 the bridge which in the interval had been used by the railway companies, was condemned as unsafe, and in obedience to notice by the county to the railway companies their traffic over it was stopped, the county agreeing not to treat this as an abandonment of any rights. Pursuant to due and lawful proceedings, and unopposed by the railway companies, the iron bridge was entirely demolished and removed by the county, and a new concrete bridge, over 1,300 feet long, 80 feet wide, having a roadway about 60 feet wide, and costing upwards of \$575,000, has been erected. The county and the railway companies have agreed to the latter's laying of a double track upon the new bridge, without prejudice, however, to any right of the county to prescribe new terms and conditions to be observed by the railway companies for that privilege and the operation of the railway on the bridge, or, in the event of a failure to agree thereon, to apply to the court for the imposition of such new terms and conditions upon the railway companies.

5. The county, by way of condition, has demanded an annual payment by the railway companies of \$5,000 for a period of 10 years, the amount payable thereafter to be readjusted at the expiration thereof. This de-

mand has been declined by the railway companies, and they have filed their bill to enjoin the county from interfering with their laying and operating a double track upon the new bridge, while the county has filed a cross-bill praying for a decree in accordance with its demand and an injunction against the railway companies prohibiting them from using the new bridge for their purposes until the terms and conditions of their occupancy of it be fixed and determined.

6. The population of the city of Reading has increased since 1893 from somewhere about 60,000 to nearly 100,000 and that of the territory west of the river and directly accessible by the bridge has grown correspondingly, being now thickly populated and containing large industries, many of whose employes reside in Reading. The travel over the bridge is very considerable, and in the natural course of things will become steadily greater—especially in the event of connections with other lines under the Transit Company's control so as to bring their traffic and travel into the city over the bridge.

7. The new bridge is amply able to sustain and accommodate the traffic over a double track, and the general travel, without inconvenience or danger to the public or the bridge.

8. The repairs to the bridge likely to be necessitated by its use by the railway companies will be insignificant.

9. The cost of the construction of the new bridge of a width sufficient to permit a double track upon it has been about \$100,000 greater than it would have been had no railway tracks but the ordinary travel only been provided for—and the cost to the railway companies of a bridge of their own, adequate for their purposes, having a life of 30 to 35 years would be from \$60,000 to about that sum, not including changes of route, new tracks, etc., and the price of land to be taken, and thereto would be added the annual expense of maintenance and repairs.

10. Since the discontinuance of the railway companies' use of the old bridge, the county has accepted no payments from them.

#### Conclusions.

A. The subject-matter of the agreement of 1893 between the county and the railway companies, and of the suit to No. 606, Equity Docket, 1894, and the decree of 1895 made therein, was the bridge structure then existing and the use of the same by the railway companies. Necessarily, by the unavoidable demolition and removal of that structure and destruction of its use for any purpose the agreement was terminated and the decree exhausted, and all rights and liabilities created by either ended; and the right of the railway companies to occupy the present bridge structure became dependent upon new arrangements as to terms and conditions if the county desire to impose such.

B. The county is entitled to exact from the

railway companies, as a condition precedent to their right to use the new bridge structure, a reasonable compensation for such right and use, the amount and manner of payment of which, upon and by reason of the failure of the parties to agree thereon, are to be fixed by the court in this proceeding.

C. A requirement that the railway companies pay to the county in quarterly installments the sum of \$3,000 for and during each of the first two years, \$4,000 for and during each of the next two years, and \$5,000 for and during each of the succeeding six years, the regulation of the amount, etc., of payment to be made after the expiration of the said period of 10 years to be left to further agreement of the parties or decree of the court thereafter, is reasonable and fair under the circumstances of the case as stated in the findings of fact.

D. The prayer of the bill filed by the railway companies is to be refused, and upon the county's cross-bill a decree is to be entered enjoining the railway companies as prayed for therein, except upon compliance with the terms and conditions indicated in the next preceding conclusion, to be secured by the filing of a bond by the railroad companies in \$10,000.

E. The costs of this suit are to be paid by the railway companies.

The court on final hearing refused the relief prayed for in the plaintiffs' bill, and entered a decree upon the cross-bill in favor of the defendant. Plaintiffs appealed.

The following exceptions, among others, were filed and dismissed:

"1. The court erred in admitting the following evidence: 'D. K. Hoch, sworn: Q. Will you tell us what the contract price for the erection of the new bridge is? Mr. Hiester: Objected to as irrelevant. Mr. Dickinson: This for the purpose of giving the court all necessary data. The Court: Admitted; exception for plaintiffs. A. \$325,910. Q. Is that the entire cost of construction? A. No, sir; that is the contract price. Q. Will there be any additional cost? A. Yes, sir. Q. What will that be? A. There are extras of \$14,175.46; cement so far has cost us \$20,955.07; damages to properties \$166,406; and other expenditures \$48,225.87.'"

Order of court: "The exceptions are dismissed."

"2. The court erred in admitting the following evidence: 'Charles F. Sanders sworn: Q. Are you able to give the approximate cost of an iron bridge, exclusive of land damages of course, erected at or about the same place sufficiently strong and large to permit the operation of a double track street railway thereon and to be used only for railway purposes? A. Yes, sir. Mr. Hiester: Objected to as immaterial. Mr. Dickinson: This for the purpose of giving the court all the necessary data on which they can come to a conclusion as to what should be a proper compensation for the use of the bridge. The purpose here is to show what it would cost the Traction Company to erect a bridge if they were erecting one for their own exclusive use. The Court: Admitted; exception for plaintiffs. By Mr. Dickinson: Q. What in your opinion would be the approximate cost of such a bridge? A. I have made up an estimate on two different types— By the Court: Q. What in your opinion would it be? A. A truss bridge would cost \$60,560. By Mr. Dick-

inson: Q. That is a truss bridge? A. Yes, sir. Q. What other kind of bridge? A. Through deck girder bridge would cost \$94,880. Q. Either of such bridges though would be sufficient for the accommodation of a double track railway? A. Yes, sir. And that would be an iron bridge? A. Yes, sir. Q. What would the life of a bridge of such character be? A. The ordinary life of an electric railway bridge is about 30 to 35 years.'"

Order of court: "The exceptions are dismissed."

"3. The court erred in admitting the following evidence: 'Charles F. Sanders sworn: Q. What would be the ratio of cost of structures having a width of 56 feet and one of 80 feet, other dimensions and construction being the same? Mr. Hiester: We object to this. A. 72½ to 100. Q. What in your opinion would be the cost of a structure having a width of 56 feet, of the same construction as the present bridge, which you have already said would be sufficient for ordinary travel, not including highway travel? A. \$257,515. Q. Would a concrete bridge of the type of the new structure, of the width of the old bridge, be sufficiently wide to accommodate the operation of a double track railway thereon without interfering with ordinary travel? A. No, sir. Q. How much wider is the driveway of the new structure than the driveway of the old bridge? A. 30 feet. Q. What proportion of the whole cost of the new structure do you consider was rendered necessary by the fact that it was designed to accommodate a double track railway? A. 27½ per cent. Q. What, in dollars, in your opinion does the new bridge cost more than a bridge of the same type of construction designed to accommodate only the ordinary travel? A. \$97,795.'"

Order of court: "The exceptions are dismissed."

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

Errors assigned, among others were: (1, 8) In dismissing exceptions to rulings on evidence as to various findings and conclusions of the trial judge, and the decree of the court.

Isaac Hiester, C. H. Ruhl, and R. L. Jones, all of Reading, for appellants. Joseph R. Dickinson, of Reading, for appellee.

BROWN, J. [1] With the demolition and removal of the old Harrisburg bridge, in the city of Reading, there was a termination of the agreement of December 27, 1893, between the county of Berks and the Reading City Passenger Railway Company and the Reading Traction Company. When that bridge passed away the agreement of 1893 passed away with it. The learned chancellor below was so manifestly correct as to this that we are not called upon to say anything further upon the subject.

[2] When the new and much larger county bridge was erected, the appellants had no right to occupy it without the consent of the county; but that consent could not have been arbitrarily withheld from them. Berks County v. Reading City Passenger Railway Co. et al., 167 Pa. 102, 31 Atl. 474, 663. The terms upon which they had the right to use it became a matter of agreement, in the first instance, between them and the county, and when they were unable to agree, the equitable jurisdiction of the court below was prop-

erly invoked by the county in its cross-bill, for the purpose of determining the terms and conditions upon which the appellants might use it. *Pittsburg & West End Passenger Railway Co. v. Point Bridge Co.*, 165 Pa. 37, 30 Atl. 511, 26 L. R. A. 323; *Berks County v. Reading City Passenger Railway Co. et al.*, supra; *Larue et al. v. Oil City Passenger Railway Co. et al.*, 170 Pa. 249, 32 Atl. 977.

[3] The appellants resist payment of any demand in excess of \$600 per year for the use of the bridge—the amount fixed by the agreement of 1893—as “illegal, exorbitant, and unjustifiable.” In support of this contention they rely upon what we said in *Point Bridge Co. v. Pittsburgh Railways Co.*, 240 Pa. 105, 87 Atl. 614, and *Monongahela Bridge Co. v. Pittsburgh Railways Co.*, 240 Pa. 121, 87 Atl. 619, limiting the claim of a city owning certain bridges to a sum equal to the additional cost for the supervision and repair of the same, made necessary by the use of them by the street railway companies. The answer to this is found in the following from the opinion of the court below:

“In each of the cases cited a railway company had acquired the right to use with its tracks and cars a toll bridge owned by a corporation upon payment to it of a certain rental, and the city had consented to its occupation of the bridge as part of the highways without imposing any conditions. Subsequently the city had acquired the stock of the bridge company, thereby becoming the owner of the bridge, and declaring it free, reserving no payments from the railway company. It was held that the city could not thereafter exact any rental from the railway company, but was restricted to demanding from it such a license fee as would reasonably cover the cost and expense of repairs, maintenance, and supervision required by the extraordinary use to which the structure was subjected—a right vested in it by reason and in the exercise of its police power. The language of the decisions, however, carefully confines them to the case of a right already acquired and lawfully used, as contradistinguished from one to be newly acquired upon terms and conditions imposed by the municipality, and to be used in accordance with them. The power in the latter case to exact something more is nowhere negatived, but explicitly recognized, as in the earlier cases, the intention to disturb which is disavowed, and under which, where they apply the authority to demand and the obligation to pay are not referable to the police power. As already pointed out, it is with a question of the initial grant of a new right upon original conditions that we have here to do, not with one of a demand based upon the continued use of a right previously granted and accepted on other, or without, conditions. In passing upon the question here arising the inquiry is whether the county in its demand is exceeding what is fair and reasonable under all the circumstances, so as to make it in effect an attempt arbitrarily to defeat the railway companies' use of the bridge. See *Berks Co. v. Rdg., etc., Co.*, 167 Pa. 102, 115, 118, 31 Atl. 474, 663.”

On this appeal the real question is whether the compensation fixed by the decree of the court below for the use of the county bridge by the appellants was based upon proper and competent evidence, and is fair and reasonable under all the circumstances.

Under the evidence which was considered by the learned chancellor below we find no error in any fact found by him, and the eleventh, twelfth, thirteenth, fourteenth, and fifteenth assignments are dismissed. The ninth finding is as follows:

“The cost of the construction of the new bridge of a width sufficient to permit a double track upon it has been about \$100,000 greater than it would have been had no railway tracks, but the ordinary travel only, been provided for, and the cost to the railway companies of a bridge of their own, adequate for their purposes, having a life of 30 to 35 years, would be from \$60,000 to about that sum, not including changes of route, new tracks, etc., and the price of land to be taken, and thereto would be added the annual expense of maintenance and repairs.”

This fact was pertinently found, and the evidence in support of it, which is complained of by the first, second, and third assignments, was properly received as helpful to the court in determining what would be proper compensation for the use of the bridge by the appellants, so constructed by the county as to accommodate their growing needs. The first, second, and third assignments are overruled.

[4] The fourth, fifth, sixth, and seventh assignments complain of the admission of evidence as to the compensation paid by the street railway or traction companies in other counties for the use of public bridges. This was not proper testimony for the consideration of the court. The question before it was as to the compensation to be paid for the use of a particular bridge, under all the circumstances surrounding its construction. What might be proper compensation for the use by a trolley company of an entirely different kind of bridge, situated elsewhere, could throw no possible light upon the question of the proper compensation to be paid for the use of the Harrisburg bridge in the city of Reading. But this evidence did the appellants no harm, for the learned chancellor distinctly says, in overruling the exceptions to his findings of fact and conclusions of law, that he gave no consideration whatever to it. Its mere admission does not, therefore, call for a reversal of the decree. In this respect the proceeding below differs from a common-law action. *Sawtelle's Appeal*, 34 Pa. 306.

The eighth, ninth, and tenth assignments do not seem to be pressed, and there is no merit in them, for the appellants were in no manner prejudiced by the information submitted to the court as to the number of passengers which they carried in their cars daily over the bridge, or as to the extent of the general travel over it.

There is nothing in the remaining assignments of error calling for further discussion. The legal conclusions reached by the court below properly followed the facts found, and the decree is affirmed at appellants' costs.

(246 Pa. 35)

**VILE v. PENNSYLVANIA R. CO.**

(Supreme Court of Pennsylvania. July 1, 1914.)

**1. EVIDENCE (§ 539½\*)—EXPERT WITNESSES—COMPETENCY.**

A witness was qualified to testify as an expert as to the practical means of cleaning locomotive boiler tubes, where he testified that he had been an engineer for 25 years, devoting himself exclusively to the study of power and combustion, and was experienced in doing away with the evil of soot, smoke, and gas, and the installation of apparatus for the distribution of escaping smoke so that it could produce no local injury, and that, while he had no experience with locomotive boilers, there was no difference between such boiler and other boilers in regard to soot, smoke, and gas.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2350-2352; Dec. Dig. § 539½.\*]

**2. NUISANCE (§ 49\*)—ACTIONS—INJURY TO ADJOINING LAND—SUFFICIENCY OF EVIDENCE.**

The uncontradicted evidence in an action for injuries to land from substances discharged thereon in connection with the cleaning of locomotive boilers with compressed air authorized a verdict for plaintiff, where it showed that the nuisance could have been avoided by brushing the tubes instead of cleaning them with compressed air, that this method was effective and had been in use by railroads for 70 years, and that the compressed air method was adopted to save time and expense, or that the damage could have been avoided by distributing the noxious fumes through a high chimney.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 115-117; Dec. Dig. § 49.\*]

**3. NUISANCE (§ 43\*)—ACTIONS—INJURY TO ADJOINING PROPERTY—DEFENSE.**

In an action for injuries to land from the cleaning of locomotive boilers by compressed air, causing the deposit of substances ruinous to vegetation on the land, it was no defense that the compressed air method of cleaning boilers was in general use, where it appeared that there were other means of cleaning boilers, by the use of which the damage could have been avoided.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 104-106; Dec. Dig. § 43.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Trespass by Charles M. Vile against the Pennsylvania Railroad Company for damages to land from the discharge of cinders, smoke, etc., from defendant's locomotives. Verdict for plaintiff, and from judgment for defendant non obstante veredicto, plaintiff appeals. Reversed.

Argued before FELL, O. J., and BROWN, MESTREZAT, POTTER, and MOSCHZIS-KER, JJ.

J. Hibbs Buckman, of Philadelphia, for appellant. John Hampton Barnes, of Philadelphia, for appellee.

BROWN, J. In 1889 the plaintiff below leased several acres of land, in the city of Philadelphia, for the purpose of carrying on his business as a truck gardener. He raised all kinds of vegetables, some under sash for the early market. In 1904 the Pennsylvania Railroad Company established a place about

400 yards from his truck garden, for the purpose of cleaning its locomotives. These were cleaned by the use of compressed air driven through the boiler tubes. As a consequence of this process of cleaning, smoke, soot, ashes cinders and greasy substances were blown out of the stacks of the locomotives and settled on appellant's premises, ruining his plants and vegetables and destroying his business. In this action he recovered a verdict of \$5,500 for the injuries which he sustained, but defendant's motion for judgment non obstante veredicto was allowed on the ground that the testimony of the witness called by the plaintiff as an expert to show that the locomotives of the defendant could have been cleaned without any resultant injury to the plaintiff was insufficient to sustain his charge of negligence. On this appeal the narrow question is whether the court below correctly so held in denying plaintiff judgment on the verdict.

[1, 2] The witness upon whose testimony the plaintiff relied as sufficient to satisfy the jury that the defendant could have adopted means for cleaning the tubes in the boilers of its locomotives which would have prevented the deposits of soot, ashes, and other injurious materials upon his premises, was J. H. Whitham. On his preliminary examination this witness testified that he was an engineer, having graduated from the United States Naval Academy; that he had followed his profession for 35 years and had been a consulting engineer since 1891; that he had devoted himself almost exclusively to the study of power and combustion, and had experience in doing away with the evils of soot, gas, and smoke; that this experience included the installation of apparatus which prevented the escape of smoke or caused the distribution of it through a zone so large that it did no local injury, and that the deposits of soot on premises adjoining or near those upon which boilers are cleaned can be avoided by the use of scrapers instead of blowers, and by washing the smoke to remove injurious impurities. While the witness admitted that he had not had experience with locomotive boilers, he at the same time said there was no difference between locomotive boilers and any other boilers in regard to soot, gas, and smoke. His testimony as to this was as follows:

"Q. Will you tell us whether there is any difference between locomotive engines or boilers and any other boilers in regard to the soot and gas and smoke? A. No, sir. Except that the locomotive has a shorter stack, and the smoke hugs the lower grade closer than a stationary plant with a tall chimney. Q. Then exactly what could be done with one could be done with the other; is that true? A. Yes, sir. Q. Does the mere fact that a locomotive boiler is on wheels make any difference from any ordinary stationary boiler? A. No, sir. Both boilers burn fuel, both have to have a draft to burn the fuel and a grate to burn the fuel on. Both have to have water in an inclosed reservoir. Both have to have surface for preserving

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



heat. Both sustain pressure and both operate engines. Q. Do both have tubes? A. Yes, sir. Q. Of the same character? A. Of the same character."

It may be here noted that the foregoing testimony was not contradicted by Alfred W. Gibbs, the chief mechanical engineer of the defendant company, the only witness whom it called.

Before he was called as a witness Whitham had inspected the property of the plaintiff and the yard of the defendant in which its locomotive boilers were cleaned, and, when asked whether in his judgment anything reasonably practicable and in accordance with actual experiments could have been done to have saved the plaintiff from the injuries which he suffered through the emission of smoke, soot, and greasy substances from the locomotive of the defendant, he answered in the affirmative, and then proceeded to testify as follows:

"Q. In your opinion, could anything be done to eliminate the damage testified there? I might state, you not being present, briefly, that the testimony is that great and serious damage has been done to the growing of vegetation, lettuce, cauliflower, beets, celery, spinach, parsley, of the plaintiff by reason of a heavy deposit of an oily, greasy, black substance that settles on the vegetation, falling when the wind comes from the direction of these yards, as described by the witnesses, as being like snow, killing the vegetation, and when it did not kill it, settled on it, that this substance, when it was attempted to be washed off or removed, kind of smears like grease. In your opinion, could anything be done which is not being done by the defendant in this case, which is something reasonable, practicable, and according to demonstrated experiments, to obviate the nuisance? A. Yes, sir. Q. What could be done? A. The tubes of the boiler could be brushed out instead of being blown out with an air blast or steam blast. That is a custom which has prevailed ever since we have had steam boilers. It is over 70 years old. It was followed by the railroads in the early days. It is followed in stationary plants to-day, largely in plants which are under my control. It is the most effective way of cleaning a boiler tube that is known. Even the air blast or steam blast only partially cleans the tube, but the brush that sweeps the tubes has got to clean them from end to end. It takes longer to operate with a brush than it does with a steam jet or a blast, and for that reason, to save time and expense of cleaning, these practices have come into use. \* \* \*

Q. Would or would not that be more effective in cleaning the tubes than compressed air? A. It is more effective. Compressed air or steam, either one of them, is only partially effective, and this absolutely cleans the tubes, removes everything. Q. Could that be used on all the tubes of a locomotive boiler? A. Yes, sir. \* \* \*

Q. Is there any other system in use to avoid nuisance and damage by gas and soot than the cleaning with a brush? A. Yes, sir. In a great many industries, where the gas and dirt and dust would be local, that is, overcome by distributing them at a high elevation so that the air currents will take them and dispose of them over a large territory, thereby not localizing them at any one spot. Suppose, for instance, you had noxious fumes, such as they have in smelting of metals, that is destructive of vegetation, the custom and practice is to have a very tall chimney, sometimes 400 feet high, and distribute those noxious fumes or acids out into a large high zone, and they will be distributed by the air currents so that they do not

hurt any one particular spot. Again, right along the river, in Camden, in one of the plants I was connected with, the manufacture of phosphates, and the odor of phosphates was disagreeable to the neighborhood, particularly on a heavy day, and we had to put a tall flue up and conduct these fumes up and distribute them through a larger zone. The same was the case where they were recovering iron and lead from old cans. They had a chimney about 20 feet high, and as they burned the solder off from the cans they burned any material left in the cans, such as fish or vegetable matter, and that made a very disagreeable oily smelling gas that went into the dwellings near by, and that is overcome entirely by putting in a chimney about 100 feet high, so those gases would be distributed at a high elevation. Q. Was that actually done? A. That was actually done, and is followed to-day. Q. Would the same be true of soot? A. The same is true of soot. You would not eliminate the soot by cleaning a boiler in that manner, but you would distribute the soot through a large zone so it would not be localized on any one spot. Q. How would you treat a plant of this kind? How would it be done in the case of a locomotive? A. In the case of a locomotive you could have a stack which rested on a structure or framework, and run your locomotive right under that chimney, let the chimney go up 200 feet, and not come down to touch the locomotive, to just clear it, and run the chimney of your locomotive right under that stack, put a flexible hood connecting the two, and then clean the tubes by your air blast in the same manner, having at the base of this stack a fan to induce a draft to expel all the dust and air that you are driving through your boiler tubes into the air at high velocity instead of letting it go out 15 feet high into the air. When it gets out of the chimney at that high elevation it strikes the air current. Of course, this soot and ash will ultimately drop, but they go through a large zone and are spread and diffused so they are not localized and do not injure any particular spot. That would be a very simple apparatus and very inexpensive. Q. In your opinion, that could be done and the property of the plaintiff here not injured? A. It would not be injured. It would carry further than his property. Q. Would any other property in the neighborhood be injured to any appreciable extent? A. No, sir; because instead of being localized on the spot, it would be diffused through a wide territory. Q. Would any portion of this deposit drop back on account of the height of the stack? A. No, sir. The fan inducing the draft at the base of the stack would prevent that. It would expel the dust and air up that stack at a high velocity."

The foregoing testimony, which we have quoted at length for the proper consideration of the question before us, was deemed insufficient by the learned court below to sustain the verdict returned for the plaintiff, because it was not based upon experience and knowledge of the witness derived from the operation of railroads or locomotives. To this reason for holding his testimony insufficient we cannot assent. He was uncontradicted in his statement that what could be done to prevent the escape of smoke, soot, and other injurious substances from a stationary engine boiler when being cleaned could be done to prevent their escape from the boiler of a locomotive when being cleaned, and he then proceeded, not merely with a theory of his own for the avoidance of the injuries suffered by the plaintiff, but distinct-



ly stated that by one of the methods suggested by him, the matter of which the plaintiff complained had been avoided in industrial and manufacturing establishments. He specifically referred to one of these—a phosphate plant in Camden. The competency of this witness ought not to be doubted, and his testimony was sufficient to lead the jury to the conclusion that the defendant had not exercised proper care under the circumstances.

[3] In support of the judgment of the court below it is argued that the defendant cannot be held liable to the plaintiff, because it appeared that the means which it had adopted to clean the boiler tubes were those in general use by other railroad companies. In view of the testimony as to the practicability of adopting other means for cleaning the boilers by which such injuries as were sustained by the appellant may be avoided, the doctrine of general usage, contended for by counsel for appellee, is not to be applied. To apply it in the present case would mean that though the defendant could have adopted means for the prevention of injuries to others in cleaning its locomotives in its yard, it was not bound to adopt them until they had been adopted by other railroad companies. It is to be remembered that the complaint of the appellant does not grow out of the actual operation of the locomotives, but out of what resulted from preparing them for operation—on property owned by the defendant company. It had a right to use the property for that purpose, but, under the competent testimony in the case, believed by the jury, only in obedience to the rule, "Sic utere tuo ut alienum non lædas;" and not to have so used it was found by the jury to have been negligence, for the consequences of which the defendant must answer to the plaintiff.

In further support of the judgment appealed from we have been referred to a number of cases involving the liability of employers to injured employes, in which the test of negligence in methods, machinery, and appliances is the ordinary usage of the business. This rule has no application in the case at bar, for, as was properly said by Rice, president judge, in *Spronson v. Philadelphia & Reading Railway Co.*, 54 Pa. Super. Ct. 30:

"These cases rest on a principle which is not involved in a case where no contract relation existed between the parties, and where the party aggrieved could do nothing to protect himself against the injury complained of, but which turns on the obligation of one owner of property conducting a lawful business thereon to so conduct it as not to inflict substantial injury upon his neighbor which it has been demonstrated, by actual experience under the same or substantially similar conditions, it is reasonably practicable to avoid."

In the *Spronson* Case the superior court had before it practically the same question that is raised on this appeal, the same witness—Whitham—having testified to the practicability of adopting means for the preven-

tion of the escape of soot, dust, cinders, and gases from a yard in which locomotives were stored, cleaned, and stoked.

No error was committed in submitting this case to the jury, and plaintiff is entitled to judgment on the verdict. The judgment entered for the defendant is therefore reversed, and the record remitted that plaintiff may have judgment.

(246 Pa. 28)

# TRUSTEES OF ROMAN CATHOLIC HIGH SCHOOL v. McCANN et al.

(Supreme Court of Pennsylvania. July 1, 1914.)

## 1. MORTGAGES (§ 535\*)—FORECLOSURE—SALE—EFFECT.

Where a first mortgage is foreclosed and the property sold, junior lien creditors are remitted to the fund realized in the foreclosure proceedings above that required to satisfy the first mortgage.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. § 1556; Dec. Dig. § 535.\*]

## 2. MORTGAGES (§ 151\*)—MECHANICS' LIENS—PRIORITIES.

A mechanic's lien for labor and material furnished prior to the recording of a mortgage relates back to the commencement of the work on the building.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 307, 309-311, 314-329, 332-336; Dec. Dig. § 151.\*]

## 3. MORTGAGES (§ 568\*)—MECHANICS' LIENS—PRIORITIES—BURDEN OF PROOF.

The burden is on a mechanic's lien claimant to prove the facts necessary to give his lien priority over a mortgage recorded prior to the filing of his lien.

[Ed. Note.—For other cases, see *Mortgages*, Cent. Dig. §§ 1639-1646; Dec. Dig. § 568.\*]

## 4. APPEAL AND ERROR (§§ 260, 719\*)—EXCEPTIONS—ADMISSION OF EVIDENCE—PRESENTATION FOR REVIEW.

An objection to the admission in evidence of the record in a prior action could not be considered on appeal, where no exception was taken to the admission of such evidence, and there was no assignment of error raising the question.

[Ed. Note.—For other cases, see *Appeal and Error*, Cent. Dig. §§ 1503-1515, 2988-2982, 3490; Dec. Dig. §§ 260, 719.\*]

## 5. MECHANICS' LIENS (§ 132\*)—TIME FOR FILING.

A mechanic's lien may be filed more than six months after the furnishing of the last labor or material, where it appears that at the time of filing the building had not been completed, that the work thereon had been stopped at the owner's instance, with the contractor's consent, because of the owner's financial embarrassment, and that it was the intention of the parties to complete the work; the six months' period within which mechanics' liens may be filed under Act June 4, 1901 (P. L. 435) § 10, not beginning to run until completion of the building under the contract.

[Ed. Note.—For other cases, see *Mechanics' Liens*, Cent. Dig. §§ 190, 192-207; Dec. Dig. § 132.\*]

Appeal from Court of Common Pleas, Philadelphia County.

Action by the Trustees of Roman Catholic High School against Charles F. McCann and others. From a decree dismissing exceptions to auditor's report, defendant Delaware Stor-

age & Freezing Company, a second mortgagee, appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

C. S. Wesley, of Philadelphia, for appellant. Julius C. Levi, of Philadelphia, for appellee.

ELKIN, J. [1] This is a controversy between a second mortgage creditor and a mechanic's lien claimant. The fund for distribution is the balance of the proceeds arising from the sale of the lien premises on the foreclosure of the first mortgage, which was paid in full. The first mortgage was foreclosed and the premises sold by the sheriff February 1, 1909. This sale divested all liens, including that of appellee for labor and materials furnished in the erection of the building, and all lien creditors were remitted to the fund realized in the foreclosure proceedings. *Rosenberg v. Cupersmith*, 240 Pa. 162, 87 Atl. 570, 47 L. R. A. (N. S.) 706.

[2] At the time of the foreclosure of the first mortgage the record showed a second mortgage due appellant and the mechanics' lien which forms the subject-matter of this litigation. The second mortgage was recorded March 11, 1908, and the mechanic's lien was filed July 17, 1908; the former antedating the latter a little over four months. The fund for distribution is \$7,698.69, which, after deducting costs and expenses, leaves a balance of \$6,805.81, a sum insufficient to pay either the second mortgage or the mechanic's lien in full. The lien creditor entitled to priority takes the entire fund, and hence the importance of determining the question of priority as between the second mortgagee and the mechanics' lien claimant. On the face of the record the second mortgage has priority, but the contention is that the mechanics' lien represents labor and materials furnished prior to the recording of the mortgage, and, this being the fact, the lien relates back to the commencement of work on the building, which antedated the second mortgage. No doubt this is the general rule, and it has been so held in many cases by this court. Chief Justice Sharswood, in *Reading v. Hopson*, 90 Pa. 494, said:

"If when he (the mortgagee) takes his mortgage a building has been commenced, he knows or ought to know that the liens of mechanics and materialmen for work done or materials furnished subsequently will relate back to the commencement of the building."

This rule has never been questioned in our state when the facts warrant its application.

[3] But when the lien is filed after the recording of the mortgage, the burden is on the lienor to prove the facts necessary to give his lien priority. In the present case the lienor assumed this burden before the auditor, who decided the questions of fact and of law in his favor. It is very earnestly and ably contended for appellant that the

evidence was not sufficient to warrant the findings; that the time for filing the lien had expired before the second mortgage was recorded; and that there was no statutory right to file the lien after March 5, 1908, being six months from the date when the last substantial work was done on the building, September 5, 1907, and two days before the second mortgage was executed, and six days before it was recorded.

[4] Some facts must be recited to give an intelligent understanding of the questions raised by appellant. A *scire facias* proceeding was instituted to reduce the lien to judgment before the first mortgage was foreclosed, and this proceeding was pending when the premises were sold by the sheriff, but after the sale there was a jury trial and a verdict in favor of the lien claimant. At the trial on the *scire facias* every question of fact raised here was submitted to the jury, and likewise all questions of law insisted upon as a defense now were raised and decided by the court. Judgment was entered upon the verdict and an appeal was taken to this court. The appeal was subsequently non prossed, and that record shows a judgment regular on its face for the amount claimed before the auditor in the present case. The record in the *scire facias* proceeding, including the judgment entered thereon, was offered and admitted in evidence at the hearing before the auditor for two purposes primarily: (1) To show the amount due claimant on the lien; and (2) as establishing the right to file the lien. Learned counsel for appellant strongly urged that this record was inadmissible as evidence and insufficient to warrant the findings of the auditor. The difficulty with this contention is that no exception was taken to the admission of this record in evidence, and there is no assignment of error raising the question. We must therefore accept the record as we find it, and cannot disregard the evidence thus introduced and not challenged in such manner as to give this court the right of review.

[5] But, accepting the record as it is, there still remains for decision: What effect is to be given the judgment entered on the *scire facias*? The lien claimant successfully contended before the auditor that it was res adjudicata as to all questions involving the validity of the lien, and that it could not be attacked collaterally in a proceeding to distribute the fund arising from the sale of the premises. Appellant, on the other hand, contends that the proceedings on the *scire facias*, including the jury trial, was not only irregular, but absolutely void, because the foreclosure of the first mortgage and the sale by the sheriff divested the lien and arrested the proceeding to reduce it to judgment. That the proceeding was irregular and voidable must be conceded, and that the sale by the sheriff of the lien premises could have been set up as a complete defense to the *scire facias* cannot now be questioned. It

was so decided in *Rosenberg v. Coppersmith*, 240 Pa. 162, 87 Atl. 570, 47 L. R. A. (N. S.) 706, above cited, upon reasons sound and convincing, and the authority of that case will not be disturbed. But in the present case no such defense was made in the scire facias proceeding, and the case went to trial upon the amount of the lien and the right to file it under the facts and circumstances. These questions were decided in favor of the lienor by the court and jury, and that record remains unimpeached. We are not prepared to say that the judgment entered on that record is conclusive against all the world, and that it must be deemed a final adjudication of all matters that could have been raised as a defense in that proceeding; in other words, that it was res adjudicata in the broadest legal signification. For the purposes of the present case it is not necessary to go so far, and we do not do so. What we do decide is that, the record having been offered, and no exception taken to its admission, it is in evidence, and, taken in connection with the other testimony introduced at the hearings, it is sufficient to warrant all the material findings of the auditor. The auditor found, in substance, that the building was not completed when the work was suspended, or even when the lien was filed; that the work was temporarily suspended in September, 1907, at the instance of the owner and by consent of the contractor, because of the financial embarrassment of the former; that it was the intention of both parties to resume work on the building as soon as conditions warranted it; that the building was not completed in accordance with the terms of the original contract, not because of any default on the part of the contractor, but by reason of the inability of the owner to provide the necessary funds to complete the work; that it was the intention of both owner and contractor to have the building completed as provided in the original contract; and that this was the situation when the lien was entered. The evidence was sufficient to warrant these findings of fact. Section 10 of the act of June 4, 1901 (P. L. 431), limits the time for filing the lien to six months from the completion of the building under the contract, and we think, under the facts disclosed by the testimony, and especially in view of the finding of the jury in the scire facias proceeding, the facts have been established to show that the lien was filed within the statutory period. The auditor so held, and we feel bound by the conclusion. It is argued that the act of 1901 changed the old rule and limited the time for filing the lien to a period not exceeding six months from the time the last labor or materials were furnished without regard to whether the contract was completed or not. We do not so read or understand the act, and cannot agree that anything in its provisions changes the statutory limitation in this

respect, or alters the conditions affecting the time when the limitation begins to run.

The auditor further found as a fact that appellant, through its proper officers, had frequently visited the building before taking the second mortgage, saw its unfinished condition, and thus had notice that the contract had not been completed, and knew or should have known that a lien for work done or materials furnished might be filed, and, if so, it would relate back to the commencement of the building. Under such circumstances, a valid lien subsequently filed would have priority over the mortgage, and this was the conclusion reached by the auditor.

While the case is not free from difficulties, our conclusion is that, upon the whole record, no reversible error has been pointed out. The case is controlled by its own facts, and is not intended to announce any rule of general application.

Judgment affirmed.

(245 Pa. 538)

REA v. PENNSYLVANIA CANAL CO. et al.  
(Supreme Court of Pennsylvania. July 1, 1914.)

1. CORPORATIONS (§ 480½\*) — CORPORATE MORTGAGE—INTEREST COUPONS PURCHASED UNDER AGREEMENT—EFFECT TO EXTINGUISH.

Where a railroad company purchased interest coupons of mortgages executed by a canal company, pursuant to its agreement indorsed on the bonds to "purchase the said coupons at their par value from their respective holders on presentation thereof," this did not extinguish the coupons, so as to disentitle the railroad company to its priority of lien over the principal of the bonds, though the resolution of the railroad company authorizing the agreement to purchase referred to the transfer of collateral security, "all of which shall be held as indemnity against loss under the guaranty above provided for"; the use of the word "guaranty" not operating to convert the agreement to purchase the coupons into an agreement to pay them.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1874, 1875; Dec. Dig. § 480½.\*]

2. CORPORATIONS (§ 480½)—CORPORATE MORTGAGES—INTEREST COUPONS—TRANSFER OF TITLE—PRESUMPTION.

Transfer of possession of interest coupons of corporate mortgages is presumptively a transfer of title.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1874, 1875; Dec. Dig. § 480½.\*]

3. CONTRACTS (§ 170\*) — INTERPRETATION — CONTEMPORANEOUS CONSTRUCTION BY PARTIES.

No contemporaneous construction by the contracting parties can be considered in construing an unambiguous written agreement.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. § 170.\*]

Mestrezat, J., dissenting.

Appeal from Court of Common Pleas, Philadelphia County.

Bill by Samuel Rea, trustee, against the Pennsylvania Canal Company and others, to foreclose a mortgage and fix the order of distribution of funds. From a decree making distribution, plaintiff and the de-

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

defendant Pennsylvania Railroad Company appeal. Reversed.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

John G. Johnson, of Philadelphia, for appellant Rea. Francis I. Gowen, of Philadelphia, for appellant Pennsylvania R. Co. Thos. Raeburn White, William F. Norris, Robert D. Jenks, John Cadwalader, Jr., and William A. Glasgow, Jr., all of Philadelphia, for appellees.

POTTER, J. This was a bill in equity, filed by Samuel Rea, trustee for bondholders, under a mortgage executed by the Pennsylvania Canal Company. The bill prayed for foreclosure, and for instructions as to the distribution of the proceeds of sales of the mortgaged premises. The defendant the Pennsylvania Canal Company in its answer admitted all the allegations of the plaintiff's bill, and submitted itself to the decree of the court. Mr. John Cadwalader and others intervened as defendants to protect themselves as the owners of certain bonds of the Pennsylvania Canal Company. Certain pertinent findings of fact by the court below, may be stated as follows:

The Pennsylvania Canal Company, being empowered to issue bonds under its charter to the amount of \$5,000,000, duly issued bonds to the amount of \$3,000,000. These bonds were indorsed, in pursuance of a resolution adopted by the board of directors of the Pennsylvania Railroad Company, which reads as follows (June 30, 1870):

"Resolved, that the Pennsylvania Railroad Company will agree to purchase the interest coupons of \$3,000,000 of the general mortgage bonds of the Pennsylvania Canal Company—said bonds being intended to retire the \$2,367,000 existing debt of the Canal Company; to pay \$103,000 for the Hazard Coal Property, as contracted to be paid by the Canal Company; to pay \$200,000 for the contemplated enlargement of the canal this year; and the balance of said \$3,000,000 to be used for future enlargement: Provided, the Pennsylvania Canal Company transfer to the Pennsylvania Railroad Company, as collateral security, all their rights and interest, directly or indirectly, in their coal properties, and all stock of coal companies owned by them, all of which shall be held as indemnity against loss under the guarantee above provided for. This being done, then the following indorsement to be placed on the said \$3,000,000 of bonds: 'For a valuable consideration the Pennsylvania Railroad Company by resolution of the board of directors thereof dated the 30th day of June, A. D. 1870, has agreed with the respective holders of the issue of bonds of the Pennsylvania Canal Company, dated July 1, 1870—of which bonds the within is one, there being two thousand nine hundred and ninety-nine (2,999) others, differently numbered, but of like date, tenor, and amount—that in case the said Pennsylvania Canal Company, their successors and assigns, shall fail to pay the interest coupons thereto attached when and as the same may mature, or within 30 days afterwards, respectively, that then the said Pennsylvania Railroad Company will purchase the said coupons at their par value from their respective holders on presentation thereof.'"

Under the mortgage there was reserved to the Canal Company the right to sell any part of the mortgaged premises, at any time, free from the lien of the mortgage, provided it used the proceeds for the benefit of the bondholders, or in the purchase of some of the bonds secured by the mortgage. Under this power the Canal Company sold from time to time portions of its property to the Pennsylvania Railroad Company. The proceeds of these sales were used by the Canal Company in the purchase and cancellation of bonds of the Canal Company, which bonds were at the time the property of the Pennsylvania Railroad Company. The Canal Company paid the interest coupons until July 1, 1888. After that date the holders of coupons, or their representatives who came to collect the coupons, were told to take them to the Pennsylvania Railroad Company, which would purchase them. Upon presentation at the offices of the Pennsylvania Railroad Company, an agreement was presented to and signed by the persons offering the coupons, setting forth that the coupons were being sold to the Railroad Company, and agreeing that the coupons so sold should continue in full force and validity as against the Canal Company.

The plaintiff, as trustee, has a fund of \$433,014.74 in his hands, for distribution, and has also the property of the Canal Company, which remains unsold. The holders of 858 bonds have intervened to protect their interests. The Pennsylvania Railroad Company holds coupons which it has bought to the amount of \$3,116,400. These were obtained in several ways: (a) By purchase on presentation for payment; (b) those coupons still attached to the bonds belonging to the Pennsylvania Railroad Company; and (c) those coupons unpaid, which were clipped from bonds by the Pennsylvania Railroad Company, to facilitate the sale of the bonds to outsiders. The Pennsylvania Railroad Company claims priority as regards these coupons, over the principal of the bonds, on the fund for distribution, and on any fund realized from the sale of the property covered by the mortgage.

The court below, as a matter of law, reached the conclusion that the indorsement of the bonds by the Pennsylvania Railroad Company as above described constituted a guaranty of the payment of the interest of the bonds, and that as against the bondholders the coupons in the hands of the Pennsylvania Railroad Company are to be considered as having been paid, and not as having been purchased by the Railroad Company. The correctness of this view is the principal question here involved.

In reaching his conclusion, the trial judge was evidently moved by the ethics of the case. He noted from the record that the Canal Company was to all intents and purposes merely a department of the Railroad Company, and that the management of the Canal Company was entirely within the con-

trol of the railroad. He saw that the latter had from time to time taken over upon terms arranged to its own satisfaction, the property of the Canal Company, which was covered by the mortgage, and it was difficult to see why in fairness and justice, provision should not have been made for the payment of the bonds, which had been placed upon the property with the full knowledge and consent of the Railroad Company, and which had been issued under an agreement with the Railroad Company, by which it bound itself to purchase the interest coupons at par, in case the Canal Company failed to pay them. It is not strange that the court below felt strongly disposed to apply the maxim "Equity considers that as done which ought to have been done." But this maxim is of much more limited application than its terms would suggest. It presupposes a contract, under which a party would have had a benefit from something which it was agreed should be done, but which was not done. In such case there is an equitable right to have the case considered as if the thing contracted for, had been done. But in the application of this principle we are not at liberty to go beyond the sphere of contract relation created by the parties. We cannot make for them an agreement, into which they have not entered.

[1] The question, therefore, which is here presented to us for consideration, is not what the Railroad Company under the circumstances ought to have done with the coupons; but it is, what did it agree to do, and what as a matter of fact did it do, in taking the coupons over? Did it on behalf of the Canal Company pay the coupons, with a view to their extinguishment, as a claim under the mortgage, or did it purchase them, with the right to hold them under the continued security of the mortgage, with the same right to priority of payment which the coupons would have had in the hands of the bondholders? It is clear that the Railroad Company did not take over the coupons without having an agreement or stipulation as to the nature of the transaction. And this stipulation was expressed in very definite language, in which we can discover no ambiguity. The obligation which the Railroad Company intended to assume, and which it did assume, appears, first, in the resolution of its board of directors, in which it is distinctly set forth that the Railroad Company will purchase the interest coupons upon certain conditions. The squarely defined intention to purchase again appears in the indorsement upon the back of the bonds, in which is reiterated the statement:

"In case the said Pennsylvania Canal Company, their successors and assigns, shall fail to pay the interest coupons thereto attached, or as the same may mature, or within 30 days afterward, respectively, that then the said Pennsylvania Railroad Company will purchase the said coupons at their par value from their respective holders on presentation thereof."

This was the contract with the bondholders, which went into the hands of each bondholder, and which stared him directly in the face. He saw before him, indorsed upon the bond as he took it, a statement, not that the Railroad Company would pay the coupons and take them over for extinguishment, but that it would hold itself ready upon presentation to purchase the interest coupons, if not paid by the Canal Company.

[2] It is common knowledge that interest coupons are passed from hand to hand, and that the title to them passes by mere delivery. A transfer of possession is presumptively a transfer of title. The Railroad Company was under no legal obligation to purchase these coupons, except upon the exact terms set forth in the written agreement, by which it bound itself to make the purchase. In strict accordance with that agreement is the writing signed by the holders of coupons at the time when they presented them to the Railroad Company, in which it is stated that in pursuance of the indorsement upon the said bonds they did sell and deliver to the Pennsylvania Railroad Company the said coupons; and it was further agreed that the coupons so sold as aforesaid shall continue in full force and validity and remain and be a debt secured by the said mortgage. How could it be possible to set forth more clearly, or in plainer language, the intent of the Railroad Company to purchase the coupons in question, and the intention of the holders of the coupons to make sale of the same to the Railroad Company? Had there been but a single transaction of the kind, some excuse might have been made for a failure to take note of the terms of purchase which were so clearly set forth both in the indorsement upon the bonds, and in the writing which was signed when the coupons were sold and set over to the Railroad Company. But when it is remembered that twice each year, for a period of 22 years, the coupons were thus presented to, and purchased by, the Railroad Company, no good or sufficient reason appears for a failure to understand the terms of the transaction. There was no compulsion upon the part of any bondholder to part with his coupons upon these terms. It must, of course, be admitted that the parties had the right to make their own contract, and to say for themselves what they would do. In unmistakable terms the Railroad Company agreed to purchase the coupons, which involved the right upon its part to retain them, in reliance upon the security of the mortgage. It did not agree to pay the coupons, or to take them upon terms that implied their extinguishment, as a claim under the mortgage.

In the argument of counsel for appellees, some stress is laid upon the language of the proviso, in the resolution of the Railroad Company, in which reference is made to the

transfer of collateral security, "all of which shall be held as indemnity against loss under the guaranty above provided for." The transaction to which reference was thus made was the agreement to purchase the interest coupons. It was this agreement to which the board referred as "the guaranty above provided for." This reference can have no effect whatever upon the terms of the agreement. These terms were in no way enlarged by the use of the word "guaranty" in referring to them in this matter. The use of this word "guaranty" in this connection did not have, and could not have, the effect of turning an agreement to "purchase" coupons into an agreement to "pay" them, for the purpose of extinguishment or cancellation. Counsel for appellees have not cited to us, nor have we been able to discover, any decision in which a court has ever undertaken to construe a plain agreement to purchase coupons as being the equivalent of a contract to pay them, for the purpose of extinguishment.

[3] A portion of the able argument of counsel for appellees is based upon the hypothesis, that the resolution of the Railroad Company, which embodies the contract with the bondholders, is ambiguous. But, as we have already said we find no uncertainty of meaning in the language of the resolution or in that of the indorsement which was placed upon the bonds. The agreement upon the part of the railroad company was clearly stated, as being one to purchase the interest coupons; it was not an agreement to pay them, with a view of extinguishment. In the absence of any uncertainty as to the sense of the language which was used, any argument based upon contemporary construction by the parties has no application to the present case.

It appears, also, that it was contemplated in the resolution that collateral to protect it from loss in the purchase of the coupons should be transferred to the railroad company. If this had been done, the collateral should have been accounted for, and the proceeds of anything so received should have been applied to the claim upon the coupons. But this feature disappears from the case under the stipulation of counsel, by which it was agreed that no transfer of coal properties, or stock of coal companies, owned by the Canal Company, was made to the Railroad Company as collateral security, as was contemplated in the resolution. Under the plain terms of the agreement, and under the undisputed facts of the transaction, we cannot regard it as anything else than a purchase of the interest coupons. It follows that the coupons so purchased were entitled under the terms of the mortgage to priority of lien over the bonds, and to prior recognition in the distribution of the funds arising from the sale of the mortgaged premises.

The first, second, third, fourth, fifth, sixth,

seventh, ninth, tenth, and eleventh assignments of error are sustained. The decree of the court below is reversed, and the record is remitted for further proceedings in accordance with this opinion.

MESTREZAT, J., dissents.

(246 Pa. 1)

HENCH v. PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania. July 1, 1914.)

1. MASTER AND SERVANT (§ 265\*)—INJURY TO RAILROAD EMPLOYE—BURDEN OF PROOF—INTERSTATE COMMERCE.

In an action against a railroad company under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (U. S. Comp. St. Supp. 1911, p. 1322), and Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (U. S. Comp. St. 1901, p. 3174), for death of plaintiff's husband, the burden is on plaintiff to prove violation of the federal statutes, and that decedent was engaged in interstate commerce, or with its instrumentalities, at the time of the accident.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

2. MASTER AND SERVANT (§ 265\*)—INJURY TO RAILROAD EMPLOYE—INTERSTATE COMMERCE—PRESUMPTION.

In an action for injuries resulting in the death of a brakeman, evidence merely that from time to time cars containing both intrastate and interstate commerce were received, stored, shifted, and reloaded in the yard in which the accident occurred created no presumption that the cars being shifted at the time of the accident were intended for use in interstate commerce.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

3. MASTER AND SERVANT (§ 265\*)—INJURIES TO RAILROAD EMPLOYE—INTERSTATE COMMERCE—PRESUMPTION.

In an action against a railroad company under federal statutes for death of plaintiff's husband, who was fatally injured while coupling cars, failure of defendant to produce records showing what particular cars were being moved in the freightyard on the night of the accident created no presumption that the cars therein were being used in interstate commerce, where defendant's clerk, who kept certain records of cars, testified that he had no such records.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877-908, 955; Dec. Dig. § 265.\*]

Appeal from Court of Common Pleas, Washington County.

Action by Stella M. Hench, administratrix of Edgar S. Hench, deceased, against the Pennsylvania Railroad Company. From judgment for plaintiff, defendant appeals. Reversed.

The witness Allen was a clerk in defendant's employ, who had charge of the records of loaded cars moved in the freightyard, where the accident occurred.

Argued before FELL, C. J., and BROWN, MESTREZAT, POTTER, ELKIN, STEWART, and MOSCHZISKER, JJ.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

R. W. Irwin, Rufus S. Marriner, and Jas. A. Wiley, all of Washington, Pa., for appellant. W. Clyde Grubbs, of Pittsburgh, Edwin T. Levengood, of Youngstown, Ohio, and Alexander M. Templeton, of Washington, Pa., for appellee.

ELKIN, J. [1] This is an action of trespass to recover damages for personal injuries resulting in the death of plaintiff's husband, who was employed as a brakeman in a general freightyard of defendant railroad company located in the city of Pittsburgh. The suit was brought under two acts of Congress—the Employers' Liability Act of April 22, 1908, and the Safety Appliance Act of March 2, 1893. In such a case the burden is on the party suing to prove the facts necessary to show a violation of the federal statutes, and that the injured party was engaged in interstate commerce or with its instrumentalities at the time of the accident.

[2] In the case at bar the injured party was engaged as a brakeman on a shifting crew in a freightyard, where all kinds of freight were received and distributed. If the action had been brought at common law or for the violation of a state statute, the question of the character of the commerce in which the decedent was engaged at the time of his injury would have been immaterial; but plaintiff elected to bring her suit under the acts of Congress, as she clearly had the right to do, and thus assumed the burden of making out a case under the federal statutes. The controlling question for decision here is whether the evidence adduced at the trial was sufficient to make out a prima facie case under the acts of Congress relied on to sustain a recovery. Appellant contends the evidence does not show that in the performance of his duties as brakeman the deceased husband had anything to do with interstate commerce, or that at the time of the injury he was engaged in such commerce, or that the cars being shifted in the freightyard where decedent was injured, including the cars which caused the injuries, were so engaged. Even counsel for appellee concede that there was no direct or positive testimony bearing upon these material questions. No attempt was made to prove what the general duties of decedent were, or what duties were included within the scope of his employment, and the fact that he was a brakeman only appears as an incident of the trial without explanation as to the character of his general duties, or that he had anything to do in connection with interstate shipments. At the close of the trial the only substantive fact proved tending to show in any way decedent to have been engaged even remotely in interstate commerce was that in the freightyard where he was employed cars containing both intrastate and interstate shipments were received, stored, shifted, and reloaded for transportation from time to

time. So far as the evidence discloses there is no greater presumption that the empty cars being shifted at the time of the accident were intended for use in interstate commerce than that they were to contain intrastate shipments. The evidence is silent as to the character of freight with which these cars were loaded when they arrived in the freightyard, what disposition had been made of the cars after their arrival, and what kind of shipments, if any, they contained when they left the yard. All of these important facts are left to conjecture.

Can it be said under these circumstances that the plaintiff made out a case under the acts of Congress? It is argued that where there is no direct or positive evidence of the negligence charged, or of the facts required to make the acts of Congress applicable, the circumstances may be such as to warrant the necessary inference to be drawn by the jury. This is stating the rule more broadly than the cases relied on warrant. It is true that the facts proved at the trial may warrant a presumption of negligence, and there are exceptional cases in which it has been so held. But even in such cases it is for the court to say whether the facts proved are sufficient to raise the presumption relied on. 38 Cyc. 1519; *Stoeber v. Whitman*, 6 Bin. 416. In the case at bar the facts proved do not show what kind of commerce decedent was engaged in at the time of the accident. The empty cars may have been intended for interstate shipments, or for intrastate. There is no more presumption one way than the other. The presumptions in this respect are equal, if, indeed, it can be said there is any presumption under such circumstances. Again, it is worthy of notice that the cars being shifted were empties and did not contain any kind of commerce, and there is no evidence to show from whence they came nor whither they were going, what kind of shipments they carried into the freightyard, or what character of commerce they were engaged in when they left it.

[3] It is further contended for appellee that the failure to produce the records of the draft of cars in question when subpoenaed to do so amounts to a suppression of evidence on the part of appellant and raises a presumption that decedent was engaged in interstate commerce. The difficulty with this argument is that the facts do not sustain it. The witness Allen was subpoenaed to produce the records of the conductor, Hickey, showing the cars he moved in the freightyard on the night of the accident. The witness appeared and testified, and there is nothing in his testimony to indicate a suppression of evidence. He said he had no such records, and that as soon as the subpoena was served he wired the Philadelphia office, where all records were kept, asking for the records in question, but was informed that no record of empty cars was kept,

This witness testified that reports of loaded cars were kept, but not of empty cars handled in the yard. The evidence was straightforward and was not disputed. This stands as an established fact by a witness produced by plaintiff and not challenged by any one. The witness could not produce what he did not have, and how can it be said that he suppressed a record which never existed? There were 2 loaded cars in the draft of 22 cars; but counsel for plaintiff asked no questions about the loaded cars, and, indeed, these cars had nothing to do with the injury of decedent. Counsel did ask the witness Hickey for the number of the car which caused the injury, and was informed that it was "Hopper, 682970." No further inquiry was made about this car, nor about the other five cars in the draft being shifted at the time decedent was injured. The numbers of these cars could have been obtained, their movements could have been traced, and the kind of shipments they contained when loaded and made up into trains could have been ascertained by proper inquiry; but no such questions were asked, and no attempt was made to elicit this information, or to establish these material facts. We discover no attempt to suppress evidence in this record, nor is there anything to indicate that the witness Allen did not tell the exact truth when he testified that no record of empty cars was kept while they were lying in the freightyard awaiting consignment in regular trains, or were being shifted for this purpose. Under this state of facts, it is our opinion, that the rule of spoliation, upon which the contention of appellee is based, has no application.

As we view this case, the burden was on plaintiff to prove facts to show that her husband was engaged in interstate commerce, or had to do with the instrumentalities of such commerce, at the time he received his injuries, and as to these essential facts the proofs fail to make out a prima facie case. It is difficult to lay down a definite rule marking the division lines between intrastate and interstate commerce in this class of cases, so as to be able to determine with precision and exactness in each case as it arises whether the injured employé was or was not engaged in interstate commerce within the meaning of the acts of Congress. Much depends upon the facts of each particular case, and hence the necessity of proving the essential facts relied on to show that the injured party was engaged in interstate commerce, or had to do with its instrumentalities when he was injured. How liberally the acts of Congress shall be construed, and to what extent they may be widened and broadened in their enforcement, so as to include injured persons only remotely or incidentally engaged in interstate commerce, and without reference to their primary and principal duties, is not for this court to finally determine. To hold the scales evenly bal-

anced, so as not to unduly limit the powers of Congress on one hand, nor yet encroach upon the proper exercise of state jurisdiction on the other, is not an easy task for any court. But there must be a division line at some point in each case, and the facts must be the guide to determine where that line shall be drawn.

We are not unmindful of the recent decisions of the Supreme Court of the United States in which this question has been broadly considered. These cases construe the federal statutes most liberally, and will have the effect of extending their application in many directions. Such are *Southern Railroad Co. v. United States*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72, *Mondou v. Railroad Co.*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327, 38 L. R. A. (N. S.) 44, *Pedersen v. Railroad Co.*, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, and other cases of like import. We must assume, however, that it was not the intention of these decisions to construe the acts of Congress so as to make them cover injuries sustained by an employé engaged in intrastate commerce at the time he was injured. Certainly the acts of Congress could not apply to a railroad, or its employés, engaged exclusively in intrastate commerce and not having any business of an interstate character. But no such situation is likely to arise, because nearly every railroad in this country, and perhaps every one, engages to some extent in interstate commerce, either by shipments to points outside the state or by receiving cars or freight from points beyond state lines. If the mere fact that a railroad may be used at times, frequently or otherwise, for interstate commerce transportation, fixes the status of all its employés as being engaged in interstate commerce within the meaning of the acts of Congress, without reference to the duties they were performing at the time of the injury, it would follow that all such employés, no matter how incidentally or remotely their duties had to do with interstate commerce generally, or what kind of commerce they were engaged in when injured, would come within the purview of the federal statutes when they brought an action to recover damages for personal injuries. To so hold would mean the wiping out of all state regulation and authority in matters relating to the personal injuries of railroad employés. The cases have not gone so far, and we do not see how the rule can be laid down so broadly without doing violence to the plain language of the commerce clause of the Constitution which limits the federal power to interstate subjects.

Our view is that in cases like the one at bar commerce must be regarded as of two kinds, intrastate and interstate, and the status of the employés must be determined by the kind of commerce they are engaged in at the time the injuries were sustained. If they were engaged in interstate commerce, the acts of Congress apply; if they were engag-



ed in intrastate commerce, the federal statutes have no application. All of this depends upon the facts, and in order to make out a case under the acts of Congress plaintiff must prove that the injured person was engaged in interstate commerce at the time of the accident. In the present case this burden was not borne.

This position is sustained by a historical view of the decisions and legislation relating to this subject. The Employers' Liability Act of Congress of June 11, 1906 (34 Stat. 232, c. 3073 [U. S. Comp. St. Supp. 1911, p. 1316]), was declared unconstitutional by the Supreme Court of the United States, because it included subjects wholly outside the power of Congress under the commerce clause of the Constitution—that is, subjects relating to intrastate commerce. *Employers' Liability Cases*, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297. Following that decision Congress passed the act of 1908, which in plain language limited its application to interstate commerce and to "any person suffering injury, while he is employed by such carrier in such commerce." The evident purpose of this act was to limit its application to interstate subjects and to correct what the Supreme Court of the United States had pointed out as a fatal defect in the act of 1906. Keeping in mind the plain language of the act of 1908, and the sequence of events which led to its enactment, how can it be successfully contended that it may be so enlarged and extended as to include injuries to all kinds of employes engaged in all kinds of commerce, and that it is not to be restricted to interstate commerce and to persons engaged therein?

There is some question as to the evidence being sufficient to sustain a charge of negligence under the acts of Congress even if it appeared that decedent was engaged in interstate commerce at the time. It is a close question, to say the least; but it is of no special importance, in the view we have taken of the case, that there was no proof to show decedent to have been engaged in interstate commerce. Having failed to establish this essential fact, the case falls.

This case has now been heard and carefully considered by all the members of this court with the result that there is entire agreement upon the conclusion reached. In other words, we all agree that the evidence was insufficient to make out a case showing that decedent was engaged in interstate commerce when injured.

Judgment reversed, and is here entered for defendant upon the whole record.

(245 Pa. 612)

#### COMMONWEALTH v. DE FELIPPIS.

(Supreme Court of Pennsylvania. July 1, 1914.)

#### 1. CRIMINAL LAW (§ 1064\*)—APPEAL—PRESENTATION BELOW—MOTION FOR NEW TRIAL.

An assignment of error, alleging that a new trial should have been granted because of

the commonwealth's failure to call a material witness whom it has subpoenaed will be overruled where it does not appear that such reason was advanced below in support of the motion for a new trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2676-2684; Dec. Dig. § 1064.\*]

#### 2. CRIMINAL LAW (§ 1129\*)—APPEAL—DENIAL OF NEW TRIAL.

An assignment of error, alleging that a new trial should have been granted because of the commonwealth's failure to call a material witness whom it has subpoenaed will be overruled, where the assignment does not show the name of the witness or what his testimony would have been.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2964-2964; Dec. Dig. § 1129.\*]

#### 3. CRIMINAL LAW (§ 956\*)—DENIAL OF NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A new trial sought for newly discovered evidence was properly refused where the only proof of such evidence was the ex parte affidavit of accused of what he expected the witness to testify to, and it did not appear that the witness' testimony, if presented, would have caused a different verdict.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2373-2391; Dec. Dig. § 956.\*]

#### 4. HOMICIDE (§ 174\*)—EVIDENCE OF FLIGHT—PROBATIVE EFFECT.

Evidence of defendant's flight may be considered by the jury in a homicide case, together with all the other circumstances, in determining the degree of guilt.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 359-371; Dec. Dig. § 174.\*]

#### 5. HOMICIDE (§ 158\*)—EVIDENCE—ADMISSIBILITY.

Evidence that accused stated that "there will be blood running around through this house in a short time" was admissible in a homicide case to show a threat and indicate premeditation, where there was also evidence that defendant had a prior dispute with deceased, which justified an inference that the threat was directed against deceased.

[Ed. Note.—For other cases, see Homicide, Cent. Dig. §§ 293-296; Dec. Dig. § 158.\*]

Appeal from Court of Oyer and Terminer, Beaver County.

Alessander De Felippis was convicted of murder of the first degree, and appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Henry H. Wilson and George Wilson, both of Beaver, for appellant. Louis El Graham, Dist. Atty., of Beaver, for appellee.

POTTER, J. The appellant in this case, Alessander De Felippis, was indicted, and tried, upon a charge of murder of the first degree, and was convicted, in the court of oyer and terminer of Beaver county. It appears from the record that in the fall of 1912 appellant was working at Ellwood City, Pa. He boarded with Dominic Salzello and Theresa Salzello, his wife. He had some difficulty with Mrs. Salzello, and she gave

him notice to leave the house. On November 24th he left, but before going he had some talk with the husband, and, according to the statement of the latter, said to him, "There will be blood running around through this house in a short time." Other witnesses who were present when appellant left testified that he said to Salzello and his wife, "Before I go from Ellwood City there will be blood," and that "There will be blood running around here." Appellant then went outside and crossed the street, and fired a revolver in the air. Salzello also testified that appellant further said to him, "Not your blood, but somebody else's." Three days later, on the morning of November 27th, between 8 and 9 o'clock, after Salzello had gone to work, appellant came to the house, saw Mrs. Salzello alone in the kitchen, and shot her four times with a revolver, three times in the body, and once in the forehead, the last shot causing her death. A little child of Mrs. Salzello's seems to have been present at the time. The first person to arrive after the shooting took place, was a boarder, who had been asleep upstairs. He was awakened by the crying of the child and smelled the odor of burnt powder. He dressed and went down to the kitchen, where he found Mrs. Salzello lying face downward on the floor in a dying condition. Immediately after the shooting appellant was seen running from the house. He hid himself in a railroad tunnel, where he remained until the evening of the next day, when he came out and was arrested.

Upon the trial appellant admitted that he had shot Mrs. Salzello. He testified that he had given her \$250 of his savings to keep for him, and that after leaving her house he had obtained employment at Connellsville; that on the morning of the shooting he had gone to her to get his money, or part of it; that she had refused to give it to him and they had quarreled; that she called him names and struck him with a stick, and that, then being crazy with anger and not knowing what he was doing, he drew his revolver and shot her. Under the admitted facts the only question for the jury was the degree of murder of which the prisoner should be convicted.

[1] In the first assignment of error here presented, it is alleged that the court below erred "in overruling a motion for a new trial when it appeared from the record that the only witness capable of giving direct evidence of the immediate circumstances of the shooting was unknown to the defendant, and, although in attendance at the trial on a commonwealth subpoena, was neither called to the stand, nor was notice given the defendant of an intention on the part of the commonwealth not to call the witness." It does not appear that any such reason was advanced in the court below in support of the motion for a new trial. The court below could

not therefore be properly charged with error in refusing to grant a new trial for a reason which was not presented to it.

[2] Furthermore the name of the witness, who it was said was not called, is not set forth in the assignment, nor does it appear what his testimony would have been if called. It is not apparent that appellant was prejudiced in any way by the failure to call this witness.

[3] The second assignment of error is to the action of the court below in overruling the third reason advanced in support of the motion for a new trial, which was based on the allegation of after discovered evidence. The only proof presented, with respect to this so-called after discovered evidence, is the ex parte affidavit of appellant to what he expects the witnesses to testify to, if a new trial should be granted. Their testimony was not taken. From the averments of appellant in his affidavit as to the testimony in question, it does not appear that if the testimony had been presented on the trial, it would have aided the appellant or have altered the verdict. It does not appear, therefore, that the court below in any way abused its discretion in refusing to grant a new trial on the ground of after discovered evidence.

[4] In the third assignment of error, counsel for appellant complain of that portion of the charge of the court, which refers to the action of the prisoner, after the shooting, in fleeing and placing himself in hiding. The concluding passage of this portion of the charge is as follows:

"Flight or concealment, therefore, gentlemen, is only a circumstance for your consideration, together with all other circumstances, in determining the degree of guilt, if any."

It is suggested that evidence of flight is not properly to be considered, as affecting the degree of murder. In *Com. v. McMahon*, 145 Pa. 413, 417, 22 Atl. 971, 972, it was said:

"The flight of a person charged with crime immediately after the commission of an offense is a circumstance which the jury may always take into consideration."

In *Lanahan v. Com.*, 84 Pa. 80, 86, this court said, speaking through Mr. Chief Justice Agnew:

"Flight it is argued is no evidence of the degree of murder; but flight, under the circumstances detailed, gives them strength, and they indicate the degree."

In *Com. v. Salyards*, 158 Pa. 501, 507, 27 Atl. 993, 996, Mr. Chief Justice Sterrett said:

"All the facts and circumstances connected with the shooting, including the presence of the prisoner at or about the time it occurred, his previous threats, immediate flight, arrest in a neighboring state, etc., all point to him as the person who intentionally and feloniously fired the fatal shot. All these facts and circumstances, if true, are consistent with his guilt, and at the same time irreconcilable with any other reasonable theory, arising out of the testimony. \* \* \* As already intimated, the evidence was quite sufficient to justify the jury in finding all the facts necessary to constitute murder of the first degree."

In *Com. v. Aiello*, 180 Pa. 597, 606, 36 Atl. 1079, 1080, the killing was admitted, and the one question was as to the degree of the crime. Mr. Justice Mitchell there said:

"There was evidence in appellant's acts and declarations immediately after the killing, in his flight and concealment, etc., to sustain the commonwealth's theory that although he had been friendly to the deceased at first, he afterwards lost patience and determined to 'settle him' in the way he did."

These citations make it clear that the trial judge expressed with entire correctness the law, as to the effect to be given to the fact that appellant fled and concealed himself after the shooting.

There is no merit in the fourth, fifth or sixth assignments of error.

[5] The seventh assignment is to the admission in evidence of testimony that when appellant left the house he said, "There will be blood running around through this house in a short time." This was offered to show a threat, and also as indicating premeditation. It was admissible for these purposes. It also appeared that there was evidence in this connection that appellant said to the husband, "Not your blood, but somebody else's." This taken in connection with the evidence of a dispute with Mrs. Salzello, and the fact that she had ordered him from the house, and that he returned three days later and shot and killed her, was enough to justify the jury in the inference that the threat was directed against Mrs. Salzello.

In none of the other assignments of error do we find any merit or anything that calls for further discussion. The criticism that the charge as a whole was unfair and prejudicial to the prisoner, is without basis. We find nothing in the charge to indicate any spirit of unfairness to the prisoner. On the contrary the law was fully and correctly stated to the jury, and the facts and the testimony were reviewed fairly and impartially.

The judgment is affirmed, and it is ordered that the record be remitted to the court of oyer and terminer of Beaver county that the judgment may be executed according to law.

(246 Pa. 11)

**MILES LAND CO. v. HUDSON COAL CO.**  
(Supreme Court of Pennsylvania. July 1, 1914.)

**1. BOUNDARIES (§ 4\*) — "NATURAL MONUMENT."**

"Natural monuments" are objects permanent in character, which are found on the land as they were placed by nature.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 42, 43; Dec. Dig. § 4.\*]

For other definitions, see *Words and Phrases*, Second Series, *Natural Monument*.]

**2. BOUNDARIES (§ 3\*)—NATURAL MONUMENTS—CONTROLLING EFFECT.**

Where natural monuments, referred to in the description in a deed as marking the boundary, can be found, they fix the limits of the premises conveyed, though they correspond neither with the courses and distances nor with

the quantity of land given in the same description.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 3-41; Dec. Dig. § 3.\*]

**3. BOUNDARIES (§ 8\*)—SURVEY.**

A survey made of an independent separate member of an established block is to be located by its own marks and monuments, aided, if need be, by the legal presumptions.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 66-76; Dec. Dig. § 8.\*]

**4. BOUNDARIES (§ 35\*)—DETERMINATION.**

Where some only of the original marks and monuments of a survey can be found, evidence that others answering to the calls existed at one time is competent.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 153-155, 157-159, 163, 165, 177-183; Dec. Dig. § 35.\*]

**5. BOUNDARIES (§ 33\*) — SURVEY — PRESUMPTION.**

Where the evidence supplies part, but fails to supply all, the original marks and monuments of a survey, the legal presumption will supply those not accounted for.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 146-152; Dec. Dig. § 33.\*]

**6. BOUNDARIES (§ 8\*)—SURVEY—ESTABLISHMENT—PROOF.**

It is only in the absence of natural marks on the ground to show a survey, and in case of the total failure of evidence to supply such marks, that recourse can be had to the lines and calls of the block, or of any junior member of that block, or any other.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 66-76; Dec. Dig. § 8.\*]

**7. BOUNDARIES (§ 37\*) — LOCATION — SUFFICIENCY OF EVIDENCE—EJECTMENT.**

Evidence in ejectment, wherein plaintiff claimed title to land between the Lackawanna river and certain lots admittedly the property of defendant under patents from the commonwealth, held to demand a judgment for defendant, on the ground that the drafts and patents showed that the river was the boundary of the lots.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 184-194; Dec. Dig. § 37.\*]

**8. NAVIGABLE WATERS (§ 36\*) — TITLE TO SOIL—SURVEY.**

A survey, returned as bounded by a navigable river, vests in the owner the right to the soil to the ordinary low-water mark, subject to certain rights of the public in the stream between ordinary high and low water mark.

[Ed. Note.—For other cases, see *Navigable Waters*, Cent. Dig. §§ 180-200; Dec. Dig. § 36.\*]

**9. BOUNDARIES (§ 40\*)—QUESTION OF FACT—QUESTION OF LAW.**

What are boundaries is a question of law for the court to determine, by construing the deed or survey; but the location of the boundaries is a question of fact for the jury.

[Ed. Note.—For other cases, see *Boundaries*, Cent. Dig. §§ 196-204; Dec. Dig. § 40.\*]

Appeal from Common Pleas, Lackawanna County.

Ejectment by the Miles Land Company against the Hudson Coal Company. From judgment for defendant non obstante verdicto, plaintiff appeals. Affirmed.

Ejectment for land in Moosic borough. The facts appear in the following opinion of Johnson, P. J., specially presiding, sur de-

pendant's motion for a new trial and for judgment n. o. v.:

This is an action of ejectment, brought to recover 1 acre and 24 perches of land situate in the borough of Moosic, in Lackawanna county, on which are located a coal shaft, engine house, and boiler house. The case came on for trial, was submitted to the jury, and a verdict was rendered for the plaintiff. The defendant is now asking for judgment non obstante verdicto, and, if this is refused, for a new trial.

The land in dispute lies on the southeasterly side of the Lackawanna river, and is claimed by the plaintiff to be included in the two grants of adjoining tracts of land from the commonwealth of Pennsylvania to Harmon A. Chambers, covering the Lackawanna river and bounded on the east by the Pine lots, senior surveys. The plaintiff contends that the western boundary of the Pine lots is some distance east of the Lackawanna river, and that the land in dispute is located between the western boundary of the Pine lots and the eastern shore of the Lackawanna river, and therefore lies within the grants to Harmon A. Chambers, whose title has by different conveyances become vested in the plaintiff. The defendant, owner of the Pine lots adjoining plaintiff's land on the east, contends that the western boundary of the Pine lots is the Lackawanna river, that there is no space between them and the river, and that the land in dispute is contained within the Pine lots and therefore belongs to the defendant. The sole issue in this case, therefore, is to determine whether or not the Lackawanna river is the western boundary of Pine lots Nos. 3, 4, 5, and 6, which, if they run to the river, include the land in dispute. If the Lackawanna river is the western boundary of these lots, the plaintiff has no title to the land in question. If it is not, the defendant has no title.

[1, 2] The defendant claims that in the surveys of the Pine lots the Lackawanna river is called for as their western boundary. The plaintiff disputes this, and contends that the Pine lots must be located on the ground by the courses and distances given in the surveys, which places this western boundary some distance east of the river. The western line of the Pine lots, as contended for by the plaintiff, is not marked upon the ground by any natural or artificial monuments. Before attempting to determine the western boundary of the Pine lots, it is necessary to have in mind the rule of law which governs in the location of land. It is stated in 4 Am. & Eng. Enc. of Law, (2d Ed.) page 764, as follows: "Natural monuments are objects permanent in character, which are found upon the land as they were placed by nature, such as streams, lakes, and ponds, shores and beaches, also highways and streets, walls, fences, trees, hedges, springs, and rocks, and the like. All lands are supposed to be actually surveyed, and the presumed intention of the grant is to convey the land according to such actual survey. Consequently, wherever natural monuments, referred to in the description of a deed as marking the boundary, can be found, they fix the limits of the premises granted, though they correspond neither with the courses and distances nor with the quantity of the land given in the same descriptions." The same principle is laid down in 5 Cyc. 918: "In the absence of marked and established boundaries, natural objects called for as the boundary of a survey, being more certain and permanent, controls calls for courses and distances; but this rule will not be enforced when either the instrument itself or the clearly expressed intention of the parties would be thereby defeated, or when the rejection of a call or calls for natural objects would reconcile other parts of the description and leave enough to identify the land." In Leading Cases in the American Law of Real Property, Sharswood and Budd's Edition, vol. 4, page 357, we have the

following statement of the rule: "The first rule is that, where there is a conflict between monuments, whether natural or artificial, and the courses and distances named in a deed, the former must control, and the distances must be contracted or extended and the courses deflected so as to accord with the monument."

The rule as above stated by the text-writers is clearly held to be the law of Pennsylvania by Chief Justice Gibson in *Cox v. Couch*, 8 Pa. 147, on page 154, where he says: "It is a principle of construction that where land is described by courses and distances, and also by calls for adjoiners, the latter, where there is a discrepancy, invariably govern; and it is as applicable to conveyances as it is to official surveys. By reason of imperfection of instruments, as well as inequalities of surface and carelessness of assistants, extreme accuracy is not to be attained by the compass and chain; while, on the other hand, calls for natural objects, or, what is much the same, known and established lines of contiguous tracts, admit of perfect certainty. When a vendor, therefore, conveys by established landmarks, the subject of the grant will neither overrun nor fall short of them. They form the true boundary, and the courses and distances serve but to point towards the place."

[3-6] Pine lots 3, 4, 5, and 6 were surveyed independently of the block of the Pine lots, and therefore, if possible, we must locate the western boundary of these Pine lots by their own monuments or calls as indicated in the surveys before resorting to extrinsic evidence. We are supported in this view by the opinion of Mr. Justice Stewart in *Collins v. Clough*, 222 Pa. 472, on page 481, 71 Atl. 1077, on page 1079 (15 Ann. Cas. 871), where he says: "With the question of priority of location settled, it would yet remain with the plaintiffs to show that the original location of the warrants under which they claim embraces the disputed territory. The law indicates in no uncertain way the kind of evidence required for the purpose, and makes clear distinction between what is best and what but secondary. Involved in the very idea of priority is that of separate individual location. We are then dealing here with a survey actually made of an independent, separate member of an established block. Such a survey is to be located by the work of the surveyor found upon the ground, if it can be traced; in other words, by its own marks and monuments, aided, if need be, by the legal presumptions. *Ferguson v. Bloom*, 144 Pa. 549 [23 Atl. 49]. Where admitted marks and monuments are found answering to the calls of the survey, they establish conclusively the location. As has been said, these are the official footsteps of the deputy surveyor, and are therefore the highest and best evidence of the true location. If some only of these original marks and monuments can be found, it is entirely competent to show that others answering to the calls did at one time exist, and where. If the testimony fails to supply them all, the legal presumption will supply those unaccounted for. It is only in the absence of such marks upon the ground, and the total failure of the evidence to supply them, that recourse can be had to the lines and calls of the block, or the lines and calls of any junior member of that block or any other. Both these methods cannot be resorted to at the same time. *Ferguson v. Bloom*, 144 Pa. 549 [23 Atl. 49]; *Grier v. Penna. Coal Co.*, 128 Pa. 79 [18 Atl. 480]."

[7] In determining whether the Lackawanna river is the western boundary of Pine lots Nos. 3, 4, 5, and 6, we shall consider separately the survey of each lot. In the draft of the survey of Pine lot No. 3, made by Henry Cole June 23, 1831, we find the following adjoiners given: "No. 2," "Down Lackawanna," with the flow lines of the river indicated "No. 4" and "No. 36." Lots "No. 2," "No. 36," and "No.

4" are adjoiners. "Down Lackawanna," with the flow lines of the river, stands in the same relation to Lot No. 3 as "No. 2," "No. 36," and "No. 4." This survey was evidently abandoned, and on June 1, 1869, Harmon A. Chambers applied for a warrant and survey for Pine lot No. 3 in which he described the same as follows: "Adjoining Pine lot No. 4, lot No. 36, First division, on the southwest, Pine lot No. 2 on the northwest and Lackawanna river on the north." The warrant and draft, together with the description of the draft, give the same adjoiners. The patent to Harmon A. Chambers dated August 3, 1870, contains the following description: "Beginning at a corner in line of lot No. 36, First division, thence along said line forty-nine and one-half degrees west seven perches to another corner in said line; thence by Pine lot No. 2 north forty-three and one-half degrees east thirty-six and one-tenth perches to a corner near Lackawanna river; thence up said river south seventy-six degrees east eight perches to another corner near said river; thence by said Pine lot No. 4 south forty-three and one-half degrees west forty and two-tenths perches to the beginning, containing one acre and one hundred and seven perches strict measure."

[8] The Lackawanna river is clearly a call, and the western boundary of Pine lot No. 3 runs to low-water mark, and therefore there is no vacant space between it and the Lackawanna river. In this conclusion we are supported by our Pennsylvania decisions. In *Klingensmith v. Ground*, 5 Watts, 458, the court say: "A corner tree is not always to be had where it is wanted, and where that is the case it is the practice to mark the next convenient one, leaving the exact point of intersection to be determined by an extension of the lines, as marked on the ground. Where a running stream is called for, it is always understood that the ownership extends to low-water mark, and so far has this been held in Pennsylvania that a traverse line has been held technically to pursue the meanders, so as to include the points that would otherwise be thrown out by it. Though the words 'near the creek,' strictly speaking, imply the existence of space betwixt the object immediately expressed, and the object of reference beyond it, they indicate, in popular meaning, no more than the whereabouts. Such is the general rule, and what is there to take the case out of it? If the words 'thence up the creek north,' do not call for the creek as a boundary, why was the creek mentioned at all? The argument on the other side is that, the course being also given, no more is necessary to close the survey. But if the course were sufficient to express the whole intent, we are unable to conjecture why a natural object should have been employed." In *Younkin v. Cowan*, 34 Pa. 198, on page 200, Woodward, Judge, delivering the opinion of the court, lays down the following rule: "That lines actually marked on the ground constitute the survey of a land warrant, and control the surveyor's return, even where that calls for a natural or other fixed boundary, and that where lines are not actually run and marked on the ground the survey is to be carried to its calls of adjoiners, even though it overrun the distances returned on the survey, are fixed and familiar rules of property that are not questioned in this case." In *Wharton v. Garvin*, 34 Pa. 340, page 342, Justice Thompson says: "Generally, a survey is to be carried to its calls, unless there are actual lines on the ground excluding them."

Pine lots Nos. 4 and 5, adjoining lot 3, were surveyed together. No warrant was offered for this tract. There is one patent covering Pine lots 4, 5, 6 and 7. The draft of Pine lots 4 and 5 gives "No. 3," "No. 36, First division," "No. 6," and "Down Lackawanna" as calls or adjoiners. Pine lot "No. 3" lot "No. 36," and Pine lot "No. 6" we know are adjoiners. In

the draft, "Down Lackawanna" is used with reference to Pine lots 4 and 5 in the same relation as "No. 3," "No. 36," and "No. 6" are used. Therefore, from the draft, the conclusion is irresistible that "Down Lackawanna" is a call, just as "No. 3," "No. 36," and "No. 6" are calls. From this we conclude that Pine lots 4 and 5 extend to the Lackawanna river, and therefore that there is no land between them and the Lackawanna river. We are confirmed in this conclusion by the patent for lots 4, 5, 6, and 7, which is some evidence as to the adjoiners, in which the following description is given: "Beginning at a corner, thence up Lackawanna river, south seventy-nine and one-half degrees east thirty-three perches and one-tenth to a corner; thence by lot No. 8 south forty degrees west fifty-seven perches and three-tenths to a corner; thence by lot No. 36 of the First division north fifty-three degrees west twenty-nine perches to a corner; and thence by lot No. 3 north forty degrees east forty perches and two-tenths to the beginning."

The draft to the return of survey of Pine lot No. 6 shows the following adjoiners: "No. 5," "No. 36, First division," "No. 7," and "Up Lackawanna." Here again we know Pine lot "No. 5" lot "No. 36, First division," and Pine lot "No. 7" are calls or adjoiners. "Up the Lackawanna" is used in the same connection with reference to Pine lot No. 6. Therefore it is a call, or the western boundary of lot No. 6, and there is no land between this lot and the Lackawanna river. The description in the patent covering this lot has been given above.

That we are correct in our conclusion that the Lackawanna river is the western boundary of Pine lots Nos. 4, 5, and 6 will appear from the following authorities: "In construing the description in a conveyance which bounds the lands conveyed upon a body of water, courts incline strongly to such an interpretation of the language as will pass all the riparian rights to the grantee, and it will be presumed, in the absence of a clear showing to the contrary, that the adjacent flats and shore, to the extent of the grantor's rights therein, pass as appurtenant to the highland. On the other hand, a grant or conveyance of flats or shore passes no title to upland by presumption." 5 Cyc. 892. In this connection it is well to revert to *Klingensmith v. Ground*, supra, where the court said: "If the words, 'thence up the creek north,' do not call for the creek as a boundary, why was the creek mentioned at all? The argument on the other side is that, the course being also given, no more is necessary to close the survey; but if the course were sufficient to express the whole intent, we are unable to conjecture why a natural object should have been employed." In *Wharton v. Garvin*, supra, Justice Thompson says: "We are predisposed to presume the existence of an intent to bound surveys on navigable waters by the stream, not only on account of a supposed advantage arising from such location, but because it is in accordance with practice." In *Wood v. Appal*, 63 Pa. 210, on page 221, Justice Agnew, delivering the opinion of the court, says: "Ever since the case of *Carson v. Blazer*, 2 Bin. 475 [4 Am. Dec. 463], decided in 1810, it has been held in many cases that a survey, returned as bounded by a large navigable river, vests in the owner the right of soil to ordinary low water mark of the stream, subject to the public right of passage for navigation, fishing, etc., in the stream between ordinary high and ordinary low water mark. Variety in the language of the return matters little, so that the intention to make the stream a boundary appears sufficiently in the description and diagram." And, further, on page 224 of 63 Pa., he says: "The result of the cases is that when a return of survey calls for a stream as its boundary, or to run by, along, up, or down it, the title will run to the stream, and the marking of trees on the bank or margin

of the stream to identify the lines run to the river, as well as the return of course and distances measured along the margin, necessarily to ascertain the quantity of land in the survey, will not restrain the title to the bank or margin only."

The plaintiff relies chiefly upon the cases of *Kelly v. Graham*, 9 Watts, 116, and *Wharton v. Garvin*, 34 Pa. 340; but these cases are clearly distinguishable from the case now before us. This distinction will appear in *Wood v. Appal*, supra, where Chief Justice Agnew says, quoting Justice Kennedy in *Kelly v. Graham*: "The survey, as returned here by the deputy surveyor, as also all the other evidence on the subject, shows most unequivocally that the river is not made a boundary in it, and, indeed, that it could not have been so intended. The draft of the survey returned is made out according to the courses and distances actually run and marked upon the ground, and not made to call for the river on any side or point whatever. At some distance from the survey, however, the Allegheny river is laid down upon a straight line without any regard to its meanders as if it were intended by the artist merely to show that the land included within the survey lay near to the river."

The case of *Wharton v. Garvin* is distinguished in the following reference by Chief Justice Agnew: "The diagram exhibited no protraction to the river, and the closing line was represented as a straight line of 238 perches long, leaving a large vacancy between it and the river. The return did not call for the river as a boundary, but it was represented as some distance off with the words written within representation, 'up Allegheny.'" The opinion was written by Justice Thompson, the present Chief Justice, who was careful to distinguish the case upon its facts. He remarked that generally a survey is to be carried to its calls, unless there are actual lines on the ground excluding them; that a call to stand as a boundary must be indicated to be such with sufficient certainty to show that it was so intended. The representation of an object at a distance from a closing line, without any words indicative of an intent to make it a boundary, would hardly be sufficient to constitute it such. The line plotted at a distance would have little weight, he remarked, if the river had been made the call; and as it is not so made in terms, and appears to be excluded by the draft, it is a circumstance of controlling influence, as held in *Kelly v. Graham*, supra. Thus it was the intent of the surveyor (appearing clearly in the return of survey) to bound the survey on the 238-perch line, and not on the river, which controlled the decision. Instead of impugning the general doctrine, the case supports it, and the judge remarked: "We are predisposed to presume the existence of an intent to bound surveys on navigable waters by the stream, not only on account of the supposed advantage arising from such location, but because it is in accordance with practice."

There are other reasons to support the conclusion, to which we have already come, that the western boundary of Pine lots 4, 5, and 6 is the Lackawanna river; but it is unnecessary to refer to them.

[9] Whether or not the Lackawanna river was a call, and the western boundary of lots numbers 3, 4, 5, and 6, is a question of law for the court, and not of fact for the determination of the jury. "What are boundaries is a matter of law for the court; where they are, a matter of fact for the determination of the jury under proper instruction from the court." 5 Cyc. 969. "The meaning of a deed—that is, what it covers—is a question of law for the court; what the boundaries of a given piece of land are is a question of construction for the court also; where they are is a question of fact for the jury." 4 Am. & Eng. Enc. of Law (2d Ed.) 809. "Where the

boundary lines of a grant are fixed by the grant itself, the question as to what these lines are is purely one of law." 8 Enc. of Plead. & Prac. 676.

As the Lackawanna river is the western boundary of Pine lots Nos. 3, 4, 5 and 6, and as the land in dispute is located within them, the jury should have been instructed to find a verdict for the defendant. The question of the location of this boundary having been submitted to the jury, and a verdict rendered for the plaintiff, the motion for judgment non obstante veredicto should now be sustained.

**Verdict for plaintiff for the land described in the writ.** The court subsequently entered judgment for defendant n. o. v.

Argued before FELL, C. J., and BROWN, MESTREZAT, ELKIN, and MOSCHZIS-KER, JJ.

S. B. Price, O. B. Price, and J. H. Price, all of Scranton, for appellant. James H. Torrey and John P. Kelly, both of Scranton, for appellee.

**PER CURIAM.** Whether the Lackawanna river was a call of senior surveys and a boundary line of the land in dispute was submitted to the jury, and their verdict was for the plaintiff. A different finding would have established conclusively the defendant's right, and have entitled it to judgment in its favor. On its motion for judgment non obstante veredicto, the court properly held that the question was one of construction. What are boundaries is a matter of law for the court, to be determined by construction of the deed or survey; where they are is a question of fact for the jury.

We are not convinced of error in the conclusion reached that the surveys called for the river as a boundary, and we affirm the judgment entered in the common pleas, for the reasons stated in the opinion of Judge Johnson, specially presiding at the trial.

(245 Pa. 606)

#### STEINGUEST v. WHITE et al.

(Supreme Court of Pennsylvania. July 1, 1914.)

**MASTER AND SERVANT (§ 281\*) — INJURY TO SERVANT—CONTRIBUTORY NEGLIGENCE.**

In an action to recover for the death of an employé, evidence held to show that deceased was guilty of contributory negligence.

[Ed. Note.—For other cases, see *Master and Servant*, Cent. Dig. §§ 987-996; Dec. Dig. § 281.\*]

Appeal from Court of Common Pleas; Philadelphia County.

Action by Amelia Steinguest against Charles G. White and Christian E. White. From judgment for defendants notwithstanding the verdict, plaintiff appeals. Affirmed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZIS-KER, JJ.

Victor Frey and Augustus Trask Ashton, both of Philadelphia, for appellant. William A. Gray, of Philadelphia, for appellees.

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes

POTTER, J. The plaintiff brought this action in trespass to recover damages for the death of her husband, resulting, as alleged, from the negligence of the defendants, his employers. On August 2, 1909, the date of the accident, Steinguest was employed by the defendants as foreman in charge of a gang of bricklayers and laborers. They were engaged in erecting the brick work of a building at the corner of Thirty-Fourth and Chestnut streets in the city of Philadelphia. To hoist material an open elevator was employed. It was supported by a cable, which passed through an eyebolt, and was then turned back upon itself, and clamped in place by means of two iron plates secured by bolts. At the time of the accident Steinguest, as foreman, was helping to get the materials ready for the bricklayers. A loaded wheelbarrow had been hoisted to the third floor, and Steinguest attempted to take it off the elevator, but found that it was a little below the proper point. He called to the engineer, "Up a little," and the engineer raised the elevator platform a few inches, when the cable slipped from between the clamps, and the elevator dropped, carrying Steinguest with it. He had been standing with one foot on the floor of the building, and one foot on the platform of the elevator. It was alleged that the cable slipped because the clamps were improperly fastened. Upon the trial in the court below, the jury returned a verdict in favor of plaintiff, which the court afterwards set aside, and entered judgment for the defendants non obstante veredicto, upon the ground that the deceased was guilty of contributory negligence in standing with one foot on the floor and the other on the elevator, and while in that position, directing the engineer to move the elevator. It appears from the testimony of the engineer that whenever the elevator is at a floor, for service, it is customary to throw in a dog, or ratchet upon the drum, to hold the elevator in a fixed position. This had not been done at the time of the accident, for the elevator was not yet quite at the right place. The testimony also shows that it was not necessary for Steinguest to have placed his foot upon the elevator at all. He could have taken the wheelbarrow off, by taking hold of the handles, keeping his feet upon the floor of the building. That it was regarded as dangerous to be on the elevator clearly appears from the testimony. The workmen were instructed never to ride upon the elevator. Steinguest was instructed not to permit any one to do so, and he did tell others to keep off. A danger signal was also put up, which read, "Danger, keep off."

There is other testimony which points with even greater directness to the contributory negligence of Steinguest. It was shown that he was the foreman of the job, and as such assisted in putting up the elevator. Occupying

this position of authority and responsibility, he more than any one else was bound, for the protection of himself and his fellow workmen, to see that the cable was properly clamped fast to the top of the elevator. The fastening of the clamps was merely a matter of properly screwing up the nuts upon the bolts passing through two small iron plates, which pressed tightly upon the cable. Whether or not they were properly tightened at first, it is well known that nuts have a tendency to become loosened, or unscrewed, and must be tightened at proper intervals. Clearly the foreman in charge had the responsibility of doing this, or of seeing that it was done. The evidence shows that in this case Steinguest was not without knowledge of the condition of the cable. There was testimony that at least he had warning which should have put him upon his guard. Two witnesses, Taylor and Young, testify without contradiction that on the Saturday, before the accident, which happened early Monday morning, they noticed the end of the cable did not seem to be tight, but seemed to be slipping; it did not seem to them to be right; it seemed to be loose, and they each spoke to Steinguest about it; but he answered them, "That is all right, go ahead." Had this direct warning been heeded by Steinguest, and had he been less self-sufficient, the accident would in all probability have been avoided. His lack of prudence in this respect brought a most regrettable penalty upon himself.

Our examination of all the testimony has satisfied us that in entering judgment for the defendants non obstante veredicto the court below properly discharged a plain duty.

The assignment of error is overruled, and the judgment is affirmed.

(245 Pa. 606)

# COMMONWEALTH v. CONSOLIDATED DRESSED BEEF CO.

(Supreme Court of Pennsylvania. July 1, 1914.)

## 1. LICENSES (§ 15\*)—MERCANTILE LICENSE TAX—"DEALER."

A purchaser of material for resale is a "dealer" within the act of May 2, 1899 (P. L. 194), providing for the imposition of a mercantile license tax upon dealers in goods, wares, and merchandise.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 30-35; Dec. Dig. § 15.\*]

For other definitions, see Words and Phrases, First and Second Series, Dealer.]

## 2. LICENSES (§ 15\*) — MERCANTILE LICENSE TAX—"WHOLESALE VENDOR."

A person, engaged in the business of purchasing cattle, slaughtering them, and selling the beef and other products from the slaughtered animals to dealers, was a "wholesale vendor" of merchandise, within the act of May 2, 1899 (P. L. 134), which imposes a mercantile license tax on wholesale vendors.

[Ed. Note.—For other cases, see Licenses, Cent. Dig. §§ 30-35; Dec. Dig. § 15.\*]

For other definitions, see Words and Phrases, First and Second Series, Wholesale Dealer.]

\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key-No. Series & Rep'r Indexes



Appeal from Court of Common Pleas, Philadelphia County.

Action by the Commonwealth against the Consolidated Dressed Beef Company. From judgment for plaintiff on case stated to determine defendant's liability to pay mercantile license tax, defendant appeals. Affirmed.

See, also, 242 Pa. 163, 88 Atl. 975.

Appeal from assessment of the board of mercantile appraisers for the county of Philadelphia. From the record it appeared that case was heard in the court below on a case stated, which was as follows:

"1. It is hereby agreed by the parties to the above proceeding that the following case be stated for the judgment of the court:

"2. The Consolidated Dressed Beef Company is a corporation of Pennsylvania, organized for the purpose, and engaged exclusively, in the city of Philadelphia, in the business of the purchase of cattle, the slaughtering of the same and the sale of the beef and other products obtained from the animals slaughtered. The cattle are slaughtered and dressed by the defendant at the abattoir in the West Philadelphia stockyards. All sales made by the defendant are sales of the beef and other products of the cattle slaughtered by the defendant. All sales made by the defendant are made at the place where the defendant slaughters the cattle. The defendant does not keep a store or warehouse for the purpose of vending and disposing of any goods, wares, or merchandise. All sales made by the defendant are made only to dealers in or vendors of beef or other products obtained from the animals slaughtered. The sales of the defendant during the year 1913 amounted to \$4,334.500. The board of mercantile appraisers for the county of Philadelphia assessed against the defendant, as a wholesale vendor for the year 1913, a mercantile license tax of \$2,167.45, from which assessment the defendant appealed to the said board on May 8, 1913, the day assigned by the board to hear the appeal. The appeal was dismissed by the said board and the defendant on May 9, 1913, appealed to this court.

"3. If, under the above facts, the defendant is liable to the said mercantile license tax, judgment shall be entered for the commonwealth of Pennsylvania for \$2,167.45; otherwise judgment shall be entered for the defendant.

"4. Each party shall have the right to appeal from the judgment entered by the court."

The court entered judgment for the plaintiff for \$2,167.45. Defendant appealed.

Argued before FELL, C. J., and MESTREZAT, POTTER, ELKIN, and MOSCHZISKER, JJ.

Theodore F. Jenkins, of Philadelphia, for appellant. John T. Murphy, of Philadelphia, for the Commonwealth.

POTTER, J. This is an appeal from the assessment of a mercantile license tax. From the facts as set forth in the case stated for the decision of the court below, it appears that the defendant is engaged in the business of purchasing cattle, slaughtering them, and selling the beef and other products obtained from the slaughtered animals. The sales are made only to dealers in and vendors of the beef and other products. The court below held that under the facts as stated, the defendant was properly assessed for a mercantile license tax, and is liable for the payment thereof, and judgment was therefore entered against it accordingly.

[1, 2] From our review of the record, we are unable to see how the court below could have reached any other conclusion than that defendant is a dealer in and vendor of goods and merchandise. It buys cattle, which are for it the raw material, and it converts that material into forms and sizes suitable for the market which it supplies, and it then sells the material, as merchandise, to others who vend and deal at retail in the same products. It buys material, to sell again, and therefore comes within the proper definition of a "dealer," as the term is used in the act of May 2, 1899 (P. L. 184), under which the mercantile license tax is imposed. It subjects the material which it buys to certain manipulations, but those are not such as to properly constitute it a manufacturing corporation. This was decided in the case of *Com. v. Consolidated Dressed Beef Co.*, 242 Pa. 163, 88 Atl. 975. Nor does the defendant make sale of that which it raises upon its own premises, as in the case of a farmer who sells his own cattle, raised upon his farm. The defendant carries on a business properly termed as merchandising, and a large one at that. It would be difficult to find a better example of a dealer or vendor of merchandise, upon a large scale. Defendant buys for the sole purpose of selling again that which it has purchased. We think the learned court below was clearly right in holding that the defendant company was liable to assessment as a wholesale vendor of merchandise, and judgment was therefore properly entered against the defendant, upon the case stated.

The assignments of error are overruled, and the judgment is affirmed.



## MEMORANDUM DECISIONS

**BICKNELL v. MORSE et al.** (Supreme Judicial Court of Maine. Oct. 5, 1914.) Exceptions and Motion from Supreme Judicial Court, Knox County, at Law. Action by Charles E. Bicknell against James A. Morse and others. On exceptions and motion by defendants. Overruled. Argued before SAVAGE, C. J., and BIRD, HALEY, HANSON, and PHILBROOK, JJ. M. A. Johnson, of Rockland, for plaintiff. Reuel Robinson, of Camden, for defendants.

**PER CURIAM.** This case comes before us on exceptions and motion by the defendant. We have examined the bill of exceptions and the arguments of counsel, and can perceive no error on the part of the presiding justice in giving the instructions concerning which the defendant complains. We have also examined the testimony upon which the jury, in the light of the instructions given, rendered the verdict. That verdict was justifiable, and we cannot set it aside. Exceptions and motion overruled.

**HOGAN v. GREAT NORTHERN PAPER CO.** (Supreme Judicial Court of Maine. Sept. 29, 1914.) Action by Vinton A. Hogan against the Great Northern Paper Company. On motion for a new trial. Granted. Argued before SAVAGE, C. J., and CORNISH, BIRD, HALEY, HANSON, and PHILBROOK, JJ. W. H. Judkins, of Lewiston, for plaintiff. Newell & Skelton, of Lewiston, for defendant.

**PER CURIAM.** We have examined the entire evidence in this case with great care and are unable to discover sufficient testimony to warrant a finding that the defendant was negligent in the performance or nonperformance of any duty which it owed the plaintiff. The jury must have been influenced by sympathy or misconceived the force and application of the evidence. It is the opinion of this court that the verdict was manifestly wrong. Motion for new trial sustained.

**WOODROW v. FITZ BROS. CO.** (Supreme Judicial Court of Maine. Aug. 28, 1914.) On Motion from Supreme Judicial Court, Androscoggin County, at Law. Action by John C. Woodrow against the Fitz Bros. Company. On motion for new trial. Motion overruled. Oakes, Pulsifer & Ludden, of Auburn, for plaintiff. John A. Morrill, of Auburn, for defendant.

**PER CURIAM.** No exceptions to the admission or exclusion of evidence or to any part of the charge of the presiding justice are presented, and the parties do not disagree as to the principles of law which obtain in the case. The verdict rests upon questions of pure fact, and of such a nature as to be peculiarly within the province of the jury to finally decide. We discover no error in the result reached by that branch of the court. Motion overruled.

**MARSHALL v. MARSHALL.** (Court of Appeals of Maryland. Feb. 6, 1914.) Appeal from Circuit Court of Baltimore City. Action by Thomas W. Marshall against Laura Marshall for divorce. Judgment for defendant, and plaintiff appeals. Reversed. Argued before BOYD, C. J., and BRISCOE, BURKE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ. William Colton, of

Baltimore, for appellant. William A. Wheatley, of Baltimore, for appellee.

**STOCKBRIDGE, J.**, delivered the opinion of the court.

**OUTLAW v. OUTLAW.** (Court of Appeals of Maryland. Feb. 13, 1914.) Appeal from Circuit Court, Baltimore County. Bill by Laura F. Outlaw against Charles W. Outlaw for alimony and custody of infant child. From an order modifying an order dismissing the bill without prejudice, and from an order declaring plaintiff in contempt for failing to produce the child in court as ordered, and from orders as to alimony, plaintiff appeals. Certain orders modified, and others reversed, and cause remanded. Argued before BOYD, C. J., and BRISCOE, THOMAS, PATTISON, URNER, STOCKBRIDGE, and CONSTABLE, JJ. El Allan Sauerwein, Jr., and Joseph C. France, both of Baltimore (Victor I. Cook, of Baltimore, on the brief), for appellant. S. S. Field, of Baltimore, for appellee.

**PATTISON, J.**, delivered the opinion of the court.

(83 N. J. Eq. 340)  
**BERDAN v. PASSAIC VALLEY SEWERAGE COMMISSION.** (No. 125.) (Court of Errors and Appeals of New Jersey. June 18, 1914.) Appeal from Court of Chancery. Bill by William Berdan against the Passaic Valley Sewerage Commission. From an order denying motion for preliminary injunction (88 Atl. 202), complainant appeals. Affirmed. Warren Dixon, of Jersey City, for appellant. Riker & Riker, of Newark, for respondent.

**PER CURIAM.** The order appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Backes.

(85 N. J. L. 367)  
**BLANZ v. ERIE R. CO.** (Court of Errors and Appeals of New Jersey. Oct. 17, 1913.) Appeal from Supreme Court. Action by Lennia Blanz against the Erie Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed on the opinion of the Supreme Court, reported in 84 N. J. Law, 35, 85 Atl. 1030. Collins & Corbin, of Jersey City, for appellant. John A. Bernhard, of Newark, for respondent.

**PER CURIAM.** The judgment under review will be affirmed, for the reasons stated in the opinion filed in the Supreme Court by Mr. Justice Swayze.

(83 N. J. Eq. 347)  
**BLOHM v. HANNA et ux.** (Court of Errors and Appeals of New Jersey. Aug. 24, 1914.) Appeal from Court of Chancery. Suit by Charles H. Blohm against John M. Hanna and wife to foreclose a mortgage. From a decree of the Court of Chancery (88 Atl. 622) for complainant, defendants appeal. Affirmed. J. Emil Walscheld, of Union, for appellants. McDermott & Enright, of Jersey City, for respondent.

**PER CURIAM.** The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Lewis.

**BERGEN, MINTURN, VREDENBURGH, and WHITE, JJ.**, dissent.

(85 N. J. L. 726)

**BOWLBY v. BOARD OF CHOSEN FREEHOLDERS OF MORRIS COUNTY.** (Court of Errors and Appeals of New Jersey. March 17, 1914.) Appeal from Supreme Court. Charles W. Bowlby was removed from the office of County Superintendent of Weights and Measures by a resolution of the Board of Chosen Freeholders of the County of Morris. From a judgment of the Supreme Court (83 N. J. Law, 346, 85 Atl. 229) on certiorari, affirming the resolution, he appeals. Affirmed. Wilbur A. Heisley, of Newark, for appellant. George G. Runyon, of Morristown, for respondent.

**PER CURIAM.** The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Trenchard in the Supreme Court.

(86 N. J. L. 630)

**DELAWARE RIVER TRANSP. CO. v. INHABITANTS OF CITY OF TRENTON.** (No. 70.) (Court of Errors and Appeals of New Jersey. July 10, 1914.) Appeal from Supreme Court. Proceeding by the Inhabitants of the City of Trenton against the Delaware River Transportation Company. The proceedings were affirmed by the Supreme Court on certiorari (90 Atl. 5), and the Transportation Company appeals. Affirmed. Peter Backes, of Trenton, and Gilbert Collins, of Jersey City, for appellant. Charles E. Bird, of Trenton, for respondent.

**PER CURIAM.** The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Farker in the Supreme Court.

(86 N. J. L. 679)

**DELAWARE RIVER TRANSP. CO. v. INHABITANTS OF CITY OF TRENTON.** (No. 71.) (Court of Errors and Appeals of New Jersey. July 10, 1914.) Appeal from Supreme Court. Proceeding by the Inhabitants of the City of Trenton against the Delaware River Transportation Company. The proceedings were affirmed by the Supreme Court on certiorari (90 Atl. 731), and the Transportation Company appeals. Affirmed. Peter Backes, of Trenton, and Gilbert Collins, of Jersey City, for appellant. Charles E. Bird, of Trenton, for respondent.

**PER CURIAM.** The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Trenchard in the Supreme Court.

**DELAWARE RIVER TRANSP. CO. v. INHABITANTS OF CITY OF TRENTON.** (No. 72.) (Court of Errors and Appeals of New Jersey. July 10, 1914.) Appeal from Supreme Court. Proceeding by the Inhabitants of the City of Trenton against the Delaware River Transportation Company. The proceedings were affirmed by the Supreme Court on certiorari (90 Atl. 731), and the Transportation Company appeals. Affirmed. Peter Backes, of Trenton, and Gilbert Collins, of Jersey City, for appellant. Charles E. Bird, of Trenton, for respondent.

**PER CURIAM.** The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Trenchard in the Supreme Court.

(86 N. J. L. 356)

**FEIGHAN v. SOBERS et al.** (No. 82.) (Court of Errors and Appeals of New Jersey. May 8, 1914.) Appeal from Supreme Court. Action by Annie L. Feighan against Jacob Sobers and another. There was a judgment for plaintiff. Defendant named having died, his executor obtained a rule to show cause why the judgment should not be set aside. From a rule absolute to the end that the judgment should be set aside (87 Atl. 636), plaintiff appeals. Af-

firmed. H. H. Voorhees, of Camden, for appellant. U. G. Styron and John F. X. Ries, both of Atlantic City, for respondents.

**PER CURIAM.** The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Voorhees in the Supreme Court.

(85 N. J. L. 334)

**GLAZER v. BOROUGH OF FLEMINGTON.** (Court of Errors and Appeals of New Jersey. Oct. 16, 1913.) Error to Supreme Court. Proceeding between Marcus L. Glazer and the Borough of Flemington. From a judgment of the Supreme Court, affirming a judgment for the borough, Glazer brings error. Affirmed. William C. Gebhardt, of Jersey City, for plaintiff in error. George H. Large, of Flemington, for defendant in error.

**PER CURIAM.** The judgment under review will be affirmed, for the reasons stated in the opinion (Board of Education of Flemington v. State Board, 81 N. J. Law, 212, 81 Atl. 163), filed in the Supreme Court by Mr. Justice Swayze.

(83 N. J. Eq. 342)

**GOERZ v. GOERZ.** (No. 24.) (Court of Errors and Appeals of New Jersey. May 4, 1914.) Appeal from Court of Chancery. Action between Edward V. Goers and Mathilda Goers. From a judgment in favor of the latter, the former appeals. Affirmed. McDermott & Enright, of Jersey City, for appellant. Weller & Lichtenstein, of Hoboken, for respondent.

**PER CURIAM.** The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Advisory Master Hartshorne.

(85 N. J. L. 334)

**GONZALES v. MAYOR AND COUNCIL OF CITY OF HOBOKEN et al.** (Court of Errors and Appeals of New Jersey. Nov. 17, 1913.) Appeal from Supreme Court. Certiorari by George Gonzales against the Mayor and Council of the City of Hoboken and others to review a resolution passed by the council designating an official newspaper for the city. From a judgment dismissing the writ, prosecutor appeals. Reversed. Merritt Lane, of Jersey City, for appellant. John J. Fallon, of Hoboken, for respondents.

**PER CURIAM.** The questions raised in this case are precisely the same as those existing in the case of Fagan v. Hoboken, 84 N. J. Law, 226, 86 Atl. 1025, and the judgment of the Supreme Court entered in this case will be reversed, and the proceedings and resolutions under review set aside, for the reasons given in that case.

(83 N. J. Eq. 343)

**GRAND COURT, FORESTERS OF AMERICA, v. COURT CAVOUR, NO. 133, FORESTERS OF AMERICA, et al.** (No. 31.) (Court of Errors and Appeals of New Jersey. May 4, 1914.) Appeal from Court of Chancery. Bill by the Grand Court Foresters of America, State of New Jersey, against Court Cavour, No. 133, Foresters of America, and others. From a decree dismissing the bill (88 Atl. 191), plaintiff appeals. Affirmed. Philip J. Schotland, of Newark, for appellant. Anthony R. Finelli, of Newark, for respondents.

**PER CURIAM.** The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Stevens.

**GRUPELLI v. ROSEN.** (No. 46.) (Court of Errors and Appeals of New Jersey. June 16, 1914.) Appeal from Supreme Court. Action

\* No opinion filed.

by Eney Grupelli against Jacob Rosen. From a judgment of the Supreme Court (91 Atl. 1071), affirming a judgment for defendant, plaintiff appeals. Affirmed. Charles A. Rathbun, of Morristown, for appellant. Willard W. Cutler, of Morristown, for respondent.

**PER CURIAM.** The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered per curiam in the Supreme Court.

(83 N. J. Eq. 866)

**HEATH v. MADDOCK.** (Court of Errors and Appeals of New Jersey. Nov. 17, 1913.) Appeal from Prerogative Court. Suit by Carlotta Heath against Frederick R. Maddock for revocation of letters of guardianship. From a decree of the Prerogative Court, reversing a judgment for petitioner (81 N. J. Eq. 470, 86 Atl. 945), petitioner appeals. Affirmed. Edward A. & William T. Day, of Newark, for appellant. Lum, Tamblin & Colyer, of Newark, for respondent.

**PER CURIAM.** The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by the ordinary.

(86 N. J. L. 357)

**HEYMAN v. STOPPER.** (Court of Errors and Appeals of New Jersey. May 8, 1914.) Appeal from Supreme Court. Action by Simon Heyman against Charles Stopper. From a judgment (88 Atl. 946), reversing a judgment for plaintiff, he appeals. Affirmed. Jacob L. Newman, of Newark, for appellant. Hugo Woerner, of Newark, for respondent.

**PER CURIAM.** The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Voorhees in the Supreme Court.

(83 N. J. Eq. 364)

**HOLCOMBE et al. v. TRENTON WHITE CITY CO.** (Court of Errors and Appeals of New Jersey. Oct. 16, 1913.) Appeal from Court of Chancery. Bill by Alfred G. Holcombe and others against the Trenton White City Company. From a decree of the Court of Chancery, on the application of Charles J. Fury, receiver of defendant, for assessments on capital stock of defendant (80 N. J. Eq. 122, 82 Atl. 618), appeals are taken, one by John S. Broughton, and the other by said Fury. Affirmed. John M. Dickinson, of Trenton, and Gilbert Collins, of Jersey City, for Broughton. Peter Backes, of Trenton, for Fury.

**PER CURIAM.** The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Walker.

**HYAMS v. OLD DOMINION COPPER MINING & SMELTING CO.** (Court of Errors and Appeals of New Jersey. June 18, 1914.) Appeal from Court of Chancery. Suit by Godfrey M. Hyams against the Old Dominion Copper Mining & Smelting Company. From a decree for defendant on condition (89 Atl. 37), complainant appeals. Affirmed. Edward M. Colie, of Newark, for appellant. Collina & Corbin, of Jersey City, for respondent.

**PER CURIAM.** The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Howell.

(82 N. J. Eq. 371)

**In re LERCHE'S WILL.** (Court of Errors and Appeals of New Jersey. Nov. 17, 1913.) Appeal from Prerogative Court. Petition for the probate of the alleged last will of Elise Lerche, deceased. On appeal from a decree of the prerogative court, affirming a decree of the Hudson county orphans' court admitting the will

to probate on the opinion of the judge of the orphans' court. Affirmed. The opinion of the orphans' court is as follows: "In this matter the court has examined all the testimony and the briefs of counsel, the testimony consisting of some 1200 pages, and the briefs almost as voluminous. The court has given careful consideration to this case, running over a period of several months, and it has come to the following conclusions: First, that the will was executed in due form of law. The execution had incident to it all the requisites of our statute. In fact, I may say that there was no serious contention made in the course of the contest that this was not so. Secondly, I find that there is absolutely no evidence of undue influence of any sort, kind or character in the case. There is no testimony on the part of any of the witnesses in the case that would indicate that the parties who were responsible, either directly or indirectly, for the drawing of this will, exercised any improper or undue influence upon the testatrix. The will was the product, undoubtedly, under the evidence, of her own mind. The only question that required any serious consideration by the court was the proposition that the testatrix was not of such mentality as the law requires in the making of a will. The court will find, as a matter of fact, that at the time of the making of this will the testatrix, Elise Lerche, was of sound and disposing mind and memory, and was in such mental condition that she was thoroughly and completely competent to make a will, applying the legal principles recognized in this state to such a situation. The court, therefore, has determined that the will was the valid will of Elise Lerche and is entitled to probate as such. The court briefly states its findings in the matter as the result of an analysis of all the testimony and a consideration of all the arguments advanced. If counsel desire, the court will express its opinion more at length. The necessity of this, however, does not seem at present apparent, as the issues involved are really issues of fact. A copy of this memorandum may be forwarded to all counsel who appeared in the case. The court will hear counsel on Wednesday morning of next week in the matter of counsel fees and allowances." Weller & Lichtenstein and Frederick K. Hopkins, all of Hoboken, and Sommer, Colby & Whiting, of Newark, for appellants. John J. Fallon, of Hoboken, Lindabury, Depue & Faulks, of Newark, Condict, Condict & Boardman and Robert S. Hudspeth, all of Jersey City, Daniel H. Applegate, of Red Bank, and Charles D. Thompson, of Jersey City, for appellees.

**PER CURIAM.** The decree of the prerogative court appealed from will be affirmed, for the reason stated in the opinion filed in the Hudson county orphans' court by Judge Carey.

**VREDENBURGH, J., dissents.**

(82 N. J. Eq. 367)

**MCGRATH v. NORCROSS.** (Court of Errors and Appeals of New Jersey. Nov. 17, 1913.) Appeal from Court of Chancery. Suit by Anna R. McGrath against William F. Norcross to quiet title. An issue at law was framed and tried in the Supreme Court, and a verdict rendered for defendant, and from an order of the Vice Chancellor granting complainant a new trial (78 N. J. Eq. 120, 79 Atl. 85), defendant appeals. Affirmed on the opinion of the Vice Chancellor. Thomas E. French, of Camden, for appellant. Collins & Corbin, of Jersey City, for respondent.

**PER CURIAM.** The order appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Leaming.

(85 N. J. L. 373)

**MAYOR AND ALDERMEN OF JERSEY CITY v. MONTVILLE TP. et al.** (Court of Errors and Appeals of New Jersey. Nov. 17,

1913.) Appeal from Supreme Court. Certiorari by the Mayor and Aldermen of Jersey City against the Township of Montville and others to review a tax assessment. From a judgment affirming the assessment (84 N. J. Law, 43, 85 Atl. 838), prosecutor appeals. Affirmed on the opinion of the Supreme Court. James J. Murphy, of Jersey City, for appellant. Philip R. Van Dyne, of Newark, for respondents.

**PER CURIAM.** The judgment under review will be affirmed, for the reasons stated in the opinion delivered in the court below by Mr. Justice Swayze.

(85 N. J. L. 727)

**MELICK v. METROPOLITAN LIFE INS. CO.** (Court of Errors and Appeals of New Jersey. March 16, 1914.) Appeal from Supreme Court. Action by Annie Melick against the Metropolitan Life Insurance Company. From a judgment of the Supreme Court (84 N. J. Law, 437, 87 Atl. 75), reversing a judgment for plaintiff, plaintiff appeals. Affirmed. McCarter & English, of Newark, for appellant. Samuel Press, of Newark, for respondent.

**PER CURIAM.** The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Garrison in the Supreme Court.

**GUMMERE, C. J., and PARKER and HEPENHEIMER, JJ.,** dissent.

**NIXON v. NIXON.** (Court of Errors and Appeals of New Jersey. June 26, 1913.) Appeal from Supreme Court. Action by Lizzie A. Nixon against Joast Nixon. From a judgment of the Supreme Court, denying the rule to show cause why a verdict for defendant should not be set aside, plaintiff appeals. Rule to show cause made absolute, and judgment reversed. See, also, 87 Atl. 454. Edward C. Waddington, of Woodstown, for appellant. John Boyd Avis, of Woodbury, and Isaac O. Acton, of Salem, for respondent.

**PER CURIAM.** After a careful examination and consideration of all of the evidence submitted to the jury in this case, we feel satisfied that its verdict is not supported by a preponderance of that evidence, but, on the contrary, is opposed to it. For this reason the rule to show cause must be made absolute.

(83 N. J. Eq. 348)

**NORCROSS v. NORCROSS.** (Court of Errors and Appeals of New Jersey. Aug. 24, 1914.) Appeal from Court of Chancery. Suit by Charles W. Norcross against Marian Pearl Norcross for divorce. From an adverse decree of the Court of Chancery (91 Atl. 733), petitioner appeals. Affirmed. Francis V. Dobbins, of Rahway, for appellant.

**PER CURIAM.** The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Backes.

(82 N. J. Eq. 647)

**PHILAN et al. v. PHELAN et al.** (Court of Errors and Appeals of New Jersey. March 16, 1914.) Appeal from Prerogative Court. Application by Sarah M. Phelan and others for the probate of the alleged will of Cornelius Phelan, deceased. From an order of the Prerogative Court (82 N. J. Eq. 316, 87 Atl. 625), reversing an order denying probate and admitting the will to probate, Margaret M. E. Phelan and others appeal. Affirmed. William B. Gourley and Albert Comstock, both of Paterson, for appellants. Peter Backes, of Trenton, for respondent.

**PER CURIAM.** The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by the ordinary.

**GUMMERE, C. J., and SWAYZE, PARKER, BOGERT, and VREDENBURGH, JJ.,** dissent.

(88 N. J. Eq. 345)

**PHILLIPS v. PHILLIPS.** (No. 16.) (Court of Errors and Appeals of New Jersey. May 4, 1914.) Appeal from Court of Chancery. Bill by Henry D. Phillips against Jennie P. Phillips. From a decree dismissing the bill (86 Atl. 940), complainant appeals. Affirmed. Scott Scammell, of Trenton, for appellant. Linton Satterthwait, of Trenton, for respondent.

**PER CURIAM.** The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Backes.

(83 N. J. Eq. 661)

**POTTER v. NIXON et al.** (Court of Errors and Appeals of New Jersey. March 16, 1914.) Appeal from Court of Chancery. Bill by David Potter, trustee, against Mary Alice Nixon, administratrix, and another, for construction of the will of James B. Potter, deceased. From the decree of the Court of Chancery (81 N. J. Eq. 338, 86 Atl. 444), complainant appeals. Affirmed. Hampton & Fithian, of Bridgeton, for appellant. Walter H. Bacon, of Bridgeton, for respondent Nixon. John B. R. Nixon, of Bridgeton, for respondent Everett.

**PER CURIAM.** The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Leaming.

(83 N. J. Eq. 353)

**PURCHASE et al. v. ATLANTIC SAFE DEPOSIT & TRUST CO. et al.** (Court of Errors and Appeals of New Jersey. Aug. 24, 1914.) Appeal from Court of Chancery. Suit by Albert E. Purchase and others against the Atlantic Safe Deposit & Trust Company and others for an accounting. From a decree of the Court of Chancery (81 N. J. Eq. 344, 87 Atl. 444), complainants appeal. Affirmed. Wilson & Carr, of Camden, and Thompson & Smathers, of Atlantic City, for appellants. Garrison & Voorhees and U. G. Styron, all of Atlantic City, for respondents.

**PER CURIAM.** The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Leaming.

(85 N. J. L. 729)

**RODENBURG v. CLINTON AUTO & GARAGE CO.** (Court of Errors and Appeals of New Jersey. March 16, 1914.) Appeal from Supreme Court. Action by George Rodenburg against the Clinton Auto & Garage Company. From a judgment of the Supreme Court (84 N. J. Law, 545, 87 Atl. 71), affirming a judgment for plaintiff, defendant appeals. Affirmed. Vredenburg, Wall & Carey of Jersey City, for appellant. Weller & Lichtenstein, of Hoboken, for respondent.

**PER CURIAM.** The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Parker in the Supreme Court.

(86 N. J. L. 701)

**SEXTON v. NEWARK DISTRICT TELEGRAPH CO.** (No. 8.) (Court of Errors and Appeals of New Jersey. July 10, 1914.) Appeal from Supreme Court. Action by Lizzie Alida Sexton against the Newark District Telegraph Company. A judgment for plaintiff was affirmed by the Supreme Court (84 N. J. Law, 85, 86 Atl. 451), and defendant appeals. Affirmed. McCarter & English, of Newark, for appellant. Kinsley Twining, of Newark, for respondent.

**PER CURIAM.** The judgment of the Supreme Court is affirmed. The opinion filed in

that court, which deals with some topics that are not heard upon this appeal, deals also, and in a manner entirely satisfactory to us, with the point upon which this appeal is argued by counsel, viz., the legal situation presented by the fact that the statute of May 2, 1911, took effect upon the day on which the plaintiff's intestate was killed. For the reasons given upon this branch of the case by Mr. Justice Trenchard in the Supreme Court, the judgment of that court is affirmed.

(86 N. J. L. 702)

**SMITH v. INHABITANTS OF CITY OF TRENTON.** (No. 113.) (Court of Errors and Appeals of New Jersey. July 10, 1914.) Appeal from Supreme Court. Certiorari by Harry F. Smith against the Inhabitants of the City of Trenton to review an ordinance of that city. From a judgment affirming the ordinance, the prosecutor appeals. Affirmed. The opinion of the Supreme Court was as follows: "The ordinance brought up for review was enacted pursuant to the powers conferred upon the city of Trenton by P. L. 1910, p. 140, and by P. L. 1904, p. 283. The sole objection to the ordinance has been disposed of in an opinion this day filed in Delaware River Transportation Company v. Inhabitants of the City of Trenton, 90 Atl. 731. The ordinance will be affirmed, with costs." William E. Blackman, of Trenton, for appellant. Charles E. Bird, of Trenton, for respondent.

**PER CURIAM.** The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Trenchard in the Supreme Court.

**BLACK and MINTURN, JJ., dissent.**

(85 N. J. L. 388)

**STATE v. POTTER.** (Court of Errors and Appeals of New Jersey. Oct. 16, 1913.) Error to Supreme Court. Leo Potter was indicted for violating the general election law and the corrupt practice acts. An order quashing the indictments was affirmed on certiorari by the Supreme Court (83 N. J. Law, 428, 85 Atl. 216), and the State brings error. Affirmed on the opinion of the Supreme Court. Michael Dunn, of Paterson, for the State. William I. Lewis, of Paterson, for defendant in error.

**PER CURIAM.** The judgment under review is affirmed, for the reasons stated in the opinion filed in the Supreme Court by Mr. Justice Minturn.

(86 N. J. L. 374)

**STATE v. SCHLOSSER et al.** (No. 106.) (Court of Errors and Appeals of New Jersey. May 8, 1914.) Error to Supreme Court. Henry Schlosser and John Seibert were convicted of keeping a disorderly house, and bring error to reverse a judgment of the Supreme Court (89 Atl. 522) affirming the conviction. Affirmed. Lehlbach & Van Duyne, of Newark, for plaintiffs in error. Louis Hood, of Newark, for the State.

**PER CURIAM.** The judgment under review herein should be affirmed, for the reasons expressed in the opinion delivered by Mr. Justice Kalisch in the Supreme Court.

(83 N. J. Eq. 335)

**SWAYZE v. HUNTINGTON et al.** (No. 39.) (Court of Errors and Appeals of New Jersey. May 4, 1914.) Appeal from Court of Chancery. Bill by Francis J. Swayze, executor, against Harriet M. Huntington and others, for a settlement of accounts. From a decree settling accounts (87 Atl. 106), defendants appeal. Affirmed. Thomas P. McKenna, of New York City, for appellants. Edward M. Collie, of Newark, for respondent.

**PER CURIAM.** The decree appealed from will be affirmed, for the reasons stated in the opinion filed in the court below by Vice Chancellor Howell.

(82 N. J. Eq. 369)

**TAYLOR v. BORDEN et al.** (Court of Errors and Appeals of New Jersey. Oct. 16, 1913.) Appeal from Court of Chancery. Action by David L. Taylor against Mary S. Borden and others. Judgment for plaintiff, and defendants appeal. Affirmed. Edmund W. Wakelee, of Englewood, for appellants. Cohn & Cohn, of Paterson, for respondent.

**PER CURIAM.** The testimony in the cause fully sustains the facts found by the learned vice chancellor. Upon those facts the complainant was clearly entitled to the relief granted to him. The decree appealed from will be affirmed.

(86 N. J. L. 356)

**GRUPELLI v. ROSEN.** (Supreme Court of New Jersey. Oct. 9, 1913.) Appeal from District Court, Morris County. Action by Eney Grupelli against Jacob Rosen. From a judgment for defendant, plaintiff appeals. Affirmed. Judgment affirmed by Court of Errors and Appeals (91 Atl. 1068). Argued before GARRISON, TRENCHARD, and MINTURN, JJ. Charles A. Rathbun, of Morristown, for appellant. Willard W. Cutler, of Morristown, for appellee.

**PER CURIAM.** The question presented in this case was decided by our Court of Errors and Appeals in *Mangonaro v. Karl*, 87 Atl. 94. The judgment below will be affirmed, with costs.

**STATE v. HART.** (Supreme Court of New Jersey. April 29, 1914.) Indictment of Leon O. Hart for conspiracy to procure illegal and fraudulent votes at a primary election. On motion to quash. Granted. Argued before SWAYZE and BERGEN, JJ. Harlan Besson, of Hoboken, and Mark Townsend, Jr., of Jersey City, for the motion. Robert S. Hudspeeth, of Jersey City, for the State.

**PER CURIAM.** The indictment in this case must be quashed. The case cannot be distinguished from *State v. Nugent*, 77 N. J. Law, 157, 71 Atl. 481.











